1960

CANADA LAW REPORTS

Exchequer Court of Canada

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON

(Appointed October 6, 1942)

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON

(Appointed September 4, 1946)

THE HONOURABLE JOHN DOHERTY KEARNEY

(Appointed November 1, 1951)

THE HONOURABLE ALPHONSE FOURNIER

(Appointed June 12, 1953)

THE HONOURABLE JACQUES DUMOULIN

(Appointed December 1, 1955)

THE HONOURABLE ARTHUR LOUIS THURLOW

(Appointed August 29, 1956)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

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

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

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

The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.

The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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 THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed November 26, 1959.

ATTORNEY-GENERAL OF CANADA:

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITORS GENERAL OF CANADA:

The Honourable LEON BALCER, Q.C.

The Honourable WILLIAM JOSEPH BROWNE

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The Honourable Sidney Alexander Smith, District Judge in Admiralty for the British Columbia Admiralty District died during the current year.

CORRIGENDUM

At page 303, line 26 delete the word "therefore".

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2. *Beaver Lamb & Shearling Co. v. The Queen* [1958] Ex.C.R. 336; [1960] S.C.R. 505. Appeal allowed.
3. *Canadian General Electric Co. Ltd. v. Minister of National Revenue* [1960] Ex.C.R. 24. Appeal pending.
4. *Gordon Johnson Co. et al v. Harold Callwood* [1960] Ex.C.R. 466. Appeal pending.
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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

1958
Nov. 18, 19, 20

EDOUARD LATREILLE ....APPELLANT;

AND

1959
June 15

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Unprofitable taxicab business liquidated by sale of individual taxis—Whether proceeds capital gain or taxable income—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, and 127(1)(e).

In 1946 the appellant, a garage operator, while continuing his main business, branched out into the taxicab business, became a member of a taxicab association and by 1950 was operating 21 taxis. At the end of 1949 he realized the new venture was an unprofitable one and advertised it for sale for a lump sum. Not having received a satisfactory offer he decided to try and sell the taxis with their permits individually. To do this and to avoid heavy losses he continued to operate the taxi business. During this time he was obliged to replace worn out taxis with new ones, accept trade-ins on sales and re-possess cars for default in payment. It was not until July 1952 after completion of some 47 transactions in all that the last car was sold and the taxicab business liquidated. The profits realized from the sales in 1950, 1951 and 1952 were assessed by the Minister as income from a business and the assessment upheld on an appeal to the Income Tax Appeal Board. On an appeal to this Court:

Held: That the taxpayer's garage business and taxicab business constituted two distinct and separate operations. The latter involving a capital investment in the form of rolling stock.

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2. That the taxpayer's whole course of conduct indicated an intention to dispose of the taxicab operation as an unprofitable business.
3. That having decided to sell the taxicabs individually he was forced by the custom of the trade to accept trade-ins to escape the alternative of a bulk sale with the much smaller profit such a sale would bring.
4. That since the proceeds from the transactions constituted capital gains, they were not subject to assessment for income tax.

APPEAL from a decision of the Income Tax Appeal Board.[1]

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

Rodolphe Paré for appellant.

J. C. Couture and *Alban Garon* for respondent.

DUMOULIN J. now (June 15, 1959) delivered the following judgment:

Pourvoi devant cette Cour de la décision rendue le 11 février 1957, par la Commission d'Appel de l'Impôt, déboutant l'appelant de ses conclusions à l'encontre des cotisations imposées par l'intimé pour les années 1950, 1951, 1952, et mentionnées au préambule de l'avis d'appel.

Les faits sont simples; leur interprétation légale, par contre, l'est moins.

En 1946, Edouard Latreille qui, depuis quelques années, exerçait le métier de garagiste, résolut d'exploiter par surcroît une entreprise de taxis à Montréal. Dès lors, il acquit, selon les besoins de l'heure et au gré d'occasions favorables, quelques autos pour les fins susdites. Au début de mars 1950, sa flotte de voitures-taxis comprenait vingt et une (21) unités.

De 1946 à 1950, tout voiturier public devait satisfaire à certaines conditions: être inscrit dans une association régulière autorisée à émettre un contrat par taxi; obtenir de l'autorité civique le permis réglementaire; puis, réunir la triple qualité de propriétaire du véhicule, de détenteur du permis municipal et du contrat d'association.

Edouard Latreille devint membre de "Diamond Taxicab", une société du métier qui, en 1946, attribua gratuitement à ses adhérents un certain nombre de contrats. Quelques mois

[1] 57 D.T.C. 144; 16 Tax A.B.C. 422.

après, une seconde allocation de permis eut lieu au coût de $200 pièce. Il convient de noter les conditions de gratuité ou de prix modique auxquelles furent faites, en 1946, ces répartitions dont la valeur unitaire atteindra mille dollars cinq ans plus tard.

A la fin de 1946, Latreille possédait sept taxis et, nous l'avons dit, 21 au début de 1950.

Il semble bien cependant que l'occupation principale de l'appelant fut et demeura celle de garagiste, qu'il exerçait sous la raison sociale de: "Garage Ed. Latreille". Disons encore que, le 16 septembre 1950, l'appelant obtenait de la firme Jarry & Frères Ltée, une sous-agence pour la vente d'automobiles Ford et Monarch, incident sans grande importance sur la décision du litige.

Quatre ou cinq années durant, Latreille continua d'exploiter ce service de taxis, jusqu'à ce que le tableau financier de l'entreprise pour l'exercice fiscal 1er janvier-31 décembre 1949 (pièce A), lui révélât, en noir sur blanc, un état de choses précaire, à savoir, des recettes au montant de $137,171.35, des dépenses de $136,880.56, soit un minime surplus de $290.79. La troisième et dernière feuille de ce bilan attribue une valeur résiduaire de $20,320.51 aux voitures dépourvues de taximètre, et une autre de $3,485.44, aux autos avec taximètre, une évaluation comptable de $23,805.95. Il s'agit là d'immobilisations de capital que la récapitulation du passif, à la première page de la pièce A, a tôt fait d'englober.

Nous verrons ci-après que les aléas de la liquidation compliqueraient singulièrement l'élucidation du profit de revente de ces 21 taxis, complétée le 31 juillet 1951, si, par ailleurs, Latreille, à l'article 12 de son avis d'appel, ne consignait que:

12. Le contribuable-appelant réalisa de la disposition de ses automobiles taxis, avec leurs permis respectifs, les profits, en capital, suivants:

1950	$28,579.84
1951	18,394.48
1952	6,078.06

Par ailleurs, l'intimé clôt ce chapitre du différend en demandant acte de cette admission, au paragraphe 7 de sa réponse.

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Le piètre résultat révélé par le bilan de 1949, cet excédent de $290.79, rendait impérieux l'abandon du service de taxis. Mais comment devait-on procéder, en l'occurrence, à disposer des 21 voitures et des contrats afférents, afin d'obtenir le plus favorable rendement?

Edouard Latreille rapporte qu'il essaya de vendre en bloc, au prix de $50,000, ce matériel roulant, permis et contrats compris, et que des annonces à cet effet furent insérées dans les journaux. Une offre de $42,000, fut soumise par un certain Soudeyns. Le propriétaire, espérant davantage, refusa et résolut de liquider sa flotte par unités. D'autres annonces en ce sens parurent dans les papiers-nouvelles, et ce fut dans ces conditions que l'affaire s'amorça.

Cette liquidation s'échelonna sur une période de deux ans et demi environ, plus exactement vingt-neuf mois, du 1er mars 1950 au 31 juillet 1952. Voici le résumé ou tableau de l'opération, année par année, selon qu'établi par la preuve:

1950—1er mars, Latreille possède	21 unités
1950—31 décembre, il lui reste	7 unités
1951—31 décembre, il lui reste	2 unités
1952—31 juillet, il ne lui en reste	aucune.

L'appelant vint à la conclusion qu'il lui fallait maintenir ses taxis en activité afin d'éviter de trop lourdes dépenses. En d'autres termes, il persista dans l'exploitation normale de son commerce attendant de trouver preneur pour une ou plusieurs de ses autos. Force lui fut aussi, entre 1950 et 1952, de substituer de nouveaux taxis à ceux que l'usure avait rendu impraticables et cela pour ne point se soustraire à l'attention des chalands. Les ventes effectuées rendaient nécessaires des reprises en échange, des repossessions faute de paiement, et la rétention par Latreille de droits de propriété comme garantie additionnelle. Certaines ventes furent annulées, obligeant le vendeur impayé à rechercher une meilleure occasion et, dans l'intervalle, à demeurer titulaire du contrat avec la Diamond Taxicab Association.

A titre d'exemple, je citerai ce passage commençant au bas de la page 7 du mémoire de l'appelant:

> Ainsi, en 1950, cinq des contrats et taxis vendus durent être repris, dont deux de ces contrats deux fois; en 1951, six durent être repossédés, enfin, en 1952, deux furent repris.

La cédule "A", un appendice de la pièce de même cote, comprend 47 transactions et elle en particularise les incidents, avec la plus-value à $1,000, en 1951, des contrats dans la société de taxis.

Il est en preuve que le voiturier de métier, dont les moyens pécuniaires sont habituellement très modiques, et qui, à l'époque, devait acheter véhicule et contrat, préférait consolider cette double dette entre les mains d'un créancier unique.

Enfin, une preuve incontestée établit qu'un taxi remisé entraîne une dépense quotidienne de $6, licence, permis, cotisation, assurances. Cette entreprise était l'objet d'une comptabilité propre, tout à fait distincte et séparée de la tenue de livres relative aux autres négoces d'Édouard Latreille.

Acception faite de cet état de choses, l'appelant, aux articles 17 et 19 de l'avis d'appel, soumet que:

> 17. Toutes les transactions faites par le contribuable-appelant ont été uniquement dans le but de disposer d'un commerce qu'il avait opéré jusque là et qu'il voulait cesser d'opérer pour l'avenir;
>
> 19. Ces profits constituent un gain capital et ils ne doivent pas en conséquence être cotisés contre le contribuable-appelant pour les années d'imposition 1950-1951 et 1952.

L'intimé, référant aux articles 3 et 4 de la Loi de l'impôt sur le Revenu 1948, puis à l'alinéa (*e*) du paragraphe (1) de l'article 127 de ladite loi (S.C. 1948, 11-12 Geo. VI, c. 52), répond:

> 11. . . . que les profits découlant des susdites ventes et plus particulièrement ceux réalisés par l'appelant durant les années d'imposition 1950, 1951 et 1952, soit $28,579.84, $18,394.48 et $6,078.06 respectivement, constituaient un revenu de l'appelant pour lesdites années au sens des articles 3 et 4 de ladite loi.

A l'audition, les procureurs de l'intimé convinrent, et c'était un truisme, que l'appelant, comme tout contribuable, pouvait disposer avantageusement de ses 21 taxis, et que la conjoncture d'un profit ou d'une perte n'informait pas, au regard du statut, la nature d'une transaction. Il fut admis aussi que la vente globale ou même échelonnée par unité n'outrepasserait pas les limites d'une mutation de capitaux si, par ailleurs, aucun achat de véhicules ne se fût produit durant la période de liquidation. Cette restriction, je pense, ne saurait peser sur les quelques voitures usagées,

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non point achetées par l'appelant, mais forcément acceptées en acquit partiel du prix de ses propres taxis, ni sur certaines reprises rendues obligatoires par défaut de paiement.

Exception faite de deux autos, cédées à Latreille pour comptes de garage, et qu'il aurait adjointes à ses autres taxis, la preuve testimoniale et la cédule A font voir que les transactions accessoires consistèrent précisément dans les inéluctables repossessions indiquées au paragraphe précédent. Et la preuve paraît démontrer encore que, pendant les deux années en question, Latreille poursuivit sans interruption le dessein de vendre ses taxis, que spécifiquement il n'en acquit aucun, puisque les repossessions incidentes qui lui furent imposées, ne peuvent influer sur la réalité même de son intention persistante.

Ces deux dations en paiement, si ma mémoire est fidèle, furent portées aux états de comptabilité du garage Latreille et au rapport des revenus de cette entreprise pour l'année. Puis, la dation en paiement n'équivaut à vente (Code civil, art. 1592) qu'en fonction de son incommutabilité; à l'égard du donataire ou acquéreur, elle compense d'ordinaire un manquement à une obligation principale et antécédente. Elle ne constitue pas, selon la pleine acception du terme, une vente libre; aussi le Code civil l'a-t-il rangée sous la rubrique "Des Ventes Forcées". De ce côté, encore, je ne décèle rien qui imprime nécessairement un caractère de spéculation aux actes sous examen.

Posons maintenant quelques principes de jurisprudence qui faciliteront, en l'éclairant, ma tâche de départager les thèses rivales dont l'une, celle de l'appelant, voit un accroissement de capital dans les gains réalisés; l'autre, celle de l'intimé, un revenu corollaire à "une initiative ou affaire d'un caractère commercial" selon le langage du sous-paragraphe (1)(*e*) de l'article 127 de la loi, texte de 1948.

Une décision britannique fréquemment invoquée: *Californian Copper Syndicate v. Harris*[1], suggère des normes concises d'appréciation, je cite:

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 . . . assessable to Income Tax. But it is equally well established that enhanced values obtained from

[1] (1904) 5 T.C. 159, 165, 166.

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. . . .

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 it is a gain made in an operation of business in carrying out a scheme for profit-making?

De ces lignes, trois notions se dégagent: la revente d'une valeur de placement est d'ordinaire une mutation de capital dont la plus-value n'est pas imposable; inversement tout gain découlant "d'une initiative ou affaire d'un caractère commercial", ayant comme objectif essentiel l'obtention de profits, est imposable; enfin, chaque cas soumis en est un d'espèce, qu'il importe d'analyser à la lumière des faits concomitants.

L'empirisme relatif de cette décision ne prétend pas exclure, cela va de soi, l'influence du facteur intentionnel, révélé, moins par le témoignage de la partie, que par l'attestation plus convaincante des circonstances. Il suffira, je crois, de deux citations pour accréditer ce sentiment.

Parlant au nom de la Cour Suprême, M. le juge Kerwin, maintenant Juge en chef du Canada, dans l'instance *Atlantic Sugar Refineries Ltd. v. Minister of National Revenue*[1] disait que:

The Court of Appeal in England decided in *Imperial Tobacco Co. v. Kelly*[2] that the intention with which a transaction was entered into is a feature that should be considered under the British Income Tax Act. That is an important matter under our Act but the whole sum of the circumstances must be taken into account in determining whether a profit arose as part of the taxpayer's business.

Le Président de cette Cour, décidant la cause de *Cragg v. Minister of National Revenue*[3], met en relief l'apport du climat moral et matériel de l'opération. Il écrit:

. . . the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

[1] [1949] S.C.R. 706, 707. [2] [1943] 2 All E.R. 119.
[3] [1952] Ex. C.R. 40, 45, 46.

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Il n'est guère douteux que l'entreprise de voiturier public, montée par Latreille de 1946 à 1949, sans confusion avec son commerce de garagiste, ne constitue, au même titre que ce dernier négoce, une initiative distincte, comportant un investissement de capitaux concrétisé par le matériel roulant. L'intimé même n'en disconvient pas.

L'ensemble circonstanciel, à partir du négligeable ou même périlleux excédent de $290 pour l'exercice 1949, jusqu'à la disparition absolue du service, le 31 juillet 1952; puis la réduction continue des unités dans la période intermédiaire, tout corrobore raisonnablement l'explication de Latreille et de son comptable au chapitre de l'abandon des affaires.

Toute chose a ses modalités propres, et disposer de 21 taxis est plus complexe, on l'admettra, que la revente d'actions de banque ou de valeurs d'État. Dans cet ordre d'idées, il est notoire que la vente d'automobiles entraîne, presque toujours, la nécessité d'en reprendre de plus usagées. L'appelant, comme tout autre, devait subir cette pratique coutumière, afin d'échapper à l'alternative peu alléchante d'une vente globale à prix moindre.

Nous avons présentement, je pense, une application littérale de l'opinion de M. le juge Thorson, que la fréquence des transactions, considérées isolément, n'est pas un facteur décisif, si d'autres indices repoussent l'hypothèse de la commercialité.

Et encore, la vente en vrac des 21 taxis, solution que l'intimé eut exonorée de tout reproche, aurait vraisemblablement astreint le vendeur à des échanges. Advenant cette plausible éventualité, quelle eût été la distinction juridique entre ces reprises en gros et des échanges dispersés?

Je dois conclure que la ligne de conduite suivie, en l'occurrence, par l'appelant n'a pas dévié de l'intention réelle de disposer d'une entreprise peu rentable et qu'il y procéda selon la pratique inhérente à l'espèce. Soutenir le contraire équivaudrait à dire que Latreille, astreint à des modalités opposées à l'usage, devait se résoudre à subir une perte. Je ne sache pas que le statut ou la jurisprudence ait pareille sévérité.

Edouard Latreille rapporta que son banquier lui avait vivement conseillé, en 1950, "de laisser là sa ligne de taxis". Or, son débit bancaire de $12,500, à cette époque, atteignait peu après, le chiffre de $24,575. L'intimé s'arroge de ce fait pour révoquer en doute la sincérité de Latreille. La réplique fut assez probante: la revente des taxis facilitait le transport à la banque de créances en collatéral au montant de $58,895. La confiance renaissait parce que les motifs de crainte s'atténuaient.

A Latreille, disant que l'entreposage de ses taxis eut entraîné des dépenses quotidiennes de $6 chacun, l'intimé oppose des pertes d'exploitation de $22,774.07 pour l'année 1950; de $15,154.78 en 1951 et de $4,213.44 en 1952.

L'appelant répond que 21 véhicules inutilisés, coûtant $6 de faux frais par jour, auraient creusé un déficit annuel de $45,990, et qu'entre deux maux il importe de choisir le moindre.

Sans insister plus que de raison, j'inclinerais à croire que pareil reproche dessert ses auteurs autant qu'il ne les aide: l'exploitant encourt des risques sérieux pour donner effet à sa décision de se défaire d'une entreprise onéreuse. Et n'oublions pas que la transaction, tout compte fait, se solda par d'appréciables bénéfices, en fonction desquels le ministère réclame paiement d'impôts.

A l'appui de sa prétention, l'intimé invoqua trois décisions que j'examinerai succinctement.

La première, *Gloucester Railway Carriage and Wagon Co. Ltd. v. Commissioners of Inland Revenue*[1], offre le cas d'une firme anglaise qui manufacturait des wagons de chemin de fer. Pendant la première guerre cette compagnie, au lieu de vendre ses wagons, en pratique la location à différents réseaux ferroviaires. Les hostilités terminées, Gloucester Company décida de disposer de la totalité des voitures naguère louées, au nombre de 1,622, opération commerciale qui valut aux intéressés un profit de 148,651 livres ou, en devises canadiennes, environ $700,000. Le Comité judiciaire de la Chambre des Lords confirma la décision des Commissaires de l'Impôt, à l'effet que les profits ainsi obtenus étaient de nature commerciale, puisque la raison d'existence

[1] [1925] A.C. 469.

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de la compagnie consistait à fabriquer et à vendre des wagons. La location des voitures n'avait été qu'un incident commercial.

Latreille ne fut jamais fabricant d'automobiles mais simplement un voiturier public, dont les revenus commerciaux provenaient de locations de services. Lorsqu'il résolut de liquider l'affaire, son capital se composait de la flotte de taxis.

Dans l'instance *Cragg v. Minister of National Revenue*[1], précédemment citée, l'appelant, comptable d'une compagnie d'assurances, acheta dix propriétés ou conciergeries, entre 1946 et 1949, dans le dessein, expliqua-t-il, d'augmenter le chiffre de ses revenus. Le juge Thorson décida, après une analyse circonstanciée des incidents, que Cragg avait spéculé sur le marché des immeubles. Il convient de signaler que le 26 mai 1947, ce même M. Cragg déclarait solennellement, dans un document officiel, que, depuis le mois de juillet 1943, il faisait affaires en qualité de courtier ou d'agent d'immeubles. Cela étant, il eut fallu un gosier singulièrement extensible pour ravaler pareille contradiction.

Quant à l'instance *Minister of National Revenue v. James A. Taylor*[2], il m'est impossible d'y apercevoir la moindre analogie avec l'actuel problème. Taylor, gérant d'usine, sous contrôle américain, ne pouvait obtenir du bureau chef qu'en de faibles proportions le plomb requis à la fabrication de ses produits. Il décida d'acheter en son propre nom une forte quantité de ce métal qu'il revendit à sa compagnie par personnes interposées, touchant ainsi des bénéfices considérables. La Cour conclut que cette transaction était une spéculation et je m'expliquerais mal une solution différente.

Pour les motifs qui précèdent, je suis d'avis que l'appelant a repoussé la présomption qui militait *a priori* en faveur des cotisations ministérielles et prouvé les allégations de son pourvoi.

En conséquence, je maintiens l'appel et annule la décision rendue par la Commission d'Appel de l'Impôt sur le Revenu, le 11 février 1957. Le dossier sera référé au Ministre du

[1] [1952] Ex. C.R. 40.
[2] (1956) 10 D.T.C. 1125; C.T.C. 189.

Revenu National pour que soit effectué le dégrèvement fiscal requis. L'appelant aura droit de recouvrer ses dépens taxables.

Jugement en conséquence.

BETWEEN:

1958
Oct. 8
1959
Aug. 13

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

AND

NORMAN LE FEVRE GRIEVE AND TORONTO GENERAL TRUSTS CORPORATION .... } RESPONDENTS.

Revenue—Income—Income tax—Chief source of income—Combination of farming and other source of income—Determination by Minister—When functus officio—Income Tax Act, R.S.C. 1952, c. 148, ss. 13, 42 and 46.

Section 13 of the Income Tax Act, R.S.C. 1952, c. 148 is as follows:

"13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income."

In computing his income tax returns for the years 1953, 1954, a taxpayer whose sole occupation was farming, deducted his farming losses from his other income, the bulk of which he received as life beneficiary of an estate. For 1953 he claimed to elect to average his income in accordance with the provisions of s. 42 of the *Income Tax Act*. The Minister assessed the taxes payable by the taxpayer accordingly but later determined pursuant to s. 13(2) that the taxpayer's chief source of income for 1953 and 1954 was neither farming nor a combination of farming and some other source of income and he thereupon re-assessed for those years and in so doing allowed as a deduction from other income only one-half of the farm losses claimed. The election to average income for 1953 was also rejected because the chief source of income during the averaging period did not appear to have been derived from farming as required by s. 42(1).

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The taxpayer's appeal to the Income Tax Appeal Board having been allowed, the Minister appealed from that decision to the Exchequer Court and, the taxpayer having died in the interval, the executors of his will were made parties respondent. On the appeal to this Court it was contended for the respondent that the determinations made by the Minister under s. 13(2) were subject to review by this Court and that the chief source of income for 1953, 1954 was a combination of farming and some other source of income, and alternatively that, in view of the original assessments, the Minister was *functus officio* and had no power thereafter to make the determination under s. 13(2) upon which the re-assessments were based.

Held: That it does not follow from the mere fact of an assessment having been made that the Minister necessarily has made a determination under s. 13(2) and become *functus officio,* for until the applicability of s. 13(1) was questioned by some one, there would have been no issue to be determined.

2. That the original assessments being in conformity with the taxpayer's computations, there was no issue for determination by the Minister under s. 13(2) until such issue was opened in the subsequent correspondence. In this situation there was no foundation for an inference that the Minister had made determinations or had exhausted his power prior to or when making the first assessments and he therefore was not *functus officio* when making the determinations admitted in the taxpayer's reply.

3. That as it was conceded that the taxpayer's chief source of income for 1953 and 1954 was not farming, and as there was no evidence that his chief source of income was farming in any of the years 1949 to 1953, s. 42(1) was inapplicable and the claim to average properly rejected.

4. That the determination by the Minister under s. 13(1) is reviewable on appeal to this Court, but only within the limits indicated in *Minister of National Revenue v. Wright's Canadian Ropes Ld.* [1947] A.C. 109 at 122.

APPEAL from a decision of the Income Tax Appeal Board.

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

F. J. Cross for appellant.

L. A. King for respondent.

THURLOW J. now (August 13, 1959) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a judgment of the Income Tax Appeal Board dated November 22, 1957,[1] allowing an appeal by William Robert

[1] 18 Tax A.B.C. 208; 57 D.T.C. 574.

Grieve against income tax reassessments for the years 1953 and 1954. Mr. Grieve died on August 8, 1958, and at the opening of the trial by consent Norman LeFevre Grieve and the Toronto General Trusts Corporation, the executors named in his will, were made parties respondent, and the proceedings were continued against them. The matter in issue is whether Mr. Grieve was entitled, in computing his income for income tax purposes for the years in question, to deduct the whole of his farming losses for those years or was limited to a deduction of half of them by s. 13 of the *Income Tax Act*. For 1953 there is a further issue of whether or not he was entitled to average his income pursuant to s. 42 of the Act.

Section 13 of the *Income Tax Act*, R.S.C. 1952, c. 148, as applicable to the years 1953 and 1954, was as follows:

13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income.

(3) For the purpose of this section, a "farming loss" is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

Section 42 provided a right for a taxpayer to elect to average his income "where a taxpayer's chief source of income has been farming or fishing during a taxation year (in this section referred to as the 'year of averaging') and the four immediately preceding years (in this section referred to as the 'preceding years')."

William Robert Grieve was a farmer who had carried on farming operations for many years prior to 1953 and 1954. Farming was his sole occupation. In some years these

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operations had yielded a profit. In others, notably in 1953 and 1954, they resulted in a loss. The following figures relating to his income were put in evidence:

Year	Investment Income	Farming Profit	Farming Loss
1942	$15,706.00	$ 565.67	
1943	15,030.24		$ 528.98
1944	15,187.38	1,570.08	
1945	14,784.56	2,616.61	
1946	15,264.97	170.29	
1947	16,726.04		314.72
1948	17,278.57	238.04	
1949	16,541.47		1,386.19
1950	15,800.71	260.60	
1951	14,878.89		3,674.32
1952	14,238.12		4,898.80
1953	9,297.23		6,539.19
1954	11,062.64		4,851.77

In computing his income for 1953 and 1954 for the purposes of the *Income Tax Act,* Mr. Grieve deducted his farming losses for these years from his other income, the bulk of which was income which he received as life beneficiary of an estate. For 1953 he also claimed, pursuant to s. 42, to elect to average his income in accordance with the provisions of that section. His returns for the years 1953 and 1954 were dated April 8, 1954 and April 12, 1955, respectively. In the return for 1953, gross farming revenue was reported at $2,255.93 and farming expenses at $8,795.12, including $424.19 for capital cost allowances, and a tax refund of $509.23 was claimed as a result of the averaging under s. 42. In the return for 1954, the farming revenue was reported at $2,542.42, the expenses claimed amounted to $7,394.19, including $411.69 for capital cost allowances, and tax was computed at $487.50. By notices of assessment dated May 31, 1954 and May 18, 1955 respectively, the Minister advised Mr. Grieve that tax levied for 1953 resulted in a credit of $509.23 and that the tax levied for 1954 was $487.50, these amounts being exactly as computed in Mr. Grieve's returns.

On or about January 7, 1955, by a letter directed on behalf of the Chief Assessor for the Vancouver Taxation District to a firm of chartered accountants who acted for Mr. Grieve, the latter was informed that his income tax returns for 1953

and earlier years were under review and information was requested on a number of details pertaining to his farming operations. He was also informed that, as the farming losses incurred in the averaging period amounted to $16,074.31 and were offset only by the 1950 profit of $260.60, while during the same period investment and other income totalled $17,851.42 (*sic*), his chief source of income did not appear to be from farming and therefore the averaging "privilege" could not be "extended" to him. The accountants answered the questions and on March 8, 1955 a further letter was addressed on behalf of the Chief Assessor to Mr. Grieve. In this letter he was again informed that his returns for 1952 and 1953 were under review and, after setting out s. 13 verbatim, the letter went on to state that it was proposed to recommend to the Deputy Minister that he make a determination under s. 13(2) that Mr. Grieve's chief source of income for 1952 and 1953 was neither farming nor a combination of farming and some other source of income. In the final paragraph, Mr. Grieve was informed that any representations he might wish to make should be made, preferably in writing, within two weeks, after which time the matter would be referred to head office. Some further correspondence, in which the accountants offered representations on his behalf, followed, and later, on December 16, 1955, a notice of reassessment was sent to him in which his tax for the year was computed at $835.74. Some two months later, a letter was sent to him referring to the letter of March 8, 1955, and stating that the Deputy Minister had determined that Mr. Grieve's chief source of income for 1953 was neither farming nor a combination of farming and some other source of income. The reassessment had been made on that basis, and in it one-half only of the farm loss for the year (after deducting therefrom the capital cost allowances claimed) was allowed as a deduction. The election to average income pursuant to s. 42 was also rejected, because "the chief source of income during the averaging period does not appear to have been derived from 'farming' as required by s. 42(1) of the *Income Tax Act*." A notice of objection was given by Mr. Grieve, and subsequently, on July 26, 1956, the Minister, per the Deputy Minister (as

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to which see s. 116(1)), confirmed the reassessment as having been made "in accordance with the provisions of the Act and in particular on the ground that under the provision of s-s. (2) of s. 13 of the Act the Minister has determined that the taxpayer's chief source of income is not farming or a combination of farming and some other source of income; that the taxpayer's chief source of income was not farming within s-s. (2) of s. 41 of the Act."

It appears from the notice of objection to the reassessment for 1954 that on January 5, 1956 a letter, setting out s. 13 and "advising of intended reduction of farm loss claimed" was sent by the District Taxation Office to Mr. Grieve in respect of his 1954 income. To this letter Mr. Grieve made no reply "as the same point was being dealt with at that time in respect of a 1953 assessment." This, I assume, refers to a proposed reference to the Deputy Minister to obtain his determination under s. 13(2) with respect to the 1954 taxation year. In any case, on January 26, 1956, notice of reassessment for 1954 was sent to Mr. Grieve, accompanied by a letter stating that the Deputy Minister had determined that Mr. Grieve's chief source of income for 1954 was neither farming nor a combination of farming and some other source of income. By this reassessment, as well, only half of the farm loss claimed (after deducting capital cost allowance) was allowed as a deduction from other income.

Following a notice of objection given by Mr. Grieve, this reassessment was also confirmed by the Minister, per the Deputy Minister, as having been "made in accordance with the provisions of the Act and in particular on the ground that under the provisions of subsection (2) of section 13 of the Act the Minister has determined that the taxpayer's chief source of income is not farming or a combination of farming and some other source of income."

Notice of appeal to the Income Tax Appeal Board from both reassessments was then given, and on the matter coming before the Board the appeal was allowed by a judgment the effect of which was to vacate the reassessments for both years. The Minister thereupon appealed to this Court and, in his notice of appeal, set out as allegations the deduction

by Mr. Grieve of amounts representing farm losses in calculating his income for the 1953 and 1954 taxation years, the original assessments, and the reassessments, and went on to state in paragraph 4 as follows:

> 4. Before the making of the re-assessments referred to in paragraph 3 hereof, determinations were made under subsection (2) of Section 13 of the Income Tax Act, that the Respondent's chief source of income for the 1953 and 1954 taxation years was neither farming nor a combination of farming and some other source of income.

All of these allegations, as well as allegations relating to the notices of objection, confirmation of the reassessments by the Minister, and the appeal to the Income Tax Appeal Board were admitted in the reply filed on behalf of Mr. Grieve. In subsequent paragraphs of the reply, however, reasons (the truth of which on the evidence there is no reason to doubt) were given accounting for the 1953 and 1954 farming losses as being the result of marketing conditions and severe frosts which killed many of the taxpayer's apple trees, and it was objected that the determinations made by the Minister under s. 13(2) were subject to review by this Court, that the taxpayer's chief source of income for 1953 and 1954 was either farming or a combination of farming and some other source of income, and alternatively, that, in view of the original assessments, the Minister was *functus officio* and had no power to make the reassessments.

Under the last-mentioned plea, it was submitted that it must be presumed that the Minister exercised his power to make a determination as provided by s. 13(2) prior to or at the time of the making of the first assessment for each of the years in question and that thereafter he was *functus officio* and without power to make the later determinations which were referred to in the notice of appeal in the paragraph above quoted. If this contention is sound, it goes to the root of both reassessments.

As there was no direct or other evidence that the Minister had made a determination for either year under s. 13(2) prior to giving the first notice of assessment for that year, the substantial question raised by the submission is that of what is to be inferred as to the exercise by the Minister of his power from the giving of the first notices of assessment.

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In approaching the problem, it is, I think, important to note that, while both the function of assessing the tax under the authority of s. 46 and that of making a determination under s. 13(2) are by the Act committed to the Minister, they are separate and different functions and their effects are not the same. The first, that of assessing the tax, is strictly an administrative function. It involves simply the application by the Minister of the substantive law to the facts as they appear. Liability for the tax imposed by the statute is not affected by the assessment so made being incorrect or incomplete or by the fact that no assessment has been made, and, within the times limited by s. 46(4), the assessing function may be re-exercised to realize the full amount of the tax imposed by the statute. If there is any dispute between the taxpayer and the Minister, both the facts and the law, as well as the application of the law to the facts, are left to be determined by the Court on an appeal as provided by the statute. The second function, that of making a determination under s. 13(2), is a judicial function. The subsection constitutes the Minister the judge, for the purpose of s. 13, of the material fact on which the application of s. 13(1) depends and, subject to his decision being not contrary to "sound and fundamental principles," empowers him to bind the taxpayer by such determination.

I do not think, however, that it follows that a determination pursuant to s. 13(2) is necessary in every case to which the rule of s. 13(1) may apply. For example, if a taxpayer files a return and, in doing so, correctly computes his income by applying the rule of s. 13(1), I can see no occasion for the Minister to make a determination of the fact under s. 13(2) before making an assessment of tax for, in such a case, there is no issue to be determined. Nor do I think it would follow from the fact of an assessment having been made that the Minister must necessarily have made a determination under s. 13(2) and become *functus officio* and, therefore, powerless to vary the assessment if it subsequently appeared that s. 13(1) was in fact inapplicable and that the computation was thus wrong, for until the matter was raised by someone there would have been no issue to be determined. As I see it, this power is provided for and

is to be exercised by the Minister in situations where an issue, whether raised by the taxpayer or the Minister, exists as to the material fact on which the application of s. 13(1) depends.

The power conferred by s. 13(2) is substantially different from that which the Minister had under s. 13(2) as it was prior to the repeal and substitution of s. 13 by S. of C. 1952, c. 29, s. 4. For a review of the history of this legislation, see *Minister of National Revenue v. Robertson*[1]. Formerly, the power was to determine what the chief source of income was. That power and the rule for computing income contained in s-s. (1), as it then was, applied to the right of taxpayers to deduct losses not related to the taxpayer's chief source of income, while the present section is concerned only with the right to deduct farming losses. The power contained in the applicable s. 13(2) is not a power to determine what the chief source of income was, nor is it a power to determine, in any general sense, what it was not. It is limited to determining that the chief source of income was neither of two things, namely *farming* or a *combination* of farming and some other source of income. The making of such a determination results only in a negative conclusion of fact, and the absence of such a conclusion cannot imply a positive determination that the chief source of income was one thing or another. At most, the absence of such a conclusion can imply only one of two things, either that the Minister has not exercised the power, or that he has considered the matter judicially, pursuant to s. 13(2), and has come to the conclusion that the facts do not warrant such a determination. Only in the latter case could there be any possible application of the principle that, having exercised the power, the Minister had become *functus officio*.

Now it is, I think, also important to observe that, in the present case, the first assessments for 1953 and 1954 were predicated not on the basis of the rule of s. 13(1) being applicable, but on the basis of the rule of s. 13(1) being inapplicable. This suggests that the Minister has not made a determination that the taxpayer's chief source of income was neither farming nor a combination as set out in s. 13(2), for the assessments do not reflect the application

[1] [1954] Ex. C.R. 321 at 328.

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of the rule of s. 13(1). It is, accordingly, consistent with the assessments to infer that the applicability of s. 13(1) was not considered at all—in which case it would, in my opinion, remain the duty of the Minister to consider it and to reassess accordingly, if necessary—or that the Minister, acting through his subordinates engaged in carrying out the administrative duty of assessing, considered the matter but came to the conclusion that the facts did not warrant raising an issue between himself and the taxpayer on the point. In the latter event as well, I think that it would be the duty of the Minister, in view of s. 46(3) and (4), and that it would remain open to him, to review the assessment and, if necessary, raise the issue at a later time within the periods limited by s. 46(4).

Since these explanations are not inconsistent with the assessments, it cannot, in my opinion, be said that the raising of an issue and the exercise of the power to determine it under s. 13(2) are necessarily to be inferred where all that has happened is that a taxpayer in his return has proceeded to calculate his income and his tax on the basis of s. 13(1) being inapplicable and an assessment of tax has been made which apparently proceeds on the same basis, and I think this is so even though both the taxpayer's and the Minister's computations may be quite wrong and even though it was the Minister's duty in his administrative capacity before making the assessment to examine the taxpayer's return and to consider and apply all relevant provisions of the statute. I doubt that any inference can ever be drawn from a mere assessment of tax as to the making of a determination pursuant to s. 13(2), but whether it can in some instances or not, unless an issue for determination under that provision has been raised prior to the making of the assessment, I am of the opinion that the mere making of the assessment implies nothing as to whether or not the power to determine such an issue has been exercised.

In *Minister of National Revenue v. Robertson*[1] Potter J., on the evidence before him, drew an inference that the power conferred on the Minister by s. 13 had in fact been exercised. There, however, both the provisions

[1] [1954] Ex. C.R. 321.

of s. 13 and the power of determination given by s-s. (2) were widely different from those applicable to the years 1953 and 1954, the computation on which the assessment in question was based was at variance with the taxpayer's computation, and Potter J. appears to have drawn his conclusion that the determination had been made not merely from the notice of assessment and a letter referring to s-ss. (3) and (4) of s. 13, though not to s-s. (2), which had accompanied the notice of assessment, but as well from the Minister's decision (following the appellant's notice of objection), in which it was stated that the appellant's chief source of income was neither farming nor a combination of farming and some other source of income within the meaning of s-s. (3) of s. 13 of the Act.

In the present case, the original assessments being in conformity with the taxpayer's computations, there was, in my opinion, no issue for determination by the Minister under s. 13(2) until such an issue was opened in the respective letters whereby the taxpayer was informed that it was proposed to refer the matter to the Deputy Minister for his determination, and the taxpayer was invited to submit representations thereon. In this situation, there is, in my opinion, no foundation for an inference that the Minister had made determinations or had exhausted his power prior to or when making the first assessments, and I am therefore of the opinion that the Minister was not *functus officio* at the time of making the determinations which were admitted in the taxpayer's reply.

It was also submitted that the Minister's determinations were open to review on this appeal and that they were not justified by the facts. In my opinion, a determination by the Minister under s. 13(1) is reviewable on appeal to this Court, but only within the limits indicated in the *Minister of National Revenue v. Wright's Canadian Ropes* case.[1] There Lord Green M. R. said at p. 122:

> This right of appeal must, in their lordships' opinion, have been intended by the legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless the limits within which the Court is entitled to interfere are in their lordships' opinion strictly circumscribed. It is for the taxpayer to

[1] [1947] A.C. 109; [1947] C.T.C. 1; [1947] 2 D.T.C. 927.

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show that there is ground for interference and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court, in their lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173 at p. 179 he must act "according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular". Again in a case under another provision of this very sec. 6 (s. 6, sub-s. 1) [sec. 5(1)(*a*)—Ed.] where a discretion to fix the amount to be allowed for depreciation is given to the Minister, Lord Thankerton in delivering the judgment of the Board said "The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision unless—as Davis, J. states—'it was manifestly against sound and fundamental principles' ". (*Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue* [1938-39] C.T.C. 411 at pp. 416-417.)

In the present case, there was no agreement between the parties nor was there any oral evidence as to what was in fact before the Minister or his Deputy when the two determinations were made, though a number of documents were offered on behalf of the Minister and admitted in evidence by consent. These included copies of the taxpayer's returns for the years in question, the notices of the reassessments and accompanying documents, the taxpayer's notices of objection, which included copies of the correspondence and representations made on the taxpayer's behalf, and a statement showing the taxpayer's investment income and farm profits and losses as previously set out for the years 1942 to 1954 inclusive.

I think it may fairly be assumed that the taxpayer's income tax returns for the years in question and copies of the notices of reassessment and accompanying documents, as well as the taxpayer's notices of objection with accompanying documents, were before the Deputy Minister when he decided to confirm the reassessments. Indeed, it is stated in the decisions that he has reconsidered the reassessments and considered the facts and reasons set forth in the notices of objection. But whether or not the figures relating to the taxpayer's investment income and his farming profits and losses for earlier years were before the Deputy Minister

was not established. Nor was any evidence offered as to what was before him when the determinations, as admitted, were made. In this situation, since "it is for the taxpayer to show that there is ground for interference and if he fails to do so the decision of the Minister must stand," no ground has been shown for interfering with the Minister's determinations. But even assuming that the Deputy Minister had before him the material set out in the taxpayer's returns and the correspondence which preceded the reassessments and reviewing the matter on the basis of that having been the material which was before the Deputy Minister, I am of the opinion that there was in it ample material to support the determinations and that no good ground has been shown for disturbing either of them. I am also of the opinion that, if the figures for earlier years were before him, the determinations are equally unassailable, for if the figures have any effect, it is simply to confirm the determinations. Nor was anything further shown in the notices of objection which would, in my opinion, afford ground for disturbing the determinations. It was conceded in the course of argument, and I think quite properly so, that the taxpayer's chief source of income was not farming, and the case was thus narrowed down to a submission that the taxpayer's chief source of income was in fact a combination of farming and investments. However, on the whole of the material, including that put forward on behalf of Mr. Grieve, there does not appear to have been any connection or relation whatever between his farming as a source of income in any year and the estate or investments from which the bulk of his income was derived upon which one could say that his chief source of income was a combination of the two, beyond the mere fact that he was the recipient or owner of the estate or investment income and was also the recipient or owner of the farming profits or the sufferer of the farming losses. That fact alone does not, in my opinion, inevitably lead to the conclusion that Mr. Grieve's chief source of income was a *combination* of such sources of income within the meaning of s. 13(1), and I can, therefore, see no reason for disagreeing with the Deputy Minister's

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determinations for either 1953 or 1954 that Mr. Grieve's chief source of income was neither farming nor a combination of farming and some other source of income.

There remains the issue under s. 42(1); a matter which is not affected by the Minister's determination under s. 13(2) since that determination is merely for the purpose of s. 13. On this issue, it was accordingly open to the respondents on the trial of this appeal to prove, if they could, that Mr. Grieve's chief source of income for the five averaging years was farming, and it was incumbent on them to prove this if the issue under s. 42(1) was to be resolved in their favour. However, as previously mentioned, it was conceded that Mr. Grieve's chief source of income for 1953 and 1954 was not farming, and on the evidence and particularly the figures already referred to, I am unable to find that his chief source of income was farming in any of the years 1949 to 1953 inclusive. Section 42(1) was therefore inapplicable, and Mr. Grieve's claim to average was properly rejected.

The appeal will, accordingly, be allowed with costs and the reassessments restored.

Judgment accordingly.

1958 Dec. 8, 9, 10

1959 Sept. 21

BETWEEN:

CANADIAN GENERAL ELECTRIC COMPANY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Foreign exchange profits—Method of computing income—Must reflect real profit or loss—The Income Tax Act, 1948, S. of C. 1948, c. 52; R.S.C. 1952, c. 148, ss. 3, 4 and 14(1).

The appellant company borrowed funds from its parent United States company to purchase goods from it and other suppliers in the United States indicating its indebtedness by promissory notes payable in U.S. funds. Due to the fact that during the currency of the notes the Canadian dollar rose from a discount to a premium over U.S. funds the appellant was able to pay off all the notes at a saving of some $512,847. Notes totalling $1,567,847 were paid off in 1951 at a saving of $81,744 and the balance totalling $9,225,326 in 1952 at a saving of $431,072.

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The respondent added the latter amount to the appellant's declared income for 1952 as "foreign exchange on notes payable". In an appeal from the assessment the appellant contended that the profit should be computed on an accrual basis by revaluing the amount of foreign exchange originally provided for, at the end of each fiscal year and including such amounts and the amounts actually realized by payment, in income. On this basis it submitted the profit should be apportioned as $64,675 for 1950; $259,820 for 1951 and $188,351 for 1952. It argued that the system was followed in 1952 and the preceding years in regard to outstanding obligations to other U.S. suppliers, the "profit" due to the lower rate of exchange being taken into account at the end of each year and treated as taxable income. To be consistent it urged that the same practice should be followed in regard to the notes.

Held: That the issue before the Court was one of law and not of accounting. The profits in question were neither made nor ascertained by the mere revaluation downward on December 31, 1950 and 1951 on the books of the company, of the amount of the premium in Canadian dollars necessary to pay the outstanding notes, but that such were made only upon actual payment of the several notes.

2. That no taxable profit in respect of foreign exchange was made by the appellant until the time at which the several notes payable in U.S. currency were actually paid.

3. That the giving of a renewal note cannot be considered as payment of the debt any more than the giving of the original.

4. That the word "method" used in s. 14(1) of the *Income Tax Act* is not limited to those methods referred to as the "cash" and "accrual" methods.

5. That a taxpayer can invoke the provisions of s. 14(1) only when the method which he has adopted in an earlier year to compute his income (and which he proposes to follow in the taxation year in question) is one which is computed in accordance with the provisions of the Act and truly reflects his real profit or loss for the year.

APPEAL from an assessment under the *Income Tax Act* 1948, S. of C. 1948, c. 52 and the *Income Tax Act,* R.S.C. 1952, c. 148.

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

A. D. McAlpine and *W. L. N. Somerville* for appellant.

W. R. Jackett, Q.C., J.D.C. Boland and *G. W. Ainslie* for respondent.

CAMERON J. now (September 21, 1959) delivered the following judgment:

By a re-assessment dated August 6, 1957, the respondent added to the declared income of the appellant for its taxation year ending December 31, 1952, the sum of $431,072.68, described as "Foreign exchange profit on notes payable", and an appeal is now taken therefrom. In its original

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Notice of Appeal, the appellant took the position that to the extent that any such profits were made in that year, they were profits on capital rather than on revenue account and therefore not taxable. By amendments to the Notice of Appeal and doubtless because of the decisions of the Supreme Court of Canada in *Tip Top Tailors Ltd. v. M.N.R.*[1] and *Eli Lilly & Co. (Canada) Ltd. v. M.N.R.*[2], the appellant now admits that to the extent that it made "foreign exchange profits on notes payable" in 1952, such profits are of a revenue nature and are to be taken into consideration in computing its taxable income. As will be seen later, the dispute has to do with the quantum of such profits in 1952.

The facts are not in dispute. The appellant is an incorporated company having its head office at Toronto, most of its shares being owned by the General Electric Company of Schenectady, New York. It is engaged in the business of manufacturing and selling electrical machinery and supplies of all sorts and purchases substantial quantities of needed supplies from General Electric, as well as from other suppliers in the United States. In 1950, the appellant had borrowed very substantial amounts from its Canadian bankers in the form of overdrafts. In August of that year, General Electric offered to make U.S. funds available to the appellant at a rate substantially lower than that paid to the appellant's Canadian bankers. The initial arrangement was that General Electric would defer payment of accounts for goods purchased from it by the appellant, carrying them on open account and at an interest rate of 2 per cent. Within a few weeks, however, General Electric required that any such indebtedness should be evidenced by promissory notes of the appellant payable to General Electric and all in U.S. currency.

These arrangements were duly carried out (the appellant, however, as before, continuing to pay cash for a portion of its purchases from General Electric) and, as will be seen from Exhibit 13, some 25 notes were issued between August 20, 1950 and May 20, 1952. All of these notes were in respect of goods or services supplied by General Electric to the appellant except for one dated May 9, 1952, for

[1] [1957] S.C.R. 703.

[2] [1955] S.C.R. 745.

$500,000 in U.S. funds supplied by General Electric to the appellant and used by the latter for the purchase of goods in the United States. Exhibit 13 gives the date and amount of each note, the dates of payment on account, as well as the rate of exchange of U.S. and Canadian dollars existing at the date of each note and at the time of each repayment. Exhibits 7 and 10 are respectively photostatic copies of the notes and of the cheques issued in repayment, the latter all being drawn on the appellant's account at the Guaranty Trust Company of New York.

Due to the fact that during the currency of these notes the premium on U.S. funds over the Canadian dollar was sharply reduced, and that in 1952 the Canadian dollar was at a premium over such U.S. funds, the appellant, as shown by Exhibit 13, was able to pay off all the notes at a saving which the parties have agreed upon at $512,847.12. Five of the notes issued in 1950, and aggregating $1,567,149.20, were paid off in 1951 at a saving of $81,774.44; the remaining notes, issued in 1950, 1951 and 1952 and aggregating $9,225,326.87, were paid off in 1952 at a saving of $431,072.68. It is the latter amount which was added to the appellant's declared income and which is now in dispute.

It is now submitted on behalf of the appellant that the total amount of the agreed profits should be apportioned over three years as follows:

1950	$ 64,675.17
1951	259,820.23
1952	188,351.72
	$512,847.12

In order to understand this contention, it is necessary to state what the appellant did in relation to its liability on the notes in question. At the time that each note was given, there was set up in the books not only the liability for the face value of the note, but a further item under "Foreign exchange" of an amount in Canadian funds which, together with the face amount of the indebtedness, would be necessary to pay the note in U.S. funds. That, of course, was based on the premium from time to time of the U.S. dollar over the Canadian dollar. It is not disputed that

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such entries were correct, the total of the two amounts truly representing the appellant's then liability for the goods purchased. As shown by the schedule attached to the Notice of Appeal, the amounts so set up for "Foreign exchange" in 1950 totalled $300,573.15. The exchange rate in that year had varied from a high of 10½ per cent to a low of just less than 4 per cent. On December 31, 1950, the exchange rate was 6 per cent and the appellant on that date (which was the end of its fiscal year) revalued the amount of the "Foreign exchange" premium which it would have had to provide if it had paid the existing notes in full at that date, namely, at the then rate of exchange of 6 per cent.—a total of $235,897.98. The difference of $64,675.17 between the total amounts it had originally set up to meet the exchange premium ($300,573.15) and that fixed for the year end ($235,897.98) was said to be "profit" for that year, notwithstanding the fact that no payments whatever were made on the notes. In its income tax return for the year 1950, this "profit" of $64,675.17 was disclosed, but as it was considered by the appellant to be a gain on account of capital, it was not taken into income. The Minister, however, added it to the declared income, but an appeal to the Income Tax Appeal Board was allowed. From that decision, the Minister lodged an appeal which was later abandoned. I am not directly concerned with the 1950 income tax return and have pointed out the facts relating thereto merely to indicate that the appellant then considered that the item in dispute was a profit (although not on revenue account) and that the Minister had re-assessed the appellant on the ground that it was in fact on revenue account as now submitted by the appellant.

Again, the second schedule to the Notice of Appeal sets forth the computation of the appellant in respect of the "profit" in question for 1951. The item of $235,897.98 set up by revaluation on December 31, 1950, as the amount necessary to pay the exchange on the outstanding notes on that date was carried forward to the beginning of 1951 and to it was added the amount of foreign exchange premium necessary to pay all the new notes issued in 1951 at the rate of exchange prevailing when each note was given, the total

of both sums aggregating $404,793.26. From that aggregate, there was deducted (*a*) the actual exchange premiums paid on the notes which were redeemed in that year, and (*b*) the total of the revalued amounts of exchange necessary to pay the outstanding notes at December 31, 1951, at the then current rate of 1¼ per cent.—a total of $144,973.03. The difference of $259,820.23 is said to have been the "profit" for the taxation year 1951. In its return for that year, the appellant showed that amount as exchange profit on notes, but considered it to be a gain on capital account.

Schedule 3 to the Notice of Appeal relates to the year 1952 in which further notes were issued, and these, together with all outstanding notes, were paid in full before December 31, 1952. The Canadian dollar throughout the year was at a premium. Accordingly, from the "credit" in exchange on the new notes issued totalling $68,789.34, there was deducted the "debit" established by revaluation of the notes unpaid on December 31, 1951, namely, $62,196.80, leaving a balance of $6,592.54. That amount was deducted from $194,944.26, the amount of the actual benefits accruing to the appellant upon payment of its several notes in 1952, due to the premium on the Canadian dollar. The difference of $188,351.72 is now said to be the "profit" for 1952 relating to "exchange on the notes". In its income tax return for that year, the appellant attached Schedule 28 thereto with the same particulars as in Schedule 3 of the Notice of Appeal. In computing its taxable income, however, the full amount of $188,351.72 was deducted from net income, the appellant then being of the opinion that such "profit" was not on revenue account. It is now conceded, however, that whatever profit was made in 1952 upon payment of the notes, was a profit on revenue account.

The contention of the appellant may be stated as follows:

It is said that the only suitable system of accounting for a trader such as the appellant is that frequently called the "accrual" system. The expert accountants called by the appellant are in agreement on that point and there can be no doubt that that is so, the "cash" system being wholly unsuitable for such a business. Then it is said that under the "accrual" system, it is necessary to value not only receivables, but payables, at the balance-sheet date, in order

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to reach a true position of profit or loss. It is therefore necessary, it is contended, to show accurately on that date the true amount of Canadian dollars necessary to retire the outstanding notes by taking into consideration the then existing rate of exchange and to substitute that figure for the one used at the time the actual transactions took place. To disregard the fluctuating rate of exchange until actual payment would, it is said, result in an over-statement or under-statement of actual liabilities and thus bring about an under-statement or over-statement of profits for the year. Then it is pointed out that the system now advocated was followed in 1952 and the preceding years in regard to outstanding obligations (not represented by notes) to other suppliers in the United States, the "profit" due to the lower rate of exchange being taken into account at the end of each year and treated as taxable income. To be consistent, it is urged that the same practice should be followed in regard to the notes.

I find it unnecessary to state in full the opinion of the expert accountants who gave evidence for the appellant, for, with great respect, I have come to the conclusion that the issue before me, and which I shall state shortly, is one of law and not of accounting. These accountants were all in agreement that the "accrual" system was the only suitable one for the appellant company and that from an accounting point of view it was proper, in order to give a true picture of the company's position, to revalue the amount of Canadian dollars necessary at each balance-sheet date to pay off the outstanding notes.

Most, if not all, in reaching that conclusion, placed great stress on the undoubted fact that the appellant, had it so desired, could at all relevant times have paid the notes (which admittedly were current liabilities) in full by having recourse to the line of credit which it had with its Canadian bankers. That fact, they said, eliminated any contingency as to a future gain or loss in exchange due to the fluctuating rates.

The submission made by counsel for the Minister may be summarized briefly. He says that no profit arose at the end of the fiscal years 1950 and 1951 by the mere revaluation downwards on the books of the appellant company of

the amount of Canadian dollars necessary to pay the outstanding notes in U.S. dollars. A trade, it is said, is only taxable in the year for profits made in that year in respect of realized profits. Here it is submitted that the profit arose only upon actual payment of the notes and that profit was the difference between the amount of Canadian dollars set up in the company's books when each note was given to General Electric and the actual amount paid to retire the notes. No notes were paid off in 1950 and accordingly the profit on exchange should be apportioned to the years in which the notes were actually paid, as follows:

1951	$ 81,774.44
1952	431,072.68

If this submission be correct, then the re-assessment must be upheld, there being no dispute as to the amounts computed on that basis.

It will be seen, therefore, that the issue is one of amount only, the appellant's main contention being that the profit on exchange in 1952 was $188,351.72 and not $431,072.68, the amount added by the Minister.

In my view, the broad issue to be determined here is this—"When did this profit arise?" That question, as I have suggested, is one of law, to be answered by a consideration of the Act and the relevant decisions of the Courts. By s. 3 of the 1948 *Income Tax Act*, "The income of a taxpayer for a taxation year . . . is his income from all sources . . . (and) includes income for the year from all . . . businesses." Then, by s. 4, "Income for a taxation year from a business . . . is the profit therefrom for the year."

The problem will, I think, be made clearer if a specific example is considered. Certain of the notes issued to General Electric in 1950 were wholly unpaid until 1952. Notwithstanding this fact, the appellant on December 31, 1950, and on December 31, 1951, in relation to these notes revalued downwards on its books the amount of Canadian dollars necessary on those dates to pay the premium then in effect on U.S. exchange. In 1951, nothing else was done in connection with these liabilities. The question, therefore, is whether in these circumstances a trader who in one year has incurred a debt in foreign currency and has left it

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wholly unpaid throughout the following year, is taxable under *The Income Tax Act* by reason of the single fact that its liability in terms of Canadian currency has decreased during that subsequent year as the result of the change downwards in exchange rates.

After most careful consideration of the arguments of counsel and of the authorities cited in support of their submissions, I have come to the conclusion that the appeal on this point is not well founded and must be dismissed. I do so for the reason that the profits in question, in my opinion, were neither made nor ascertained by the mere revaluation downwards on December 31, 1950 and December 31, 1951 on the books of the company, of the amount of the premium in Canadian dollars necessary to pay the outstanding notes, but that such profits were made only upon actual payment of the several notes.

It may be stated that, in general, income tax is calculated on the basis of the receipts of a business. In *Johnson v. W. S. Try Ltd.*[1], Lord Greene, M.R. stated:

> It should be noted that, in general, tax is calculated on the basis of the receipts of a business. There is one notable exception to that and that is the case of trade debts . . . a trader is not entitled to say: you must not tax me on these debts because I have not received payment. You can only tax me when I have received payment. The Legislature says: No, it is ordinary commercial practice in calculating your profits to bring in debts which are owing to you on the same basis as if they were receipts. . . . The reason why that exception is brought in is that it is in accordance with ordinary commercial practice to treat debts in that way.

In that connection, reference may also be made to *Ken Steeves Sales Ltd. v. M. N. R.*[2]. A further exception to the general rule is the statutory provision now found in s. 14(2) of *The Income Tax Act* which provides that in computing income, property described in an inventory shall be valued at its cost to the taxpayer, or its fair market value, whichever is the lower, or as may be permitted by regulation. There a profit or loss may result without actual disposition of the stock-in-trade.

In the instant case, however, the subject-matter has to do with foreign exchange on debts payable and is related in no manner to debts receivable or to inventory. It is significant to note that in all of the cases cited to me, not

[1] 27 T.C. 167 at 181-182. [2] [1955] Ex. C.R. 108.

one was found in which a taxable profit was made in relation to current debts payable in foreign exchange, except at the time of payment of the debt.

In my view, the decision of the Supreme Court of Canada in *Eli Lilly and Co. (Canada) v. M. N. R.*[1], while more directly related to the question as to whether the profit was or was not on revenue account, is of assistance in the problem now before me. The facts in that case are summarized in the headnote as follows:

> The appellant, the Canadian subsidiary of an American corporation, for the years 1940-1945 inclusive, purchased goods from the parent company totalling $640,978.29 in American currency. During that time the United States dollar was at a premium and the appellant, though it made no payments on account, set up in its books the amount of its indebtedness in Canadian dollars (as if the two currencies were at parity) plus the amount required each year to cover the premium on exchange for the purchases made in that year. At the end of 1945 the amount of Canadian dollars required to cover the premium totalled $67,302.77. In filing its income tax returns in each of these years the appellant included the premium so computed as an expense and it was allowed by the taxing authorities. In July 1946, the Canadian dollar attained a position of parity with the United States dollar and the appellant in its 1946 profit and loss account included the said sum of $67,302.77 as income under the heading of "Foreign Exchange Premium Reduction" and, in filing its income tax return for that year, treated the amount as a capital rather than an operating profit and deducted it in determining its net income subject to tax. The deduction was disallowed by the Minister. Appeals by the taxpayer to the Income Tax Appeal Board and to the Exchequer Court were each dismissed. In its appeal to this Court the appellant contended that as all the goods were purchased prior to 1946 it, in making settlement of the indebtedness in that year (which it effected with $640,978.29 in Canadian dollars by the issue of additional shares to the parent company without payment of any exchange) realized neither a profit, gain nor gratuity within the meaning of s. 3 of the *Income War Tax Act* and therefore the amount in question was not properly included in the word "income" as defined in that section.

In delivering judgment for the majority of the Court, Estey J. said at p. 747:

> It is contended that as all of the gods were purchased prior to 1946 the appellant, in making the settlement of that year, realized neither a profit, gain nor gratuity within the meaning of s. 3 of the *Income War Tax Act* (R.S.C. 1927, c. 97) and, therefore, the amount here in question was not properly included within the word "income" as defined in that section.
>
> The agreement that the invoice price in the total sum of $640,978.29 was payable in United States dollars introduced a contingency, or a factor of uncertainty, in the purchase price that could only be settled or determined by payment and, therefore, upon the date of payment. In reality the amounts set up in each year totalling $67,302.77 were a reserve to provide for this contingency. If, at the date of payment, no premium was required,

[1] [1955] S.C.R. 745.

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the reserve set up would be unnecessary. If the premium was lower than the rate at which it was computed, only a part of the reserve would be necessary, but if, on the other hand, a higher premium was required, an additional item of expense would be incurred.

It will be observed that in that case consideration was given to the very question now before me, namely, whether the profit did arise in the actual year of payment, all trading transactions having been carried out in prior years. There, as here, the rate of exchange fluctuated from time to time and the taxpayer set up a reserve against the contingency of having to pay an exchange premium. It was held that the factor of uncertainty regarding the actual amount to be paid as a premium on foreign exchange could only be settled or determined "by payment and therefore upon the date of payment". The appeal of the taxpayer was dismissed.

In the *Eli Lilly* case, Estey J. referred with approval to the opinion of Dixon J. in *Texas Co. (Australia) Ltd. v. Federal Commissioner of Taxation*[1]:

> For where liabilities are not fixed in their monetary expression, whether because of contingencies or because they are payable in foreign currency, a difference between the estimate and the actual payment must be borne as a business expense, and where the continuous course of a business is divided for accounting purposes into closed periods it is a reduction of the net profit, which otherwise would be calculated for the period.

That case had to do with the deduction of expenses in the year of payment, in excess of the foreign exchange premium as estimated at the time the transaction took place. The measure of the additional expense was the difference between the original estimate and the amount actually required *at the date of payment*.

In *Davies v. The Shell Co. of China Ltd.*[2] a unanimous decision of the Court of Appeal in England, rendered by Jenkins L. J., a part of the headnote is as follows:

> Owing to the subsequent depreciation of the Chinese dollar with respect to sterling, the amounts eventually required to repay agency deposits in Chinese currency were much less than the sums held by the company to meet the claim, and a substantial profit accrued to the company.

[1] (1940) 63 C.L.R. 382 at 465. [2] (1951) 32 T.C. 133.

Jenkins L. J., in referring to *Landes Brothers v. Simpson*[1], a decision of Singleton J., said:

All the transactions between the appellants and the company were conducted on the dollar basis and owing to fluctuations in the rate of exchange between the dates when advances in dollars were made by the appellants to the company against goods consigned and the dates when the appellants recouped themselves for the advances on the sales of the goods, a profit accrued to the appellants on the conversion of repaid advances into sterling.

Later, on the same page, he quoted with approval the comment of Singleton J. in that case in referring to *McKinley v. H. T. Jenkins & Sons Ltd.*[2]:

I pause there to say that in my view the profit which arises in the present case is a profit arising directly from the business which had to be done, because, as is found in para. 6 of the Case, the business was conducted on a dollar basis and the Appellants had, therefore, to buy dollars in order to make the advances against the goods as prescribed by the agreements. The profit accrued in this case because they had to do that, thereafter as a trading concern in this country re-transferring or re-exchanging into sterling.

And then Jenkins L. J. added:

That is accepted by both parties as correctly stating the law and if I may say so, in my view it was clearly a right decision on the facts of that case.

In my opinion, that case is further authority for the view that the profit on foreign exchange here in question arose only upon the actual payment of the liability of the taxpayer.

Counsel for the Minister also cited *Tip Top Tailors Ltd. v. M. N. R.*[3]. That case also had to do with the profits made on foreign exchange due to the revaluation of sterling. I find it necessary to refer only to two extracts from the opinion of Rand J., in which Fauteux J. concurred. At p. 709 he said:

Up to devaluation the rate was 4.04 to the pound, but the bank overdraft was paid on an exchange rate of $3.0875. The net profit was approximately $160,000 and the question is whether that profit is taxable as income.

* * *

A number of authorities were examined by both counsel which bear more or less directly upon dealings involving foreign exchange. Those relied on by the Crown were cases in which the exchange was encountered as part of the transaction of purchase and sale as between the buyer and seller themselves: the exchange benefit or detriment was immediately

[1] 19 T.C. 62. [2] 10 T.C. 372.
[3] [1957] S.C.R. 703.

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involved in the actual payment to the seller of the price of goods purchased. Admittedly in such a mode of dealing the rate of exchange at the time of payment and not at any other time controls: the actual outlay by the purchaser to the seller for the goods received, in terms of the domestic currency, is the amount which must be taken into the account.

The "profit" there referred to was unquestionably that realized by actual payment of the debt; it is made abundantly clear that the exchange benefit or detriment was made at the time of the *actual* payment, and that the rate of exchange at such date was the controlling factor.

Even in cases where contracts for the sale of goods are made in one year and the vendor's profit is ascertainable in that year, it does not follow in all of such cases that the profit is one which fails to be taxable for income tax purposes in that year. It was so decided in *J. P. Hall & Co. Ltd. v. C. I. R.*[1]—a decision of the Court of Appeal. The facts in that case are summarized in the headnote as follows:

> In March, 1914, the Appellant Company entered into a contract to supply certain electric motors, complete with control gear, to be delivered between the 1st July, 1914, and the 30th September, 1915, payment to be made one month after delivery. In accordance with the provisions of the said contract, the Appellant Company in April, 1914, made a sub-contract for the purchase of the control gear at a price which would yield them a profit of £1,064. Owing to the war, deliveries of the control gear, which were to be made direct from the sub-contractors to the purchasers under the main contract, were delayed and were actually made at various dates between August, 1914, and July, 1916.

It was held that the taxpayer's profit arose in the accounting period in which deliveries were made and not in in the period in which the contracts were made.

In that case the taxpayer in keeping its accounts brought the profit of the contract into the accounts on the various dates on which deliveries were made, and payment therefore became due. The result was that they became liable to payment of an amount of Excess Profits Tax on the comparison of the accounting period and the pre-war period. In the appeal, however, they made up their accounts in a different way and sought to carry into the pre-war period

[1] (1920) 12 T.C. 382.

the whole of the £1,064 profit eventually realized from the sub-contract. In allowing an appeal from Rowlatt J., Lord Sterndale, M. R., said at p. 388 ff.:

What happened was this: both the contract with the Kirkcaldy firm and the contract with the firm who made the control gear for the Respondents stipulated for delivery at various times at future dates, which were in fact extended in consequence of the war, but they were to be future dates in any case. The Respondents in keeping their accounts brought the profit of the contract into their accounts on the various dates on which deliveries were made, and payments, therefore, became due, and as all the firms concerned in the matter were of good financial standing and perfect solvency all these debts were treated quite properly at their face value. The result of doing that is that they would have to pay a certain amount of Excess Profits Duty on the comparison of the accounting period and the pre-war period. But what they seek to do, and what Mr. Justice Rowlatt has said they are entitled to do, is to make up their accounts in a different way and to carry into the profits of the pre-war period the whole of the £1,000 eventually realised upon the contract for the control gear. The accountant who was called, the Respondents' auditor, said that that profit might well have figured in their accounts on the 30th June, 1914, but he admitted that in the ordinary way, and I rather think he meant the ordinary way of keeping business accounts, at any rate the ordinary way of keeping these people's accounts, such a profit would not be included in the accounts until the invoices were received, that is to say, the actual dates of delivery of the goods. As I say, Mr. Justice Rowlatt has said they are entitled to bring the whole of the profit upon these contracts for the control gear into the year in which the two contracts were made, and I suppose on the contention stated by the Respondents before the Commissioners that the profit on the transaction in question was ascertained and made on the completion of the contract for the purchase and sale. It seems to me the simple answer is, it was neither ascertained nor made at that time.

* * *

As I say, the short and simple answer to this, in my mind, is that these profits were neither ascertained nor made at the time that these two contracts were concluded. There are any number of contingencies that might have happened, by which the profit would not have turned out what it appeared on the face of it when the contracts were made. Any number of complications might have occurred that might have caused quite a different result to have accrued from these two contracts. I think that the Respondents did what was right in the way they carried these profits into their account: it is the ordinary commercial way of making up accounts, and in my opinion it is the right way, and the other would be the wrong way, because the other would be carrying into the accounts as profits of one year the estimated profits which would accrue in subsequent years that might perhaps never be made at all. As I say, I regret to say that I cannot agree with the learned Judge. I think the Commissioners, whose opinion he reversed, came to a perfectly proper conclusion, and that this appeal should be allowed, and the Commissioners' decision restored with costs here and below.

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The other learned Judges were of the same opinion, Atkin L. J. stating at p. 390:

It seems to me that no person here trying to ascertain these profits on the principles of ordinary commercial trading would dream of including profits in his yearly balance-sheet, which would not be made until the goods had actually been delivered in respect of some contract which was to run over a period of at least two years, and possibly more. To my mind the procedure of the Company was the ordinary commercial procedure in taking the profits that they made as and when the goods were delivered. Anything else, it appears to me, would be quite contrary to commercial procedure, and would not be profits in the natural and proper sense. I think, therefore, this appeal should be allowed.

Younger L. J., in a short judgment, said at p. 390:

I am of the same opinion. It appears to me that the principle sanctioned by the learned Judge in this case for the purpose of ascertaining these profits is justified neither for the purpose of Excess Profits Duty, nor for the purpose of Income Tax, nor as a matter of ordinary commercial trading. *In my view, on the facts in this case, the only proper way in which the profits arising from the working out of this contract ought to be brought into account is to ascertain them as and when they are realised.*

I turn now to two other cases in each of which an unsuccessful attempt was made by the taxpayer to treat future anticipated losses as actual losses in a taxation year. The first is *Whimster & Co. v. C. I. R.*[1], a decision of the Court fo Appeal. The facts and finding are stated briefly in the headnote as follows:

Part of the business of the Appellants consisted of hiring ships on time charter and carrying in them goods and merchandise as offered, and at 31st December, 1920, they had a number of such vessels on time charter under charter parties the currency of which did not expire until various later dates. In making up their accounts for the year 1920 they took the view that in 1921, in consequence of a depression in shipping business which had already set in, the rates payable for vessels on time charter and the amounts receivable as freights would fall very seriously, and they accordingly debited in the case of each vessel the hire payable from 31st December, 1920, to the end of the period of its charter, and credited the amount they would have had to pay if they had entered into a fresh charter at 31st December, 1920, for the unexpired period of the existing charter.

Held, that the difference between these sums was not a proper deduction in computing the profits of the accounting period ended 31st December, 1920, inasmuch as it was not a loss actually incurred in that period.

The Lord President (Clyde) said that the question to be answered was "What are the actual profits made during the accounting period?" (p. 825) and rejected the submission made on behalf of the taxpayer that the time-charters should be regarded as its stock-in trade.

[1] 12 T.C. 813.

At p. 823 he stated:

In computing the balance of profits and gains for the purposes of Income Tax, or for the purposes of Excess Profits Duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts*. In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes.

Then at pp. 824-5, after referring to the facts, he said:

In this way, the Appellants seek to include *future* anticipated losses in the account of their profits for the accounting period.

Then he disposed of a submission, similar to the one made in the instant case, that the time-charters in question should be regarded as stock-in-trade and valued downwards in view of prospective losses in later years.

They figured the company as doing a business in time-charters, just like doing business in goods, whether raw or manufactured. They represented the unexpired portions of the time-charters as so much stock-in-trade, and said quite truly that it was proper in making up trading accounts to value the trading stock at the beginning and at the end of the year. This, they maintained, was just what they had done in their balance sheet and relative profit and loss account at the end of the accounting period. But it is not really possible to regard the time-charters as stock-in-trade, for in point of fact the company never dealt with them as such. They did not deal in time-charters, and neither bought nor sold them. All they did was to hire the services of the ships at so much a month for so many months, and use them for a profit; much as a man might hire omnibuses and horses, or motor conveyances, and either himself employ them in carrying passengers at a profit, or sub-let them to others. In all such cases the periodical payment of hire is just one of the incidents inevitable in order to the making of profit during the period to which the hire applies.

All other members of the Court were of the same opinion, Lord Sands stating at p. 826:

Where a trader sits down to ascertain from his books his profits or losses for the year, it is not enough that he should set on one side the money he has paid out, other than capital outlay, and on the other the money he has received in respect of the year's business, plus the price he paid for commodities now in his possession. There are at least three other things that he must take into account—the present value of these commodities, the debts he has incurred, and the debts due to him, in respect of

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the year's operations. In normal circumstances, and in business other than insurance, the matter might probably end here. Contracts entered into for execution in the future would not be taken into account. A prospective loss here would just be taken as set off by prospective profits there. But in abnormal circumstances, such as those of 1920-21, a prudent trader who had in the course of the year undertaken contracts upon which great loss seemed to be inevitable, would probably take these into account in making up his balance sheet. Though the losses are not realised in the year, they are losses incurred by the conduct of the business during the year, in respect that it was during the year and in the conduct of the business that the contracts are entered into.

The consideration of how it would be prudent for a trader to act does not solve the question here presented to us as one of Revenue law. Under this law the profits are the profits realised in the course of the year. What seems an exception is recognised where a trader purchased and still holds goods or stocks which have fallen in value. No loss has been realised. Loss may not occur. Nevertheless, at the close of the year he is permitted to treat these goods or stocks as of their market value. This exception to the general rule has never, however, been extended to the case of probable or indeed apparently inevitable loss to be incurred in the execution of future contracts entered into during the year in question, and the authorities are against it.

The case for the Appellants here depends upon their ability to assimilate their shipping commitments to goods or stocks, rather than to contracts for future fulfilment. But in my view they have failed to do so. The manner in which they have adjusted their accounts was probably quite reasonable as a domestic arrangement, but it would lead to great confusion if such haphazard and speculative estimates were to enter into the business of the collection of the public revenue.

The other case is *M. N. R. v. Consolidated Glass Ltd.*[1]. The facts are stated shortly in the headnote as follows:

The respondent, having elected under 95A of the *Income Tax Act,* 1948, as enacted in 1950, proceeded to compute its undistributed income in accordance with 73A(1)(*a*). In doing so it deducted some $114,000 representing a loss in value on shares owned by it in another company which was still in business. This deduction was disallowed by the Minister but restored by the Income Tax Appeal Board. The Minister appealed to the Exchequer Court and after service of his notice of appeal obtained, with the respondent's consent, an order permitting him to raise a new ground of appeal to the effect that if the respondent had sustained a capital loss in respect of these shares that loss was more than offset by a capital gain on other assets during the same period. The Exchequer Court held that it was too late to raise this new ground and affirmed the decision of the Income Tax Appeal Board.

It will be seen that the question there was whether a loss or gain had been sustained on assets still held by the taxpayer, and while the loss or gain in question was related to capital, I cannot see that any different principles should be applied to losses or gains on revenue account.

[1] [1957] S.C.R. 167.

The case, as so reported, was on a re-hearing by the full Court. By a majority, it was held that the appeal should be allowed, and the original assessment restored.

Rand J., speaking also for Locke and Fauteux JJ., said at p. 173:

The narrow issue in this appeal is whether in the determination of "undistributed income" as defined by s. 73A of the Income Tax Act, as enacted in 1950, the amount by which the value of a capital investment has depreciated can be deducted under subs. (1)(*a*)(iii) which reads:

> "the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds (sic) all capital profits or gains made by the corporation in those years before the 1950 taxation year."

The deduction is one of a number to be made from the aggregate of incomes for the tax years from 1917 to 1949, including, among others, under cl. (i) income losses and cl. (vi) all dividends paid.

The phrase "capital losses sustained" or its equivalent appears in several provisions of the statute in a context from which it is apparent that, within the conceptions of accountancy underlying the Act, it means actually realized. For example, in s. 26(*d*) "business losses sustained"; s. 39(1)(*a*) "loss sustained"; s. 75, subss. (6) and (7) "losses sustained".

These instances, however, afford only a limited assistance to the question raised. What is much more significant, if not decisive, is that the capital losses sustained under cl. (iii) are the net capital losses, those that exceed the "capital profits or gains made" during the same period. "Losses sustained" and "profits and gains made" are clearly correlatives and of the same character; but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This is no inventory valuation feature in relation to capital assets. That the words do not include mere appreciation in capital values is, in my opinion, beyond controversy. It is difficult if not impossible to say that where only value is being considered in which a variable inheres you can have any other than a fluctuating estimate. The word "loss" in the context means absolute and irrevocable, finality. That state of things is realized upon a sale; it can also be said to be realized in the case of stock in a company which is hopelessly insolvent and has ceased business. When, on the other hand, the business is maintained and all that can be said is that in the most likely prospect the value of the shares cannot exceed a maximum, there is still no more than an estimate: the actual loss cannot in fact be so determined and unless there is that determination the statute is not satisfied. The element of appreciation illustrates the quality of fluctuation more clearly perhaps than that of depreciation, but they are essentially of the same nature. If, then, appreciation must be ruled out, as I think it must be, similarly mere loss of some value while a company remains in business must be treated in the same manner.

Abbott J. was of the same opinion, stating at p. 183:

I have had the advantage of considering the reasons given by my brother Rand and I agree with the view which he has expressed that so long as a capital asset remains in existence, with the possibility of fluctuation in value up or down, the owner of such asset cannot be said to have sustained a capital loss or made a capital profit or gain within the meaning

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of the subsection. Such loss or gain, as the case may be, must be established by (i) a sale of the asset, (ii) the asset being proved valueless, or (iii) the asset being proved to be no longer susceptible of any fluctuation in value.

And Nolan J. at p. 184 agreed with the opinion of Rand J. Five of the members of the Court were therefore of the opinion that where a variable inheres, you can have only a fluctuating estimate of a capital loss or gain and that the word "loss" in the contents means absolute and irrevocable, finality; the actual loss or gain cannot be determined, and, unless there is that determination, the statute is not satisfied.

It seems to me, therefore, that without statutory authority, deductions are not permissible for merely anticipated losses or for contingent liabilities. In addition to the cases which I have cited, reference may be made to the following cases—*Edward Collins & Sons, Ltd. v. C. I. R.*[1]; *The Naval Collier Co. Ltd. v. C. I. R.* and *The Glamorgan Coal Co. Ltd. v. C. I. R.*[2]; *J. H. Young v. C. I. R.*[3]; and *Barnhard v. Cahan*[4].

Applying the principles above referred to, to the facts in this case, I must find that no taxable profit in respect of foreign exchange was made by the appellant until the time at which the several notes payable in U.S. currency were actually paid. It was then only when the profits were ascertained and realized. The fluctuations in the rate of exchange for U.S. currency introduced an element of uncertainty as to the precise amount that would be actually required to meet the obligations and that uncertainty could only be resolved by actual payment. The computations made by the taxpayer at the end of each year and based entirely on the then current rates of exchange were estimates only and however useful such computations may have been for the domestic purposes of the company, they could be of no assistance in computing the actual costs of the company for the purposes of ascertaining its taxable profit.

A simple illustration will, I think, point out the fallacy inherent in the submission made on behalf of the appellant. Let it be assumed that goods were purchased in the United

[1] 12 T.C. 773.
[2] 12 T.C. 1017.
[3] 12 T.C. 827.
[4] (1918) 13 T.C. 723.

States at a time when U.S. funds were at a premium of only 3 per cent., that notes similar to those above mentioned were given in payment and that such notes were still outstanding at the end of the following year, by which date the premium on U.S. funds had risen to 10 per cent. In my view, the taxpayer in such circumstances could not then successfully claim a deduction of an additional 7 per cent. as a further cost of goods purchased for the reason that such an expense had not actually been incurred and was a mere estimate of anticipated losses.

In my view, the proper method to be used by a trader-taxpayer in computing his profit or loss for income tax purposes and in relation to a fluctuating rate of exchange for goods purchased in another country, and not then paid for, is as follows: I think he is entitled to include in his costs for the year in which the goods were purchased the amount in Canadian dollars necessary to pay the costs in full, including any premium payable on foreign currency which he is required to pay. Then, upon actual payment of such obligations in a subsequent year, when the uncertainty as to the rate of exchange has been eliminated and the precise cost has been fixed by reason of the payment, he is entitled to deduct any further amount he may then be required to pay in excess of that originally set up in his books. If, on the other hand, the amount he is required to pay to meet the obligation is less than the amount originally set up, the difference, if within the principles of the *Tip Top Tailors* case and the *Eli Lilly & Co.* case (*supra*), will properly enter into the computation of profit and loss for tax purposes.

Two further matters must be referred to. The appellant alleges in the alternative that in addition to the profit of $81,774.44 which the respondent admits was made in the taxation year 1951 by actual payment of some of the notes, a further profit of $106,466.42 was made in the same year. The evidence establishes that on December 31, 1951, the appellant gave to the parent company a renewal note for $2,364,483.87.

Exhibit 20 provides the details for this computation. The renewal note of December 31, 1951 (Exhibit 8) replaced nine notes, all issued in 1950 and all due on December 31,

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1951, the total of such notes being for the same amount as the new note, and the new note providing for payment on or before June 30, 1953. In the computation made in Exhibit 20, the total amount of the premium for U.S. exchange as of the date when the several notes were given, totalled $136,022.48. As of December 31, 1951, when the premium had fallen to 1¼ per cent., the premium then required in respect of these notes was $29,556.06. It is submitted that the difference of $106,466.42 also constituted a profit for 1951, and if that were the case, that amount would be transferred from the taxation year 1952.

This alternative submission was not seriously pressed and in my view cannot be supported. It fails for the reasons which I have given above, namely, that it was not made nor realized in 1951. The giving of a renewal note cannot be considered as payment of the debt any more than can the giving of the original notes. In both cases, the notes were merely evidence of indebtedness with a promise to pay on or before a certain date at a fixed rate of interest.

I find it necessary to refer to only one case on this point—*The Commissioner of Income Tax v. The Maharajadhiraja of Darbhanga*—a case which arose in India[1]. In the Privy Council it was held that a creditor, when he receives promissory notes from his debtor in respect of unpaid interest, does not receive the interest. In that case, Lord McMillan stated at p. 161:

> . . . but the seventh item . . . consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of . . . rupees is concerned, the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all.

The remaining point relates to s. 14(1) of the *Income Tax Act,* now repealed. In 1952 it was as follows:

> 14.(1) When a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or property for a subsequent year shall, subject to the other provisions of this Part, be computed according to that method unless the taxpayer has, with the concurrence of the Minister, adopted a different method.

[1] [1933] L.R. 60, I.A. 146.

The witness, B. M. Thompson, a tax accountant employed by the appellant, said that for a number of years the assessors for the respondent knew that the appellant in preparing its income tax returns, had revalued downwards at the end of the fiscal year the amount necessary to provide for premiums on U.S. exchange on its outstanding open accounts (and possibly in 1950 on some of the outstanding notes), had approved of the practice, and that assessments and the re-assessments were made accordingly. The evidence on this point is not too clear, but as I understand it, the profits made on the downward revision of the premiums on U.S. exchange on December 31, 1951, were included as taxable income only in respect of its open accounts payable, the profits so made regarding the notes payable to General Electric being treated in the tax returns as gains on capital account. It is submitted, therefore, that this was a "method" which had been adopted by the taxpayer in one or more years prior to 1952 and accepted by the respondent, and that consequently, under s. 14(1) the 1952 income should be computed according to that method.

The subsection similarly numbered and similarly worded was first enacted by the 1948 *Income Tax Act*. I think it probable that it was enacted mainly to remove any doubt as to the right of certain taxpayers to file returns on a basis other than a "cash" basis (e.g., on that commonly referred to as the "accrual" basis) following the decision of the President of this Court in *Trapp v. M. N. R.*[1]. The subsection is silent as to the meaning of the word "method" and does not purport to lay down any rules "for computing income". It is expressly made "subject to the other provisions of this Part" and accordingly the method for computing income must be sought elsewhere. In my view, the object of the subsection was to permit and require taxpayers who had adopted a method of computing income which was in accord with the provisions of the Act and truly reflected the profit or gain for the year (s. 4), and which had been accepted by the respondent, to compute their income from a business or property in subsequent years by the same

[1] [1946] Ex. C.R. 245.

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method. No different method could be adopted without the consent of the Minister, that provision being necessary in order to prevent the use of another method which by reason of the change might allow certain items of income to go untaxed.

I do not think, however, that the word "method", used in s. 14(1), is in any way limited to those frequently referred to as the "cash" and "accrual" methods. Special cases may require special methods of computation as was pointed out in *Sun Insurance Office v. Clark*[1]. In that case, the problem was to determine the proper method of computing the profits of a fire insurance company, the premiums for a period of years being payable in advance but the risks of loss extending frequently beyond the three-year period on which the average profit was to be computed. In reaching the conclusion that one of several proposed methods of computation should be accepted, Earl Loreburn L.C. said at p. 453:

> In these circumstances it seems to me quite obvious that the third and not the second method must be applied here for the plain reason that upon the materials before us it is the fair and only way presented to us by which the truth can be approximately attained.

And at p. 454 he added:

> A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, namely, that the true gains are to be ascertained as nearly as it can be done.

In my opinion, a taxpayer can invoke the provisions of s. 14(1) only when the method which he has adopted in an earlier year to compute his income (and which he proposes to follow in the taxation year in question) is one which is computed in accordance with the provisions of the Act and which truly reflects his real profit or loss for the year. If the method that has been used in previous years does not result in the ascertainment of the true gains as nearly as can be done, it is not a method sanctioned by the law. In the instant case, even if it be the fact that in the year or years prior to 1952 the appellant had used a method by which it showed as taxable income the difference between the cost in Canadian dollars of goods purchased on open account in the United States and the lesser amount which it estimated it would require to pay for such goods at the

[1] [1912] A.C. 443.

end of its taxation year by reason only of the lessening in the rate of U.S. exchange, that method, in my view, and for the reasons which I have stated above, is not in accordance with the requirements of the Act. It is not, therefore, a method which it is entitled to adopt in a subsequent year even if the respondent's assessors had knowledge of it or if it had been accepted by the respondent in an earlier year. Accordingly, the appeal will be dismissed with costs and the re-assessment made upon the appellant for the year 1952 will be affirmed.

Judgment accordingly.

BETWEEN:

THE ROYAL TRUST COMPANY, Executor of the Will of AMY KATHERINE McDONALD, deceased } APPELLANT;

AND

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

Revenue—Succession duty—Gift inter vivos—Husband and wife—Presumption of advancement—Dominion Succession Duty Act, R.S.C. 1952, c. 89.

A testatrix who died on September 20, 1956 by her will dated August 14, 1947, gave the whole of her property to a trustee upon trust to convert the whole into money and pay the residue to her husband if he survived her. As required by the *Succession Duty Act,* R.S.C. 1952, c. 89, the executor filed form SD1 setting out all the assets of the deceased. In assessing the estate the Minister proceeded on the assumption that the assets declared were the wife's property and the husband her sole beneficiary. The executor appealed from the assessment on the ground that the assets were the absolute property of the husband which the deceased had held in trust for him. The husband died before the hearing of the appeal and the evidence in support thereof was mainly that of persons with whom the husband and wife had business and financial dealings in their lifetime in relation to investments. It was admitted at the trial that all the assets in question were registered in the name of the wife as sole owner at the time of her death and that there was nothing therein to indicate that they were held in trust for the husband or that he had any interest therein. It was further admitted that the wife had never executed any declaration of trust or other document which might indicate she held the assets in trust or on behalf of her husband or anyone else.

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A statutory declaration of the husband dated in May, 1947 filed in connection with claims for unpaid income tax was tendered in evidence by the appellant. It purported to set out his assets but added that the inventory "includes all the assets of my wife as well as myself" and "that no person holds any assets in trust for me".

Held: That on the evidence adduced the Court could reasonably assume that all the assets held by the deceased at the time of her death had been either purchased by funds supplied by the husband, were replacements for assets so acquired, or represented income or profits from the assets so acquired, and there was a presumption in law that such assets were either gifts by the husband or profit, gains or accretions from such gifts.

2. That the husband's statutory declaration being subsequent to the date when the securities mentioned were placed in the wife's name, was admissible as evidence only against the declarant's interest and established that as of May, 1947 the wife had assets and did not hold them in trust for her husband.

3. That since the appellant had wholly failed to rebut the presumption that in placing assets in the name of his wife, the husband intended that they were gifts made to her by way of advancement, the appeal should be dismissed and the assessment affirmed. *Shephard v. Cartwright* [1954] 3 All E.R. 649, followed.

APPEAL under the *Dominion Succession Duty Act*.

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

Ernest S. Watkins for appellant.

Michael W. Bancroft and *T. E. Jackson* for respondent.

CAMERON J. now (October 14, 1959) delivered the following judgment:

This is an appeal by the Royal Trust Company, Executor of the estate of Amy Katherine McDonald, late of the city of Calgary, from an assessment made under the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, and dated April 30, 1957. Mrs. McDonald died testate on September 20, 1956, and by her last Will and Testament, dated August 14, 1947, appointed the Royal Trust Company as her "Trustee", and probate of the said Will was duly granted to the appellant by the District Court of the District of Southern Alberta on January 11, 1957.

As required by the Act, the appellant prepared, and on January 4, 1957 filed in the Calgary office of the Dept. of National Revenue, the form SD1 (Exhibit "A"), which included a statement of the assets of the deceased. That return showed assets having a gross value of $135,554.75.

In assessing the appellant, the respondent increased the value of the assets by $5,675.75, allowed as debts the full amount claimed ($1,075), and levied a tax of $30,553.89 and interest.

By her Will, Mrs. McDonald gave the whole of her property to the said Trustee upon trust, to convert the whole into money and, after payment of debts, estate, legacy and succession duties, "to hold my said estate UPON FURTHER TRUST to pay the same to my husband, Arthur Benedict McDonald". The Will contained further provisions for the disposal of her whole net estate to or for the benefit of her two children and their families, but as these provisions were applicable only "in the event of my husband's predeceasing me", they need not be referred to in detail. As I have said, the husband survived the deceased, but died testate on December 12, 1957, probate of his last Will and Testament being granted to the appellant on July 8, 1958 (Exhibit 3). The assessment made upon the appellant in regard to Mrs. McDonald's estate was based on the assumption that all the assets shown in the return (Exhibit "A") were her property and that the husband was the sole beneficiary.

From the assessment so made, the appellant filed a Notice of Appeal dated May 8, 1957. The appeal was on the ground that all the assets listed in the succession duty return were the absolute property of her husband and that the deceased had held the same in trust for him. By his decision dated November 14, 1957, the respondent affirmed the assessment on the ground that the property held by the deceased was in fact property owned by her. Following a Notice of Dissatisfaction by the appellant, pleadings were delivered.

The burden is on the appellant to establish the existence of facts or law showing an error in relation to the taxation imposed. (See *Johnston v. M. N. R.*[1]; and *Re Webster*[2].) The single question for determination is whether under the applicable law and on the facts disclosed in evidence, the assets shown in Exhibit "A" were held by the deceased in

[1] [1948] S.C.R. 486; [1948] C.T.C. 195.
[2] [1949] O.W.N. 581.

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trust for her husband—as alleged by the appellant—or whether they were in fact the property of the deceased as claimed by the respondent.

The evidence is conclusive—in fact, it is now admitted—that all the assets shown in Exhibit "A" were in the name of Mrs. McDonald as sole owner at the time of her death. They consisted of stocks, bonds, debentures, bank accounts, traveller's cheques, cash in the hands of certain solicitors, an insurance policy, motor car, personal effects, mortgages, agreements of sale, and a residence property. While these assets or documents of title were not produced, it is freely admitted that there was nothing therein to indicate that Mrs. McDonald was not the sole and absolute owner thereof or that they contained any suggestion that they were held in trust for the husband or that he had any interest whatever therein. It is further admitted that Mrs. McDonald never executed any declaration of trust in regard thereto, or any other document which might indicate that she held the assets in trust for or on behalf of her husband, or anyone else. I was not asked to give special consideration to individual assets, either on the law or facts, the contention of the appellant being that *all* of the assets were in fact the property of the husband.

The deceased was fifty-seven years of age at the date of her death and her husband sixty-one years old. They were married in 1929, the deceased at that time being a waitress. I think that on the evidence I may reasonably assume that at her marriage, she had few, if any, possessions and that following her marriage she ceased to be employed and thereafter received no earned income from outside pursuits, and received nothing by way of legacies or bequests. Without reviewing the evidence as a whole, I think I can assume, on a reasonable interpretation thereof, that all the assets held by the deceased at the time of her death had been either (a) purchased with funds supplied by her husband and the title taken in her name; or (b) were replacements or substitutions for assets acquired as in (a); or (c) represented income, profits or gains from assets acquired by the deceased as in either (a) or (b).

In these circumstances, and from the evidence later to be referred to, it is clear that there is a presumption in law that all the assets in Exhibit "A" were either gifts to Mrs. McDonald by her husband or represented profits, gains or accretions from such gifts. The principle is stated in Halsbury's *Laws of England*, 2nd Ed., Vol. 16, at p. 663:

> 1057. Where a husband purchases property or makes an investment in his wife's name, a gift to her is presumed in the absence of evidence of an intention to the contrary, and there is a similar presumption where the property is purchased or the investment made by the husband in their joint names, the wife in the latter case being entitled in the event of her surviving the husband. Where the purchase or investment is made by the husband in the joint names of husband and wife and third persons with regard to whom no presumption of gift arises, the third persons will presumably be trustees for the husband and wife and the survivor.
>
> A gift is also presumed where money is deposited at a bank in the name of the wife, or shares or stock are transferred into her name, or where any such deposit or transfer is made in or into the joint names of both husband and wife, even if the wife is ignorant of such deposit or transfer, or where a mortgage or other security for money lent by the husband is taken in their joint names.

In Lush on *Husband and Wife*, 4th Ed., p. 145, that principle is stated to be a rebuttable presumption.

> It will be seen that in every case there is only a presumption of a gift and this presumption may be rebutted by contrary evidence, the sole question being with what intention the transaction took place. And all the surrounding circumstances of the case should be taken into consideration to determine whether a gift or a resulting trust was intended.

The principle so stated was applied in *Shephard v. Cartwright*[1], a decision of the House of Lords in a case which had to do with gifts by a father to his children. In my view, the principle, generally speaking, is the same whether applied to gifts by a husband to his wife or by a father to his children (see White and Tudor's *Leading Cases in Equity*, 9th Ed., Vol. 2, p. 765). In that case Viscount Simonds, in a judgment which was concurred in by all the judges, stated at p. 651 ff.

> I think it well then to pause in this year 1929 and to ask what was the result in law of equity of the registration, in the names of his children, of shares for which he supplied the cash, and I pause in order to examine the law, because it appears to me that the only two facts which are at this stage relied on to rebut the presumption of advancement, viz.: that the children were ignorant and that certificates were not given to them, are of negligible value. My Lords, I do not distinguish between the purchase of shares and the acquisition of shares on allotment, and I think that the

[1] [1954] 3 All E.R. 649.

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law is clear that, on the one hand, where a man purchases shares and they are registered in the name of a stranger, there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally, it is clear that the presumption may be rebutted, but should not, as Lord Eldon said, give way to slight circumstances.

It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) on the well settled law on this subject. It is, I think, correctly stated in substantially the same terms in every text-book that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell's Principles of Equity (22nd Edn.), p. 122, which is as follows:

> "The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

I do not think it necessary to review the numerous cases of high authority on which this statement is founded. It is possible to find in some earlier judgments reference to "subsequent" events without the qualifications contained in the text-book statement: it may even be possible to wonder in some cases how, in the narration of facts, certain events were admitted to consideration. But the burden of authority in favour of the broad proposition as stated in the passage I have cited is overwhelming and should not be disturbed.

In White and Tudor, *op. cit.*, at p. 772, it is further stated:

> Purchase in the name of a child etc. is, as we have seen, merely a *circumstance of evidence* of an intention to make a gift to the child, (etc.), and *prima facie*, therefore, it displaces the equitable presumption of a resulting trust. But such evidence may be strengthened or opposed by other evidence, for the object of the Court is to discover, upon a review of all the circumstances, the true explanation of the transaction.

I turn now to an examination of the evidence adduced on behalf of the appellant. The evidence is clear on one point, namely, that Mr. McDonald at all relevant times was a bookmaker and gambler in Calgary, owning in whole or in part and operating a number of gambling clubs and, at some time, a taxicab business. There is no evidence, however, to support the allegation in the Statement of Claim that following his marriage he was drinking and gambling to excess and that, in order to reduce the temptation to dissipate his whole estate, it was agreed between his wife and himself that "all his assets should be legally registered

in her name". The burden on the appellant to establish that there was a resulting trust in favour of the husband is made more difficult by the fact that both husband and wife died before the hearing of the appeal. The evidence introduced was mainly that of persons with whom the husband and wife had business and financial dealings in their lifetime in relation to the investments.

Mr. A. L. Barron, a barrister and solicitor practicing in Calgary, stated that he acted professionally for both Mr. and Mrs. McDonald from about 1935 to 1947. In 1935 he acted for Mr. McDonald in the purchase of a taxicab business, the purchase money of about $4,000 being supplied in cash by Mr. McDonald. There is no evidence that this business was ever in the name of Mrs. McDonald; it seems to have been operated in connection with the gambling clubs. Mr. Barron suggests that Mrs. McDonald was her husband's financial manager and looked after his financial affairs, but a close examination of his evidence does not lead to such a conclusion. He saw both of them frequently. He says that Mrs. McDonald consulted him about investments and mortgages, that she brought the money, presumably in cash or cheques, and that in the case of some stock purchases he bought them in his own name and turned them over to her, endorsed in blank as street certificates. The mortgages—and there were a large number of them—were always put in her name. While he could not at this late date recall any specific discussions with them, he says he felt that the money supplied was that of the husband and that *probably* he got instructions from the husband. If he did get such instructions, they must have been that all such investments should be in the wife's name, for that was done. Mr. Barron said that in regard to a loan of $13,000 to one Bryant, he had discussions with them both, but later added that he could not recall any conversation with her regarding any of the investments. He received money to be put out on mortgages for both of them, but could not say to which party he remitted the mortgage collections. He said, also, that he had no recollection whatever regarding any of the investments in stocks and could not state who gave him the instructions regarding such investments.

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In cross-examination, he admitted that in every instance the mortgages were taken in the name of Mrs. McDonald, that as a rule she brought him the money for investment in stocks and bonds and that all the investments were given to her. Again, he said that she always brought in the money for all investments and that all deeds, mortgages and investments were handed to her.

Mr. Barron produced no documentary evidence of any sort except Exhibit 4 which I shall refer to later. His recollections were vague and uncertain to a considerable extent, but it is quite clear that he was never asked to prepare any document between husband and wife which would indicate that Mrs. McDonald held the assets in trust for her husband. Neither does his evidence go so far as to suggest that either husband or wife ever stated to him directly or indirectly that the assets were not Mrs. McDonald's sole property, or that Mr. McDonald retained any beneficial interest whatever in any of them. His evidence is wholly insufficient to set aside the presumption that the properties and investments with which he was concerned were the sole property of Mrs. McDonald, or were outright gifts from her husband.

I must now refer to the statutory declaration of Mr. McDonald tendered in evidence by Mr. Barron. It was dated in May 1947, the last year in which he represented husband and wife. Counsel for the respondent took the objection that it was inadmissible in that it was not a statement or declaration made in the course of duty. Mr. Barron stated that he was acting at the time for Mr. McDonald in connection with claims for unpaid income tax. I gather that it was necessary to show his net worth at that date and, accordingly, Mr. Barron prepared, and Mr. McDonald signed and declared the statement before him. Attached thereto is a list of mortgages bearing dates from early 1943 to late 1946, on which there was a balance owing of $33,680. Mr. Barron stated that all of these mortgages were in the name of Mrs. McDonald, but there is no evidence as to whether the other assets mentioned in the declaration were in the name of Mr. or Mrs. McDonald,

other than that of Mr. Barron who stated that when he made purchases of stocks or bonds, they were invariably in the name of Mrs. McDonald.

The Statutory Declaration reads as follows:

That my assets as of the 31st day of December, A.D. 1946, consisted of the following:

House Property, 2407—5th Ave. N.E.		$ 4,200.00
Automobile, Buick, bought in 1939		2,025.00
Property 520—1st Avenue W.		4,800.00
Stocks and Bonds:		
10 shares Canadian Utilities	$ 1,000.00	
15 " Northwest "	1,500.00	
140 " Calgary Power Co.	14,840.00	
500 " Chesterville	1,000.00	
Dominion of Canada Bonds	12,000.00	
		30,340.00
Cash on hand, in safety deposit box and in Banks		25,000.00
Mortgages as per list		33,680.00
TOTAL		$100,045.00

THAT I have no other assets of any nature or kind.

THAT the said statement includes all of the assets of my wife as well as myself.

THAT no person holds any money or assets of any nature or kind in trust for me or for my benefit.

THAT I have no liabilities.

THAT, on the 31st day of December, A.D. 1939, I had assets amounting to not less than the sum of $100,000.00.

It will be noticed that while the declarant speaks of "my assets", he adds that the inventory "includes all of the assets of my wife as well as myself", and "That no person holds any money or assets of any nature or kind in trust for me or for my benefit".

It may be assumed, I think, that the husband, in settling his income tax liability at that time, was fully aware that he was liable under the *Income War Tax Act* to pay tax on any income accruing to his wife from gifts made by him to her. That would account for the statement that the inventory included "the assets of my wife as well as myself". The statutory declaration was prepared by Mr. Barron and no doubt Mr. McDonald had the benefit of his legal advice on the matter. It contains a clear admission that at that time Mrs. McDonald had assets of her own

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and, as I have said, Mr. Barron tells us that all the mortgages were in her name and it may be inferred from his evidence that some or all of the stocks and bonds were also in her name at the time.

Now it is not suggested that the declaration was made at the time when any of the assets referred to were transferred to Mrs. McDonald and it is particularly clear that all the mortgages at least antedated the statutory declaration. That being so, it follows from the principles stated in Snell's *Principles of Equity,* and referred to by Viscount Simonds in the *Shephard* case (*supra*), that the declaration being subsequent to the date when the securities, etc., were placed in Mrs. McDonald's name, is admissible as evidence against the declarant and not in his favour.

On this ground, I rule that the statutory declaration tendered as Exhibit 4 is admissible in so far as the statements therein are against the interest of the declarant. The statutory declaration, which is the only written statement by the husband, contains clear evidence that as of May 1947, his wife had assets and that she did not hold any of them in trust for him. If it be the case that, having admitted parts of the declaration which are against Mr. McDonald's interest, I should admit the whole of his statement, my finding would be that the mere reference to "my assets" is wholy insufficient to establish that all the assets in the inventory were his property or that such as were in Mrs. McDonald's name were held in trust for him.

Mr. E. R. Tavender, a barrister of Calgary, acted professionally for both Mr. and Mrs. McDonald from 1947 to the dates of their death. I do not find it necessary to set out all his evidence which was given with complete candour throughout. About the period 1951-1953, a large number of mortgages and agreements of sale were brought to him, all being in Mrs. McDonald's name. From that time he looked after all mortgage transactions and on the husband's instructions, all were taken in the wife's name and all remittances were made to her. I gather from his evidence that when he wished to secure mortgage monies, he would call Mr. McDonald who would decide whether the proposed

loan should be taken up, but that invariably Mrs. McDonald brought in the necessary funds and in turn received all collections of principal and interest.

Two of Mr. Tavender's statements are of particular interest. He said: "I never heard any statement from them as to the relationship between them or as to who owned them" (i.e., the securities). And in cross-examination, he said: "I know of nothing which suggested that she was other than the full legal owner of all the assets". It is quite clear, therefore, that nothing was said or done by Mr. McDonald in Mr. Tavender's presence which would indicate in any way that McDonald had at any time been the owner of the funds put out on loan by Mrs. McDonald, or that he had any beneficial interest therein. In referring to the funds so brought in for investment, Mr. Tavender said: "They could have come from anywhere".

As I recall his evidence, Mr. Tavender was concerned only with mortgages, deeds and agreements of sale. None of his evidence casts any light on the manner in which Mrs. McDonald came into possession of the other assets in Exhibit "A" (except the balance to her credit on his books), or, if they were gifts from her husband, the circumstances surrounding such gifts. I might add here that in opening his ledger account, Mr. Tavender first placed it in the name of Mr. McDonald, then in the name of both husband and wife, and later—because he was dealing with funds brought in by her and with securities entirely in her name—in her name alone. I am quite unable to find that any of this evidence provides any indication that Mrs. McDonald held any of the assets in Exhibit "A" in trust for her husband. This is made abundantly clear in a letter from Mr. Tavender to the Director of Taxation regarding Mrs. McDonald's estate, dated February 15, 1957, and written after Mrs. McDonald's death (Exhibit 11). In it he states:

The writer and Mr. MacEwing of The Royal Trust Company here discussed with your Mr. Perkins a few days ago the question of ownership of the assets shewn in the Succession Duty Return herein.

The writer has acted for both Mr. and Mrs. McDonald for many years and has looked after all Mortgage work and the collection of all moneys owing thereunder. We never paid any attention to the question of ownership of assets since this did not concern us.

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Upon receiving instructions to apply for Probate of Mrs. McDonald's Will we prepared and filed all necessary documents in the ordinary way and it was only recently that Mr. McDonald informed us that all his wife's assets were in fact his own. We immediately made such inquiries as we thought necessary and notified you as to our instructions.

The statement of Mr. McDonald referred to above is, of course, wholly inadmissible in this case for the reasons which I have stated earlier.

Mr. W. J. King, a public accountant and a former assessor in the Department of National Revenue at Calgary, gave evidence for the appellant. He was consulted by Mr. McDonald apparently about April 1957 (after Mrs. McDonald had died) as to his 1956 income tax return, and was furnished with a copy of the 1955 return (Exhibit 6). He prepared the 1956 return (Exhibit 5) on instructions received from Mr. McDonald, and also in September 1958, after Mrs. McDonald's death, prepared the return for 1957 (Exhibit 8). I am unable to find anything of significance in this evidence. In so far as the returns are based on any statement by Mr. McDonald to the witness that he personally owned the assets held in Mrs. McDonald's name—they are inadmissible; in fact, however, Mr. King does not suggest that he received any such information. It is significant that in the T-3 Form attached to the return for 1956, the sum of $801.81 is said to be income paid or payable from his late wife's estate and this by an added note is said to be "included in statement". If it be suggested that by his 1955 and 1956 returns, Mr. McDonald showed as his income not only that which he personally received, but that arising from assets in his wife's name, that matter would be of no special significance in view of the liability he was under to pay tax on income from property transferred to his wife (see s. 21(1) of *The Income Tax Act*). In my view, none of the evidence of Mr. King is of assistance to the appellant.

Finally, there is the evidence of Albert W. McDonald, a stepson of the late Mrs. McDonald. He confirmed the fact that his father was a gambler and a bookmaker and that he had had but little education. His stepmother, he said, was somewhat better educated, being the daughter of a schoolteacher. It was she who was a housewife, banker and in charge of investments and all business matters.

While he stated at one point that the father and stepmother discussed all investments together, he later said that there was only one discussion in his presence—the Bryant mortgage—which appears in Exhibit "A". The witness has not lived with his father since 1940.

Again, there is nothing in this evidence which throws any light on the circumstances surrounding any gifts made by the husband to his wife. A suggestion was made that due to the nature of the father's business, he had no time to look after his investments, but such was not the case as is clearly shown by the evidence of both Mr. Barron and Mr. Tavender who were in contact with him on a good many occasions.

There is one other matter which I think is of some importance. Following Mrs. McDonald's death, Mr. Tavender, who was acting as solicitor for the executor (the Royal Trust Company) had several interviews with Mr. McDonald regarding the particulars of the assets of her estate to be included in the succession duty return. Mr. Tavender had full knowledge of her assets which consisted of mortgages and interest in real property; the information as to the stocks and bonds and other assets was given by Mr. McDonald to the Royal Trust Company which in turn supplied it to Mr. Tavender. At that time, Mr. McDonald, it seems, was made fully aware of what assets were being included in the succession duty return, although perhaps not fully aware of the amount of tax which might be levied. He did not then suggest that he had any beneficial interest in any of them. The return was filed on January 4, 1957. It was not until the end of that month that Mr. McDonald told Mr. Tavender that "his wife's assets were in fact his own". There is a suggestion that he had been so shocked by his wife's sudden death that when the succession duty return was prepared, he did not fully realize the amount of tax involved.

It is submitted by the respondent on this matter that as Mr. McDonald agreed that all the assets described in Exhibit "A" should be included in his wife's estate, his later statement that the assets were his own was but an afterthought and made for the purpose of avoiding succession duty tax. In view of the conclusion which I have reached

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on the case as a whole, I find it unnecessary to consider what weight should be attached to this matter which, if any, would be of assistance to the respondent only.

Keeping in mind the statement of Viscount Simonds in *Shephard v. Cartwright* (*supra*), that the presumption of advancement "may be rebutted but should not . . . give way to slight circumstances", my finding must be that even if it were found that all the assets in Exhibit "A" had their origin in Mr. McDonald or were the fruits thereof, there is no evidence of the slightest significance regarding the circumstances under which any one of the transfers from the husband to wife took place, or which tends to show that the husband had any intention of retaining any beneficial interest therein. No one really professed to have any knowledge of any individual transfer or the circumstances surrounding it. The whole of the evidence led by the appellant was made in an effort to establish a *course of dealing* from which it might be possible to infer that the wife was a trustee for the husband. That type of evidence was considered and held to be inadmissible by Viscount Simonds in the *Shephard* case (*supra*), where at p. 652 he said:

> Before, however, I ask whether evidence of any subsequent events is in this case admissible either because they formed part of the original transaction or because they were in the nature of admissions, I must shortly examine an argument which has been pressed on this appeal and appears to have carried particular weight with Romer, L.J. It is that an inference about the intention of the deceased at the time of the vesting of the relevant shares in the appellants can be drawn from his manner of dealing with other property which before or after the transaction in question he had transferred to one or other of his children. I cannot regard such evidence as admissible or, if admissible, as of any value. If the argument only means that such other transfers ought to be regarded as "part of the same transaction" then it fails, because it is altogether too artificial so to regard them. If, on the other hand, the argument is intended to introduce a new category of admissible evidence, viz., acts which, though not part of the same transaction, yet indicate a course of dealing, I must reject it on the ground that it cannot be supported by reason or authority. This form of evidence was expressly rejected by Lord Eldon, L.C., in *Murless v. Franklin* (1 Swan. at p. 19), and I am not aware of any attempt having been again made to introduce it.

In my view, after a careful consideration of the evidence, the appellant has wholly failed to rebut the presumption that in placing assets in the name of his wife, Mr. McDonald intended that they were gifts made to her by way of advancement.

I have not overlooked the suggestion on the part of the appellant that no person would voluntarily divest himself of all his assets and run the risk of being left penniless (see *Pahara v. Pahara*[1]). In this case, there is no evidence to establish what part of his assets had been transferred by McDonald to his wife, but there is evidence which indicates that he had always owned an interest in the gambling clubs, taxicab business, and in McDonald Agencies, Ltd.

Reference may be made to *Walsh v. Walsh*[2], and to *Hyman v. Hyman*[3].

Accordingly, and for the reasons which I have stated, the appeal will be dismissed and the assessment affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

1958
June 19
1959
Oct. 26

BETWEEN:

LEVY BROTHERS COMPANY LIMITED AND THE WESTERN ASSURANCE COMPANY .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3 and 4—Conversion of package of diamonds by employee of the Crown in the course of his employment—Crown held liable.

Suppliants bring their petition of right to recover from the Crown the value of a parcel of diamonds imported by suppliant Levy Brothers Company Limited from Belgium, which was lost in the premises of the Customs Postal Branch at Hamilton, Ontario. It was admitted that the parcel of diamonds arrived by prepaid registered air mail at the Hamilton Post Office on or before Saturday, October 15, 1955, and was transferred to the Customs Postal Branch premises. Notice of the arrival of the package of diamonds was sent to Levy Brothers Company Limited, and was received by it in due course. On October 18 it attended at the Customs Postal Branch to make due entry but the parcel could not be found. It is agreed between the parties hereto that the parcel "had presumably been stolen by a person or persons unknown". The suppliants' claim to recover the loss from

[1] [1946] S.C.R. 89; [1946] 1 D.L.R. 433.
[2] [1948] 1 D.L.R. 630; [1948] O.R. 81.
[3] [1934] 4 D.L.R. 532.

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the Crown is based on negligence. The Court found that the package was stolen by a Customs employee during working hours, and in the course of his employment.

Held: That the Crown was not a bailee.

2. That the conversion was one in the course of the servant or servants' employment and the Crown is liable to make good the loss.

3. That neither s. 23(1) of the *Customs Act* R.S.C. 1952, c. 58 nor s. 40 of the *Post Office Act,* R.S.C. 1952, c. 212 apply to relieve the Crown of liability.

PETITION OF RIGHT to recover the value of a package of diamonds lost through the negligence of the Crown.

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

L. A. Fitzpatrick for suppliant.

R. W. McKimm for respondent.

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

THURLOW J. now (October 26, 1959) delivered the following judgment:

This is a petition of right by which the suppliants claim the sum of $3,191 for the value of a parcel of diamonds imported by Levy Brothers Company Limited from Belgium, which was lost while in the premises of the Customs Postal Branch at Hamilton.

From the statement of agreed facts filed at the trial, it appears that the parcel of diamonds arrived by prepaid registered air mail at the Hamilton post office on or before Saturday, October 15, 1955, and on the morning of that day, along with 213 other parcels of mail, it was taken by employees of the Customs Postal Branch from the post office to the premises in the same building occupied by the Customs Postal Branch. There the parcels, including the parcel in question, were sorted and put in bins arranged in alphabetical order in two steel bunks, so placed that the open side of the bunks faced each other with an aisle between them. The aisle was closed overhead with wire mesh and at each end with a wire mesh door. Notice of the arrival of the package of diamonds at Customs was prepared and sent to Levy Brothers Company Limited, and

at approximately 12.30 p.m. that day the doors of the bunks were locked by the customs employee in charge and the key placed in an unlocked drawer of the desk of the Superintendent of the Customs Postal Branch. Upon the departure of the employees, the Customs Postal Branch office was closed and locked.

The Customs Postal Branch office was not open to the public on Saturday, October 15, although four employees of that branch, forming a skeleton staff, were at work that morning and carried out the duties already mentioned. The office was not open at all on Sunday, October 16, but was open to the public on Monday, October 17, and on Tuesday, October 18. Members of the public are not permitted access to that portion of the Customs Postal Branch office behind the customers' counter. During working hours of employees of the Customs Postal Branch, the doors to the bunks are kept open. There were approximately sixteen employees of the Department of National Revenue in the Customs Postal Branch office on Monday, October 17, and Tuesday, October 18. The procedure followed in this office was not substantially different from that followed in dealing with dutiable mail arriving in Canada from abroad in all other customs houses in Canada.

There were no markings on the parcel in question to indicate that it contained diamonds, but Levy Brothers Company Limited was at all material times carrying on business as a manufacturer and wholesaler of jewellery and was well known to be an importer of diamonds.

Levy Brothers Company Limited received the notice of arrival of its parcel of diamonds in due course and on October 18 attended at the Customs Postal Branch office to make due entry, but despite a search the parcel could not be found. It is agreed that the parcel "had presumably been stolen by a person or persons unknown." No other parcels were lost during the period in question, and the investigation of the loss did not indicate that anyone had broken into either the office or the bins.

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The suppliants' claim to recover the loss from the Crown, as set out in the petition of right, is based on negligence. In paragraphs 11 and 12, it is alleged:

11. The said loss occurred by reason of the breach of duty of Her Majesty attaching to the occupation, possession or control of the said property viz. the diamonds in that:

(*a*) Her Majesty failed to deliver up the diamonds to your suppliant Levy Brothers Company Limited when lawfully required;

(*b*) Her Majesty failed to properly protect the said property and exposed it to being lost or stolen;

(*c*) Her Majesty hired incompetent servants who could not take proper care of your suppliant's Levy Brothers Company Limited property.

12. In the alternative your suppliants allege that Her Majesty's servants and agents were negligent in that:

(*a*) They failed to return the property of the suppliant when lawfully required;

(*b*) They failed to properly protect the property of your suppliant in permitting it to be exposed to be lost or stolen;

(*c*) In permitting a small package of such value as herein represented to be kept not under lock and key at all times.

These allegations of negligence were, of course, denied in the defence, and it was further pleaded that the Crown was never in possession of the parcel of diamonds. Nowhere in the petition of right is there any allegation that the diamonds were unlawfully converted by a servant of the Crown in the course of his employment, and the only statement in the pleadings that the diamonds were converted is to be found in paragraph 10 of the defence, in which it is alleged by the Crown that the diamonds were unlawfully removed from the customs warehouse by a person or persons unknown. At the trial, however, counsel for the Crown, as well as for the suppliants, argued the matter of the inferences to be drawn from the admitted facts and the applicability, in the circumstances, of the rule of vicarious liability established by the House of Lords in *Lloyd v. Grace, Smith & Co.*[1], and accordingly, despite the failure of the petitioners to allege it specifically in their petition, it should, I think, be taken that the question of a conversion by a servant of the Crown in the course of his employment is in issue.

[1] [1912] A.C. 716.

The question to be determined is whether, in the situation described, the Crown is liable to make good the loss. It is clear that, apart from statute, the Crown would not be liable and that, if liability exists, it must flow from the provisions of the *Crown Liability Act*, S. of C. 1952-53, c. 30, ss. 3 and 4 of which provide:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.
>
> 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.

The suppliants' first submission was that the Crown was bailee of the diamonds and was liable pursuant to s. 3(1)(*b*) for failure to take reasonable care to ensure their safety. I do not think that s. 3(1)(*b*) was intended to provide for cases wherein the Crown is or was the bailee of goods, and I doubt very much that that subsection does, in fact, render the Crown liable in tort for injury to or loss of goods bailed to it, but whether the subsection can be invoked for that purpose or not, it is settled law in this Court that, in the circumstances described, the Crown is not a bailee, though the customs officer having control of the goods may be a bailee of them. In *Corse v. The Queen*[1], Burbidge J. said at p. 17:

> Even if it were possible under the authorities to hold that the Crown was, in the ordinary acceptation of the word, a bailee of the goods in question, and bound in keeping them to that degree of diligence which the law exacts, for example, of such special or quasi-bailees as captors or revenue officers, the plaintiffs would, I think, fail. There is no evidence of want of diligence in keeping the goods, or, if it is to be inferred that they were stolen by a servant of the Crown, of negligence in selecting or retaining the dishonest servant. But the question is not to be determined by the law of bailments. The officer of the Crown who has the custody of goods sent to a Customs warehouse for examination may be, and no doubt is, in a sense, a bailee of such goods, but the Crown is not. For any wrong committed by an officer of the Crown the injured person has his remedy against such officer, but the Crown is not liable therefor except in cases in which the legislature has expressly, or by necessary implication, imposed the liability, and given the remedy.

[1] (1892) 3 Can. Ex. C.R. 13.

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Moreover, the officer answers for his own acts and omissions only and not for those of his subordinates.

At p. 21 he said:

Mr. Curran, for them [the suppliants], pointed out that the case differed from the storage of goods in a bonded warehouse, in which case the importer may exercise his option to leave the goods in the warehouse or not, but that in such a case as the present he has no option but must submit to having his goods taken to the examining warehouse to be examined by the officers of the Customs. That is, no doubt, true, and it might be an element to take into consideration if the case depended upon the law applicable to bailees. But we have seen that in such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenues. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officer through whose personal negligence or act the loss happens.

The judgment in *Corse v. The Queen* was followed by Audette J. in *Hodgson, Sumner & Co. v. The King*[1] and, so far as I am aware, has not been overruled. I am, accordingly, of the opinion that the Crown cannot be held responsible for loss of the diamonds on the basis of failure on its part to take reasonable care for their safety. Even if the Crown were bailee, it has been agreed between the parties that the diamonds were presumably stolen by a person or persons unknown, and I see no reason to think on the facts related that the loss was due in fact to negligence on the part of the Crown in any of the several respects alleged in the suppliants' petition. The suppliants' submission on this point, in my opinion, accordingly fails.

Nor do I think it can be said that the loss occurred through negligence on the part of employees of the Crown, as alleged in paragraph 12 of the petition. The Crown not being the bailee of the goods and thus called upon to explain their absence, the burden was, in my opinion, upon the suppliants to show that the loss had in fact been caused

[1] (1914) 15 Can. Ex. C.R. 487.

by negligence on the part of the Crown servants, as alleged in the particulars set out in their petition, for which the servants themselves were liable to the suppliants, and on the agreed facts this, in my opinion, has not been established.

There remains the question whether, on the agreed facts, a conversion of the diamonds by a servant of the Crown in the course of his employment has been established.

It is agreed that at some time on the Saturday morning the parcel of diamonds was in a bin in a room or compartment to which the public does not have access, and when, on the following Tuesday, the loss was discovered, the investigation, which I see no reason to assume was not a thorough one, revealed no indication that anyone had broken into the room or the office. Nor was any other parcel missing. There is no evidence that anyone but some one or more of the four employees who were on duty on the Saturday morning knew of the presence in the bin that day of a parcel addressed to Levy Brothers Company Limited or that anyone but these employees of the Customs Postal Branch had access to the parcel, as well as the knowledge or the means of learning of its presence in the bin that day. Nor is there evidence that, at any later material time, anyone but employees of the Customs Postal Branch had both access to the parcel and the means of knowing of its presence in the bin. In this situation, it is, in my opinion, a fair inference that the parcel was unlawfully converted by some one or more of the Crown employees who had access to the bin during working hours. Whether or not the conversion occurred during working hours is on the agreed facts more doubtful, but having regard to the absence of any indication of a break and the lack of any indication that any of the employees who knew or might have known of the presence of the package of diamonds in the bin was in possession of a key to the office door, I think the preponderance of probability, though slight, favours the view that the conversion occurred on the Saturday or Monday, during a time when both the

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office and the bunks were open and access to the bins could be had by an employee without using a key. Moreover, in the course of argument, counsel for the Crown suggested that, if the inference were drawn that the package was stolen by a customs employee, the most reasonable inference would be that the package was stolen during working hours. Accordingly, I find that the conversion occurred at such a time.

Now, is the conversion so made a conversion in the course of the servant's employment? In *United Africa Co. Ltd. v. Saka Owoade*[1], Lord Oaksey considered the question thus at p. 144:

In their Lordships' opinion, *Lloyd v. Grace, Smith & Co.,* [1912] A.C. 716, 28 T.L.R. 547, establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire v. Bailey,* [1905] 1 K.B. 237, it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and by arrangement with two thieves participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from *Lloyd v. Grace, Smith & Co.* or has been overruled by the decision in *Lloyd v. Grace, Smith & Co.*

In the present case the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out, and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in each case whether the wrong was committed in the course of the servant's employment, and in the present case their Lordships are of opinion that upon the uncontradicted evidence the conversion of the appellants' goods took place in the course of the employment of the respondent's servants.

[1] [1955] A.C. 130.

In the present case, it is not disputed that the parcel of diamonds was lawfully taken by the customs employees from the post office and placed in the bin in the premises of the Customs Postal Branch pending due entry and payment of customs duty. During working hours, the employees of the Customs Postal Branch were entrusted with free access to parcels in the bins for the purpose of carrying out their duties, which included collecting the customs duties payable on them and delivering parcels to their owners on due entry and payment of the duties being made. For any of these purposes, it was within the scope of the employees' authority to remove parcels from the bins. The case here for holding the master vicariously liable is weaker on its facts than was the case in *United Africa Co. Ltd. v. Saka Owoade,* but, in my opinion, the Crown employee or employees who converted the diamonds did so while engaged in the duties of his or their employment and while, by reason of that employment, he or they were entrusted with access to the parcel for the purpose of carrying out those duties, which included at times the removing of parcels from the bins. This, I think, is sufficient to classify the conversion as one in the course of the servant or servants' employment, within the meaning of that concept as applied in *Lloyd v. Grace, Smith & Co.* and *United Africa Co. v. Saka Owoade.* It follows, in my opinion, that the Crown is liable to make good the loss.

I may add that I regard the present situation as quite different from that in *Darling Ladies' Wear Ltd. v. Hickey*[1], where the servant who took the plaintiff's car entered his employer's building after his duties, both for the day and in respect of the plaintiff's car, had been completed.

In the course of the argument, s. 23(1) of the *Customs Act,* R.S.C. 1952, c. 58, was cited, and it was objected that, at the material time, the parcel of diamonds was in a customs warehouse and that the Crown was not liable since the parcel was held there at the owner's risk. Section 23(1) is as follows:

> 23. (1) In default of such entry and landing, or production of the goods, or payment of duty, the officer may convey the goods to a Customs warehouse, or some secure place appointed by the collector for such purpose, there to be kept at the risk and charge of the owner.

[1] [1949] O.W.N. 768.

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A similar provision has been in the *Customs Act* continuously since 1877. (*Vide* 40 Vict., c. 10, s. 15(4).) Assuming that the parcel of diamonds was in a customs warehouse pursuant to s. 23(1), I am of the opinion that the section affords no answer to the suppliants' claim. The subsection, as I interpret it, was not originally directed to protecting the Crown against liability, for, as pointed out in *Corse v. The Queen* (*supra*), no responsibility or liability attached to the Crown. Customs officers, however, might be liable, and, in my view, it was to clarify their position that the words "there to be kept at the risk and charge of the owner" were introduced into the section. For loss through such causes as spoiling of perishable goods or fire or other casualty for which the customs officer is not personally responsible, the section may well afford him complete protection, but *Corse v. The Queen* also shows that a customs officer may be liable for loss caused by his negligence, and this, I think, is so despite s. 23(1), the forerunner of which was in effect when *Corse v. The Queen* was decided. If, for example, a customs officer were to negligently or recklessly or deliberately drop a parcel known to contain fragile goods, I think he would clearly be liable for the resulting loss, despite s. 23(1), and if he deliberately converts goods, the protection of the section is, in my opinion, equally unavailing. Given a loss through conversion by a customs officer, he is liable for the tort, and under s. 3 of the *Crown Liability Act* the Crown, as well, is vicariously liable if the tort was committed by the officer in the course of his employment. Section 23(1) accordingly, in my opinion, affords no defence in the present situation.

It was also submitted on behalf of the Crown that the parcel of diamonds, when in the custody of employees of the Customs Postal Branch, was still mail, as defined in the *Post Office Act*, R.S.C. 1952, c. 212, and that s. 40 of that Act applies to relieve the Crown from liability. Section 40, which was first enacted in its present form by S. of C. 1940, c. 57, provides as follows:

40. Neither Her Majesty nor the Postmaster General is liable to any person for any claims arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

This section replaced a former one which, since 1867, had, with but one or two immaterial amendments, provided that the Postmaster General should not be liable for the loss of any mailable matter sent by post. In my opinion, the present section does not purport to refer to or protect the Crown or the Postmaster General against anything occurring other than when mail is under the control of the Post Office Department or its employees or in the ordinary course of post. When a customs officer takes possession of a parcel from the post office, pursuant to s. 44 of the *Post Office Act,* he is required to deal with it according to the law relating to customs, and when this has been done he may *return* it to the post office or *deliver* it to the owner. Whether or not the parcel is still mail for some purposes while in the custody of customs officers, what the customs officer is required to do he does as customs officer, not as an employee of the Post Office Department; nor, in my opinion, is the parcel under the control of the Post Office Department while the customs officer has it in his custody. I see nothing in the language of s. 40 to suggest that Parliament, in enacting it, had the custody of goods by customs officers in mind. Nor does s. 40 say that the Crown shall not be liable for loss of goods while they are mail. It merely refers to "anything deposited in a post office," which by definition means "left in a post office or with a person authorized by the Postmaster General to receive mailable matter." The customs officer's authority to receive goods is the statute itself, not that of the Postmaster General, nor do I think that a parcel remains "deposited in a post office" or "left in a post office" when the situation is that it has been lawfully removed therefrom and is in the custody of customs officers, who, when they have carried out their duties, may *return* it to the post office or *deliver* it to the owner. In my opinion, therefore, s. 40 affords no defence to this proceeding.

The suppliant Levy Brothers Company Limited will have leave to make any necessary amendment to its petition of right so as to found its claim upon a conversion by a servant of the Crown in the course of his employment, and there will be judgment that the suppliant Levy Brothers Company Limited is entitled to damages in the sum of

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$3,191, being the relief sought in the petition of right herein, together with its costs of the petition and proceedings thereon. In my opinion, it has not been shown that the suppliant The Western Assurance Company is entitled to any relief against the Crown (*Simpson and Co. et al. v. Thomson, Burrell et al.*[1]), and its claim will be dismissed with such costs (if any) as have been incurred by the Crown in resisting it, in so far as such costs are in addition to and distinct from costs incurred in the general defence of the proceedings.

Judgment accordingly.

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[1] (1877) 3 App. Cas. 279.

BETWEEN:

1958 June 23

1959 Oct. 26

JOSEPH B. DUNKELMAN ....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act R.S.C. 1952, c. 148, ss. 22(1), 139(1)(ag)—"Has transferred"—"Has transferred property"—"Or by any other means whatsoever"—Money advanced by way of loan to purchase property in name of trustees—Appeal allowed.

Appellant, in May 1945, arranged for the purchase of certain property by himself and the Toronto General Trusts Corporation from the Canadian Bank of Commerce as trustees for the purposes of a trust which they jointly declared in a document dated May 16, 1945. The money required to finance the purchase was provided by the appellant as a loan made by him to the trustees and secured by a mortgage of the property executed by the trustees in his favour, the loan to be repaid with interest. Both interest and principal were paid by the trustees from rentals of the property, the mortgage being retired in 1952. Since then income from the property has been accumulated in the hands of the trustees, no other assets being included in the property subject to the trust. The trust deed declared the trusts on which the property was held as being on behalf of the children of the appellant, subject to the happening of certain events. Two of the children were during the taxation years in question under the age of 19 years and the third *cestui que* trust apparently had not reached the age of 19 years by December 31, 1953.

The Minister of National Revenue assessed appellant for income tax for the years 1952, 1953, 1954 and 1955 on the income from the property and in so doing relied on s. 22(1) of the *Income Tax Act* R.S.C. 1952, c. 148 which provides that "where a taxpayer has, since 1930, transferred property to a person who was under 19 years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from property or from property substituted therefor shall be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years."

Appellant appealed to this Court from the assessments made by the Minister.

Held: That the expression "has transferred" in s. 22(1) of the Act means that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age and the means adopted to transfer property are of no importance as the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer.

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2. That the appellant never was the owner of the property purchased nor did he transfer it to any one since at the outset it belonged to the Canadian Bank of Commerce from which it was purchased by appellant and the trust company as trustees.
3. That the making of the loan by appellant for the purpose of purchasing the property was not a transaction within the meaning of the expression "has transferred property" in s. 22(1) of the Act.
4. That the words "or by any other means whatsoever" used in s. 22(1) of the Act are directed to the means or procedure by which transfers may be accomplished rather than to the scope of the expression "has transferred property" and they do not expand that scope beyond the natural meaning of the expression.

APPEAL under the *Income Tax Act.*

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

W. B. Williston, Q.C. and *H. W. MacDonnell* for appellant.

A. A. Macdonald, Q.C. and *J. D. C. Boland* for respondent.

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

THURLOW J. now (October 26, 1959) delivered the following judgment:

These are appeals against assessments of income tax for the years 1952, 1953, 1954, and 1955, the issue in each appeal being the liability of the appellant for tax in respect of an amount which the Minister, in making the assessment, added to the income declared by the appellant in his income tax return.

The amounts added by the Minister were not income of the appellant. They represent income for the years in question from a property which at the material times was held by the appellant and the Toronto General Trusts Corporation upon certain trusts, and the question to be determined in each case is whether or not in the circumstances the appellant is nevertheless liable to be taxed in respect of such income in view of s. 22(1) of *The Income Tax Act,* S. of C. 1948, c. 52, now s. 22(1) of the *Income Tax Act,* R.S.C. 1952, c. 148.

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That subsection, as applicable to the years 1952 and 1953, provided:

22. (1) Where a taxpayer has, since 1930, *transferred property* to a person who was under 19 years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years.

In the subsection substituted therefor by S. of C. 1954-55, c. 54, s. 4(1), applicable to 1954 and 1955, the words "during the lifetime of the taxpayer while he was resident in Canada" appear between the word "shall" and the words "be deemed."

"Property" was defined in s. 127(1)(*af*) of *The Income Tax Act,* now s. 139(1)(*ag*) of the *Income Tax Act,* as meaning:

property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action;

The property from which the income in question was derived was acquired in the following circumstances. In May, 1945, the appellant, being aware of an opportunity which he regarded as advantageous to others, but not to himself, to purchase a property at Belleville, Ontario, known as the Butterfield Block, arranged for the purchase of it by himself and the Toronto General Trusts Corporation as trustees for the purposes of a trust which they jointly declared in a document dated May 16, 1945. The property was purchased from the Canadian Bank of Commerce, and it is admitted in the Minister's replies that it was purchased by the appellant and the Toronto General Trusts Corporation as trustees. The deed was dated May 25, 1945 and appears to have been recorded on June 12, 1945. The whole of the moneys required to finance this purchase were provided by a loan which was made by the appellant to the trustees and secured by a mortgage of the property executed by the trustees in favour of the appellant on or about May 31, 1945. By the terms of the mortgage, the loan was to be repaid in five years, with interest at five per cent per annum payable half-yearly, as well after as before maturity. Both the interest and principal were

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subsequently paid by the trustees from rentals of the property and the mortgage was retired on May 29, 1952. Since then, income from the property has been accumulated in the hands of the trustees. No other assets have been included in the property subject to the trust.

The declaration of trust was as follows:

WHEREAS arrangements have been made by Joseph Dunkelman for the purchase from the Canadian Bank of Commerce of the property in the City of Belleville in the Province of Ontario known as the "Butterfield Block" located at the south-west corner of Bridge and Front Streets and being part of Lot Number 23 on the east side of Front Street and the south side of Bridge Street in the said City of Belleville for the price or sum of Sixteen Thousand Dollars ($16,000.00) as Trustee for the children of the said Joseph Dunkelman as hereinafter set out.

AND WHEREAS the said Joseph Dunkelman has arranged for the title to the said property to be taken in the name of the Toronto General Trusts Corporation and himself as Trustees.

AND WHEREAS the said Joseph Dunkelman intends to advance the said purchase price and to take back in his personal capacity a first mortgage against the said property for the amount of his advance with interest.

AND WHEREAS it is expedient that the said Trustees should declare the trusts on which they hold the said property.

NOW THEREFORE the said Trustees hereby declare that they hold the said property as Trustees for Richard Dunkelman, Peter Dunkelman and Donald Dunkelman, being the children of the said Joseph Dunkelman in equal shares until the youngest surviving child attains the age of twenty-one years when the said property shall be conveyed to the said children then alive absolutely as tenants-in-common or, if the property has in the meantime been sold, the proceeds of the said property shall either be re-invested for their benefit or be paid or transferred to the said children in equal shares as the Trustees may in their sole discretion deem advisable. No child of the said Joseph Dunkelman shall have an indefeasible vested interest in the said property, or, if sold, in the proceeds thereof until the youngest surviving child of the said Joseph Dunkelman shall attain the age of twenty-one years and if any child shall die before that date, leaving issue, the issue of such child shall have no interest in the said property or the proceeds thereof. In the event of the death of all of the said children before the youngest surviving child reaches the age of twenty-one years, then the said property or the proceeds thereof shall be transferred or paid to Jean Dunkelman, the wife of the said Joseph Dunkelman.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this 16th day of May, 1945.

SIGNED, SEALED AND DELIVERED in the presence of "I. Levinter"	"J. Dunkelman" [Seal] TORONTO GENERAL TRUSTS CORPORATION "Chas. McCrea" President "H. M. Forbes" Assistant General Manager

Throughout 1952, 1953, 1954, and 1955, both Peter Dunkelman and Donald Dunkelman were under 19 years of age, and neither had reached that age at the time of the hearing of the appeal. Richard Dunkelman had reached 22 years of age by November, 1957. He had, therefore, reached 19 years of age by November, 1954, though how much earlier he had reached that age does not appear. In particular, it does not appear that he had reached that age by December 31, 1953.

The problem turns on whether or not the income from the Butterfield Block, which the Minister assessed to the appellant, was income from property transferred or from property substituted for property transferred by the appellant to a person under 19 years of age, within the meaning of s. 22(1). It goes without saying that, if the rule set out in s. 22(1) applies, the appellant will be liable for tax on the income in question, regardless of how harsh or unjust the result may appear to be. But, as it is not within the purview of the general taxing provisions of the statute to tax one person in respect of the income of another, the subsection must, in my opinion, be regarded as an exception to the general rule, and while it must be given its full effect so far as it goes, it is to be strictly construed and not extended to anything beyond the scope of the natural meaning of the language used, regardless again of how much a particular case may seem to fall within its supposed spirit or intendment.

In *David Fasken Estate v. Minister of National Revenue*[1], the President of this Court, in discussing the meaning of "transfer" in s. 32(2) of the *Income War Tax Act,* said at p. 592:

> The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer. The plain fact in the present case is that the property to which Mrs. Fasken became entitled under the declaration of trust, namely, the right to receive a portion of the interest on the indebtedness, passed to her from her husband who had previously owned the whole of the indebtedness out of which the right to receive a specified portion of

[1] [1948] Ex. C.R. 580.

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the interest on it was carved. If David Fasken had conveyed this piece of property directly to his wife by a deed such a conveyance would clearly have been a transfer. The fact that he brought about the same result by indirect or circuitous means, such as the novation referred to by counsel involving the intervention of trustees, cannot change the essential character of the fact that he caused property which had previously belonged to him to pass to his wife. In my opinion, there was a transfer of property from David Fasken to his wife within the meaning of the Act.

And in *St. Aubyn v. Attorney-General*[1], Lord Radcliffe put the matter in almost the same way when he said at p. 53:

> If the word "transfer" is taken in its primary sense, a person makes a transfer of property to another person if he does the act or executes the instrument which divests him of the property and at the same time vests it in that other person.

The expression "has transferred" in s. 22(1) has, in my opinion, a similar meaning. All that is necessary is that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age. The means adopted in any particular case to transfer property are of no importance, as it seems clear that the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer. Nor is the scope of the provision affected or qualified by expressions such as "as if the transfer had not been made," which appeared in the corresponding section of the *Income War Tax Act*. *Vide McLaughlin v. Minister of National Revenue*[1]. On the other hand, it is also clear that the subject matter of a transfer that is within the section must be property of the transferor, not that of some other person, and if the subsection is to apply, such property must have been vested by him in a person under 19 years of age.

The Minister's contention in support of the assessments is that the appellant transferred money to the trustees by way of a loan, that the Butterfield Block was purchased with that money and is, therefore, property substituted for it within the meaning of the subsection, that the three children immediately became the owners of the property

[1] [1952] A.C. 15.

[1] [1952] Ex. C.R. 225.

or of an interest in it which gave them the right to the income arising therefrom, and that, accordingly, for the purposes of the *Income Tax Act*, the income therefrom or from such interest is to be deemed income of the appellant. As an alternative, it was submitted that, viewing the substance of the transaction as a whole, the Butterfield Block itself was property transferred by the appellant to the trustees for the benefit of his children.

In my opinion, it cannot be said on the facts that the appellant ever was the owner of the Butterfield Block or that he transferred it to anyone. The fact is that at the outset the Butterfield Block belonged to the Canadian Bank of Commerce, and it is admitted that the property was purchased by the appellant and the Toronto General Trusts Corporation as trustees. The alternative submission, accordingly, fails.

The Minister's other submission, that by making the loan the appellant transferred property to the trustees within the meaning of s. 22(1), presents a more difficult problem, but I have come to the conclusion that it, too, must be rejected. The expression "has transferred property" in s. 22(1) must be given its natural meaning. The problem is to determine how wide that natural meaning is in the context in which the expression is found, having due regard to the definition of property contained in the statute.

In *St. Aubyn v. Attorney-General* (*supra*), the House of Lords divided three to two on the interpretation to be put upon the words "where a person *has made* to a company to which this section applies *a transfer of any* property," which appeared in s. 46 of the *Finance Act*, 1940, the question before the house being whether a payment of money to such a company for shares therein was a *transfer of any property* within the meaning of that section. Lord Radcliffe was clearly of the opinion that the payment was a transfer. He said at p. 57:

> Lastly, there is the £100,000 which Lord St. Levan paid as his subscription for the preference shares. My Lords, I must say quite briefly that in my opinion, when he did this, he made a transfer of £100,000 to the company within the meaning of this statute. Certainly the company got £100,000 as part of their resources: first a cheque, then a credit with Messrs. Glyn, Mills & Co. Certainly Lord St. Levan by giving the cheque

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which led to the transfer of bank credit reduced his own credit by an equivalent amount. I have spoken of Lord St. Levan as having given a cheque for £100,000, for I assume that he must have. In any event he must have given some authority to the bankers to debit his account with £100,000 and to credit the company with a like amount, and that is, I think, sufficient for the purpose. Whatever form the authority took, it was a disposition made by him and it was an essential part of the transaction by which the company's resources were augmented by this £100,000. I am bound to say that in that state of affairs Lord St. Levan seems to me plainly to have made a transfer of £100,000 to the company for the purposes of section 46 as interpreted by section 58(2).

Lord Tucker was more doubtful but reached the same opinion. He said at p. 60:

As to the £100,000 paid for the preference shares, I agree that to refer to money paid by way of subscription for shares as a transfer of property to the company is an unusual use of words, none the less, not without some doubt, I have come to the conclusion that the words in their present context are wide enough to include payment in cash or by cheque. It must be remembered that the companies referred to are only those to which the section applies and that one of the commonest ways in which benefits of the kind enumerated in section 47 are obtained is as a result of payment of money. Furthermore, section 58(2) once again requires consideration and, although it does not elucidate the meaning of the word property, it would be odd if a sum of money which "comes to be included in the resources of the company" is not property. Some support for this view is, I think, also to be obtained from section 51.

The other three law lords were of the contrary opinion. Lord Simonds, with whom Lord Oaksey concurred, said at p. 32:

The first point arises on the subscription by Lord St. Levan for 100,000 preference shares. For these he paid cash according to the ordinary use of language. Did he then "transfer property" to the company within the meaning of section 46? My Lords, I have no hesitation in saying that the payment of cash to a company upon a subscription for shares is not a transfer of property to the company. No one, lawyer, business man or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose. Lord Wensleydale's familiar words (as Parke B. in *In re Micklethwait,* (1855) 11 Ex. 452, 456), which were cited by Lord Halsbury, L.C. in *Tennant v. Smith* [1892] A.C. 150, 154, may again be repeated: "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words." Lord Halsbury adds that in a taxing Act it is impossible to assume any intention or governing purpose in the Acts to do more than take such tax as the statute imposes: it

must be seen whether the tax is expressly imposed. This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits. Applying this, the one and only proper test, I say that when Lord St. Levan paid for his shares he did not transfer property to the company.

Lord Normand put his view thus at p. 43:

> The first point is whether Lord St. Levan, when he paid £100,000 for the preference shares in the company, made a transfer of property within the meaning of section 46. My opinion is that "transfer of property" are not the usual words which would be naturally selected to describe a payment of money, though it cannot be denied that money is property or that payment is a transfer. I think that if it had been intended to strike at money payments the simple words necessary to make that intention clear would have been added.

The opinions of Lord Simonds and Lord Normand were commented on and considered to be limited to the meaning of "transfer" in the particular section of the statute and, therefore, of no assistance in *Thomas v. Marshall*[1] at p. 949, where the appellant had deposited money in a Post Office Savings Bank to the credit of his children and the problem was whether or not this transfer was a settlement within the extended meaning of that term as defined in the statute there under consideration. The present problem is, however, much more similar in principle to that considered in *St. Aubyn v. Attorney-General,* and the reasoning of the majority seems to me to point the way to the interpretation that should be put on the words "has transferred property" in s. 22(1). I do not think it can be denied that, by loaning money to the trustees, the appellant, in the technical sense, transferred money to them, even though he acquired in return a right to repayment of a like sum with interest and a mortgage on the Butterfield Block as security, or even though he has since then been repaid with interest. But, in my opinion, it requires an unusual and unnatural use of the words "has transferred property" to include the making of this loan. For who, having borrowed

[1] (1953) 2 W.L.R. 944.

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money and knowing he must repay it, would use such an expression to describe what the lender has done? Or what lender thinks or speaks of having transferred his property, when what he has done is to lend it? Or again, what casual observer would say that the lender, by lending, "has transferred property"? And, more particularly, who would so describe the lending where, as in this case, the transaction is such that the only purpose to which the money loaned could be turned was in acquiring a property to be immediately mortgaged to the lender? I venture to think, in the terms used by Lord Simonds, that no one, be he lawyer, business man, or man in the street, uses such language to describe such an act. I also think that, if Parliament had intended to include a loan transaction such as the present one, the words necessary to make that intention clear would have been added, and it would not have been left to an expression which, in its usual and natural meaning, does not clearly include such a transaction. To apply the test used by Lord Simonds, I do not think this transaction was one which the language of the subsection, according to its natural meaning, "fairly" or "squarely" hits. I am, accordingly, of the opinion that the making of the loan in question was not a transaction within the meaning of the expression "has transferred property" and that s. 22(1) does not apply.

In reaching this conclusion, I have also considered the wide words "or by any other means whatsoever," but I think that they are directed to the means or procedure by which transfers may be accomplished, rather than to the scope of the expression "has transferred property" and that they do not expand that scope beyond the natural meaning of the expression.

It follows that the appeals must be allowed and the assessments referred back to the Minister to be revised accordingly. The appellant is entitled to his costs.

Judgment accordingly.

BETWEEN:

1958
Sept. 29, 30,
Oct. 1
—
1959
Nov. 3

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

FRANK SURA .... RESPONDENT.

Revenue—Income tax—Income from community of property (Que.)—Liability of husband therefor—Civil Code, arts. 1268, 1425—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, ss. 3, 9—The Income Tax Act, 1948, S. of C. 1948, c. 52 as amended, ss. 2, 3—The Income Tax Act, R.S.C. 1952, c. 148, as amended, ss. 2, 3.

The respondent and his wife, both of whom were domiciled in the Province of Quebec, were married there without having previously entered into a marriage contract. They thus accepted and became subject to the regime of legal community of property as provided by the Quebec *Civil Code*. The respondent claimed that under the provisions of the *Code* the income from the community, which consisted of his wages and income from rentals, was the income of himself and his wife in equal parts, and that for income tax purposes, each should be assessed for one half of the total income. The Minister ruled that during the existence of the community of property the income was that of the husband exclusively and he alone was liable for the tax. The husband's appeal from the ruling was allowed by the Income Tax Appeal Board. On an appeal by the Minister from the Board's decision

Held: That under the *Civil Code* of Quebec the relationship which exists between a husband and wife under the community of property is not a partnership in the ordinary sense of the law.

2. That the community is not a corporate body having the attributes of a legal entity.

3. That during the existence of the community the wife has none of the rights which characterize ownership. It is only after the dissolution and acceptance of the community that the law declares for the first time that the wife or her heirs have real and existing rights in the assets of the community.

4. That it is well settled law of the Province of Quebec that during the existence of the community, the husband is not only the administrator of the common property but that he is moreover the sole owner of the property. *Childs v. Libby* 1 C.S. 153 at 167; *Saultry v. Farrel* 31 C.S. 59; *Bonin v. La Banque d'Epargne de la Cité et du District de Montréal* 34 B.R. 322 at 331; *Dame Guérin v. Giroux* [1943] C.S. 323, 324.

5. That as during the existence of the community the husband is the sole owner of the property which makes up the assets of the community, he alone is liable for the debts which make up its liabilities.

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6. That since the parties admit that the income in issue is, in the sense of art. 1272 of the *Code*, an asset of the community, the assessment should be affirmed and the appeal allowed.

APPEAL from a decision of the Income Tax Appeal Board.

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

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

Philip Vineberg and *Perry Meyer* for respondent.

FOURNIER J. now (November 3, 1959) delivered the following judgment:

Dans cette cause, il s'agit d'un appel de la décision rendue le 1er octobre 1957 par la Commission d'Appel de l'Impôt sur le Revenu[1] accueillant l'appel de l'intimé de cotisations d'impôt sur son revenu pour les années d'imposition 1947 à 1954 inclusivement. Le Ministre du Revenu national en cotisant l'intimé avait ajusté et augmenté les montants mentionnés par ce dernier dans ses déclarations de revenu imposable pour les années en question. Ces ajustements et augmentations ne furent pas contestés par l'intimé.

Il avait basé son appel sur le fait qu'il avait été marié sans contrat de mariage dans la Province de Québec, où lui et son épouse étaient domiciliés lors de la célébration du mariage et où ils ont continué à demeurer jusqu'à ce jour. Par conséquent, il était marié sous le régime de la communauté et soumis aux dispositions du *Code Civil du Québec*, particulièrement aux dispositions régissant la communauté de biens. Il alléguait que le revenu des biens de communauté n'était pas son revenu exclusif et que les cotisations avaient été faites en violation de ses droits.

La décision de la Commission d'Appel de l'Impôt sur le Revenu, dont appel est présentement devant cette Cour, est à l'effet que l'intimé n'est imposable que pour la moitié du revenu de la communauté de biens pour chacune des années d'imposition *supra*.

[1] 57 D.T.C. 478; 18 Tax A.B.C. 65.

Pour les fins de la présente cause seulement, les parties, par leurs procureurs respectifs, ont fait par écrit certaines admissions, mais ils se sont réservé le droit d'en discuter la pertinence et matérialité relativement au litige. Ils admettent que

(1) L'intimé, Frank Sura, a été marié à Montréal le 19 janvier 1929 à dame Annie Sedilek, qui vit encore.

(2) Au moment de son mariage, il était domicilé dans la Province de Québec et n'avait pas fait de contrat de mariage prénuptial.

(3) Les époux ont donc adopté le régime de la communauté de biens suivant les dispositions du *Code Civil* du Québec.

(4) Les époux en tout temps utile ont été domiciliés dans la cité de Montréal.

(5) Les parties admettent que le revenu dont il est question dans le présent débat est un actif de la communauté au sens de l'article 1272 du *code civil* et provient de salaires relatifs à l'emploi du mari et de loyers d'immeubles.

(6) La seule dispute entre les parties est une question de droit. Le revenu, connu comme le "revenu de la communauté" suivant la législation canadienne de l'impôt sur le revenu et les règles de la communauté légale de biens telles qu'édictées au *code civil* de Québec, est-il, pendant la durée de la communauté, le revenu exclusif du mari ou le revenu du mari et de la femme, chacun pour une moitié? Dans le premier cas, les cotisations devraient être confirmées et dans le second cas les cotisations devraient être amendées en conséquence.

L'appelant a soumis que le revenu de la communauté de biens était le revenu exclusif du mari durant l'existence de la communauté et qu'il était imposable comme tel. D'autre part, l'intimé a soutenu que ce revenu était le revenu du mari et de l'épouse à parts égales et que chacun des conjoints devait être cotisé pour la moitié du revenu total.

Pour justifier leur soumission, ils ont invoqué les mêmes dispositions du *Code Civil,* en particulier les articles 1268 à 1425 (i) inclusivement; toutes autres dispositions corrélatives à la question en litige ainsi que les dispositions de la *Loi de l'Impôt de guerre sur le revenu,* S.R.C. 1927, c. 97 et amendements et de la *Loi de l'Impôt sur le revenu,* S.R.C. 1952, c. 148 et amendements, et en particulier, mais sans en restreindre la généralité, les articles 2 et 3 de ces statuts.

La question soumise à la Cour présente de nombreuses difficultés qui nécessitent une étude sérieuse des textes de lois, des différentes théories préconisées par les juristes et des décisions des tribunaux faisant autorité.

La loi qui traite des conventions matrimoniales et de l'effet du mariage sur les biens des époux dans la Province de Québec est contenue au Livre III, Titre IV, du *Code Civil.* Avant l'adoption du *Code Civil,* le 26 mai 1866, le Bas-Canada, en matières civiles, était pays de droit coutumier et soumis aux dispositions de la coutume de Paris. C'est en 1857 que le législateur a ordonné une codification du droit civil du Bas-Canada. La tâche des codificateurs était de coordonner le droit existant et d'en indiquer les sources. S'ils le jugeaient à propos, ils pouvaient suggérer des modifications avec raisons à l'appui. Quant au plan à suivre, ils devaient adopter le plan général suivi par les codificateurs du *Code Napoléon.* Le *Code Civil* a donc conservé le corps des anciennes lois en force immédiatement avant l'adoption du *Code Civil.* Les seules lois abrogées sont celles qui l'ont été expressément ou implicitement par le *Code Civil* ou celles qui sont incompatibles avec quelques dispositions qu'il contient. Une disposition expresse du *Code Civil* sur le sujet particulier des anciennes lois a l'effet d'abroger celles-ci (art. 2613).

Les codificateurs du *Code Civil,* dans leur rapport sur les conventions matrimoniales et l'effet du mariage sur les biens des époux (5e Rapport, p. 200), font les remarques suivantes:

> Le titre du *Code Napoléon,* DU CONTRAT DE MARIAGE, est équivoque, puisqu'il signifie le mariage lui-même et l'acte qui en pose les conventions. C'est le premier sens que Pothier emploie en traitant de l'union conjugale; c'est le second qu'entendent les auteurs du *Code Napoléon* au sujet des conventions matrimoniales. Il fallait, pour la

clarté, y comprendre *l'effet du mariage sur les biens des époux*: ce sont là des dispositions qui viennent de la loi, quand les conjoints ne se sont pas exprimés. D'après ce système, qui est celui de la coutume de Paris, la loi suppose en pareil cas qu'ils ont voulu s'en rapporter à ce qui se fait généralement, c'est-à-dire adopter la communauté légale de biens . . .

Ces remarques indiquent clairement que les auteurs du *Code Civil* lorsqu'ils traitent de l'union conjugale entendent considérer les obligations qui naissent du mariage et les droits et devoirs respectifs des époux quand il s'agit de déterminer les effets du mariage sur les biens des époux. C'est dans ce sens que les dispositions de la coutume de Paris ont été interprétées par Pothier. Ayant adopté les dispositions de la coutume de Paris, il est donc logique, dans les cas de doute sur l'interprétation des textes du droit civil, de recourir à l'ancien droit civil français tel qu'il était en vigueur dans le Bas-Canada avant l'adoption du code civil.

Dans le cas qui nous intéresse, le régime matrimonial de l'intimé et de son épouse est déterminé par les articles 1260 et 1270 du *Code Civil.*

Art. 1260. A défaut de conventions ou en l'absence de stipulations contraires, les époux sont présumés vouloir se soumettre aux lois et coutumes générales du pays, et notamment qu'il y ait entre eux communauté légale de biens et douaire coutumier ou légal en faveur de la femme et des enfants à naître.

Art. 1270. La communauté légale est celle que la loi, à défaut de stipulations contraires, établit entre les époux, par le seul fait du mariage, quant à certaines espèces de leurs biens qu'ils sont censés avoir voulu y faire entrer.

Les juristes ont défini la communauté comme une espèce de société de biens entre conjoints; une société de biens entre époux régie par des règles particulières; d'autres comme une société de biens entre époux de la nature d'une société ordinaire.

Dans son *Traité de Droit Civil* (1781), vol. 3, p. 497, Pothier dit:

1. La communauté entre conjoints par mariage est une espèce de société de biens qu'un homme et une femme contractent lorsqu'ils se marient.

2. Cette communauté est fondée sur la nature même du mariage. Cette convention entre l'homme et la femme, que le mariage renferme, de vivre en commun pendant toute leur vie, fait présumer celle de mettre en commun leur mobilier, leurs revenus, les fruits de leurs épargnes et de leur commune collaboration.

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Dans son *Droit Civil Canadien*, vol. 6, p. 143, Mignault, l'auteur canadien qui fait souvent autorité dans le Québec et que les praticiens citent le plus fréquemment devant les tribunaux, dit:

> La communauté est une société de biens entre époux, régie par des règles particulières. Il y a, en effet, entre elle et les sociétés ordinaires, des différences très notables.

E Baudry-Lacantinerie, dans son *Traité théorique et pratique de droit civil,* vol. 1, 3e éd., Du contrat de mariage, à la page 581, déclare:

> 637. . . . La communauté ou société de biens entre époux n'est représentée que par un fonds commun, destiné à subvenir aux charges du ménage et à s'enrichir des économies momentanément confondues et finalement soumises au principe du partage égal. Ainsi se trouve bien consolidée, semble-t-il, l'idée d'une copropriété basée sur l'égalité, du moins théorique, des droits des deux conjoints.

Ces citations sont faites pour fins de comparaison avec les remarques des auteurs du *Code Civil* dans leur 6e Rapport, p. 25, "De la société":

> Ce titre embrasse toute la matière des sociétés civiles ou commerciales, au contraire du *Code Napoléon,* qui ne traite que des sociétés civiles, les autres étant au *Code de commerce.*—Il ne s'agit pas ici des associations ou groupements d'intérêts, comme ceux qui résulte de la communauté conjugale ou de la propriété indivise, bien que les jurisconsultes les appellent sociétés.

Les codificateurs expriment donc l'opinion que la communauté conjugale se résout pour les époux en une association ou groupement d'intérêts non soumis aux dispositions qui régissent les sociétés ordinaires. Je crois que nous pouvons conclure sans hésitation que la communauté conjugale n'est pas une société au sens que lui donne le *code civil.*

Au point de vue juridique, le mot "communauté", lorsqu'il s'applique aux personnes mariées sans contrat de mariage, désigne leur régime d'association conjugale. L'expression "régime de communauté" est l'ensemble des règles légales applicables aux biens des époux et aux biens connus sous le nom de "biens de communauté". C'est donc, à défaut de contrat ou de stipulations contraires, une association conjugale que la loi établit entre les conjoints quant aux biens devant composer l'actif de la communauté, lesquels sont régis par des dispositions spéciales du *Code*

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Civil. Ces règles sont exposées au chapitre intitulé "De la communauté de biens". Dans son essence, la communauté de biens est une union d'intérêts pécuniaires entre époux et de la mise en commun de certains biens spécifiés dans le but de subvenir aux charges du ménage et de rencontrer les obligations qui naissent du mariage, telles que celles imposées par les articles 165 et 175 du *Code Civil.* C'est le régime matrimonial légal de la Province de Québec. Il régit les rapports pécuniaires de la majorité des ménages du Québec.

Les dispositions du *Code Civil,* relatives à la communauté de biens indiquant la composition de l'actif et du passif de la communauté, désignent le mari comme seul administrateur des biens et énumèrent les pouvoirs qui lui sont attribués; traitent du status juridique de la femme et de ses incapacités; de la dissolution de la communauté; de l'acceptation de la communauté et de la renonciation qui peut en être faite, avec les conditions qui y sont relatives; du partage des biens. En d'autres termes, la communauté de biens serait, d'après le *Code Civil,* une série de dispositions légales qui, après avoir régi les intérêts des époux pendant la durée de la communauté, permettraient de décider, après la dissolution d'icelle et l'exercice de l'option de la femme ou de ses héritiers, comment se compose le patrimoine et comment il sera partagé. Dans le sens juridique ci-dessus, ces dispositions ou règles ont force de loi du jour de la célébration du mariage (art. 1269); mais la jurisprudence a toujours interprété ces mots comme signifiant que la communauté commence du moment du mariage.

Le *Code Civil,* après avoir expliqué comment s'établit la communauté légale, pose une première règle. A l'article 1272 il énumère les biens qui composeront l'actif de la communauté.

Art. 1272. La communauté se compose activement:

1. De tout le mobilier que les époux possèdent le jour de la célébration du mariage, et aussi de tout le mobilier qu'ils acquièrent, ou qui leur échoit pendant le mariage, à titre de succession ou de donation, si le donateur ou testateur n'a exprimé le contraire;

2. De tous les fruits, revenus, intérêts et arrérages, de quelque nature qu'ils soient, échus ou perçus pendant le mariage, provenant des biens qui appartiennent aux époux lors de la célébration, ou de ceux qui leur sont échus pendant le mariage à quelque titre que ce soit;

3. De tous les immeubles qu'ils acquièrent pendant leur mariage.

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Cette première règle désigne les catégories de biens qui sont ou seront mis à la disposition du ménage. Dès le début de la communauté et par la suite, ces biens seront affectés au passif actuel et futur occasionné par des dépenses antérieures non soldées ou des obligations contractées pour les besoins de la famille. Il est évident qu'il y aura peu de stabilité dans la situation pécuniaire de la communauté. Les biens qui composeront l'actif pourront varier en nombre et en valeur suivant les nécessités du moment. Le même sort est réservé aux obligations que le *Code Civil* appelle le passif de la communauté, dont l'énumération est faite à l'article 1280 C. C.

Art. 1280. La communauté se compose passivement:

1. De toutes les dettes mobilières dont les époux sont grevés au jour de la célébration du mariage, ou dont se trouvent chargées les successions qui leur échoient pendant sa durée, sauf récompense pour celles relatives aux immeubles propres à l'un ou à l'autre des époux;

2. Des dettes, tant en capitaux qu'arrérages ou intérêts, contractées par le mari pendant la communauté, ou par la femme du consentement du mari, sauf récompense dans les cas où elle a lieu;

3. Des arrérages et intérêts seulement des rentes ou dettes passives qui sont personnelles aux deux époux;

4. Des réparations usufructuaires des immeubles qui n'entrent point en communauté;

5. Des aliments des époux, de l'éducation et entretien des enfants et de toute autre charge du mariage.

Les auteurs parfois désignent ces catégories de biens et d'obligations de masse commune ou de fonds commun. Au point de vue théorique ces termes sont peut-être appropriés, mais au point de vue pratique il ne faut pas oublier que cet actif et ce passif sont en continuel mouvement pendant la durée de la communauté. Aucune disposition du code civil n'exige une reddition de compte entre les époux ni l'établissement d'un bilan avant la dissolution de la communauté. Par conséquent, il me semble qu'au sens juridique il est impossible de conclure que la communauté de biens est une série d'additions de biens communs réellement existants, qui s'accumulent cinquante pour cent pour le mari et cinquante pour cent pour la femme à compter du mariage.

Mignault commentant sur la composition de l'actif de la communauté soutient la théorie des trois patrimoines. Voir volume 6, page 148.

> Dès que le mariage est formé, on peut dire qu'il y a au logis trois patrimoines différents: 1er celui du mari; 2e celui de la femme; 3e le patrimoine commun au mari et à la femme, ou patrimoine de la communauté.
>
> La loi ne permet jamais qu'un des trois patrimoines s'enrichisse indirectement aux dépens d'un autre: lorsque cela arrive, le patrimoine enrichi doit indemnité ou récompense au patrimoine appauvri.
>
> Nous avons à rechercher les éléments constitutifs de chacun de ces trois patrimoines.
>
> Ceux qui lui appartiennent en pleine propriété s'appellent *biens de communauté*; les autres, *biens personnels aux époux, propres de communauté,* ou, plus brièvement, *propres*.
>
> La communauté, tant qu'elle dure, possède tous les biens, tant les biens de communauté que les propres. Lors donc qu'un époux prétend, à la dissolution de la communauté, qu'un bien lui est personnel, c'est à lui de le prouver en justifiant de la cause qui le lui a attribué en propre.

Pour accepter cette théorie que les biens communs appartiennent en pleine propriété à la communauté ou qu'elle possède tous les biens, tant les biens de communauté que les propres, il faudrait admettre qu'elle est une personne morale qualifiée pour exercer ces droits.

Sous le droit coutumier cette question ne se posait pas. La coutume de Paris avait établi le principe que le mari était seigneur et maître de la communauté (article 225).

> Art. 225. Le mari est seigneur des meubles et conquêts immeubles par lui faits durant et constant le mariage de lui et de sa femme. En telle manière qu'il peut les vendre, aliéner et hypothéquer et en faire et disposer par donation ou autre disposition faite entre vifs à son plaisir et volonté, sans le consentement de sa dite femme, à personne capable et sans fraude.

Il aurait été inconcevable qu'un être fictif aurait pu supplanter le mari et que ce dernier n'aurait été que le représentant ou serviteur de cette personne morale. Sous le droit français moderne, le seul auteur de quelque réputation qui a soutenu que la communauté était une personne morale a été Duranton. Dans son *Cours de Droit Français,* vol. 14, quatrième édition, p. 102, il dit:

> Si donc le mari n'est pas réellement propriétaire absolu des biens de la communauté pendant le mariage, comme la femme ne l'est pas non plus, il faut bien, de toute nécessité, qu'il y ait un intérêt intermédiaire; or, cet intérêt intermédiaire, c'est la communauté, comme disait la coutume de Paris: "Mari et femme seront uns et *communs* en biens *dès le jour des épousailles* et de la bénédiction nuptiale"; . . .

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> Oui, il y a entre le mari et la femme un être *moral,* quoiqu'en dise M. Toullier: cet être moral a des intérêts séparés de chacun de ceux des époux, . . .

Cette théorie que la communauté est une personne morale n'a eu que quelques adeptes, mais de nombreux adversaires; je n'en citerai que deux.

Baudry-Lacantinerie (*op. cit.*), après avoir commenté cette question, termine en disant:

> D'après l'opinion commune, la communauté ne forme pas une personnalité civile, comme la société. Ce n'est qu'un fonds commun, un troisième patrimoine distinct de ceux des époux, mais il y a confusion entre les biens de la communauté et ceux du mari. (Comp. M. Baudry-Lacantinerie, *Contrat de mariage,* N° 249).

Voici maintenant comment Laurent—*Principes de Droit Civil,* vol. 21, p. 229, —réfute la thèse de Duranton:

> . . . Non-seulement le mari ne serait plus seigneur et maître des biens communs, il ne serait même plus propriétaire de ses biens propres, ces biens se confondant avec ceux de la communauté il en résulterait cette étrange conséquence que le mari serait dépouillé de ses propres et qu'il ne les gérerait que comme agent d'une personne morale qui absorberait les droits du mari comme chef et ses droits comme propriétaire.
>
> Pour admettre une fiction aussi monstrueuse, il faudrait des textes biens formels. D'abord, ce serait une grave dérogation au droit ancien et on ne pourrait l'admettre que si le législateur la consacrait expressément. Or, ni les travaux préparatoires ni le texte ne marquent l'intention d'innover; les auteurs du code se sont bornés, en cette matière, à consacrer la tradition. . . .

D'ailleurs, cette thèse que la communauté est une personnalité civile n'a jamais été préconisée ni soutenue ici. Faribault, dans son *Traité de Droit Civil du Québec,* vol. 10, p. 69, s'exprime ainsi à ce sujet:

> Une société ordinaire est une personne morale qui peut être poursuivie sous sa raison sociale et ses biens sont le gage du créancier qui a obtenu jugement contre elle. La communauté de biens, au contraire, n'a aucune personnalité civile.

Devant ces opinions des juristes, il faut bien arriver à la conclusion que la communauté n'est pas un être fictif créé par la loi, avec pouvoir d'exercer les droits de possession, d'acquisition, d'aliénation, d'obligation, de stipulation. En d'autres termes, la communauté n'est pas une personne morale ayant les attributs des personnalités civiles. Malgré tout le respect et l'admiration que j'ai pour Mignault, je ne puis accepter, au point de vue juridique, la théorie que

tous les biens communs appartiennent à la communauté en pleine propriété et qu'elle possède tant les biens de communauté que les propres jusqu'à la dissolution d'icelle.

Avant de passer à l'étude de l'administration de la communauté et de l'effet des actes des époux relativement à la société conjugale, je crois utile de référer à la disposition de la loi cencernant la puissance maritale. Quoiqu'il soit permis de faire toutes sortes de conventions matrimoniales, la loi fait certaines exceptions. Les règles de la communauté légale de biens sont des conventions que les époux sont présumés avoir adoptées en se mariant sans contrat. Ces règles doivent s'interpréter en tenant compte des dispositions de l'article 1259 C.C.

Art. 1259. Ainsi les époux ne peuvent déroger ni aux droits résultant de la puissance maritale sur la personne de la femme et des enfants, ou appartenant au mari comme chef de l'association conjugale, ni aux droits conférés aux époux par le titre *De la Puissance Paternelle*, . . .

Le principe de la puissance maritale étant ainsi reconnu, les règles qui régissent la communauté légale de biens découlent de ce principe. Cela devient évident lorsqu'on considère l'article 1292 du *Code Civil* relatif à l'administration de la communauté et aux pouvoirs extraordinaires du mari. Le mari exerce la puissance maritale; la femme lui doit obéissance (art. 174 C.C.). Pothier enseigne que la société de biens est une suite et image de la société des personnes: chef de l'un, le mari doit être chef de l'autre. Toutefois, rien dans la loi n'oblige les futurs époux à adopter le régime de la communauté de biens. Ils peuvent faire entre eux toutes sortes de conventions matrimoniales qui n'enfreignent pas les dispositions de la loi, mais en l'absence de telles conventions ils sont censés avoir voulu vivre en communauté de biens. Dans ce cas, la coutume de Paris dit à l'article 225 que le mari est seigneur des meubles et conquêts immeubles de la communauté. Il est vrai qu'après la révolution française cette formule a été changée, mais le droit coutumier, avec quelques modifications, a été continué. Le mari seul adminisre les biens de la communauté.

Le *Code Civil* du Québec à l'article 1292 dit:

1292. Le mari administre seul les biens de la communauté. Il peut les vendre, aliéner et hypothéquer sans le concours de sa femme.

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Si l'on peut dire que la communauté conjugale est une espèce de société tout à fait différente des sociétés ordinaires, l'on peut ajouter que l'administrateur des biens de cette communauté est muni de pouvoirs et de droits exorbitants de ceux des administrateurs des sociétés ordinaires. L'administrateur dans le cas qui nous intéresse possède non seulement des droits de jouissance et d'administration mais aussi des droits généraux de disposition. Les auteurs du *Code Civil* dans leur rapport disent que ce premier alinéa de l'article 1292, tiré du *Code Napoléon,* est en tout point conforme aux coutumes de Paris et d'Orléans et à l'ancienne jurisprudence des pays de coutumes. Avant l'amendement de 1931, le deuxième alinéa se lisait:

> Il peut même seul en disposer par donation ou autre disposition entrevifs, pourvu que ce soit en faveur de personne capable et sans fraude.

Aujourd'hui, cet alinéa se lit:

> Il ne peut, sans ce concours, disposer entrevifs à titre gratuit des immeubles de la communauté, ni de l'universalité ou d'une quotité du mobilier si ce n'est pour l'établissement des enfants communs. Il peut disposer des effets mobiliers à titre gratuit et particulier pourvu qu'il ne s'en réserve pas l'usufruit et que ce soit sans fraude.

Cette disposition est une copie de l'article 1422 du *Code Napoléon.* C'est cette modification de l'ancien droit qui a fait dire à certains auteurs modernes que le mari n'est plus seul seigneur des biens de la communauté, puisqu'il ne peut plus en disposer entre vifs à titre gratuit.

Je ne crois pas que cette disposition qui exige le consentement de la femme pour permettre au mari de faire donation de certains biens de la communauté, sauf pour l'établissement des enfants communs, ait pour effet de lui enlever le droit de disposition qu'il a en vertu du premier alinéa de l'article, mais tout au plus de donner à l'épouse une certaine protection des droits éventuels qu'elle pourrait avoir dans ces biens. Si l'on compare les règles qui régissent la communauté de biens et la définition de la propriété à l'article 406 C.C., il devient évident que le mari a tous les droits du propriétaire.

> Art. 406. La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou les règlements.

En d'autres termes, c'est le droit de jouir et de disposer des choses dans les limites de la loi, ce qui implique que ce droit peut être l'objet de certaines restrictions, limitations ou contrôles sans cesser d'être la propriété. Le fait que le législateur soumet parfois la propriété à ces modifications ne peut être interprété comme mettant fin au droit du propriétaire de jouir et de disposer de sa chose.

Il n'y a pas doute que l'article 1292 C.C. confère au mari le droit de faire les actes qui caractérisent essentiellement la propriété, à savoir les actes d'administration et de disposition. L'acte de disposition est l'acte final du propriétaire qui se dépossède de son bien ou de sa chose en le vendant ou en l'aliénant. Il a un droit réel dans la propriété: celui de l'hypothéquer, droit inhérent à la propriété.

Je suis d'opinion que la prohibition de la loi de donner les immeubles et parfois les meubles sans le concours de la femme ne peut être interprété comme affectant radicalement le droit de disposition conféré par la propriété. S'il fallait conclure que les actes de disposition nécessitant le concours de tierces personnes avaient pour effet de priver le propriétaire de sa propriété, il deviendrait impossible d'interpréter juridiquement les dispositions de l'article 1422 du *Code Civil*. Cet article est relatif à la convention matrimoniale de séparation de biens et indique l'effet de cette convention sur les droits de la femme quant à ses biens. Je cite:

> Art. 1422. Lorsque les époux ont stipulé, par leur contrat de mariage qu'ils seront séparés de biens, la femme conserve l'entière administration de ses biens meubles et immeubles, la libre jouissance de ses revenus et le droit d'aliéner, sans autorisation, ses biens meubles.
>
> Elle ne peut sans autorisation aliéner ses immeubles ni accepter une donation immobilière.

Dès la première phrase, il est évident que la femme séparée de biens est propriétaire de ses biens, puisque la loi lui donne l'administration de *ses* biens. Elle est propriétaire mais elle ne peut pas aliéner ses immeubles, même à titre onéreux, ni accepter une donation immobilière sans autorisation de son mari ou, dans certaines circonstances, de la justice. Qui voudra prétendre que la femme séparée de biens perd ses droits de propriétaire dans ses immeubles du fait que la loi l'oblige à obtenir l'autorisation de son mari pour en disposer à titre onéreux? Non, cette restriction

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n'a pas l'effet d'enlever à la femme son droit de propriété. Lorsque la loi dit que la femme séparée de biens conserve l'entière administration de ses biens et que le mari administrera seul les biens de la communauté, elle n'entend pas dire qu'ils administreront des biens appartenant à d'autres personnes.

Avant de continuer cette étude je crois utile de citer les remarques de Pothier, *Traité de Droit Civil* (1781), vol. 3, p. 497, relatives à la nature de la communauté et les droits, pouvoirs et obligations des conjoints quant aux biens de communauté.

> 3. Cette communauté entre conjoints par mariage est exorbitante des sociétés ordinaires. Dans celles-ci, chaque associé a un droit égal; au contraire, dans la communauté entre conjoints, la puissance que le mari a sur la personne et les biens de sa femme, le rend chef de cette communauté, et lui donne, en cette qualité, le droit de disposer à son gré, à tel titre que bon lui semble, même de donation entre vifs, de toutes les choses qui la composent, tant pour la part de la femme que pour la sienne, sans le consentement de sa femme, laquelle, de son côté, n'a pas droit de disposer de rien. C'est pour cette raison que le mari, pendant que la communauté dure, est réputé en quelque façon comme le seul seigneur et maître absolu des biens dont elle est composée, et que le droit qu'y a la femme n'est regardé, pendant que la communauté dure, que comme un droit informe, qui se réduit au droit de partager un jour les biens qui se trouveront la composer lors de sa dissolution. C'est ce qui fait dire à Dumoulin, que cette communauté était plutôt *in habitu quàm in actu, non est proprie socia, sed speratur fore.*

Les auteurs du *Code Civil* ont suivi la règle que pour déterminer les effets du mariage sur les biens des époux il fallait considérer les obligations, droits et devoirs respectifs des époux qui naissent du mariage. C'est pour cette raison qu'ils ont incorporé la disposition de l'article 1259 C.C. relativement à la puissance maritale et paternelle.

Un autre jurisconsulte français, Claude de Ferrière, *Compilation de tous les commentateurs anciens et modernes sur la Coutume de Paris,* Tome III, Titre X, De la communauté de biens, (1714), p. 210, commente sur les droits des conjoints quant aux biens de la communauté. Il dit:

> La coutume en cet article rend le mari maître absolu de tous les biens de la communauté, meubles ou immeubles, pour en pouvoir disposer à sa volonté, sans le consentement de sa femme.
>
> Ce qui est contraire à la nature de la société, qui ne permet pas, que l'un des associés puisse disposer solidairement et pour le tout, des biens d'icelle, sans le consentement de ses associés.

La raison est que pendant le mariage la femme n'a aucun droit dans les biens de la communauté qu'après la dissolution d'icelle, par l'acceptation qu'elle en fait; mais tant qu'elle dure elle n'a qu'un droit virtuel, habituel et potestatif, et le mari par le travail et l'industrie duquel les biens sont acquis, en est le maître, comme si la femme n'était point commune avec lui.

En 1772, au Tome VII de ses œuvres le Chancelier D'Aguesseau, l'un des plus grande juristes français, expose les motifs qui justifient l'opinion que la femme condamnée à la mort civile perdait tous ses droits dans la communauté vu que la mort civile en France impliquait la confiscation des biens. Dans son rapport au Parlement de Paris il discute la question de droit de propriété relativement aux biens de la communauté. Il s'est demandé si au moment ou avant la dissolution de la communauté la femme était propriétaire par indivis de cinquante pour cent de ce qu'on appelle les biens de la communauté, ou si elle n'était que propriétaire éventuel de ses biens jusqu'au moment de son acceptation de la communauté. A la page 577 il motive son opinion que la femme n'y avait évidement aucun droit véritable. Je cite ce qui me semble pertinent au présent litige:

Certainement, à prendre les choses à la rigueur, la femme n'a encore aucune propriété dans les biens communs au jour de la condamnation qui est prononcée contre elle; il est vrai qu'elle aurait pu avoir un droit réel sur ces biens après la dissolution du mariage; mais elle ne l'a pas encore quand elle est condamnée: on ne peut donc la réputer propriétaire de la moitié de la communauté, que par une espèce de fiction, qui prévient l'ordre des temps, qui suppose ce qui n'est pas encore, et ce qui ne sera peut-être jamais, comme s'il était déjà.

Ce droit de prendre la moitié de la communauté dépend d'un fait incertain, d'une option que la femme peut faire avec une liberté absolue, non-seulement selon son intérêt, mais encore selon son caprice; qui peut savoir ce qu'elle aurait fait, si elle avait été en état d'accepter ou de renoncer?

Aussitôt que la condamnation est prononcée, elle est réputée morte civilement, ne pouvant plus ni être saisie elle-même d'aucun droit, ni saisir ses héritiers; ainsi comment peut-on feindre que le droit de prendre la moitié de la communauté passe au fisc, puisque ce droit n'a jamais été réalisé? Il n'a fait aucune impression sur la tête de la femme, elle n'a eu qu'une espérance certaine, à la vérité, en elle-même, mais qui n'a jamais été accomplie. La puissance n'a pas été réduite en acte, le fisc ne peut prendre les choses que dans l'état où elles sont; or quel est cet état, si ce n'est un état de propriété certaine dans la personne du mari, un état d'espérance douteuse, casuelle, dépendante de plusieurs événements dans la personne de la femme? il est juste, dans ce parallelle, que le droit du mari l'emporte sur l'espérance de la femme, et qu'ainsi le fisc n'ait rien dans la communauté, parce qu'à la rigueur la femme n'y avait encore rien.

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La doctrine préconisée par ces juristes d'autrefois, dans leurs commentaires sur la communauté de biens sous la Coutume de Paris, est, à mon avis, encore applicable aux règles du *Code Civil* qui régissent la communauté légale de biens. Les auteurs du *Code Civil* n'ont pas innové, mais ils ont codifié, pour les perpétuer, les lois en vigueur dans le Bas-Canada en cette matière. Avant l'adoption du *Code Napoléon,* le vieil adage de Dumoulin *"non est proprie socia, sed speratur fore"* (la femme n'est pas l'associée du mari, elle n'a que l'espérance de l'être) n'a jamais été contesté avec succès. Il est vrai que certains auteurs ont prétendu que Dumoulin n'avait pas dit qu'il n'y avait pas de communauté mais seulement que la femme n'avait pas les droits d'une véritable associée, et que Pothier avait dit que le mari était réputé en quelque façon comme seul seigneur et maître absolu des biens. Je ne crois pas que les opinions de ces auteurs soient acceptables, vu le texte même de l'article 225 de la Coutume de Paris et l'ensemble des commentaires de Pothier.

Même après l'adoption du *Code Napoléon,* des auteurs modernes, notamment Toullier et Championnière et Rigaud, ont continué à préconiser la doctrine que le mari est le seigneur et maître des biens communs et que ce n'est qu'à la dissolution que la femme acquerra des droits.

Toullier, *Le Droit civil français* (1826), vol. 12, p. 125:

> La communauté proprement dite, c'est-à-dire la co-propriété actuelle des biens communs, ne s'ouvre donc réellement qu'au moment où finit la société conjugale, *saluto matrimonio.* Avant cette époque, la femme n'est pas commune en biens ou associée; elle n'a que l'espérance de le devenir.

Championnière et Rigaud, *Traité des droits d'enregistrement,* vol. 4, No 2835, p. 6:

> 2835. . . . Durant le mariage, le mari seul est propriétaire de tout ce que la loi qualifie biens de communauté, dans la prévision d'une communauté future. La femme n'est pas et ne sera jamais l'associée de son mari; cependant, par une fiction rétroagissante, elle l'aura été, et ses droits seront établis en conséquence. . . .

A ce stage, je dois dire que la plupart des commentateurs du *Code Napoléon* ne partagent pas les opinions des auteurs que je viens de citer. Ils préconisent la théorie que les époux sont copropriétaires des biens de la communauté pendant sa durée. Je crois qu'il serait imprudent d'adopter leur point de vue avant d'avoir examiné les raisons qui motivent leurs

prétentions, ce que je me propose de faire après avoir terminé l'étude des dispositions du *Code Civil* qui me semblent pertinentes au présent litige.

Après avoir établi les règles relatives à l'administration et à la disposition des biens de la communauté, le *Code Civil* procède à déterminer les effets des actes des époux quant aux biens communs.

Art. 1296. Les actes faits par la femme sans le consentement du mari, même avec l'autorisation de la justice, n'engagent les biens de la communauté que jusqu'à concurrence de ce qu'elle en profite, . . .

Même si dans certaines circonstances la justice peut autoriser la femme commune en biens à poser certains actes, ces actes n'engagent les biens de la communauté que jusqu'à concurrence de ce que la communauté en profite. L'autorisation, le consentement ou le concours du mari est essentiel pour que les actes de la femme engagent la communauté. L'article *supra* confirme le paragraphe 2 de l'article 1280 C.C. à l'effet que le passif de la communauté se compose des dettes contractées par le mari pendant la communauté et non de celles contractées par la femme sans le consentement du mari.

Art. 1297. La femme ne peut s'obliger ni engager les biens de la communauté, même pour tirer son mari de prison, ou pour l'établissement de leurs enfants communs . . .

Art. 1294. Les condamnations pécuniaires encourues par le mari pour crime ou délit, peuvent se poursuivre sur les biens de la communauté. Celles encourues par la femme ne peuvent s'exécuter que sur ses biens et après la dissolution de la communauté.

Comment expliquer ces dispositions de la loi si la théorie de la copropriété actuelle des époux était réellement un fait juridique? La loi permettrait au mari de solder ses condamnations pécuniaires pour délit à même les biens de sa femme, mais refuserait à celle-ci le droit d'acquitter ses propres condamnations pécuniaires pour les mêmes faits avec les biens de la communauté qui lui appartiendraient pour moitié. De plus, il me semble qu'il serait impossible de concilier cette théorie avec le texte des articles 1980 et 1981 C.C.

Art. 1980. Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers, présents et à venir, . . .

Art. 1981. Les biens du débiteur sont le gage commun de ses créanciers, . . .

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Le mari étant le seul qui puisse engager les biens communs, il faut nécessairement conclure que les biens de la communauté sont le gage commun des créanciers et que les seules dettes de la femme pouvant affecter les biens communs seraient celles contractées avec le consentement du mari. Dans ce cas, elle n'agirait que comme mandataire du mari. Alors les biens du mari deviennent le gage des créanciers. La loi dit que les dettes contractées par la femme commune en biens, avec le consentement du mari, entrent dans le passif de la communauté. C'est donc le consentement du mari qui a l'effet d'engager les biens communs comme siens et d'en faire le gage des créanciers. En définitive, les règles régissant la communauté de biens décrètent que les obligations contractées par la femme seule ne peuvent s'exécuter que sur les biens qu'elle aura après la dissolution de la communauté. Ces remarques, je crois, suffisent à démontrer que pendant l'existence de la communauté la femme n'a aucun des droits qui caractérisent le propriétaire. Comme il est généralement reconnu que la communauté n'est pas une personne civile capable de posséder et que la femme, de par les règles du *Code Civil,* est dessaisie de sa part des biens qui entrent dans la communauté, il faut conclure que le mari, juridiquement, est propriétaire des biens de la communauté pendant sa durée.

Lorsque la loi dit que la communauté légale de biens commence du jour de la célébration du mariage, elle ne fait que fixer le moment de l'entrée en vigueur des règles qui régissent la communauté de biens entre les époux et indiquer qu'ils ne peuvent plus modifier ou changer les conventions matrimoniales édictées par la loi. Les dispositions que nous avons examinées jusqu'ici concernent les droits, pouvoirs, devoirs et obligations des époux, pendant l'existence de la communauté, relativement aux biens qui en composent l'actif et les obligations et dettes qui en composent le passif.

Les règles qui suivent traitent d'abord de la dissolution de la communauté. Elle se dissout par la mort naturelle, la séparation de corps, la séparation de biens et, dans certains

cas, par l'absence de l'un des époux. Sauf dans le cas de mort naturelle, la dissolution provient, entre autres de la séparation de biens poursuivie par la femme et prononcée par la justice. Il s'ensuit que la femme dont le mari est décédé ou qui a obtenu une séparation judiciaire a le droit d'accepter ou de répudier la communauté.

> Art. 1338. Après la dissolution de la communauté, la femme ou ses héritiers et représentants légaux, ont la faculté de l'accepter ou d'y renoncer; toute convention contraire est nulle.

Aux articles 1342 et 1344 il est décrété que la femme survivante a un délai de trois mois pour faire inventaire des biens de la communauté et un délai de quarante jours pour délibérer avant d'exercer sa faculté d'accepter la communauté de biens ou d'y renoncer. Au cas de renonciation de la femme ou de ses héritiers, les biens de la communauté continuent à être la propriété du mari ou de ses héritiers (art. 1379). Dans le cas d'acceptation de la communauté par la femme, l'article 1354 du *Code Civil* dit:

> 1354. Après l'acceptation de la communauté par la femme ou ses héritiers, l'actif se partage et le passif est supporté en la manière ci-après déterminée.

C'est seulement après la dissolution et l'acceptation de la communauté par la femme ou ses héritiers, que, pour la première fois, la loi déclare que la femme ou ses héritiers ont des droits réels et actuels dans l'actif de la communauté et qu'elle les oblige à en supporter le passif. L'acte juridique d'acceptation de la communauté par la femme ou ses héritiers a pour effet de dessaisir le mari de son droit de propriété dans ces biens et l'oblige au partage de l'actif et le décharge de l'obligation d'en supporter seul le passif. Il faudra donc recourir aux dispositions du code relatives, à l'actif et au passif de la communauté pour déterminer ce qui constituera le patrimoine à partager. A l'article 1355 on voit les mots "la masse des biens communs".

> Art. 1355. Les époux ou leurs héritiers rapportent à la masse des biens communs tout ce dont ils sont débiteurs envers la communauté à titre de récompense ou d'indemnité, . . .

> Art. 1356. Chaque époux ou son héritier rapporte également les sommes qui ont été tirées de la communauté, ou la valeur des biens que l'époux y a pris . . .

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Les articles qui suivent continuent à déterminer comment la masse à être soumise au partage est constituée. L'article 1361 nous amène au partage de cette masse et indique la part d'icelle qui devra être attribuée à chacun des époux.

Art. 1361. Après les prélèvements faits et les dettes payées sur la masse, le surplus se partage par moitié entre les époux ou ceux qui les représentent.

Pendant la durée de la communauté c'est l'inégalité entre les époux qui prévaut; après sa dissolution la loi donne à la femme la faculté de rétablir l'égalité, non quant aux biens ayant pu entrer dans la communauté pendant sa durée mais quant au surplus des biens existants lorsque la communauté aura disparu. Son acceptation de la communauté lui donne la propriété de la moitié de ce surplus.

La femme est tellement peu propriétaire des biens de la communauté avant l'acceptation que, lorsqu'elle lègue sa part des biens de la communauté à ses héritiers, "si ces derniers se divisent, de sorte que l'un ait accepté la communauté à laquelle les autres ont renoncé, celui qui a accepté ne peut prendre dans les biens qui échéent au lot de la femme que la portion qu'il y aurait eue si tous eussent accepté". Le surplus reste au mari (voir art. 1362). Pourtant, le legs qu'elle en fait semble établir la présomption qu'elle aurait elle-même accepté la communauté.

Lorsque le législateur a décrété que, sous le régime de la communauté, le mari aurait sur les biens composant l'actif de la communauté tous les droits qui sont essentiels à la propriété et qu'il serait chargé de toutes les obligations qui résulteraient des dépenses du mariage et du passif de la communauté, il l'établissait chef et maître de la communauté de biens. D'autre part, il donnait à la femme protection et le droit éventuel de partager les biens communs avec le mari si après la dissolution elle décidait d'accepter la communauté. Le mari en adoptant le régime de la communauté légale de biens s'obligeait à partager avec sa femme le surplus de la masse commune, si celle-ci, après la dissolution, exerçait sa faculté d'accepter la communauté. Il devenait donc débiteur sous condition suspensive. Son obligation n'avait d'effet que si sa femme optait pour l'acceptation. Cette acceptation était facultative. La décision

dépendait de la seule volonté de la femme et constituait un événement futur et incertain. Voici comment le *Code Civil* définit l'obligation conditionnelle:

Art. 1079. L'obligation est conditionnelle lorsqu'on la fait dépendre d'un événement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive, soit en la résiliant, selon que l'événement arrive ou n'arrive pas.

Dans le cas qui nous intéresse, l'obligation du mari naît au moment de l'acceptation de la femme et le droit de propriété ou de partage des biens communs ne devient réel et exécutoire qu'à cet instant. Je suis d'opinion que c'est la seule interprétation juridique possible des règles qui régissent la communauté légale de biens, puisqu'au cas de répudiation, de renonciation, les biens communs continuent à être confondus avec les biens du mari et constituent son patrimoine.

D'ailleurs, c'est la théorie de la communauté conjugale sous la coutume de Paris, telle que préconisée et soutenue par Dumoulin, Pothier, D'Aguesseau, Toullier et Championnière et Rigaud.

Mignault n'accepte pas cette théorie que le mari pendant le mariage est le seul propriétaire des biens communs et que la femme n'a que l'expectative de devenir un jour commune. Il pose comme principe qu'elle est copropriétaire avec le mari, non sous la condition suspensive de son acceptation mais sous la condition résolutoire de sa renonciation. Sa théorie est celle des commentateurs du *Code Napoléon*. Je me suis souvent demandé comment il pouvait concilier cette opinion avec ses commentaires relatifs à l'administration des biens communs par le mari et de ses droits de jouir et de disposer de ces même biens. Il est vrai que la communauté commence avec le mariage et finit avec lui, mais il est incontestable que les dispositions du *Code Civil* traitant de la dissolution, de l'acceptation, de la renonciation et du partage sont des règles applicables aux biens de la communauté, que les règles régissant la communauté légale de biens ne forment qu'un tout et qu'il faut interpréter les unes par les autres et dans leur ensemble. Je crois devoir citer ici les commentaires du même auteur sur les droits d'administration, de jouissance et de disposition des biens de la communauté du mari.

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Dans son *Droit Civil Canadien,* vol. 6, p. 215, il dit:

> Le pouvoir *d'administrer* est d'ordinaire un pouvoir très restreint: *conserver les biens les faire fructifier,* telle est la mission d'un administrateur ordinaire.
>
> Mais le pouvoir du mari est si étendu qu'on peut l'assimiler au pouvoir du propriétaire. Ce pouvoir est défini par l'article 1292.

Ici, je crois devoir faire remarquer que l'auteur emploie l'expression "assimiler", laquelle se définit par les mots "rendre semblable". Lorsque des pouvoirs sont semblables il est logique de dire qu'ils sont les mêmes; le mari aurait donc les mêmes pouvoirs que le propriétaire. Mais continuons. En commentant l'article 1292 Mignault dit:

> A L'EGARD DES TIERS, *il peut tout.* Ainsi il peut vendre, échanger, aliéner, hypothéquer, donner (ce droit a été modifié en 1931), pourvu que ce soit sans fraude, les biens comme il l'entend, *sans le consentement de la femme et malgré elle*; il transige, il plaide, tant au possessoire qu'au pétitoire; il oblige la communauté, même lorsque ses obligations sont nées d'un délit ou lorsqu'elles ont été contractées dans son intérêt personnel.
>
> A L'EGARD DE LA FEMME, *il peut également tout,* pourvu que ce soit sans fraude. Ainsi il peut aliéner, hypothéquer, donner, plaider, transiger, ruiner la communauté en faisant des dépenses folles ou des libéralités. Il peut tout cela sans contrôle de la part de la femme, sans obligation de lui rendre compte. Elle ne peut pas lui dire: "Il y avait en caisse tel fonds social; qu'est-il devenu?" Le mari répondrait: "J'en ai fait ce que j'ai voulu, je l'ai dissipé, je l'ai donné." Pourvu qu'il ne s'enrichisse point aux dépens de la communauté, le mari l'administre, en principe, *cum libera potestate; maritus potest perdere et dissipare res communes.* La femme ne peut donc obtenir des indemnités à raison des actes émanés de son mari, ou en faire prononcer la nullité, qu'à la condition d'établir qu'il les a faits en violation d'une prohibition de la loi.

Tous ces droits et pouvoirs du mari, relativement aux biens de la communauté, que l'auteur énumère et commente sont régis par des dispositions de la loi civile. Or le *Code Civil* dit que la propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu que l'on n'en fasse pas un usage prohibé par la loi et les règlements. Tous ces droits sur les biens de la communauté sont l'apanage du mari. La femme avant son mariage avait ces mêmes droits sur ces biens, mais en adoptant le régime de la communauté légale de biens elle en a été dépossédée, dessaisie. Lorsqu'elle renonce à la propriété, je le répète, le mari ne

devient pas propriétaire mais demeure propriétaire des biens communs. C'est bien ce que Pothier enseigne (voir *Œuvres de Pothier* par Bugnet, tome 7, p. 300, No 568):

568. *Premier effet.*—L'effet de la renonciation de la femme ou de ses héritiers, est de les exclure des biens de la communauté, desquels en conséquence le mari ou ses héritiers demeurent propriétaires pour le total, *jure non decrescendi.*

Voici maintenant certaines opinions d'un auteur moderne canadien, Maître Léon Faribault. Dans son *Traité de Droit Civil du Québec,* vol. 10, p. 69, après avoir comparé la communauté conjugale avec les sociétés ordinaires, il dit:

La communauté de biens, au contraire, n'a aucune personnalité civile. Elle ne constitue qu'un troisième patrimoine distinct de celui des époux, quoique, durant son existence, il y ait confusion de ses biens avec ceux du mari, de manière à permettre aux créanciers du mari de poursuivre le paiement de leurs créances sur les uns et les autres indifféremment.

Au sujet de l'administration du mari, à la page 164, après avoir dit que le mari pouvait disposer des biens communs à titre onéreux, il continue:

. . . et il ne doit compte de son administration à personne, pas même à son épouse; celle-ci n'est même pas admise à réclamer après que la communauté a été dissoute.

On peut constater combien son administration diffère de celle d'un mandataire ordinaire, dont les pouvoirs sont généralement limités et qui doit toujours rendre compte à la fin de son mandat.

Non seulement le mari peut se passer du consentement de sa femme, mais il peut même agir malgré elle. Il peut faire toutes les transactions qu'il veut. Rien ne l'empêche de ruiner la communauté par des dépenses extravagantes et folles. Toutes les obligations qu'il contracte engagent la communauté, même lorsqu'elles sont nées de son délit ou de son quasi-délit.

D'ailleurs, la jurisprudence des tribunaux de la province de Québec a toujours, soit explicitement ou implicitement, suivi l'ancien droit et reconnu que pendant la durée de la communauté le mari seul était non seulement l'administrateur des biens communs mais encore le seul propriétaire de ces biens. La femme n'y avait qu'un droit éventuel qui ne devenait réel et actuel qu'à l'arrivée d'une condition suspensive. Cette jurisprudence est considérable, mais je crois qu'il suffit de citer quelques exemples pour justifier mes conclusions.

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Dans la cause de *Childs* v. *Libby*[1], il s'agit d'une femme qui avait acheté un immeuble en son nom avec le consentement de son mari. Le mari étant décédé, la femme renonce à la communauté. Les créanciers, qui avaient une réclamation pour balance de prix de vente, poursuivent la femme, alléguant qu'elle était personnellement responsable parce que c'était elle qui avait acheté l'immeuble.

Le juge Tellier, plus tard Sir Mathias Tellier, rendant la décision de la Cour de révision, dit à la page 167:

> Cette dernière (l'épouse) ne pouvait, dans aucun cas, en jouir ni en disposer, soit directement soit indirectement; il n'existait à son profit qu'un droit éventuel qui ne pouvait naître qu'après la dissolution de cette communauté. Il en résulte donc que, tant qu'elle subsistait, le dit immeuble qui en faisait partie était la propriété exclusive du mari, sauf le droit éventuel de la femme qui pouvait ne jamais se réaliser. Et comme nous l'avons déjà dit, ce droit éventuel s'est évanoui par le fait de la renonciation de la défenderesse, qui a laissé le mari propriétaire absolu de cet immeuble.

Dans une autre cause, *Saultry* v. *Ferrel*[2], la Cour de révision a jugé que "La femme commune en biens qui déserte le domicile conjugal où le mari se déclare prêt à la recevoir et à la soutenir, mais à qui il refuse de fournir, ailleurs, les choses nécessaires à la vie, a le droit de poursuivre la séparation de biens."

Le juge Mathieu, qui a rendu le jugement, après avoir dit que, d'après l'avis unanime des auteurs et suivant la jurisprudence, le mari ne peut lui opposer ce fait comme fin de non recevoir à la demande en séparation de biens, continue:

> . . . le devoir de cohabitation concerne la société des personnes, et n'a rien de commun avec la société des biens. Quand il s'agit de la société de biens, on ne peut reprocher à la femme d'avoir manqué à une obligation, car elle n'a pas plus d'obligations que de droits pendant la durée de la communauté. Quitte-t-elle le domicile conjugal, elle manque à ses devoirs de femme mariée; ce qui peut motiver contre elle une demande en séparation de corps, mais elle ne viole pas une obligation de femme commune en biens. Tous les droits appartiennent au mari, et lui seul a des obligations. Voila pourquoi le mari ne peut pas demander la séparation de biens, mais on peut la demander contre lui. . . .

Maintenant je citerai une cause de la Cour d'Appel dans laquelle il est reconnu que les biens communs sont la propriété exclusive du mari. Une femme commune avait,

[1] 1 C.S. 153. [2] 31 C.S. 59.

par son travail, amassé des économies qu'elle avait déposées à la banque en son nom. Le mari poursuivit la banque pour avoir cet argent, qui, alléguait-il, lui appartenait en sa qualité de chef de la communauté et sur lequel il avait un droit de disposition absolu. La Cour d'Appel a maintenu ses prétentions.

Dans la cause de *Bonin v. La Banque d'Épargne de la Cité et du District de Montréal*[1], Sir Mathias Tellier dit:

> Il ne sert de rien de dire que cet argent est le fruit du travail, de l'industrie, et des économies personnelles de la mise-en-cause. Serait-ce le cas, cela ne changerait rien à la chose; car le produit du travail, de l'industrie et des économies personnelles de chacun des époux appartient de droit et nécessairement à la communauté. Ainsi le veut la loi. La loi n'a pas tort, du reste, et il n'y a rien de plus juste, au fond, puisque les époux ont mis en commun tout ce qu'ils possédaient de talent, d'énergie, de force et de capacité d'acquérir.

Dans le cas présent, il s'agit de salaires du mari et de loyers qu'il retire de maisons et appartements et que les parties ont admis être compris dans l'actif de la communauté au sens de l'article 1272 C.C. Je terminerai ces citations de la jurisprudence québecoise par les remarques du juge Duranleau dans la cause de *dame Guérin* v. *Giroux*[1] (p. 324, *in fine*):

> Tant que dure la communauté entre les époux, la femme est sans qualité et sans droit pour attaquer les actes d'aliénation de son mari des biens de la communauté comme faits en fraude de ses droits de commune: le mari est le maître absolu des biens communs; il peut les vendre, les hypothéquer, et même les donner sous certaines restrictions, depuis la modification à notre art. 1292 C.C., adoptée en 1931, et ce n'est qu'après que la communauté a été dissoute et qu'elle a été acceptée par la femme que cette dernière peut attaquer les actes d'aliénation du mari faits en fraude de ses droits. Cette règle n'a jamais été contestée en France, avant le *Code Napoléon*. . . .

Après avoir signalé que l'article 1292 C.C. tel que modifié en 1931 est la reproduction textuelle des articles 1421 et 1422 C.N., il dit (p. 325, *in fine*):

> Or, la grande majorité des commentateurs du *Code Napoléon* s'accordent pour soutenir que le *Code Napoléon* n'a pas fait le mari simple administrateur de biens d'une société, mais qu'il en est le maître, comme sous l'ancien droit, nonobstant les restrictions de l'art. 1422 C.N., . . .

[1] 34 B.R. 322, 331. [1] [1943] C.S. 323.

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Et plus loin:

. . . si la femme accepte la communauté, après sa dissolution, elle devient alors associée réelle de son mari, et ce n'est qu'à partir de ce moment qu'elle a intérêt d'agir parce que le patrimoine commun dont elle prend la moitié est diminué par les libéralités illégales du mari et que l'intérêt est toujours la mesure des actions.

Si j'ai considéré quelque peu longuement les opinions et commentaires des anciens juristes français sur la nature et les dispositions de la communauté légale de biens sous le droit coutumier français, particulièrement sous la coutume de Paris, c'est que les dispositions du *Code Civil* qui régissent la communauté de biens sont basées sur les textes des coutumes. Ces règles n'ont pas, dans tous les cas, été codifiées en termes identiques à celles des coutumes, mais les expressions employées se prêtent à la même interprétation que les textes des coutumes. Cette considération était nécessaire à l'analyse de plusieurs dispositions du *Code Civil* que je devais faire pour motiver les conclusions juridiques essentielles à la solution du présent litige. C'est pour la même raison que j'ai cité des auteurs canadiens et des décisions de nos tribunaux sur le sujet qui nous intéresse.

D'ailleurs, pour comprendre le système juridique du régime de la communauté légale de biens dans la province de Québec, il faut référer aux lois anciennes françaises et aux commentaires des juristes d'autrefois, ainsi qu'aux opinions des auteurs canadiens et aux décisions de nos tribunaux. Autrement, il y aurait danger de confondre ce mode de vie chez nous avec des systèmes de communauté conjugale qui tendent à établir entre les conjoints des rapports d'égalité comparables à ceux qui existent entre associés ordinaires. Ici, c'est l'inégalité de droits, pouvoirs, obligations et intérêts qui existe entre les époux.

Après ces considérations, je me propose de citer des passages des auteurs modernes qui ont commenté le *Code Napoléon* aux dispositions régissant la communauté conjugale. Ces auteurs sont nombreux; dans mes notes, je devrai nécessairement en limiter la nomenclature. Qu'il me suffise de dire que la plupart s'accordent sur les raisons motivant leur affirmation que les biens de la communauté conjugale sont la copropriété du mari et de la femme en vertu des dispositions régissant la communauté qui ont été édictées par le *Code Napoléon*.

Baudry-Lacantinerie, *Traité théorique et pratique de droit civil*, "Du Contrat de mariage", vol. 1, 3e éd., p. 581, dit:

637. Le mari et la femme sont copropriétaires des biens de la communauté. La communauté ou société de biens entre époux n'est représentée que par un fonds commun, destiné à subvenir aux charges du ménage et à s'enrichir des économies momentanément confondues et finalement soumises au principe du partage égal. Ainsi se trouve bien consolidée, semble-t-il, l'idée d'une copropriété basée sur l'égalité, du moins théorique, des droits des deux conjoints.

Si nous analysons ce paragraphe, la raison principale de l'auteur de soutenir la théorie de la copropriété serait le fait que les biens communs qui, momentanément, c'est-à-dire pendant la durée de la communauté, sont confondus . . . *avec ceux du mari* . . ., seront finalement, après la dissolution de la communauté, soumis au principe du partage égal. Le fait de la confusion des biens communs avec les biens du mari ne peut suggérer l'idée d'égalité; c'est donc le fait du partage égal lorsque la communauté aura cessé d'exister qui semble lui indiquer l'idée d'une copropriété basée sur l'égalité théorique des droits des deux époux. Il base sa théorie non sur les règles qui régissent les biens de la communauté pendant sa durée, mais sur les règles du code qui indiquent le sort des biens après la dissolution. A la page 582 il continue:

Toutefois, cette idée se trouve singulièrement atténuée et transformée par l'étendue considérable et presque illimitée des pouvoirs du mari.

Mais le mari et la femme ne sont point, en réalité, des associés égaux. La nature, et la loi après elle, désignent le mari comme chef du ménage. Le mari doit protection à la femme et celle-ci obéissance à son mari. La gestion des intérêts pécuniaires, surtout dans les relations avec les tiers, est confiée au mari. Cela a paru plus conforme à nos habitudes, aux moeurs, aux convenances mêmes. . . .

Voilà pourquoi le mari, chef du ménage, est également le chef de la communauté. Ses pouvoirs sur les biens communs vont être presque sans limites. La communauté, tant qu'elle dure, est pour ainsi dire absorbée dans la personne de l'époux.

Les raisons qui motivent l'opinion de cet auteur que les biens de la communauté sont la copropriété des époux pendant son existence ressemblent étrangement aux motifs qui ont incité des juristes d'autrefois et les tribunaux canadiens à conclure que le mari seul, pendant la durée de la communauté, était propriétaire des biens communs.

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Laurent, commentateur bien connu du *Code Napoléon* dans *"Principes de Droit Civil Français"*, 3e éd., vol. 21, à la page 225, après avoir dit que Dumoulin n'avait pas enseigné qu'il n'y avait pas de communauté et que Pothier n'avait pas répété, avec les coutumes, que le mari était seigneur et maître, mais s'était borné à dire qu'il l'est *en quelque façon,* s'est demandé pourquoi ces restrictions. Il répond à sa question: "C'est que la femme est copropriétaire." Pour supporter cette affirmation, il répète une affirmation de Laurière, auteur d'autrefois:

> Si le mari est seigneur des meubles et des conquêts immeubles, il n'en est pas propriétaire, si ce n'est de la moitié seulement; s'il peut les vendre, aliéner, hypothéquer, ce n'est que parce qu'il en a la libre administration, en qualité de chef de la communauté.

Laurent conclut que ce sont les vrais principes de l'ancien droit: les deux époux sont associés, mais associés inégaux. Il préfère donc l'opinion de Laurière à celle des grands juristes que j'ai cités et dont les enseignements ont été constamment suivis ici. Lorsqu'il réfute avec succès la théorie que la communauté est un être moral ayant les droits des personnes civiles, il emploie des raisonnements qui pourraient tout aussi bien s'appliquer à la femme qui adopte le régime de la communauté de biens. Dans ce cas, les dispositions de la loi dépossèdent celle-ci des mêmes droits, pouvoirs et privilèges que la loi accorde aux personnes civiles. Voici comment il s'exprime:

> La loi dit que le mari administre seul la communauté; il n'y a rien dans nos textes d'où l'on puisse induire que le mari ne serait que l'administrateur d'un corps moral. C'est lui qui aliène les biens avec un pouvoir absolu; il est donc propriétaire et, encore une fois, rien ne marque que les biens communs appartiennent à un être fictif.

Je me demande pourquoi cette règle ne s'appliquerait pas à la femme que la loi a dessaisie de ses droits dans les catégories de biens qui composent l'actif de la communauté. L'auteur pose comme principe que celui qui aliène les biens communs avec un pouvoir absolu est propriétaire de ces biens. Ce principe est d'ailleurs conforme au principe de la propriété. Mais suivons son raisonnement.

> On distingue le patrimoine de la communauté du patrimoine qui reste propre aux époux. La communauté ayant un actif et un passif, on pourrait croire qu'elle forme une personne différente des époux. Mais cette fiction est incompatible avec le pouvoir que la loi reconnaît au mari. Il est

propriétaire de la communauté, il est propriétaire de ses propres biens; est-ce que ces deux patrimoines sont distincts quant au mari, en sorte que les dettes qui grèvent l'un ne grèveraient pas l'autre? Non, les deux patrimoines n'en forment qu'un. . . .

Plus loin:

Les biens du mari et les biens communs ne font qu'un seul et même patrimoine que le mari gère en seigneur et maître.

Il termine son exposé de la doctrine en disant que si son raisonnement n'était pas le seul vrai et conforme à la loi il en résulterait l'étrange conséquence que le mari serait dépouillé de ses propres biens et qu'il ne les gérerait que comme agent d'une personne morale qui absorberait les droits du mari comme chef et ses droits comme propriétaire. Je n'ai aucun doute que les opinions qu'il expose ainsi sont irréconciliables avec la théorie de la copropriété, mais qu'elles motivent par contre la théorie que le mari est seul propriétaire des biens communs.

Un autre auteur, Théophile Huc, est partisan de la copropriété des époux. Voici deux passages de *"Commentaire théorique et pratique du code civil"*, Vol. IX, pp. 26 et 27:

La société résultant de l'établissement de la communauté commence avec la communauté elle-même. A partir de ce moment, la femme est réellement une associée et n'a pas seulement l'espérance de la devenir un jour. Son droit sur la moitié des biens de la communauté s'acquiert et se constitue en même temps que le droit du mari sur l'autre moitié.

Toutefois, il admet que

Durant le mariage, ou du moins tant que dure le régime, le femme est comme n'existant pas. Le mari agit, non comme un associé, mais comme un maître absolu, comme s'il était seul propriétaire. La femme est associée, mais c'est comme si elle ne l'était pas, puisqu'elle ne peut rien faire. Son individualité juridique est comme anéantie, son incapacité dérivant encore du *mundium* du mari est complète; elle ne peut obliger la communauté, ni s'obliger personnellement sans l'autorisation du mari.

Nous avons vu que la communauté conjugale de biens n'est pas une personne morale, qu'elle n'a pas de personnalité civile. Nous savons maintenant que la femme commune est comme n'existant pas et que son individualité juridique est comme anéantie. La femme serait donc aux yeux de la loi incapable de posséder, de jouir et de disposer des biens, et cette incapacité proviendrait de son propre fait juridique et non pas seulement des dispositions de la loi. Elle était libre, alors qu'elle était capable, de choisir

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entre le régime de la communauté légale de biens ou tout autre régime consacré par la loi. Son incapacité est née avec sa décision de se déposséder volontairement de la catégorie de biens qui tombent dans l'actif de la communauté et d'accepter les règles de la communauté légale de biens qui donnent au mari tous les droits du propriétaire sur ces biens. Il est bien difficile de concevoir l'idée de lien de droit entre une personne sans individualité juridique et le fait pratique et juridique de la propriété des choses.

"Le droit de la femme sommeille en quelque sorte tant que dure la communauté et se réveille au moment où elle se dissout", disent Massé et Vergé dans leur *"Droit civil français"*, vol. 4, p. 59. Toutefois, eux aussi soutiennent que la femme est copropriétaire des biens communs. Ils auraient tout aussi bien pu conclure que le droit de propriété de la femme dépendait d'une condition, c'est-à-dire d'un événement futur et incertain, et qu'il était suspendu jusqu'à l'accomplissement de la condition. Ils auraient pu ajouter que si la dissolution de la communauté donnait ouverture à son droit conditionnel, ce n'est que son acceptation de la communauté qui pouvait donner lieu à l'obligation du mari de partager les biens. C'est à ce moment qu'elle devenait propriétaire et créancière de son mari ou de ses héritiers et qu'ils devaient lui remettre la moitié du résidu de l'actif de la communauté de biens.

Mignault enseigne ce qui suit (vol. 5, pp. 442 et 443, para. V.-Des effets de la condition suspensive):

La condition suspensive, *tant qu'elle n'est pas réalisée,* tient en suspens tous les effets du contrat.

L'obligation n'existe point encore, il y a seulement espoir qu'elle existera. Le débiteur conditionnel qui, par erreur, paye avant l'accomplissement de la condition, paye donc ce *qu'il ne doit pas*: aussi a-t-il le droit de répéter *ce qui a été payé.*

La *propriété,* lorsque la convention conditionnelle a pour objet de la transférer, n'est pas encore déplacée: il y a seulement espoir qu'elle le sera.

Je crois que c'est dans l'œuvre de Planiol et Ripert, *Traité pratique de droit civil français*, éd. 1957, que se trouve l'exposé le plus clair et le plus intéressant de la nature de la communauté et de ses effets sur les biens des époux. Je cite (vol. 8, p. 319):

> Dans ce qu'elle a d'essentiel et que l'on doit toujours retrouver à travers la variété de ses applications, la communauté est une union d'intérêt pécuniaire entre les époux et, plus spécialement, la mise en commun des gains réalisés pendant le mariage.

Les codificateurs du *Code Civil* dans leur rapport au corps législatif sur la société disent:

> Il ne s'agit pas ici des associations ou groupements d'intérêts comme ceux qui résultent de la communauté légale ou de la propriété indivise, bien que les jurisconsultes les appellent sociétés.

Bien avant l'auteur cité, nos codificateurs avaient exprimé l'opinion que la communauté était un groupement ou association d'intérêts pécuniaires entre les époux.

Dans le *Code Civil* ce n'est qu'après la dissolution et l'acceptation de la communauté qu'il est question de la masse des biens communs (art. 1355). A la page 321, l'auteur dit:

> C'est en somme par anticipation que l'on parle de la masse commune, tant que la communauté n'a pas été dissoute. Jusque-là, la communauté désigne une catégorie de biens, soumise à un statut spécial.

Durant la communauté, voici comment il désigne la masse (p. 331, *in fine*):

> . . . La communauté est une masse de biens, en perpétuel devenir, mise à la disposition du ménage qui est traditionnellement représenté par le mari; les dettes communes seront, en définitive, à la charge des biens communs. La réalisation d'un profit commun n'apparaît qu'au terme de l'expérience; s'il y a un reliquat actif, celui-ci sera partagé. C'est ce qu'exprimait le vieil adage qui définissait le droit de la femme pendant la durée de la communauté: *non est socia, sed speratur fore.*

En parlant des effets juridiques, il dit (p. 332):

> Quelle que soit l'origine du bien qui devient commun, un double effet juridique se constate: le bien dont il s'agit est désormais *soumis aux règles qui régissent l'administration* de la communité; il peut être *saisi par les créanciers de la communité* (qui se confondent, quant au droit de poursuite, avec les créanciers du mari).

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Quelle est, au juste, la nature du droit dont le bien commun est l'objet? C'est précisément le point où s'affirme l'originalité de la communauté, envisagée comme une catégorie de biens affectée aux intérêts du ménage: *la question de propriété s'absorbe,* en l'occurrence, dans une *question de pouvoirs.* . . .

Maintenant, pendant la durée de la communauté:

Un bien commun ne saurait être *actuellement* considéré comme destiné au partage. Le partage n'aura pas lieu si la femme renonce à la communauté; rien ne permet, en tout cas, de préciser les biens qui figureront un jour dans la masse partageable. Il ne serait donc pas seulement inexact, il serait prématuré de parler de droits indivis sur les biens communs. Par là se vérifie la justesse de l'adage qui disait de la femme: *non est socia, sed speratur fore.*

Et je termine avec quelques phrases qui résument les droits des époux à l'égard de leurs biens.

En l'état actuel des textes, rien n'est apparemment changé en ce qui concerne les biens qui étaient la *propriété du mari.* Celui-ci était et *demeure en possession.* Il avait auparavant et, sauf pour les donations, il *garde le pouvoir d'aliéner.*

Pour la femme, au contraire, le changement est brutal et complet; elle est *dessaisie* des biens dont elle avait la propriété, et elle *perd tout pouvoir de gestion et de disposition.*

De ces remarques, il faut conclure que durant la communauté il est impossible de préciser les biens qui composent la masse des biens en perpétuel devenir et dont le résidu pourra être soumis au partage après la dissolution. Il ne peut être question de droit indivis sur ces biens avant la disparition de la communauté. De plus, le mari demeure propriétaire de ses biens pendant la communauté, tandis que la femme est dessaisie des biens qu'elle verse à la masse et perd son droit d'administration et de disposition de ces biens. Ces droits essentiels à la propriété sont dévolus au mari, sauf le cas de donation, qui, en conséquence, devient propriétaire de ces biens. Toute autre interprétation, je crois, laisserait ces biens dans un vide qui répugne à la raison et au système juridique de la communauté légale de biens du Québec.

Je suis au terme de l'analyse des textes de lois, des différentes doctrines enseignées par les auteurs anciens et modernes français, des auteurs canadiens et des décisions des tribunaux canadiens. Ces textes, opinions et décisions sont d'une importance capitale, il me semble, à la solution de la question de droit qui m'a été soumise et serviront de

base à mes conclusions. Cette analyse n'a rien de nouveau. L'étude faite m'a convaincu que c'est encore le droit coutumier français et en particulier la coutume de Paris qui sont en substance le droit qui a cours dans le Québec relativement à la communauté légale de biens. J'ai donc suivi les règles du *Code Civil* et les enseignements des jurisconsultes français d'autrefois et les auteurs canadiens dans l'interprétation et l'application du système de loi qui a été transplanté ici au début de la colonie et a continué à être en force dans le Bas-Canada et la province de Québec jusqu'à nos jours, sauf certaines modifications qui, dans mon opinion, n'ont pas changé les principes de base de la communauté conjugale.

C'est pour ces raisons que les opinions que j'exprimerai ci-après seront, je crois, conformes aux vrais principes du droit civil de la province de Québec et à la construction juridique constante appliquée au système de loi qui constitue le régime de la communauté légale et aux règles qui déterminent les droits, pouvoirs et obligations des époux relativement aux biens de la communauté.

La communauté conjugale n'est pas une société au sens de la loi. Au point de vue juridique, le mot "communauté", lorsqu'il s'applique aux personnes mariées sans contrat de mariage ou aux époux qui l'ont stipulé dans leur contrat de mariage, désigne leur régime d'association conjugale. L'expression "régime de communauté" est l'ensemble des règles applicables aux biens des époux et aux biens connus sous le nom de "biens de la communauté". C'est donc une association conjugale que la loi établit entre les conjoints quant aux biens devant composer l'actif de la communauté, lesquels sont régis par des dispositions spéciales du *Code Civil*. Dans son essence, la communauté de biens est une union d'intérêts pécuniaires entre époux et la mise en commun de certains biens spécifiés, dans le but de subvenir aux charges du ménage et de rencontrer les obligations qui naissent du mariage.

Le fait que la loi permet de faire toutes sortes de conventions matrimoniales par contrat de mariage (art. 1257 C.C.) indique qu'il y a plus d'un régime d'association conjugale quant aux biens. Le choix du régime appartient aux futurs époux. Le défaut de contrat de mariage ou de

stipulation contraire implique que les époux ont adopté tacitement le régime de la communauté légale de biens établi par la loi. C'est donc volontairement qu'ils y sont soumis, puisqu'il dépendait d'eux d'en décider autrement. On ne peut dire que la loi leur a imposé la communauté conjugale.

En se soumettant ainsi à ce régime, ils en acceptent les règles et les effets du mariage sur leurs biens. Ces règles qui régissent la communauté légale de biens sont une série de dispositions légales qui, après avoir régi les intérêts pécuniaires des époux pendant l'existence de la communauté, permettent de déterminer, après la dissolution d'icelle et l'exercice de l'opinion de la femme ou de ses héritiers, comment se compose le patrimoine et comment il sera partagé.

Dès le début, la loi décrète que les époux ne peuvent déroger aux droits qui résultent de la puissance maritale et paternelle et qui appartiennent au mari. Ce principe n'est pas contestable et n'a jamais été contesté, même par les adhérents de la copropriété des époux ou de l'indivision entre eux. Pour motiver le droit du mari d'administrer seul les biens communs, ils soutiennent que c'est en sa qualité de chef de la communauté conjugale qu'il en a la libre administration. Au point de vue juridique, je suis d'opinion que le mot chef veut dire maître.

Ces principes posés, le *Code Civil* procède à déterminer les biens qui proviennent du patrimoine personnel des époux qui composeront l'actif de la communauté. A ce sujet notre droit civil est conforme au droit coutumier, comme d'ailleurs il suit le droit coutumier dans l'énumération des charges qui composeront le passif de la communauté.

Pendant l'existence de la communauté, ces biens actuels ou virtuels seront en continuel mouvement. Ils augmenteront ou diminueront suivant les besoins du ménage et les variations dans les charges du passif. Le mari aura la maîtrise des biens et sera responsable des obligations résultant des charges de la communauté. Par conséquent, il me semble qu'au sens juridique il est impossible de conclure que la communauté de biens est une série d'additions de biens communs réellement existants, qui s'accumulent

cinquante pour cent pour le mari et cinquante pour cent pour la femme à compter du mariage jusqu'à la dissolution de la communauté.

En vertu des pouvoirs conférés au mari par la loi, lui seul aura le droit d'administrer, vendre, aliéner et hypothéquer les biens de la communauté et ce sans le consentement ou concours de sa femme et même contre le gré de cette dernière. Son droit d'administration, de jouissance et de disposition sera absolu dans les limites de la loi et des règlements. Il peut s'obliger et obliger la communauté envers les tiers et même lorsque ses obligations ont été contractées dans son intérêt personnel ou proviennent de ses délits ou quasi-délits. Il peut transiger, plaider et même ruiner la communauté par des transactions malheureuses ou des dépenses imprudentes et ce sans avoir de compte à rendre à sa femme. Toutefois, il ne lui est pas permis d'en faire un usage prohibé par la loi ou en fraude des droits de la femme. En somme, quant aux tiers et à sa femme, il peut tout faire, pourvu que ce soit dans le cadre des lois.

Ces droits qui résultent des dispositions du *Code Civil* me confirment dans l'opinion que le mari commun en biens continue à être propriétaire des biens qu'il contribue à l'actif de la communauté, tout comme il en était propriétaire auparavant. Ils demeurent en sa possession et il a le droit de les aliéner, sauf pour certaines donations. Au contraire, la femme est dessaisie des biens dont elle avait la propriété et elle perd ses droits d'administration et de disposition. Ces biens tombent en la possession du mari avec droit d'administration et de disposition. Ce dernier possède, administre, jouit et dispose de ces biens aux mêmes titres que ses propres biens.

Il s'ensuit donc que la mari de par les textes du *Code Civil* a tous les droits qui appartiennent à un propriétaire, puisque la propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu que les prohibitions de la loi soient respectées.

Il est vrai que le législateur en 1931 a édicté une restriction au droit de disposition du mari par le nouvel alinéa 2 de l'article 1292, qui exige le concours de la femme pour disposer par donation des immeubles de la communauté dans certains cas. Je suis d'opinion que cette modification

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doit être interprétée comme une des prohibitions prévues ou même imprévues par les codificateurs lorsqu'ils ont ajouté à la fin de la définition de la propriété (art. 406 C.C.) les mots "pourvu qu'on n'en fasse pas un usage prohibé par les lois et les règlements". Je ne puis croire que les prohibitions quant à l'usage des choses aient l'effet d'enlever au propriétaire son droit de propriété.

Autrement, comment faudrait-il interpréter le fait juridique la femme séparée de biens, propriétaire de ses immeubles, ne peut les aliéner sans autorisation? Faudrait-il conclure qu'elle n'en est pas propriétaire? Je le crois. Mais cette conclusion ne découlerait pas d'une construction juridique du texte de l'article 406 C.C.

Avant de définir la propriété, le droit civil pose comme principe que les biens appartiennent ou à l'État ou aux municipalités et autres corporations ou enfin aux particuliers (art. 399). Dans le cas des biens de communauté, ils n'appartiennent ni à l'État ni à une corporation; ils doivent appartenir à une personne à qui la loi reconnaît des droits d'administration, de jouissance et de disposition de ces biens. La femme ayant été dépossédée de sa part des biens de la communauté et ayant perdu ses droits d'administration, de jouissance et de disposition ne peut en vertu des dispositions du *Code Civil* être reconnue comme copropriétaire des biens communs. D'autre part, le mari, de par la loi, étant en possession de ces biens pendant toute la durée de la communauté, d'une manière paisible, publique et non équivoque, avec droit de jouissance et de disposition, peut juridiquement être reconnu propriétaire de ces biens jusqu'à la dissolution de la communauté et l'exercice de l'option de la femme.

Cela ne veut pas dire que le mari, en adoptant le régime de la communauté de biens, n'a pas d'obligations envers sa femme relativement à ces biens. Il a tacitement accepté l'obligation de partager également avec sa femme la masse des biens communs existants après la dissolution de la communauté, si elle ou ses héritiers acceptent la communauté. Son obligation est donc sous condition suspensive. Il ne deviendra débiteur de l'obligation que si l'événement futur et incertain se réalise, c'est-à-dire si la femme ou ses héritiers acceptent la communauté. Si elle accepte, son

droit éventuel et virtuel, que certains auteurs décrivent comme un droit qui sommeille ou qui a été anéanti pendant la communauté, devient un droit réel de propriété dans la masse à partager si elle exerce son option d'acceptation. Si elle y renonce, le mari demeure seul propriétaire des biens communs.

D'ailleurs les dispositions du *Code Civil* concernant le droit de la femme à la moitié des biens composant la masse n'apparaissent qu'après la dissolution de la communauté et l'exercice par la femme de son option d'acceptation. Jusqu'à ce moment, les textes ne reconnaissent à la femme aucun droit de propriété dans les biens de la communauté. Au contraire, la loi accorde au mari tous les droits et pouvoirs dans ces biens.

Pour toutes ces raisons, je suis d'opinion que pendant la durée de la communauté, le mari est seul propriétaire des biens qui composent l'actif de la communauté et seul responsable des charges qui en constituent le passif.

Le revenu dont il est question dans ce débat est un actif de la communauté au sens de l'article 1272 du *Code Civil* et provient des salaires de l'intimé et de loyers d'immeubles. Ces revenus sont donc les revenus de l'intimé, le mari étant seul propriétaire de l'actif de la communauté. Cette réponse à la question de droit soumise à la Cour me fait conclure que les cotisations de ces revenus comme revenus de l'intimé sont conformes aux dispositions des lois invoquées.

La Cour confirme les cotisations du revenu de l'intimé pour fins d'impôt pour les années d'imposition 1947 à 1954 inclusivement.

L'appel est maintenu avec frais.

Jugement en conséquence.

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Sept. 25, 28, 29, 30, Oct. 1, 2, 5, 6, 7, 8, 9, 12, 13, 14.
Nov. 6

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

MARWELL EQUIPMENT LIMITED and BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED .... PLAINTIFFS;

AND

VANCOUVER TUG BOAT COMPANY LIMITED, OWNERS OF THE TUG *LA DENE* AND THE BARGE *V.T. 5* and GARYLORD MARRON LANE HARWOOD, MASTER OF THE TUG *LA DENE* .... DEFENDANTS.

Shipping—Collision—Liability of defendants—Limitation of liability—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657-659, 662—No "fault and privity" of company to neglect of employee.

In an action for damages resulting from the collision of defendants' tug and barge with a dredge owned by plaintiffs the Court found both defendants liable. Defendant shipowner seeks to limit its liability under sections 657-659 and 662 of the *Canada Shipping Act,* R.S.C. 1952.

Held: That the defendant company cannot be held in "fault and privity" to the neglect of the senior despatcher of the company whose fault in not communicating to the Captain of defendants' tug the position of the dredge was the real cause of the accident, since the despatcher has no interest in defendant company as he is not a shareholder, being an employee, and defendant company is entitled to limit its liability.

ACTION for damages resulting from collision of two ships.

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

D. McK. Brown and *R. M. Hayman* for plaintiffs.

J. I. Bird and *F. Read* for defendant Vancouver Tug Boat Co.

C. C. I. Merritt and *W. O. Forbes* for defendant Garylord Marron Lane Harwood.

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

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SIDNEY SMITH D.J.A. now (November 6, 1959) delivered the following judgment:

The hearing of this case occupied twelve Court days, so I had ample time to consider the evidence during the progress of the trial. There are two main issues involved: (1) liability of defendants' for damage done by their tug and tow; (2) whether the shipowner, if found liable, is entitled to limitation of his liability under Secs. 657-659 and 662 of the *Canada Shipping Act*. After hearing defendants' arguments on liability I gave, on the morning of the thirteenth day, judgment for the plaintiffs on the first issue. I held that there was faulty navigation on the part of the tug, and directed written argument to be filed on the second issue. This has now been done.

The plaintiffs seek damages for the sinking of the dredge *Townsend* and consequent loss. The defendants are the owners and Master of the tug *La Dene* and the defendant company owns the barge *V.T. 5*. The accident occurred on the Fraser River on March 14, 1957, at about 10:00 p.m. Just before that time the tug was bound downstream, having in tow two barges loaded with sawdust. *V.T. 5* was the leading barge. In the wheelhouse of the tug were the Master and a deckhand who was steering. Visibility was good but it was dark. The tug and tow were bound for Duncan Bay in Johnstone Strait.

The dredge had taken up her position in the river on March 12 and during part of that day and the 13th and 14th had been occupied dredging a trial trench in connection with the laying of what became known as the Deas Island Tunnel. According to notices to shipping and to mariners sent out beforehand, the dredge was in a position 1,000 feet downstream from Canada Rice Mills and 1,000 feet from the north shore. At the time of the accident this turned out to be 600 feet. She had a pipe-line stretching across the river to the south shore, so in effect the river was blocked except for this passage of 600 feet towards the north shore. The pipe-line was depositing sand upstream from the Ladner Ferry Landing. At the time in question the dredge had shut down for the day and everything was quite normal. There was, however, a strong ebb tide and

river current which together ran at the rate of approximately 3 to 4 knots. The speed of the tug was 4 knots or so through the water, giving her a speed over the ground of some 7½ knots. The dredge was headed upstream and anchored by her spuds.

Proceeding down the river, the Master of the tug followed the usual course, namely, slightly to starboard of mid-channel. As he entered Gravesend Reach, or shortly thereafter, he saw what he took to be the Ladner Ferry approach lights but these in fact were the lights of the dredge. He was then about 2 miles upstream from the dredge. The tug and barges were carrying the usual navigation lights. This was not questioned. The dredge was carrying forward two red lights. Together with these, however, she was showing quite a number of other lights about her deck, two or three 1,000-watt flood lights and a number of 100-watt deck lights and reflections from inside lights. There was considerable contest as to whether the two red lights were visible. The present rule requires that these lights indicating a vessel not under command should have a white light between them. This practice was not universally followed and it was the custom to show two red lights only. This is quite wrong: No custom can override any rule of the Collision Regulations.

I am satisfied that the two red lights were in their proper position but I am not so sure that they were 6 feet apart, as they should have been under Rule 4 (*c*) of the present regulations. I find, however, that this contributed in no way to the collision; nor do I think that the absence of a white light between the red lights made any difference. It may be that as the tug proceeded downstream, the one or other of the red lights was occasionally blocked by the "A frame" or other part of the superstructure of the dredge; but such would be only momentarily, and I think they could and should have been seen by the Master of the tug at least a mile and a half away. He admits noticing them just before or just after the collision.

I have great difficulty in seeing how, if an intelligent lookout was kept on the tug, her Master failed to make out the existence of the dredge until he was within 400 feet of her. His was the only lookout on board. He gave me the

impression of being an able tug master and one who had all his wits about him despite his 72 years. There was some evidence that he was chatting with his deckhand at the wheel from time to time which is quite understandable, but may have led to inattention. It seems to me the lookout he kept was one that assumed that everything was in order and that there was a clear channel before him, when as a matter of fact the dredge and pipe-line were in his way. It is true that he received no information whatever by way of writing or by word of mouth of the presence of the dredge. Nevertheless on the bridge or in the wheelhouse of a ship a keen lookout should be kept for the unexpected not less than for the expected; all the more so in contracted waters, as here. The lights of the dredge, described by at least one witness as being tantamount in appearance to the lights of a small city should, in my view, have been sufficient to put the Master on the alert.

There was a great deal of evidence given in the case but to my mind it resolves itself into one simple question: Was the Master of the ship keeping a proper and understanding lookout at the appropriate time? He saw the lights of the dredge as he entered Gravesend Reach but failed to appreciate their significance. He thought they were the lights of the Ladner Ferry approach on the Ladner side. This is unacceptable. The lights are different in number and in kind and while the Ladner Ferry lights would be slightly on his port hand, the lights of the dredge would be slightly on his starboard. Moreover the chart shows that the Ladner Ferry approach runs substantially parallel to the channel while the pipe-line, with a light at every 50 feet, runs across the channel. He failed to see the red lights when he should have done so. Furthermore he failed to hear or see Mr. Griffiths, the Master of the tender *Jarl*, when Griffiths went upstream past the Deas Island Buoy on his tender to warn the Master and help with the barges. Griffiths received no response whatever from the tug. I think the Master was not alive to the speed at which he was covering the ground; nor could he have realized, when he first saw the lights of the dredge, that in a quarter of an hour or less he would have reached them.

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Griffiths was an impressive witness and I accept his evidence fully. In particular I agree with him when he testified that the Master should have recognized that there was an obstruction in the channel on first entering Gravesend Reach, that is to say when he was two miles away. Had he done so his duty was to reduce speed and proceed with the utmost caution until the type and extent of the obstruction became manifest. He should have had in mind Rule 29 of the *Collision Regulations*. But as I have said, he proceeded at full speed strangely unconscious of the glaring danger ahead. Much was said about his neglect in not using the radio-telephone and in not watching the radar screen. Certainly he should have sought information from every source available. But had an intelligent lookout been kept, such would not have been necessary. I do not recall that he even used binoculars.

The Master was in a difficult position. He was called from his vacation to do this job. The practice was to move Masters and crew from ship to ship, so that while he had sailed in the *La Dene* before, she was not his permanent command. The Mate he did not know—not even whether he held a certificate. The helmsman (unfortunately now deceased) he had sailed with before. His mind may have been preoccupied or he may have been chatting with the helmsman. However that may be, I must find him negligent in failing to keep a proper lookout and when he saw the lights, in failing to appreciate their significance. Seeing without understanding is of no avail. This failure in my view was the sole cause of the collision.

After having seen the dredge he then did all he could do by going hard-a-starboard. By then it was too late; she was only 400 feet away; his forward barge struck the dredge which sank within half an hour. Something was made in the pleadings of the contention that he did not go to the aid of those on the dredge. In my opinion there is nothing whatever in this. As I have said he had his own difficulties and they were great. The tender *Jarl,* took the dredge crew on board. There was no danger to life. Something was also said about his eyesight and hearing. I saw nothing wrong with either, though as a precautionary measure he was using a hearing-aid for the first time when giving his

evidence. There was a good deal of evidence about the exact position of the dredge. Her exact position in my opinion makes little difference. She was at the time in the main channel under proper authority.

On the question of liability I therefore found both defendants liable.

I turn now to the question of limitation of liability in favour of the shipowner under the *Canada Shipping Act.* I think the principles so far as they may affect the present case are well settled. It is said here that the Notice to Shipping advising of the placing of the dredge should have been conveyed to the tug Master and that this not having been done, the shipowner is not entitled to limit its liability.

The Act allows shipowners to limit their liability when "without their actual fault or privity" their ship causes loss or damage by reason of her improper navigation. The substantial point here then is whether the ship-owning company can establish that it was free of "fault or privity". If this is established the Act protects the shipowner against the legal consequences of negligence of his servants, whether on board, in his office or elsewhere. But should the shipowner be a company (as here) it must be shown that any fault there may be is of somebody who is merely a servant of the company; not of someone who represents the very "heart" of the company itself—for example, that of a managing director or other officer.

Perhaps I may be allowed to quote from my own judgment in the *City of Alberni*[1], I said this:

> Mr. H. A. Stevenson was the directing will and mind, the *alter ego* of the plaintiff company. He is a man of very considerable experience and ability. It must be shown that he personally was without fault and privity, for parties who plead the section must bring themselves within its terms.

This is, of course, drawn from numerous cases and perhaps most clearly from the leading case of *Asiatic Petroleum Company Limited v. Lennard's Carrying Company Limited*[2]. This authority has been referred to in almost all the limitation cases since the decision in the Lords.

[1] [1947] Ex. C.R. 83 at 94.
[2] [1914] 1 K.B. 419; [1915] A.C. 705.

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I may mention in particular the Canadian case of *Robin Hood Mills Ltd. v. Paterson Steamships Ltd.*[1]

I think it is conceded here that the *alter ego* of this company consisted of Mr. Arthur Lindsay, the President, or Mr. James Stewart, the Vice President and General Manager. Mr. Lindsay may be dismissed from consideration. This is one of the "big three" towing companies on the west coast of Canada. It has numerous tugs, scows, and barges in operation. One would not expect the President to attend to the minutiae of a company such as this. I have examined closely the company's papers, orders and other documents and with the evidence before me, I feel bound to say, speaking at large, that this is a well-organized company operated by experienced and capable men.

It seems to me that just as Mr. Stevenson was the pertinent "heart" in the *City of Alberni* case, so I think is Mr. Stewart in the same position here. There was some argument that the system on the whole was not entirely proof against every contingency, and there may be something in this. Few systems are. But I have for consideration the circumstances of the present case and not some other contingency that might or might not arise.

From time to time "Notices to Mariners" were issued from Ottawa directly to the ships and also "Notices to Shipping" issued by the Federal Agent in Victoria. These went to the shipowner. They had the same force and must equally be obeyed. They are both Government directives. Notice to Shipping No. 31 (Ex. 47) advised that:

> The hydraulic dredge "Townsend" will be operating in the *main channel of the Fraser River, B.C.* for approximately two weeks. The dredge will be anchored on the centre line of the Deas Island tunnel project approximately 1,000 feet downstream from the Canada Rice Mills and approximately 600 feet North of the Deas Island Dykes. A floating pipe line will extend from the dredge to Deas Island. Mariners are warned to pass to the North of the dredge and to exercise the necessary caution in this area while these operations are in progress.

The events in the office of the company on March 14 I take from the argument of its counsel. They conform to the evidence:

> Capt. Taylor had received a copy of Notice to Shipping No. 31, either on March 13th or March 14th, 1957, which he had initialled (Exhibit 69), and which he had kept on his desk in the Despatch Office with the intention of conveying it to the tugs.

[1] [1937] 3 D.L.R. 1.

Capt. Taylor and the other Despatchers were reliable, competent and certificated men. They had undergone a training period of six months prior to taking over their duties and had, in fact, performed these duties for several years. Capt. Taylor was the Senior Despatcher who was in charge of the ship movement and had been performing this job for at least eight years.

Mr. Stewart saw and initialled Notice to Shipping No. 31 (Exhibit 47) on the morning of March 14, 1957. He put it in his basket and when he went upstairs at about 3:30 p.m. to the Despatch Office to discuss the day's work with the Duty Despatcher, he took his copy of the Notice with him, with the intention of ascertaining whether the fleet had been informed about the "Townsend".

Mr. Stewart asked Capt. Taylor if he had seen the Notice. Capt. Taylor reported that he was aware of the Notice but that he had not informed the tugs. He assured Mr. Stewart that he would do so on the next broadcast which was to take place in about half an hour.

With the assurance received from Capt. Taylor that he would inform all the tugs, Mr. Stewart left the Despatch Office and had no knowledge that the information had not in fact been conveyed, until after the accident.

It should be observed that when Mr. Stewart had his discussion with Capt. Taylor at 3:30 p.m., on March 14, 1957, neither of them had the "La Dene" particularly in mind, because she was at that time, scheduled to go to Bellingham via the North Arm of the Fraser River with two Universal Box scows. It was not until after the broadcast at 1600 that Capt. Taylor received information to the effect that the scows which were originally to be taken by the "La Dene" were not ready. Accordingly, he got in touch with Island Tug & Barge and received instructions from that Company to take scow "V.T.5", which was then under charter to Island Tug and scow "I.T. 41", to Duncan Bay, B.C.

Capt. Taylor thereupon called Capt. Harwood by land telephone and gave him his new orders, but on that occasion, he failed to inform Capt. Harwood that the "Townsend" was operating off Deas Island.

The fault lay with Capt. Taylor, the senior despatcher of the company, and a man of very considerable experience both ashore and afloat. But he has no interest in the company. He is not a shareholder; he is an employee, albeit an important one.

In view of the principles I have referred to above, it seems impossible for me to say that the company must be held in "fault and privity" to his neglect and thereby barred from the indulgence provided by the relevant sections of the *Canada Shipping Act*. I was specially referred to the case of *The Norman*[1], but I can find nothing therein that trenches upon the foregoing principles. I am fortified in this respect by the judgment of Mr. Justice Maclean

[1] [1958] 1 Ll. L. R. 141; [1959] 1 Ll. L. R. 1.

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in the Supreme Court where in a case similar to the present one he reached the same conclusion—*North Western Dredging Coy. Ltd. v. Pioneer Towing Coy. Ltd. et al.*[1]. I hold therefore that the company is entitled to limit its liability.

One minor point was left open. This concerns the expense of removing the dredge from the river bed and whether such expenditure comes within the limitation provisions. Counsel may provide me with written argument on the question. They might also deal with the matter of costs.

Judgment accordingly.

1959
Apr. 15
Nov. 13

BETWEEN:

UTAH CO. OF THE AMERICAS ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Corporation engaged in mining and construction—Whether more than one business—Right to deduct losses of one operation from profits of other—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 27(1)(e).

The appellant company's 1955 taxable income was $43,164 of which $2,005 was from its mining operations and $41,158 from construction operations. In 1956 it had a loss of $48,854 when construction operations showed a profit of $227,874 and mining operations a loss of $276,728. Because of the 1956 loss the Minister re-assessed the appellant for 1955 and allowed a deduction of $2,005 as "application of 1956 loss against mining profits". In an appeal from the re-assessment the appellant submitted that its business in 1955 and 1956 was the same and constituted but one business, consisting of a number of operations and that on a proper interpretation of s. 27(1)(*e*) of *The Income Tax Act,* the 1956 loss should have been applied against the whole of the 1955 profit, so that no tax would be payable for that year and the balance of the 1956 loss could be carried forward to subsequent years.

Held: That s. 3 of *The Income Tax Act* clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business.

2. That there was ample evidence to establish that the appellant was in fact carrying on two separate businesses in 1955 and 1956, namely mining and construction.

[1] (1959) 28 W.W.R. 140.

3. That under s. 27(1)(*e*) of the Act the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained.
4. That as here the losses were sustained in one business of the appellant, namely mining, the 1956 losses could be carried back and deducted only to the extent of the appellant's 1955 profit from the same business.

APPEAL under the *Income Tax Act*.

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

C. W. Brazier, Q.C. and *A. B. Ferris* for appellant.

A. H. Ray, Q. C. and *T. E. Jackson* for respondent.

CAMERON J. now (November 13, 1959) delivered the following judgment:

This is an appeal by Utah Co. of the Americas (hereinafter referred to as "the appellant") from a re-assessment to income tax dated July 23, 1957, for its taxation year ending October 31, 1955. The appellant was incorporated under the laws of the state of Nevada on May 21, 1951, and is a wholly owned subsidiary of the Utah Construction Co.—a Delaware corporation; it was registered in British Columbia as an extra-provincial company on September 8, 1954.

The appellant's first income tax return for the period September 8, 1954, to October 31, 1954, showed no taxable income. For the year 1955, the revised taxable income was $43,164.12, of which $2,005.29 was from its mining operations, and $41,158.63 from construction operations. In 1956, its total loss on all operations was $48,854.53, construction operations showing a profit of $227,874.10 and mining operations a loss of $276,728.63. Because of the loss sustained in 1956, the Minister re-assessed the appellant for 1955 and, purporting to follow the provisions of s. 27(1)(*e*) of *The Income Tax Act,* allowed a deduction of $2,005.29 as "Application of 1956 loss against mining profits". The deduction of that portion only of the 1956 losses was on the ground that the appellant's losses in 1956, which were incurred entirely in the mining operations, could be applied against the appellant's 1955 income only to the extent of

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its income in that year from mining operations. The appellant was accordingly assessed to tax of $17,608.20 and interest. I was advised that the full amount had been paid under protest, pending this appeal.

The appellant submits that on a proper interpretation of s. 27 (1)(*e*), the Minister in his re-assessment should have applied the 1956 loss against the whole of the appellant's profit for 1955, and that had he done so, no tax would have been payable for 1955 and the appellant would have been able to carry forward to subsequent years the balance of the 1956 loss, namely, $5,690.41. The section in question is as follows:

> 27.(1) For the purpose of computing the taxable income of the 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, 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.

Subparagraph (iii) prescribes the income figure from which the deduction is to be made, and it is common ground that clause (A) thereof is here applicable. That being so, the limit of the loss deductible is in this case the appellant's income for the year 1955 "from the business in which the loss was sustained". The appellant's submission is that the business in 1955 and 1956 was the same and constituted but one business, although consisting of a number of operations. For the respondent it is submitted that the appellant carried on two businesses, namely, mining and construction, and that consequently the net losses sustained in 1956 and which arose solely because of the losses

in that year in the mining operations, can be carried back and deducted from the 1955 taxable income only to the extent of the appellant's income from mining operations in the latter year.

As stated in *Frankel Corporation Ltd. v. M. N. R.*[1]—a decision of the Supreme Court of Canada—"Section 3 clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business". The question as to whether he does so is one of fact and it therefore becomes necessary to state in some detail the origin, history and operations of the appellant.

The appellant's parent company, the Utah Construction Co., has been engaged for many years in general engineering, contracting and mining, carrying on business throughout the western hemisphere, as well as in parts of the Orient, Australia and Africa. It was incorporated in 1900, originally for railroad contracting. Later its activities expanded and have included mining (both on its own account and for others by contract), the construction of power plants, houses, refineries, bridges, and building construction of all types. In 1951, it incorporated the appellant company in order to secure the tax advantages permitted by the United States statute referred to as *"The Western Hemisphere Act"*. The appellant was incorporated to carry on all the business of Utah Construction Co. in the western hemisphere outside of the United States and now operates in Colombia, Peru and Canada.

Prior to the registration of the appellant company in Canada in 1954, the Utah Construction Co. was the sole owner of Argonaut Mining Co. Ltd., incorporated in British Columbia in 1949. It commenced mining in 1951 and continued to produce and sell ore until February 1955, when all its shares and assets were transferred and donated by arrangement with the parent company, the Utah Construction Co., to the appellant, and the Argonaut Mining Co. Ltd. was then wound up. The appellant continued the operation of the mine and the sale of its products as the Argonaut Mining Division until 1957, and it was from that mining operation that a small profit was made in 1955 and a heavy loss incurred in 1956.

[1] [1959] C.T.C. 244 at 255; 59 D.T.C. 1161 at 1167.

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The other main operation of the appellant in Canada was that of construction, Riverdale Park Ltd.—a housing development on Lulu Island in the Fraser River—was incorporated in 1954, presumably by Utah Construction Co. It entered into a contract with the appellant for the construction of houses. The only other construction project of the appellant in Canada was that of erecting a very large and costly building in Vancouver (the Burrard Building), the contract for which was signed in July 1955. It was from these two operations that substantial profits were made in 1955 and 1956.

The main evidence relating to the appellant's management field and financial operations was that of the president, Mr. Christensen. It is managed by one Board consisting of five directors and has its head office at San Francisco. The company has three main divisions, namely, mining, construction and real estate development, each having a general supervisor in charge at the head office. In Canada, up to the date of the hearing, the company had but two main divisions, namely, mining and construction. Each activity of these main departments is conducted as an individual project with a project manager and an administrative staff located at the site. Separate accounts are kept for each job and at the year end they are reported to the general supervisor in charge of mining, construction or real estate development, according to the nature of the project, and then the accounts are consolidated.

I do not find it necessary to set out all the evidence of Mr. Christensen. He said quite frankly: "In general, I think mining is regarded as a different business than construction". He endeavoured to qualify that statement somewhat by adding:

> We ourselves feel there are greater differences between several branches of the construction industry than there are between the heavy engineering branch of the construction industry and the mining industry.
>
> We draw a greater distinction between housing construction and heavy engineering construction—the personnel, the tools, the products are more different than are those of our divisions operating as contractors for other mining companies.

I attach great significance to Mr. Christensen's statement that in general mining and construction are regarded as different businesses. Mining, I think, is generally regarded

as meaning the extraction of minerals or coal from the earth and it might well include such further steps as refining and processing the ore. Construction, on the other hand, connotes the idea of putting parts together such as a building, a dam, highways, railway, etc., although such activities might also include preparatory steps such as excavation, blasting and the like, I find it difficult to believe that anyone when referring to a mining company would normally and properly refer to it as being in the construction business, and the reverse is equally true.

In the case of *Scales (H. M. Inspector of Taxes) v. George Thompson & Co. Ltd.*[1], the question was whether the respondent company's business, which consisted of shipowning and underwriting, constituted one business or two separate businesses. The Commissioners held that there were two separate businesses and Rowlatt J., in dismissing an appeal from their finding, pointed out some of the tests to be applied. At pp. 88-9 he said:

> I think this is a plain case. I am bound to say I do not think there is any question of law raised here and, whether question of law or question of fact, I certainly should not say the Commissioners were wrong. This company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two. They both have something to do with ships; that is all that can be said about them. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting. They might carry on underwriting in a country where there were no ships, except that it would not be commercially convenient; but the two things have nothing whatever to do with one another.
>
> It is said that as a matter of law the Court must hold that they are one business, for these reasons, that the two businesses were bought together from a firm who had carried on both businesses; that the deposit at Lloyd's was bought by the same company that bought the ships and supplied the working capital to run the ships; that the company is one company. Of course it is, but the fact that the company is one company and declares one dividend and so on cannot affect this case. The company can carry on two businesses, although it may, for the purposes of convenience, if it wishes, amalgamate the proceeds before paying the shareholders. Then it was said the profit and loss account throws some light upon it. What is the profit and loss account? The profit and loss account has entered in it upon the one side the result of the working account, that is to say, the profit made upon running the ships—that comes in. It is a very short profit

[1] (1927) 13 T.C. 83.

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and loss account. Then there comes in the profit on the underwriting at Lloyd's; then there comes in the subscriptions to Lloyd's on the other side—a very small item. That is all on that.

That method of book-keeping does not seem to me to throw any light upon this matter at all. I think the real question is, was there any interconnection, any interlacing, any interdependence, any unity at all embracing those two businesses; and I should have thought, if it was a question for me, that there was none. But I do not think it was a question of law. I think the Commissioners had ample evidence upon which they could decide, and they did so decide.

As in that case, there is ample evidence here to indicate that the appellant was in fact carrying on two businesses, namely, mining and contracting. The evidence is that these two operations or divisions had different (*a*) processes; (*b*) products; (*c*) services; (*d*) customers for the products, except possibly in one unusual case; (*e*) inventories; (*f*) locations; (*g*) union contracts; (*h*) offices; and (*i*) staffs. In addition, the acounting and records for each of the two divisions were maintained separately as is shown by the various statements attached to the 1955 tax return (Exhibit 2). The general overhead costs incurred at head office for directors' fees, legal, engineering and accounting fees, etc., were divided in an equitable manner between the three main divisions which included (outside of Canada) real estate development operations. It is the fact, however, that certain equipment, such as trucks and the like, might on some occasions be switched from mining to construction and on one occasion, as Mr. Christensen recalled, a senior accounting clerk was transferred from the Argonaut Mining operation to the construction of the Burrard Building, but these are of relatively small importance. In such cases, the charges for these operations would be changed from the original to the later business.

It is to be recalled, also, that the mining operation was originally carried on by a separate company—the Argonaut Mining Co. Ltd.—and the only change after it was acquired by the appellant was that it became known as the Argonaut Mining Division of the appellant company. When it ceased operations in 1957, the other operation, that of contracting, was completely unaffected by that occurrence, but continued as before.

Counsel for the appellant drew my attention to the Articles of Incorporation (Exhibit 4) and pointed out the purposes of incorporation and the very large number of powers thereby conferred. He submitted that as all the activities carried on by the appellant fell within the powers conferred by the Articles of Incorporation, I should infer that as the appellant was but one corporation, the intention was to carry on but one business, namely, anything that fell within the corporate powers. I am unable to agree with that submission. An individual or a corporation may carry on a number of businesses concurrently. Here the Articles of Incorporation grant to the appellant the power to carry on the "business of stevedoring", and a further power to buy, develop and sell trademarks, patents and copyrights. If the appellant had chosen to embark on these two wholly unrelated activities, I think that it would have to be found that it was carrying on not one, but two businesses.

In my view, the appellant on the facts before me was carrying on two separate businesses in 1955 and 1956, namely, mining and construction. To use the language of Rowlatt J. in the *Scales* case (*supra*), I find here no interconnection, interlacing or interdependence, and no unity embracing these two operations. They were kept completely separate until at the year end when, for the purposes of convenience, the proceeds of each operation were amalgamated before paying out dividends to the shareholders.

What, then, is the effect of s. 27(1)(*e*) on these findings of fact, namely, that the appellant was carrying on the same two businesses in 1955 and 1956? Counsel for the appellant submits that even if two businesses were carried on, they were the same business in each year and that therefore the overall business in which the loss was sustained in 1956 was the same business as the overall business carried on in 1955.

An examination of s-s. (1)(*e*) of s. 27 shows that Parliament intended to put specific limits on the deductibility of losses. First they must be business losses as required by the opening words of s-s. (*e*). Then a further limit is put on the deductibility of business losses by the terms of para. (iii), under which no amount is deductible in respect of

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losses from the income of any year except to the extent of the lesser of the amounts calculated in accordance with the terms of clauses (A) and (B) thereof. Admittedly, the amount calculated under clause (A) is here the lesser and consequently the losses incurred in 1956 may be carried back and applied against the income of 1955 only to the extent of the appellant's income for 1955 "from the business in which the loss was sustained". The interpretation to be put upon the last phrase, in view of the facts which I have found, will determine the success or failure of this appeal.

This phrase was considered by the President of this Court in *M. N. R. v. Eastern Textile Products Ltd.*[1]. That appeal had to do with the respondent's taxation year 1951 and the applicable section was s. 26(1)(*d*) of the 1948 *Income Tax Act* which, save for the section numbers, was identical to s. 27(1)(*e*) now under consideration. There the taxpayer, prior to 1951, had carried on a manufacturing business in which it had sustained heavy losses for a number of years. In 1951 it did not carry on the manufacturing business, and made a substantial profit. It was held that as the losses were incurred in its manufacturing business, they could not be carried forward and be deducted from the profits of 1951 because in the latter year, the taxpayer made no profit from manufacturing—but from something else. The same result was reached in the case of *M. N. R. v. Ottawa Car and Aircraft Ltd.*[2].

In the *Eastern Textile Products* case, the President rejected the submission of respondent's counsel that the word "business" means whatever the taxpayer is doing from time to time. At p. 56 he stated:

> Moreover, Section 3 of the Act contemplates that a taxpayer may carry on more than one business and that concept is also embodied in Section 26(1)(*d*). It is well established that a company can carry on more than one business: *vide*, for example, *Birt, Potter and Hughes, Ltd. v. C. I. R.* (1926), 12 T.C. 976; *Scales v. George Thompson & Co., Ltd.* (1927), 13 T.C. 83, and *H. & G. Kinemas, Ltd. v. Cook* (1933), 18 T.C. 116. But if counsel for the respondent's contention that the word "business" in Section 26(1)(*d*) means whatever the company is doing from time to time were adopted it would be tantamount to saying that its business is always the same. That would, of course, make it impossible for it to carry on more than one business.

[1] [1957] C.T.C. 48; 57 D.T.C. 1070.
[2] [1957] C.T.C. 59; 57 D.T.C. 1076.

Furthermore, the adoption of the contention would make subparagraph (A) in Section 26(1)(*d*)(iii) meaningless. And it is a cardinal principle that an interpretation leading to such a result must be erroneous.

* * *

. . . If it had been intended to give effect to such a contention it is inconceivable that paragraph (A) of Section 26(1)(*d*)(iii) would have been worded as it was. Instead of using the expression "from the business in which the loss was sustained" some such expression as simply "from the business" would have been used. Counsel's contention brushes to one side the limiting and definitive effect of the expression "in which the loss was sustained" and amounts to a reading of the paragraph as if the limiting and definitive expression were omitted.

That case, of course, is not precisely the same as the instant one. There the taxpayer in 1951 was engaged in a business different from that of prior years, whereas here the appellant was engaged in two businesses in 1955 and the same two businesses in 1956. The President, in the *Eastern Textile* case, considered the general effect of s. 26(1)(*d*), stating at pp. 57-8:

It seems to me that Section 26(1)(*d*) contemplates that a taxpayer may continue in the business in which he has previously sustained business losses or engage in some other business, either by itself or together with his former business, with varying results that need not be enumerated, but that subsection (iii), by limiting the extent of the taxpayer's right to deduct losses to the lesser of the amounts specified in paragraphs (A) and (B) of the subsection, makes it clear that the extent of the amount that may be deducted in respect of losses from the income for any year shall never be greater but may be less than the amount of the taxpayer's profit from the business in which the loss was sustained. From this it follows, of necessity, that if he does not make a profit from the business in which the loss was sustained, whether by reason of having ceased such business or otherwise, the extent of the amount which he may deduct in respect of losses is nil. The right to deduct losses does not extend to a profit from an activity other than the business in which the loss was sustained. It seems to me that it is contrary to the policy as declared in the section that a taxpayer should have the right to deduct from his income for any taxation year a business loss sustained in another year in a case where his income is not from the business in which the loss was sustained. Thus, if he ceases to carry on the business in which the loss was sustained and, therefore, does not make any profit from it the right to deduct a business loss does not enure to him. The purpose of the policy no longer exists.

I am in complete agreement with the opinion of the President that the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained. Here the losses were sustained in one business of the appellant, namely, mining,

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and in my view, the losses for 1956 can be carried back and deducted only to the extent of the appellant's profit in 1955 from the same business, namely, mining. That is precisely what the respondent by his re-assessment has done.

It may be noted here that by s. 12(1) of c. 32, Statutes of Canada 1958, clause (A) of sub-para. (iii) of para. (*e*) of s-s. (1) of s. 27 was repealed, and the following substituted therefor:

> (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

That clause, however, is applicable only to the 1958 and subsequent taxation years.

Accordingly, the appeal will be dismissed and the re-assessment affirmed. The respondent is also entitled to his costs after taxation.

Judgment accordingly.

1959
May 25
Dec. 3

BETWEEN:

FLORENCE J. GAMBLE ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Superannuation—Supplementary death benefits—Premiums deducted from civil servant's pay despite his irrevocable election not to participate in benefits—Crown not bound by estoppel by acts of its servants—Public Service Superannuation Act, S. of C. 1952-53, c. 47, as amended by S. of C. 1953-54, c. 64—Order in Council P.C. 1954-1017, dated July 6, 1954, Regulation 34(1).

On June 26, 1954, supplementary death benefits were made available under Part II of the *Public Service Superannuation Act* to civil servants and beginning on January 1, 1955, monthly premiums to cover the benefits were deducted from their pay cheques. Section 50 of the Act empowered the Governor in Council to make regulations prescribing forms for the purposes of Part II, and s. 52 provided that a person entitled to the benefits would not be included if by November 1, 1954, such person, in the manner and form prescribed by the regulations, elected not to come under the provisions of Part II.

P.C. 1954-1017 passed on July 1, 1954, provided:

"34(1)—An election under s. 52 of the Act not to come under the provisions of Part II of the Act shall be made by completing and signing

(*a*) an election in Form P in the case of a person mentioned in paragraph (*a*) of subsection (1) of s. 52 of the Act . . . and subject to subsection (2) of this section, sending it to the Minister within the time prescribed by the Act for making the election."

The suppliant's husband, G, a Post Office Department employee, on September 3, 1954, signed a Form "P" and sent it to the Minister who received it four days later. Notwithstanding the notice, deductions for premiums for death benefits were made monthly from G's pay cheques. It was not until G's death in 1957 that competent authorities ascertained G had made an irrevocable election not to participate in the death benefit plan.

In an action to recover the benefits covered by the premiums paid, it was admitted that G was aware of the deductions and did not draw them to the attention of the respondent; but it was contended for the suppliant that the so-called election was made in a form which had never been prescribed and was therefore invalid; and that the Crown, having accepted the premiums and led G to believe he was entitled to the benefits, was estopped and could not refuse to pay them.

Held: That in enacting Regulation 34(1) it was not necessary to employ the word "prescribe" so long as the language used expressed its meaning. The word "shall" followed by the words "be made by completing and signing an election in Form P" imposes a peremptory order and lays down that Form "P" and no other must be used.

2. That in determining whether the suppliant is entitled to be paid the sum claimed, acts of omission or commission by servants of the Crown can have no bearing on the issue, the suppliant's rights or lack of rights is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant. *Nixon v. Attorney General* [1931] A.C. 184, 193.

3. That the theory of estoppel cannot be invoked against the Crown. Where a particular formality is required by statute, no estoppel will cure the defect. Here G, in order to be entitled to supplementary death benefits had to refrain from making an irrevocable option not to participate, and this he failed to do. *The King v. The Royal Bank of Canada* (1919) 50 D.L.R. 293, 304; *Millet v. The Queen* [1954] Ex. C.R. 562, 570 followed.

PETITION OF RIGHT to recover an amount alleged payable to suppliant as supplementary death benefits under the *Public Service Superannuation Act*.

The action was tried before the Honourable Mr. Justice Kearney at Windsor.

James Francis, Q.C. for suppliant.

S. Samuels for respondent.

KEARNEY J. now (December 3, 1959) delivered the following judgment:

The purpose of the suppliant's action is to obtain from the respondent the sum of $3,750, to be taken out of the Public Service Death Benefit Account established under

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Part II of the *Public Service Superannuation Act,* S. of C. 1953-54, c. 64, to which her late husband had allegedly contributed from its inception until his death.

Excepting the relevancy of certain evidence which was given at the hearing, there is no dispute about the facts in this case.

The suppliant's husband, the late William H. Gamble, was in the employ of the Post Office Department, at Windsor, Ontario, from April 20, 1921, until his death on August 27, 1957. On June 26, 1954, supplementary death benefits became available under Part II of the Act. The benefits consisted of what might be called a simple form of term life insurance on a diminishing return basis from age sixty-one. Only those civil servants who elected not to come under the said Part II were excluded, and the others were to pay, beginning January 1, 1955, a monthly premium of 10¢ for each $250 of benefit, through deductions from their monthly pay cheques. Entitlement to a bonus of two months' salary was lost to those members of the public service who did not opt out of the benefits, while it was maintained without contributions by those who declined the new gratuity. It is admitted that the late Mr. Gamble sent to the Minister of Finance a notice known as Form "P" and described hereunder.

PUBLIC SERVICE SUPERANNUATION ACT (PART II)
Form "P"

Name ....Gamble.......... (surname) ....William Henry.......... (given names in full)

Date of birth ....1897 Jan. 9.......... Sex..........Male..........

Department ..........P.O.......... Branch..........Letter Carrier..........

Location ....Windsor.......... Annual Salary..........3060..........

Pursuant to section 52 of the Public Service Superannuation Act, I hereby elect NOT to come under the provisions of Part II of that Act and I understand that this my election is irrevocable.

Dated at ....Windsor.......... this..........3rd..........day of..........Sept..........1954.

(Sgd.) A. Caird P.S. 3 (Sgd.) W. H. Gamble
Signature of Witness Signature of Employee

It is also admitted that the said notice was received by the Minister on September 7, 1954, which was within the prescribed delay.

It appears that this notice was not brought to the attention of the Comptroller of the Treasury who was unaware of it until sometime after Mr. Gamble's death. In the meantime monthly deductions totalling $42.12 were made from his salary, and an immediate interim death benefit of $562.50, or one sixth of the death gratuity as mentioned in Document No. 1 attached to the Statement of Agreed Facts, was sent to the suppliant. Subsequently, when the competent authorities had ascertained that the late Mr. Gamble had made an irrevocable election not to participate in the death benefit plan, two cheques were mailed to the suppliant: one for $37.50, representing the difference between $600, or two months of her late husband's salary, payable pursuant to the *Civil Service Act,* R.S.C. 1952, c. 48, s. 56, and the amount of $562.50 already in her possession; and another for $42.12 as refund of premiums deducted.

It is admitted that the late Mr. Gamble was aware of the deductions which were being made, to which he did not draw the attention of the respondent. It is claimed for the suppliant that the so-called election not to participate in the death benefits was not made in a form prescribed and was therefore invalid, and that, having accepted premiums from the suppliant's husband and having led him to believe that he was entitled to the supplementary death benefits, the respondent cannot refuse to pay such benefits.

The first issue is whether a valid form of election was ever prescribed by Regulation passed by Order in Council, as contemplated in ss. 50 and 52 of Part II of the Act, the pertinent provisions of which are hereunder set out and in which I have underlined certain words for the sake of emphasis.

50(1)—The Governor in Council may make regulations for carrying the purposes and provisions of this Part into effect and, without restricting the generality of the foregoing, may make regulations

(*j*) *prescribing forms* for the purposes of this Part.

52(1)—Notwithstanding anything in this Part, the expression "participant" does not include

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> (a) a person employed in the Public Service on the 1st day of July, 1954, . . . if that person, on or before the 1st day of November, 1954, *in such* manner and *form as the regulations prescribe,* has elected not to come under the provisions of this Part.

By P.C. 1954-1017 Regulation 34(1), *inter alia,* was passed on July 6, 1954, as more fully appears on reference to Vol. LXXXVIII—(page 874 No. 14) of *The Canada Gazette,* Part II, Statutory Orders and Regulations, dated Wednesday, July 28, 1954. It contained under Schedule III, in identical terms, Form "P" as hereinbefore described. The relevant portions of Regulation 34(1), wherein I have supplied the emphasis, read as follows:

> 34(1)—An election under section 52 of the Act not to come under the provisions of Part II of the Act *shall be made by completing and signing*
>
> (a) *an election in Form P* in the case of a person mentioned in paragraph (a) of subsection (1) of section 52 of the Act . . .
> and, subject to subsection (2) of this section, sending it to the Minister within the time prescribed by the Act for making the election.

The word "prescribe" is nowhere to be found in P.C. 1954-1017 and as far as I can judge, but for this omission, there would be little, if anything, left to support the suppliant's submission that the Order in Council failed to prescribe a valid form of election as required by the Act.

I do not think that in enacting Regulation 34(1) it was necessary to employ the word "prescribe" so long as the language used expressed its meaning. It is not an abstruse word but one which has well-known synonyms, such as "direct" and "order." See Roget's *Thesaurus of English Words and Phrases,* 1958 ed. No. 693, p. 250 and *Words and Phrases,* Permanent Ed., Vol. 33, p. 409. Webster's *Dictionary of Synonyms,* First Ed., p. 645, states:

> Prescribe . . . usually implies that the aim is to give explicit directions or clear guidance to those who accept one's authority or are bound to obey one's injunctions.

Among the definitions of "prescribe" the *Shorter Oxford English Dictionary,* Third Ed., p. 1573, includes "to lay down," and at p. 412 of *Words and Phrases* (*supra*) reference is made to decisions which hold that "..... the word 'prescribe' has a well-defined legal meaning, denoting to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; ......"

The word "shall" followed by the words "*be made by completing and signing an election in Form P*" imposes a peremptory order and lays down authoritatively and clearly that Form "P", and no other, must be used in the present instance. *An Act respecting the Form and Interpretation of Statutes,* R.S.C. 1952, c. 158, s. 35(28) provides that " 'shall' is to be construed as imperative . . ." The language used in the regulation and the form employed in the Order in Council, in my opinion, express the purport of the word "prescribe" almost as forcibly and clearly as if the word itself had been used; and, if after the words which I have underlined in Regulation 34(1)(*a*) a clause such as "which is hereby prescribed and set out in Schedule III hereof" were inserted, it would constitute little more than unnecessary amendment. I do not think there is any need to include by implication the use of the word "prescribe", although this could be done if the existing language of Regulation 34 were insufficient to carry out the intention of Parliament.

The second point in issue is whether the suppliant is entitled to be paid the sum claimed in virtue of Part II of the Act because of the acts of omission or commission by the servants of the Crown. Subject to objection, hearsay evidence was admitted, which indicated that the husband of the suppliant stated on more than one occasion that he thought he was entitled to supplementary death benefits. Objection was also taken to copies of Documents Nos. 1 and 2, attached to the Statement of Agreed Facts filed by the parties, which showed that civil servants in the Post Office and Finance Departments considered that the late Mr. Gamble had been a participant in the supplementary death benefits and that he was treated as such. I do not think it is necessary for me to pass on the admissibility or probative value of this evidence because it does not matter whether or not, or for how long, responsible officers in the Department of Finance, or the Post Office Department, or elsewhere, regarded the husband of the suppliant as a participant whose heirs would be entitled to share in the supplementary death benefits. What certain members of the Civil Service, or the husband of the suppliant, or she herself thought she was entitled to receive can have no bearing on this issue. As clearly pointed out by counsel for the respondent, the suppliant's rights or lack of rights

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is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant.

The learned president of this Court, in the unreported case of *Martindale v. The Queen,* dated June 27, 1957, which dealt with the rights of a retired civil servant to pension benefits under Part II of the *Civil Service Superannuation Act,* R.S.C. 1927, c. 24, and s. 24(2) of the *Public Service Superannuation Act,* S. of C. 1952-53, c. 47, stated:

> The fact that the responsible administrative officers of the various government departments treated the suppliant first as being subject to the Civil Service Superannuation and Retirement Act and later as being a civil servant to whom Part II of the Civil Service Superannuation Act applied cannot help him. The assumption of the various departmental officers charged with the administration of superannuation that Order in Council P.C. 52/517 of April 6, 1925, had the effect claimed for it did not give it such effect. The suppliant's right or lack of right is a matter of law.

A similar point arose in the United Kingdom under the *Superannuation Act* of 1859 in *Nixon v. Attorney General*[1], affirming the judgment of the Court of Appeal[2]. It was held that a Treasury Minute under which the suppliant had been granted a retirement allowance in excess of that provided in s. 2 of the *Superannuation Act* was not binding on the Crown. Viscount Dunedin stated:

> My Lords, as to a special position being held by these gentlemen on contract, the answer to that, I think, is absolutely conclusive. If you find that the statutes give the Lords of the Treasury a discretion, that is their power, and their only power, and they cannot possibly by contract take themselves out of it. They might by contract possibly involve themselves in personal liability, but they never could involve the Crown, because they are not authorized to make any such contract.

Counsel for the suppliant further submitted that she and her husband had been lulled into a feeling of false security by the silence of the responsible agents of the government whose duty it was to speak, and that the respondent is responsible for such negligence. If this situation existed, it was largely of the suppliant's and her husband's own making. There is no clear-cut evidence as to why Mr. Gamble did not draw the attention of the Department to the election on Form "P" which he had signed. If he had done so his Form "P" card undoubtedly

[1] [1931] A.C. 184, 193. [2] [1930] 1 Ch. 566.

would have been brought to light, thus rendering indefensible the claim herein alleged. It is possible that he may have been advised to refrain from doing so, as the evidence shows that the situation in which he found himself was the subject of discussions inside and outside the Federated Association of Letter Carriers. It may have been thought or hoped that by silence Mr. Gamble might retain some chance of opting one way or the other at a later date according to where his advantage lay. It so happened that he died before reaching the age of sixty-one and his estate stood to gain if it were entitled to participate in the benefits.

It goes without saying that if Form "P" signed by Mr. Gamble had been brought to the attention of the Comptroller of the Treasury, the respondent would not have deliberately continued to make deductions from his salary; but in any event I do not think that this action by one or more responsible government officials had the effect of changing the law or justifying an estoppel whereby the Crown could not show that Mr. Gamble was not a participant. It is well established that the theory of estoppel cannot be invoked against the Crown. As it was said in *The King v. The Royal Bank of Canada*[1] by Cameron J. of the Manitoba Appeal Court,

> It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them.
>
> Everest & Strode, Law of Estoppel, page 8. This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

Counsel for the suppliant, however, urged that an exception should be made to the applicability of estoppel against the Crown where the equivalent of an insurance policy is involved, as in this case. Jurisprudence cited in support of this submission referred to cases between subject and subject and, in my opinion, is inapplicable in a suit against the Crown. In the case of *Millet v. The Queen*[2], which is very similar to the present one and which concerned a claim under *The Veterans Insurance Act,* S. of C. 1944-45, c. 49 and amendments, Fournier J. considered the question of

[1] 50 D.L.R. 293, 304.
[2] [1954] Ex. C.R. 562, 570.

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whether the Crown, having accepted payment of premiums, was estopped from alleging that the conditions set out in the insurance policy had lapsed or become null and void.

The Veterans Insurance Act and its regulations, in my opinion, is the law of the land applicable to this contract of insurance. The contention that these regulations did not bind the parties or have force of law is not based on any sound reason. They are not repugnant to or beyond the reasonable contemplation or purview of the terms of the Act. This being the case, I would be inclined to follow the principle laid down in *Phipson on Evidence*, 8th ed., p. 667, in fine, viz:—

Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The formality required of Mr. Gamble in the instant case was of a negative character. In order to be entitled to supplementary death benefits he had to refrain from making an irrevocable option not to participate, and this he failed to do.

Evidence was given that the late husband of the suppliant had been in the employ of the Postal Department for over thirty-six years and that he was a war veteran who had been wounded four times and was in receipt of a disability pension. It is true that it would have been more advantageous for his widow if Mr. Gamble had not signed an irrevocable option not to participate in the supplementary death benefits, and it is regrettable that by reason of her husband's long and distinguished service she could not receive further benefits on compassionate grounds. Equity or sentiment, however, can play no part under the circumstances and I have no alternative but to dismiss the suppliant's claim with costs.

Judgment accordingly.

BETWEEN:

1959
May 14
Dec. 22

AARON HERSHBAIN ....PLAINTIFF;

AND

WHITE SEWING MACHINE PRODUCTS LIMITED .... DEFENDANT.

Trade Mark—Trade name—Infringement—Recovery of damages precludes an accounting—Trade Marks Act, S. of C. 1952-53, c. 49.

The plaintiff brought an action against the defendant for infringement of its trade marks "New Majestic" and "Majestic" used in connection with domestic sewing machines and claimed an injunction, damages in the sum of $10,000, or an accounting, as the plaintiff might elect. The defendant contended that if any infringement took place, which it did not admit but denied, it occurred in August 1955 when the defendant entered into a promotion scheme with The Robert Simpson Montreal Ltd., whereby it supplied that firm with sewing machines bearing the trade mark "Majestic Rotary" which the latter sold as its agent. That the plaintiff brought an action against the Simpson company in the Quebec Superior Court alleging the same grounds of complaint and seeking the same remedies as in the present action and was awarded damages and an injunction, and that pursuant to the Quebec civil law rules of "solidarity", linking the Simpson company and the defendant in a joint defence, the damages now claimed had been liquidated by the Superior Court judgment. The defendant further submitted that the present action should be dismissed as vexatious as the plaintiff could have taken a single action against both parties or added the present defendant as a defendant in the Superior Court action.

Held: That the Court was unable to perceive any connection between the case at bar and the civil laws of the Province of Quebec in relation to a trade mark offence. One statute only should be considered and applied, namely the *Trade Marks Act* S. of C. 1952-53, c. 49.

2. That the plaintiff having admitted it recouped all its actual damages in the Superior Court action was precluded on its own admission from now laying claim to an accounting.

3. That on the evidence and in view of defendant's admission of infringement, the injunction prayed for should be granted.

ACTION for infringement of trade mark.

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

Cuthbert Scott, Q.C., and *A. Feiner* for plaintiff.

André Forget, Q.C. for defendant.

DUMOULIN J. now (December 22, 1959) delivered the following judgment:

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This infringement of trade mark case is a less involved one than it threatened to be at trial, when several issues were stated, a few of which admittedly irrelevant were then and there abandoned.

A recital of facts, many of them uncontradicted, will, I hope, prove of assistance in avoiding unwarranted complications.

The plaintiff, Aaron Hershbain, under the firm name and style of: Hershbain Brothers Reg'd., carries on, from his Montreal office, the business of selling throughout Canada "sewing machine parts and accessories and a large variety of wares and equipment relating to sewing machines", (cf. Statement of Claim, para. 3).

Mr. Hershbain is the registered owner of trade mark No. N.S. 171/43740, dated August 13, 1952, ". . . registered pursuant to the provisions of *The Unfair Competition Act, 1932,* for the trade mark 'NEW MAJESTIC', used in association with domestic sewing machines" (cf. id. para. 4.(*a*)).

He also owns trade mark N.S. 98/25315, dated August 31, 1946, for the trade mark "MAJESTIC" ". . . used in association with tables and stands for sewing machines, etc." (id. para. 4.(*b*)).

Defendant, White Sewing Machine Products Ltd., a subsidiary organization with Canadian Head Office in the City of Toronto and its parent company at Cleveland, Ohio, purchases from the American firm sewing machines imported from Germany or Japan, and in turn sells them to wholesale dealers, or, on certain terms, to major department stores across Canada, according to the statement of defendant's manager, Mr. Kay, in his examination on discovery, many excerpts of which were read out in court.

Ownership of the trade marks just mentioned is admitted by defendant who launches a weak attack against their validity (cf. Statement of Defence, para. 4.), on the score, and I reproduce para. 5 of the defence, that:

5. The Plaintiff's use of the trade marks "Majestic" and "New Majestic", if it took place at all, was confined to sewing machines of the industrial or commercial type and accessories therefor and the Plaintiff never used the said trade marks on sewing machines of the domestic type in issue in the action herein.

In paras. 7 and 8 of the Statement of Claim, plaintiff had alleged his continuous use, since 1951, of the trade marks "New Majestic" and "Majestic" with the result that such trade names were favourably known throughout Canada, particularly in the Province of Quebec, and associated with his wares.

Paragraph 9 reproaches defendant with having,

> 9. . . . during the year 1955 commenced to manufacture and sell sewing machines not obtained from the Plaintiff, having attached thereto a label carrying the name "MAJESTIC" used as a trade mark in connection with the said goods, and the Defendant has sold, distributed and advertised or caused to be advertised the said sewing machines in association with the word MAJESTIC which is confusing with the Plaintiff's said registered trade marks and has thereby infringed the Plaintiff's exclusive right . . .

The Statement of Claim, para. 11, alleges confusion between plaintiff's and defendant's wares, and is next followed by plaintiff's claims for the customary injunctions against "Defendant, its officers, servants and agents . . ." and (*d*): "Damages in the sum of Ten Thousand Dollars ($10,000.00) or such greater sum as may be awarded or an accounting of Profits as the Plaintiff may elect".

This action was argued before the instant court on May 14, 1959. On the day preceding, May 13, Mr. Justice Batshaw, a Superior Court Judge in Montreal, delivered a judgment in an infringement suit, bearing number 379,899 of the local Superior Court records, between the selfsame plaintiff, Aaron Hershbain, and The Robert Simpson Montreal Ltd.

The grounds of complaint: infringement of plaintiff's two trade marks, the relief prayed for: injunctions and damages in a sum of $10,000 were identical in all respects with those submitted for my decision.

Both parties, after filing as exhibit A a certified copy of some of the proceedings and oral evidence in the Superior Court and a duly stamped copy of Mr. Justice Batshaw's pronouncement, as exhibit B, dealt at length with their respective interpretation of the law, relying largely upon the facts adduced before the learned Superior Court Judge.

It seems likely that the present claim never would have been instituted but for the information obtained in the suit against Robert Simpson Ltd., of Montreal.

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This initial phase of the dispute was aptly summarized by Mr. Justice Batshaw in the following terms (cf. ex. B, p. 2):

> On August 25th and 26th, 1955, the Defendant [Robert Simpson Ltd.] advertised in several Montreal papers the sale of Majestic Rotary sewing machines at $89.00 and $59.00 respectively, depending upon the model. These machines were manufactured by the White Sewing Machine Co. Ltd. and were being offered for sale as a result of a joint promotion between the two companies. It appears that the trade-mark "Majestic" as applied to sewing machines is the property of the White Sewing Machine Company in the United States, but not in Canada where it belongs to the Plaintiff. The latter objected to the infringement as soon as he became aware of the advertisement and applied for interim and interlocutory injunctions. The Defendant [Robert Simpson Ltd.], in a short delay, verified the Plaintiff's right to the trade-mark in Canada and discontinued the promotion, four hundred and fifty-four machines having been sold by it prior to such discontinuance.

The learned Judge goes on to say that:

> The task of the Court has been facilitated by the admission of the Defendant's counsel at the outset of the trial that an infringement had taken place and that the Plaintiff's request for a permanent injunction would no longer be opposed. The case proceeded then for the purpose of assessing the damages.

It will be seen further down that I have to solve a problem in every respect similar; allotting damages against the actual defendant for an infraction which at the trial before me was not denied, notwithstanding a strenuous argument on points of law.

Counsel for defendant contended that pursuant to the Quebec civil law rules of "solidarity", linking Robert Simpson Ltd. and White Sewing Machine Products in a joint offence, the damages claimed had been liquidated by the Superior Court, on May 13, 1959, in re: *Hershbain v. The Robert Simpson Montreal Ltd.*

Incidentally, this view of the matter, on defendant's part, was tantamount to a renewed acknowledgment of infringement, since it only can rest upon a joint or common offence by two or more tort feasors, as contemplated by art. 1106 Civil Code; hereunder:

> **1106.** The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

I need not pursue this course of thought because I am unable to perceive any connection whatsoever between the case at bar and the civil laws of the Province of Quebec,

in relation to a trade mark offence. One statute only should be considered and applied, namely the *Trade Marks Act*, S. of C. 1952-53 1-2 Eliz. II, c. 49.

The deal between defendant and Robert Simpson Ltd. was to all intents a purely promotional one, a fact brought out by Mr. Justice Batshaw as follows on p. 3 of exhibit B:

> The Defendant [then: Robert Simpson, Montreal, Ltd.] had agreed with the manufacturer to retain only 10% of the gross selling price as its share of the profit on the promotion. Its total sales were $34,541.00, and upon deducting the ratio of overhead expenses involved in the handling of the merchandise to the total store sales, a small deficit of $217.38 resulted.

Examined on discovery in the suit against Robert Simpson Ltd., its "manager of offices", Reginald Edwards, had specified that (cf. ex. A, Edwards, p. 14):

> We sold 521 [sewing machines], and we had 67 returns, which made a net total of 454 machines sold.

Before this court, as previously noted, defendant's counsel made no attempt at denying his client's participation in the infringement complained of, but insisted upon plaintiff's abusive and costly duplication of legal proceedings, as set out in the Statement of Defence, para. 15, according to which it was:

> 15. . . . vexatious for the Plaintiff to commence two actions in different courts on the same facts to obtain substantially the same redress when the Plaintiff could have taken a single action against both parties or added the present Defendant as a defendant in the Superior Court action.

On p. 18 of exhibit A, Mr. Thos. Montgomery, of counsel for Robert Simpson Ltd., is reported as thinking he would: "admit that the defendant [i.e. Robert Simpson & Co.] received a registered special delivery letter from Messrs. Marcus & Feiner, dated August 26, 1955", denouncing the trade mark infringement. However, no corresponding acknowledgement of this letter, or a copy thereof having been forwarded to White Sewing Machine Products in Toronto, appears in either Mr. Edwards' or Mr. Paul Kay's examinations; the latter being defendant's office manager. Therefore it is not an unwarranted assumption that plaintiff became aware of defendant's complicity only at the trial of his suit before the Superior Court.

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Admissions were also volunteered on plaintiff's part when Mr. Cuthbert Scott, Q.C. agreed at trial that Aaron Hershbain "... really did recoup all actual damages ($1,000), in the Superior Court action against Robert Simpson & Co.", but persisted to ask: (*a*) an accounting of profits; (*b*) an injunction against White Sewing Machine Products Ltd.

Since the case before me was the concluding "heat" of a litigation begun in the Superior Court, reference must be had again to exhibit B, to the penultimate paragraph on page 2 and the top one on page 3. I quote:

> It is common ground that the Plaintiff in a case of this kind is generally entitled to have, at his election, either an accounting of profits made by the Defendant or the payment of damages suffered by reason of the infringement, and that these are alternative remedies at the choice of the Plaintiff, for he cannot have both.
>
> ... At the trial, Plaintiff's counsel conceded that he could not have both, but claimed that he would be entitled to the greater of the two after the calculation had been made in the light of the evidence.

"The greater of the two", we know, turned out to be a thousand dollar award for damages. Surely Plaintiff cannot alter his stand simply because he appears before another tribunal, especially after his statement in the Superior Court that he must elect between monetary compensation or an accounting, and the admission of fact, here, of having already received full pecuniary redress for loss suffered. The remedy of his choosing being granted, plaintiff became precluded, on his own recognition, from laying claim to the alternate one.

There remains a request for an injunction, the sole eventual relief left for my consideration. The evidence adduced, more particularly the defendant's admission at trial, uphold plaintiff's contention that ss. 7(*b*), (*c*), (*e*), 20 and 22(1) of the *Trade Marks Act* were infringed to his detriment by White Sewing Machine Products Ltd.

For the reasons above, the injunction prayed for is granted, with taxable costs in favour of the Plaintiff.

Judgment accordingly.

BETWEEN:

1959
Jan. 22
June 2

DORR-OLIVER LONG LIMITED ....APPELLANT;

AND

SHERRITT GORDON MINES LIMITED .... RESPONDENT.

Revenue—Customs duty—Appeal on question of law from Tariff Board declaration—Whether parts of Eimco filter classifiable under tariff item 410p or 410w—Customs Tariff, R.S.C. 1952, c. 60, Schedule A as amended by S. of C. 1955, c. 51, s. 2 and S. of C. 1956, c. 36, s. 1—Tariff Board not bound by rules of evidence.

The appellant by leave appealed to this Court from a declaration of the Tariff Board on the question: "Did the Tariff Board err as a matter of law in declaring that certain parts . . . Eimco filters imported by Sherritt Gordon Mines Ltd. . . . were classifiable under Tariff Item 410*p* as enacted by S. of C. 1955, c. 51, rather than under Tariff Item 410*w* as enacted by S. of C. 1956, c. 36?"

Tariff Item 410*p* provides for the entry free from duty of "Sundry articles of metal for use exclusively in metallurgical operations, namely . . . apparatus for chemical conversion, extraction, reduction or recovery, n.o.p."

Tariff Item 410*w* provides for payment of duty on "Machinery, n.o.p. for use in the concentration or separation of ores, metals or minerals, namely; . . . filters . . . ."

The respondent operates a mine at Lynn Lake, Man., where ore recovered therefrom is by a mechanical process reduced to concentrates and then shipped to the respondent's plant at Fort Saskatchewan, Alta. where after the concentrates are treated by a new process of chemical conversion, extraction, reduction or recovery, involving the use of natural gas, pure nickel, cobalt and copper are obtained.

The imported articles in dispute were destined for use in the Fort Saskatchewan plant. The appellant conceded at the hearing of the appeal that the determining factor to be considered in determining the applicability of item 410*p* or 410*w* was the process in which the disputed articles of machinery were to be used, rather than the particular function they were to perform.

Held: That since it was conceded that the words "chemical conversion, extraction, reduction or recovery" taken textually from item 410*p* accurately describes the process at Fort Saskatchewan, this item applies and the declaration of the Tariff Board should be affirmed.

2. That the two processes, the one at Lynn Lake admittedly mechanical, and that at Fort Saskatchewan chemical, are two distinct processes, the former falling into the field of mining and the latter into that of metallurgy.

3. That the expressions "concentration and separation" and "apparatus for chemical conversion, extraction or recovery" are words of art, each applicable to the machinery and operations envisaged in the tariff item in which it appears.

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4. That the words "concentration and separation" are descriptive of mining but not of metallurgical operations as the legislature made abundantly clear when by S. of C. 1955, c. 51 of the *Customs Tariff* the words "for use exclusively in mining and metallurgical operations" as previously appeared in 410*p* were changed to read "for use exclusively in metallurgical operations".
5. That the Tariff Board is not bound by rules of evidence and can accept and act on information that in its judgment is authentic otherwise than under the sanction of an oath or affirmation. Thus the Board could accept the written statement or declaration of counsel quoting from his brief filed with the Board that "the goods which are the subject of this appeal are for use exclusively in metallurgical operations."

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

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

M. H. Fyfe, Q.C. and *W. L. Moore, Q.C.* for appellant.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondent.

G. T. Gregory for the Deputy Minister of National Revenue for Customs and Excise.

KEARNEY J. now (June 2, 1959) delivered the following judgment:

This is an appeal from a declaration of the Tariff Board, dated March 10, 1958, reversing a decision of the Deputy Minister of National Revenue for Customs and Excise, dated July 11, 1957, wherein he determined that certain parts for Eimco filters imported by Sherritt Gordon Mines Limited were classifiable under tariff item 410*w* instead of under item 410*p*, as claimed by the importer.

The appellant intervened in the proceedings before the Tariff Board and obtained leave, by judgment of Dumoulin J., dated April 9, 1958, to take the present appeal to this court on the following question of law:

> Did the Tariff Board err as a matter of law in declaring that certain parts (disc sectors and Hy-flo valve assembly) for Eimco filters imported by Sherritt Gordon Mines Limited under Edmonton customs entries No. 7239 (May 1, 1956) and No. 18125 (June 15, 1956) as amended by No. 27546 (July 25, 1956) were classifiable under Tariff Item 410*p* as enacted by S.C. 1955, ch. 51, rather than under Tariff Item 410*w* as enacted by S.C. 1956, ch. 36?

The two tariff items in issue read as follows:

Tariff Item		*British Preferential Tariff*	*Most Favoured Nation Tariff*	*General Tariff*
410*p*	Sundry articles of metal as follows, for use exclusively in metallurgical operations, namely: furnaces for the smelting of ores; converting apparatus for metallurgical processes in metals; apparatus for chemical conversion, extraction, reduction or recovery, n.o.p.; machinery for the extraction of precious metals by the chlorination or cyanide processes, not including pumps, vacuum pumps or compressors, blast furnace blowing engines for the production of pig iron; parts of the foregoing	Free	Free	Free
410*w*	Machinery, n.o.p., for use in the concentration or separation of ores, metals or minerals, namely; Flotation machines, flotation cells, oil feeders and reagent feeders for flotation machines and flotation cells, pumps, vibrating and impact screens, jigs, filters, magnetic separators and magnetic pulleys; parts of all the foregoing	5 p.c.	7½ p.c.	20 p.c.

The Tariff Board, by a single declaration, dealt with four appeals, Nos. 441, 449, 451 and 461, collectively. All these appeals concern the import of articles destined for use in the refining or metallurgical operations carried on in the respondent's plant at Fort Saskatchewan (near Edmonton), Alberta. Here we are concerned solely with appeal No. 451, and only to the extent of two articles mentioned therein, namely, parts for Eimco filters.

The following few salient facts will serve, I think, to place the issue in proper perspective. The respondent's mine is located at Lynn Lake in northern Manitoba. It is primarily a nickel mine but it produces also cobalt and copper ore. After five years of research and experimentation involving the expenditure of some two and a half million dollars, the respondent developed and patented, for the purpose of treating its own concentrates, a new technique known as an ammonia pressure leaching reduction process based on the use of hydrogen sulphite derived from natural gas. The respondent's plant, which is located in an area where natural

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gas is available in abundance, was ready in 1955 to receive the required machinery including the imports in issue. The operations involved in ore concentrations, all of which are of a mechanical nature, are carried on at Lynn Lake, and the resulting concentrates are shipped to Fort Saskatchewan, one thousand miles away by rail.

The Deputy Minister did not choose to appeal the declaration of the Tariff Board but was represented by Mr. G. T. Gregory who held a watching brief only and took no part in the argument before me.

The appellant concedes that the board did not misdirect itself by considering that the determining factor in the applicability of item 410*w* or 410*p* was the process in which the articles of machinery are being used instead of the particular function they perform; that total absence of evidence may constitute a question of law while sufficiency of evidence is a question of fact; and that the operations at Fort Saskatchewan were accurately described by the board as a process of chemical conversion, extraction, reduction or recovery.

The appellant submits that, if a separation of metals, ores or minerals occurred at Fort Saskatchewan, item 410*w* applied. It conceded that, insofar as separation of metals or ores is concerned, it had no case since there was evidence before the board that ores and metals do not as such exist when reduced to a solution through chemical action. The appellant added that it could not find that anybody had ever applied his mind to the possibility of a separation of minerals taking place at Fort Saskatchewan, or that there was any evidence that such a separation did not occur, and from this it concluded that tariff item 410*w*, wherein filters are specifically mentioned, overrides item 410*p* and must be held to apply.

I do not think that the record warrants the foregoing broad statements in view of the following:

The Acting Chairman: I have only one question. If I understood you correctly, in all your experience you have never seen filters used to separate either minerals or metals—always restricting my question to metallurgy? I think the question was asked by Mr. McKimm.

Mr. Knight: The filter in itself does not separate one metal or one mineral from another.

The Acting Chairman: And in your experience you never saw one used for that purpose?

Mr. Knight: No, sir.

While from one point of view, as previously stated, the process in which the filter is used is more significant than its function, nevertheless the above testimony describing its operations is important because it constitutes some evidence that a separation of minerals does not take place. This being so, I consider that this submission fails for the same reason as applies to separation of metals or ores, namely, that it resolves itself into a question of fact and does not give rise to a point of law.

It is not surprising that the respondent made no attempt to separate the insolubles filtered off at Fort Saskatchewan because they consist of minerals such as silica and other worthless residue of dross or gangue, which remain after the dressing of the ore at the mine.

Later, in his argument in reply, counsel for the appellant conceded that the filter used at Fort Saskatchewan did not separate minerals from one another, and he resorted to the following broader submission: what must be considered, he said, is the all over process from the point where the concentrates arrive from Lynn Lake and are put in at one end of the machines until they come out at the other in the form of pure nickel, cobalt and copper; that operation is one where minerals are being separated and, in the course of that process, the filter is used and "that process is a process for separating minerals." I think this submission likewise fails. Since it is conceded that the words "chemical conversion, extraction, reduction or recovery," which are taken textually from item 410*p*, accurately describe the process at Fort Saskatchewan, in my view it is this item which applies.

Apart from the foregoing, there are other reasons which, in my opinion, justify the declaration of the Tariff Board. I do not think it is material whether or not a separation of minerals occurred at Fort Saskatchewan, but what matters is when it occurred, assuming it did, because the important point to determine is the dividing line between two processes, one admittedly mechanical and the other chemical. I think that the operations at Lynn Lake fall in the

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field of mining and those at Fort Saskatchewan come under metallurgy. It is well recognized, particularly in the mining world, that these two processes are distinct, and regarding the demarcation line between them, the following is found under "Metallurgy," sub-title "Where Metallurgy Begins," p. 307, v. 15, *Encyclopedia Britannica* 1954:

> Beginning with the quarry or mine, it is difficult to determine where the province of mining ends and that of metallurgy begins.

At p. 880, v. 16 (*supra*), it is stated:

> Ore dressing may be defined as mechanical concentration whereby valuable minerals in an ore are separated from worthless impurities or gangue, and is distinguished from metallurgy which employs chemical methods for recovering metals and metallic compounds from rich ores or from the concentrated products of the ore dresser.

I think such accidents of geography and geology as the remoteness of the chemical plant from the mine and its basic need for natural gas, as well as the fact that we are dealing with the exploitation of a new process, make the problem less difficult than if both processes were carried out in the same locality as the mine. I do not consider it necessary to make any finding on this point but I would be inclined to agree that, if further mechanical filtration took place at Fort Saskatchewan before chemical conversion began, then item 410*w* might well apply. It is admitted, however, that before the Eimco filter is used the concentrates have already been chemically treated by ammonia, air and water, and the components to be recovered reduced to a state of solution, after which the filter is used to run off the worthless insoluble minerals. Furthermore, according to the evidence, although the fluid while passing through the Eimco filter undergoes no chemical change, it or its equivalent is a necessary device for use in the chemical process and forms an integral part of the machinery required therefor because, if the insolubles were not removed, it would mean the difference between profitable and unprofitable refining operations.

I think the expressions "concentration and separation" and "apparatus for chemical conversion, extraction or recovery" are words of art, each applicable to the machinery and operations envisaged in the tariff item in which it

appears. A different context and different physical circumstances might well justify a finding that an apparatus for chemical conversion, etc., was in a sense machinery used in concentration or separation.

In this connection the appellant referred to *International Nickel Co. v. Corporation of the Township of Waters*[1], where the problem was to decide whether or not certain buildings in the town of Coppercliff should be classified as concentrators and thus fall within the exemption from taxation provided under s. 33(4) of *The Assessment Act,* R.S.O. 1950, c. 24. In the above case Roach J.A. cited with approval the following statement made by Meredith C.J.O. in the similar case of *McIntyre Porcupine Mines Ltd. v. Morgan*[2]:

> The proper conclusion upon the evidence is, I think, that the word (concentrators) has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found.

In my opinion, the language of the tariff items does not lend itself to the description "colloquial expression" and is of a decidedly technical nature. Since s-s. *p* and s-s. *w* are separate parts of the same tariff item 410, which are worded differently and refer to two kinds of uses, I think that the two sub-sections are mutually exclusive and contemplate the same piece of machinery being treated differently for customs duty purposes. In the present case, if the words "concentration or separation" of item 410*w* were held to be synonymous with "apparatus for chemical conversion, etc." of item 410*p,* the latter item would in my view become meaningless, as none of the several sundry articles of metal used exclusively in the metallurgical operations at Fort Saskatchewan could be admitted free of customs duties. I think the words "concentration and separation" are descriptive of mining but not of metallurgical operations, and that the legislature made this abundantly clear when, by S. of C. 1955, c. 51 of the *Customs Tariff,* the words "for use exclusively in mining and metallurgical operations," as previously appeared in item 410*p,* were changed to read "for use exclusively in metallurgical operations."

[1] [1958] O.R. 168. [2] (1921) 49 O.L.R. 214.

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Two subsidiary arguments advanced by counsel for the appellant were that, in his opinion and subject to correction, there was no proof that filter parts were made of metal, or of their exclusive use, and consequently item 410*p* was inapplicable.

There was some evidence before the board that the filter parts were made of metal. Photographs filed as exhibit A-8a show sectors described as metal and corrugated metal sectors. In addition, the invoice dated April 18, 1956, attached to customs entry No. 7239, exhibit No. A-2k, describes the articles imported as steel disc sectors for Eimco filters.

The Tariff Board is not bound by rules of evidence and can accept and act on information that, in its judgment, is authentic otherwise than under the sanction of an oath or affirmation. (*Vide* s. 5(9) and (13) of the *Tariff Board Act,* R.S.C. 1952, c. 261.) Regarding proof of exclusive use, the Tariff Board can accept the written statement or declaration of counsel, and at p. 50 of the transcript we have the following statement by Mr. Hooper while acting on behalf of the respondent and quoting from his brief, which had been filed with the board:

> In paragraph 10 above (of the brief) we claim .... that the goods which are the subject of this appeal are for use exclusively in metallurgical operations.

This statement was never challenged. Moreover, the *Customs Act,* R.S.C. 1952, c. 58, s. 105(1), requires that goods claimed to be exempt from duty shall in the entry thereof be set forth in the words by which they are described to be free in the Act. The customs entry in the present case reveals that in the importers' declaration free entry was claimed by reference to item 410*p,* without reciting all its provisions which include exclusive use. Since the goods were admitted to the country, this description by reference apparently was accepted as sufficient compliance with the Act and constitutes at least presumptive proof of exclusive use.

For the above reasons I consider that the declaration of the Tariff Board should be affirmed and the present appeal dismissed with costs.

Judgment accordingly.

BETWEEN:

1959 Sept. 10, 11 — Dec. 22

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

LUMOR INTERESTS LIMITED ....RESPONDENT.

Revenue—Income—Income tax—Deduction—Cost of new elevator and rebuilding of elevator shaft to accommodate same—Whether "an outlay . . . made . . . for purpose of . . . producing income from property" or "an outlay . . . on account of capital"—The Income Tax Act, R.S.C. 1952 c. 148, s. 12(1)(a) and (b).

The Income Tax Act provides:

"S.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 respondent company owns and operates an office building equipped with an elevator and derives its income from leasing office space to tenants. The elevator had been in use for some forty years when the respondent was notified certain repairs would have to be made to it to meet the requirements of the law regulating elevators. In view of the cost of such repairs the respondent decided it was preferable to install a new elevator, and did so. In its 1955 income tax return it claimed as a deduction the installed cost of the new elevator as well as the cost of the rebuilding of the elevator shaft to accommodate it. Both deductions were disallowed by the Minister. The respondent appealed to the Income Tax Appeal Board which allowed the appeal in part and referred the assessment back to the Minister to allow as a deduction the amount expended for the new elevator and to treat the expenditure for the rebuilding of the elevator shaft as a capital expenditure. On an appeal and cross-appeal from the Board's decision:

Held: That the outlays for the replacement of the old elevator by the new one and the rebuilding of the elevator shaft and other works connected therewith were not current expenses made in the ordinary course of the respondent's business operations to earn income within the meaning of s. 12(1)(*a*) of the *Income Tax Act*.

2. That the outlays were not recurrent but were made or incurred to create a new asset and bring into existence an advantage of enduring benefit and were properly attributable to capital and not revenue. *British Insulated & Helsby Cables Ltd. v. Atherton* [1926] A.C. 205 at 213, followed. *Samuel Jones Co. (Devondale) Ltd. v. C. I. R.* (1951) 32 T.C. 513, distinguished.

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3. That the expenses were outlays or replacements of capital within the meaning of s. 12(1)(*b*) of the Act.

APPEAL from a decision of the Income Tax Appeal Board[1].

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

G. W. Ainslie and *A. J. Irving* for appellant.

Frank Brodie for respondent.

FOURNIER J. now (December 22, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated August 14, 1958, allowing in part the respondent's appeal from an assessment for its taxation year 1955 made and confirmed by the Minister of National Revenue and a cross-appeal by the respondent from that part of the decision dismissing the respondent's appeal.

In its income tax return for 1955 the respondent claimed as a deduction from income an amount of $17,705 which had been expended for the purchase and the installation of a new elevator in its building known as "Bank Street Chambers" and also an amount of $10,925 representing expenditure for the rebuilding of the elevator shaft in the said building in the 1955 taxation year.

In this re-assessment the Minister disallowed the two amounts as deductions and re-assessed accordingly. The respondent objected, but the re-assessment was confirmed by the appellant. The respondent appealed to the Income Tax Appeal Board, which allowed the appeal in part and referred the assessment to the Minister for him to allow as a deduction the amount expended for the new elevator and to disallow the expenditures incurred for the rebuilding of the elevator shaft, and other works connected therewith, because they were capital outlays.

It is from that decision that the appellant has given notice of appeal and the respondent notice of a cross-appeal. The appellant contends that the expenses for the purchase and the installation of the new elevator, as well as the expenditures for the rebuilding of the elevator shaft and

[1] 20 Tax A.B.C. 161; 58 D.T.C. 540.

other works connected therewith, were payments on account of capital within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, and were not expenses made or incurred by the respondent for the purpose of gaining or producing income from a business or property within the meaning of s. 12(1)(*a*) of the Act. On the other hand, the respondent submits that both the expenditures for the new elevator and the rebuilding of the elevator shaft and other works were made to earn income from a property or business and were deductible in computing taxable income.

The important and relevant facts established before the Court are hereinafter summarized. The respondent, a body corporate, is resident in Canada with its head office in the city of Ottawa. It is the owner of a number of buildings in Ottawa amongst which is the Bank Street Chambers, a store and office building. The respondent derives revenue from the renting of store and office space to tenants in this building. It purchased this property in 1943 for the sum of $150,000. The construction of the building dates back to 1890. About forty years ago a manual operated elevator was installed to accommodate the tenants of the upper floors. Since its installation and up to 1955 it was maintained in a good state of repair. Though no written lease was filed for the period, at the trial a sample copy was produced. The appellant admitted that the service of an elevator was one of the conditions of the leases between the respondent and its tenants. It appears that no complaints were made by the tenants as to the service given and that they were satisfied with the old elevator. The respondent was fulfilling his obligation towards its tenants and the old elevator could have continued to be operated for some time.

But in 1955 the respondent was notified in writing by the Ontario Department of Labour that the elevator did not comply with the law and regulations of the Province and would have to be repaired so as to meet the requirements of the Statute providing for the licensing and regulating of elevators. If the indicated repairs were not made, the elevator would be condemned and the tenants barred from using it. After obtaining estimates as to the cost of the

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repairs, the respondent inquired about the cost of a new elevator which would conform to all the requirements of the law.

Believing the cost of repairs to the old elevator to be too great an expenditure to be made on an old elevator, it was decided to purchase and install a new elevator. After giving a contract to implement this decision, the respondent was informed that certain regulations of the city of Ottawa dealing with the installation of new elevators would have to be complied with. A rebuilding of the elevator shaft and other works would have to be effected to receive the new elevator. Even the motor would have to be moved from the basement to a penthouse on the roof. Though the cost of these works would be high, the respondent, instead of proceeding with the repairs to the old elevator as requested by the authorities, decided to have a new elevator installed. The cost of the rebuilding of the shaft was $10,925 and that of the new elevator $17,705, or a total of $28,630.

So the question to be answered is whether the amounts of $10,925 and $17,705 which were claimed by the respondent as a deduction in computing its income and which were disallowed by the appellant come within the ambit of s. 12(1)(*a*) or s. 12(1)(*b*). These sections read 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, . . .

To answer the question, it is necessary to read alternately one provision after the other to determine if the facts of the case meet the tests required to allow the amounts involved to be deducted in computing income.

Section 12(1) expresses the general rule that in computing income no deduction shall be made in respect of a revenue outlay or expense, nor of a capital expenditure. But exceptions are provided for in the two subsections. In s. 12(1)(*a*) there is an exception for expenses made or incurred for the gaining or producing income; in s. 12(1)(*b*) there are exemptions when they are expressly permitted

by the Act. In most cases, one meets the difficulty that outlays or expenses under the two subsections may have the result of gaining or producing income. Certain rules have been devised to indicate that an expense is of a revenue nature or of a capital nature. Though a taxation provision in principle should be in expressed words, under our fiscal law taxes are imposed through general principles and not by enumerating everything that should be considered as income. So various tests have been devised to be applied to certain sets of facts to determine if they come within the ambit of the general principle.

A short review of the tests applicable to the facts of this case is necessary to determine the present dispute, because I believe no one test is sufficient to arrive at a proper decision.

The first test which came to my mind, after considering the facts adduced in evidence, was whether the expenditure for a practically new elevator shaft with necessary adjuncts and the purchase and installation of a new elevator were recurrent outlays chargeable against the respondent's current expenses for the operation of his business or not. I believe the answer should be in the negative in this case for the following reasons.

In 1955, the respondent's property, the "Bank Street Chambers", was an old building with an old elevator. Both the building and the elevator had been repaired and maintained for amounts commensurate to the value of the property and the income derived therefrom. The maintenance and repair costs were charged in the respondent's current expenses and allowed in computing its income. This had been going on for years. The tenants entitled to elevator service did not complain and I assume that they were satisfied. This could have continued for how long, nobody knows. One thing is certain, the building and property continued to produce a stable amount of income. But in 1955 the respondent was advised by the authorities that extensive repairs to the old elevator were needed to comply with the laws and regulations of the Province of Ontario relating to elevators. After due consideration, the respondent decided to install a new elevator rather than repair the old one. After having taken this decision, the respondent was

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informed that, in order to comply with the city of Ottawa regulations dealing with the installation of new elevators, the elevator shaft would have to be practically renewed. Even at that, it was decided that the elevator shaft would be rebuilt and the new elevator installed. The repairing of the old elevator would have been sufficient to comply with the provincial law and regulations. I do not believe this was a recurrent expenditure chargeable to operation expense account or made or incurred to produce income, but rather to comply with provincial regulations dealing with elevators. Without the above interventions, the old elevator would have continued to fulfil its function perhaps for the lifetime of the old building.

This brings me to the next test, which is whether the expense was made to yield an enduring benefit or made once and for a very long period. There is no doubt that the rebuilding of the shaft and the installation of a new elevator were made to replace equipment which could still be used. The life of the new work was estimated to be at least forty years. So the outlay for the new equipment would not be repeated annually or gradually or for a short period. The object of the expenditure was to continue in existence and usefulness over a period of four or five decades, as stated in evidence and admitted in the respondent's defence. Not only did the respondent incur the expense claimed as a deduction on account of certain regulations, but it seems to me that it undertook the replacement of the old elevator instead of having it repaired, because it was expected, and rightly so, that expense would be made once and for all. The expenditure was not made to cover the wear and tear of the old elevator. This could have been done for much less. The facts lead me to think that the outlays were made to create a new asset and to produce an enduring benefit to the respondent's business. It was a new means of transportation in the respondent's building and provided something which could have been given by the use of the old elevator if repaired, but perhaps not as efficiently or for all time. There is no evidence that the replacement of the old elevator by a new one was necessary to the earning of

income in the operation of the respondent's business or to fulfil its obligation towards its tenants. In my view it was replacement of capital.

In the case of *British Insulated & Helsby Cables Ltd. v. Atherton*[1], Lord Cave, dealing with the question of what would constitute a capital expenditure, says (p. 213, *in fine*):

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. . . .

In my view, this test applies to the facts here and justifies the conclusion that the outlays were attributable to capital and not revenue. The expense was made not only once and for all and to comply with certain regulations, but also to bring into existence an asset or an advantage for the enduring benefit of the business.

Counsel for respondent urged that the facts in this case could meet the test laid down by the Lord President in *Samuel Jones Co. (Devondale) Ltd. v. Commissioners of Inland Revenue*[2], wherein a chimney of a factory was replaced because it was in a dangerous condition. The cost to do so was claimed as a deduction, which was disallowed. On appeal, the Court held "that the whole cost of replacing the chimney was an admissible deduction." The Lord President (Cooper) at p. 518 said:

> . . . It is doubtless an indispensable part of the factory, doubtless an integral part; but none the less a subsidiary part, and one of many subsidiary parts, of a single industrial profit-earning undertaking.
>
> So viewing the matter I am unable to see why the expense incurred in relation to this transaction should not be treated as an admissible revenue expenditure on repairs, . . .

One of the reasons given by the Lord President for treating the expenditure as a revenue expense is expressed thus:

> . . . and I am in part influenced in reaching that conclusion by the fact that the factory as a whole is insured for something in the region of £165,000 whereas the expense incurred in taking down the old chimney and building the substitute is only a matter of £4,300 or about 2 per cent. . . .

[1] [1926] A.C. 205. [2] 32 T.C. 513, 518.

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The facts in the present instance may be distinguished from those in the above case. Taking for granted that the new elevator is a subsidiary part of the building, capital cost allowances are made at an annual rate of 5 per cent on the two items of expenditure amounting to $28,630. In the *Jones* case, the expenditure for the chimney was one to restore property on which there was no allowance for depreciation.

The chimney had become so dangerous that it had to be replaced. The elevator, after having been repaired, would have met the requirements of the law and regulations. I understand the condition of the chimney was such that it could not be used for the purpose for which it was built. The old elevator, once repaired, could have fulfilled its function. The cost of the chimney was only 2 per cent of the amount for which the factory was insured. The shaft and the new elevator cost $28,630 or 18 per cent of the amount for which the building was insured, to wit $150,000. True, after the new elevator was installed, the insurance was raised to $180,000, but the secretary of the respondent said that according to the insurance people the former amount was not sufficient. So, in the *Jones* case the Court was influenced by the insignificance of the expenditure as compared to the amount of the insurance on the building. In this case, I am impressed by the magnitude of the expenditure as compared to the amount for which the whole building was insured, especially when the evidence is to the effect that the expense for the maintenance and repair of the old elevator was in the neighbourhood of $500 per year.

The size of the expenditure is of assistance in determining the nature of the outlay. The building in question was purchased in 1943 for a sum of $150,000. The respondent's auditors in preparing its financial statements for income tax returns apportioned the value of the property as being $96,525 for the land and $56,299.97 for the building. Since then, every year a depreciation allowance at the rate of 5 per cent has been allowed on the building. During those same years, except for 1955, the costs of the repairs to the building were never in excess of $3,000 and the maintenance

costs to the elevator in the order of $500 or less each year. But in 1955 the cost of the rebuilding the shaft and the installation of a new elevator amounted to $28,630.

A witness heard on behalf of the respondent as an expert in appraisal matters and property management stated that he knew the building but had not examined it thoroughly in 1955 from an appraisal point of view and was not prepared to express an opinion as to its value at that time. Only the secretary of the company gave evidence on that point and he believed that its value was between $225,000 and $250,000. Though he had some experience in the cost of buildings, he did not impress me as an expert in appraisals of properties. So the evidence as to the value of the building in 1955, to my mind, was not satisfactory or conclusive. As to the rental value, it is understood that it was $44,075.

The book value of the building as appears in the respondent's income return for the year 1955 is $38,696.00. I am sure the book value was not the market value of the building, but having no satisfactory evidence on that point it is most difficult to compare the cost of the new installation with the real value of the whole building. I do know that the normal repair expenses for a building of that type would be between 5 per cent to 7 per cent of the gross revenue. The gross rentals being $44,075, the amount that should be spent on the building would be from $2,000 to $3,000 per year. This was what was spent before 1955. During that year, the repair outlays were those claimed by the respondent as a deduction. The sum expended was out of line with the amounts spent in former years and cannot be justified as spent for an accumulation of repairs, because it is far larger than the amount required to repair the elevator so that it would conform to the law and the regulations. The only reasonable conclusion is that the expenditure was to bring into existence an advantage which would be of a continuous and permanent nature.

As to the magnitude of the expenditure in relation to the value of the building, the only comparison that can be made would of necessity be based on the amount for which the building was insured, namely $150,000, and

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5 per cent of this sum, viz. $7,500. In this case the expenditure was incurred for a new elevator and shaft and amounted to more than $28,000 or approximately 18% of the amount of the insurance. It cannot be said in this case that the money value of the renewal and replacement of the old elevator by a new elevator and shaft was insignificant in relation to the value of the building or the income derived from its rental.

The tests I have applied in this matter were discussed by Cameron J. in the case of *Thomson Construction Company v. Minister of National Revenue*[1].

The appellant, a road building contractor, in 1949 purchased a used power shovel powered by a diesel engine for $27,075. Up to the end of the year 1952, the shovel was treated by both parties as a depreciable asset and under regulations authorized by 11(1)(*a*) of the *Income Tax Act* the annual capital cost allowance claimed and allowed had for depreciation purposes reduced the shovel's book value to $9,268. In 1953, the engine, in need of major repairs, was replaced by a new one at a cost of $8,894 less $3,200, the trade-in value of the old engine, or a net cost of $6,000. The appellant in its income tax return for that year deducted the latter amount as an outlay for the purpose of gaining income from its business. The Minister disallowed the amount. On appeal before the Income Tax Appeal Board, the appeal was dismissed. This decision was appealed from in the Exchequer Court. Cameron J. held:

2. That, although as a general rule repairs necessitated by wear and tear of equipment used in the business are allowed as deductions (although no specific reference is found in the Income Tax Act regarding "repairs") if the outlay brings into existence a capital asset, such as a new piece of machinery, such outlay will not be allowed as a deduction.

3. That the outlay here brought into existence a new capital asset, namely the new engine, *Minister of National Revenue v. Dominion Natural Gas Co.*[2], and consequently could not be considered an outlay on revenue account. (The Court was influenced in part by the magnitude of the outlay when related to the value of the power shovel as a whole.) *Samuel Jones & Co. (Devondale) Ltd. v. C.I.R.* [*supra*].

4. That to allow a deduction in full as an operating expense of an outlay such as this which brought into existence a new capital asset would be to frustrate the clear intent of the provisions of s. 11(1)(*a*) of the Act and the regulations passed thereunder in regard to capital cost allowances.

[1] [1957] Ex. C.R. 97 *et seq.*

[2] [1941] S.C.R. 19.

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5. That the outlay for the purchase of a new engine would properly be considered in accounting practice as a capital expenditure because of the enduring nature of the new asset.

I believe the rules laid down *supra* should be applied to the facts established in the present dispute.

In the case of *The Minister of National Revenue* and *Vancouver Tugboat Company Limited*[1], wherein the respondent was stated to have operated a tugboat service on the Pacific coast of Canada in the performance of which its tugboats often covered distances exceeding 800 miles in a single voyage, and a trip may have lasted from five to fifteen days. In 1951, it placed a new engine in one of its tugboats at a total cost of $42,086.71, which amount it claimed as a deduction from income for that year. The claim was allowed by the Income Tax Appeal Board from whose decision the Minister of National Revenue appealed to this Court. Thurlow J., applying all the tests to the facts I have mentioned in these notes, found that the outlay in question was an outlay or replacement of capital within the meaning of section 12(1)(*b*) and was not deductible from income. He allowed the Minister's appeal.

For all the reasons hereinabove stated and also in view of the evidence as to the amount of the sums spent in relation to the amount for which the building as a whole was insured and the amount of the gross income derived from the rental of space in the building, I find that

1) The outlays for the replacement of the old elevator by a new one and the rebuilding of the elevator shaft and other works connected therewith were not current expenses made in the ordinary course of the respondent's business operations to earn income within the meaning of the *Income Tax Act,* section 12(1)(*a*).

2) The outlays were not recurrent but were made or incurred to create a new asset and bring into existence an advantage of enduring benefit.

3) The expenses were outlays or replacement of capital within the meaning of section 12(1)(*b*) of the Act.

[1] [1957] Ex. C.R. 160.

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Therefore, the appeal is allowed and the cross-appeal dismissed. The assessment will be restored.

The appellant is entitled to his costs to be taxed in the usual way.

Judgment accordingly.

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Apr. 29, Oct. 20
Dec. 28

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

LEVAL & COMPANY INCORPORATED ..PLAINTIFF;

AND

COLONIAL STEAMSHIPS LIMITED ...DEFENDANT.

Shipping—Damage to cargo—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, Para. 2(a) and (c)—Damage to ship brought about by peril, danger or accident of the sea—Negligence due to navigation only—Control of ship not taken over by defendant—Action taken by defendant's assistant marine superintendent that of one of defendant's servants.

The plaintiff claims for damage to a cargo of flax seed transshipped at Port Colborne to defendant's barge the *David Barclay* for carriage to Montreal in a single uninterrupted voyage. Plaintiff alleges that defendant in breach of its undertaking and in dereliction of its duty failed to deliver the cargo in the same good order and condition in which it was received, but on the contrary on arrival in Montreal it was found to be wet, short and damaged.

Defendant pleads the *Water Carriage of Goods Act*, 1936 and alleges that the damage resulted from the fact that the *David Barclay* rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal.

Held: That the damage to the *David Barclay* resulting from the collision was occasioned or brought about by a peril, danger or accident of the sea within the meaning of Art. IV, Par. 2 (*c*) of the *Water Carriage of Goods Act* and since the *David Barclay* was seaworthy at the commencement of the voyage and at all times prior to her contact with the canal bank defendant was not liable in respect of such damage to the cargo as resulted directly from the collision.

2. That any negligence on the part of the Master of the *David Barclay* following the collision which resulted in damage to the cargo was negligence related primarily to the navigation or the management of the ship for which defendant cannot be held responsible in view of the exception afforded by Art. IV, Para. 2 (*a*) of the *Water Carriage of Goods Act*.

3. That action taken by the assistant marine superintendent of defendant subsequent to the collision and without reference to defendant's head office or any executive officer of defendant and solely on his own initiative and on the basis of the Master's telephone reports did not amount to a taking over of control of the vessel by the defendant in such a manner as to render it liable for any negligence there may have been thereafter on the part of the Master, crew or other servants of defendant in the navigation or management of the ship.
4. That anything done by the assistant marine superintendent of defendant was done by him on his own responsibility as one of defendant's servants within the meaning of Art IV, Para. 2 (*a*) of the *Water Carriage of Goods Act.*
5. That defendant has brought itself within the exception provided by Art. IV of the *Water Carriage of Goods Act.*

ACTION for damage to cargo shipped on defendant's barge.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

C. Russell McKenzie, Q.C. and *R. Gerard Sampson* for plaintiff.

Léon Lalande, Q.C. for defendant.

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

A. I. SMITH, D.J.A. now (December 28, 1959) delivered the following judgment:

The plaintiff claims for damage to a cargo of No. 1 Canada Western Flax Seed carried by the defendant's vessel *David Barclay* from Port Colborne to Montreal. This cargo of 96,599.3 bushels was part of a total of 422,038.8 bushels entrusted to and accepted by defendant for carriage from Port Arthur to Montreal, with transhipment at Port Colborne to the defendant's barge *David Barclay,* as appears by bill of lading dated the 11th day of November, 1955.

The plaintiff's statement of claim contains no allegation of negligence on the part of the defendant, the plaintiff contenting itself with alleging the contract of carriage and that the defendant, in breach of its undertaking and in dereliction of its duty in the premises, failed to deliver the cargo in the same good order and condition in which it was

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received at the time of shipment. It is alleged that on the contrary the said grain on its arrival in Montreal was found to be wet, short and damaged.

The bill of lading provides that the contract is governed by the *Water Carriage of Goods Act*, 1936.

By its statement of defence, the defendant alleges that the bill of lading speaks for itself, admits that the 96,599.3 bushels of flax seed were transhipped at Port Colborne to defendant's vessel *David Barclay* and transported to Montreal, arriving there on November 11, 1955. Otherwise the allegations of plaintiff's statement of claim are either denied or declared to be outside of the defendant's knowledge. The defendant alleges, moreover, that if the damage was caused, as alleged, it arose or resulted from the fact that the ship *David Barclay* rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal. It is alleged that the contract of carriage between the parties is governed by the terms and conditions of the *Water Carriage of Goods Act*, 1936, and by the rules relating to bills of lading comprised in the schedule of said act and all the terms, provisions and conditions of said act are invoked and, in particular, Art. IV, Rule 2(*a*) and (*c*).

The parties entered an admission that the loss sustained by plaintiff by reason of the damage to its cargo totalled the sum of $27,619.92 and the plaintiff's case was presented on the basis of this admission and the documents filed, without further proof.

The defendant brought evidence to show that the *David Barclay* had been inspected prior to the voyage and had been found to be dry and in satisfactory condition for the carriage of the said cargo. I am satisfied, and counsel for the plaintiff did not argue otherwise, that the proof justifies the conclusion that the *David Barclay* was in seaworthy condition when she sailed from Port Colborne at the commencement of the voyage. The evidence is that the voyage to Montreal proceeded without incident until the vessel reached a point about two miles east of Lock No. 5 in the Soulanges Canal when she sheered suddenly and struck a stone on the starboard bank of the canal.

The collision with the canal-bank occurred at about 2:00 a.m. on November 10 and the mate Fortier, who was on the bridge at the time, immediately sent a man to take soundings in No. 2 bilge, where water was found to an approximate depth of 14 feet. The pumps were put in operation and the master, who was asleep in his cabin, was called.

It was noted that the ship had a slight list to starboard. She proceeded however to Lock No. 4 where it was ascertained that her draft had not altered since the first soundings taken and she therefore continued down to Lock No. 3, where the master communicated with the canal superintendent and requested the services of a diver. The vessel then descended to Lock No. 1, where she was joined by a diver and the assistant canal superintendent who ordered her to proceed to the foot of the canal. These instructions were complied with and the vessel on reaching the eastern end of the canal was turned about and moored to the bank. Her draft was again checked and it was found not to have altered.

A diver descended and went along the entire length of the vessel in an effort to locate the hole through which the water had entered the bilge. At the end of one hour he surfaced and reported that he had been unable to find any hole or break in the vessel's skin. Captain Sauvageau however was not satisfied and requested him to go down and make a second examination which he did and after an hour and a half he reported that he had again failed to find any hole or break in the vessel's side. A further check of the vessel's draft satisfied the master that it remained unchanged. He had two or more telephone conversations with the defendant's assistant marine superintendent, Captain Walton, in the course of which the collision and the results of the diver's exploration were reported. On the basis of these reports the master was instructed by Walton to proceed to Montreal.

The vessel left Cascades around noon on the 10th of November and tied up at elevator No. 2 in the harbour of Montreal around 10 o'clock that evening. It was found that

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her draft had not altered and around 8 o'clock the following morning she commenced to discharge cargo. However, in the afternoon, it was noticed for the first time that water was finding its way from No. 2 bilge into No. 2 cargo hold and a tarpaulin was hung against the starboard side of the vessel with the hope that the suction created by the pressure of the water through the hole in the ship's side might draw the tarpaulin against the break and thus prevent the further entry of water.

There is evidence to the effect that little water had actually gained access to the cargo prior to the commencement of unloading, and this is accounted for by the fact that so long as the cargo maintained pressure against the limber boards at the top of No. 2 bilge, water could not enter the hold, but as soon as this pressure was removed water was permitted entry.

By way of rebuttal the plaintiff brought two expert witnesses, Messrs. Crocker and Finch, both of whom were critical of the course followed and the methods adopted by those in charge of the *David Barclay* following the collision. These witnesses expressed the opinion that, in the circumstances, the failure to locate and stop immediately the hole which was finally discovered in the vessel and the fact that the *David Barclay* continued on to Montreal although it was known that the vessel was leaking, amounted to negligence and lack of good judgment in respect to the care and protection of the cargo.

I am inclined to agree that there was negligence on the part of those in charge of the *David Barclay* in regard to the management of the vessel subsequent to the collision with the canal-bank. It would appear that a more thorough examination of the vessel in the Soulanges Canal would have revealed the hole which was later discovered and which might have been stopped by temporary repairs prior to the trip from Soulanges Canal to Montreal.

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On the other hand, I have no doubt that the damage to the *David Barclay* resulting from the collision was occasioned or brought about by a peril, danger or accident of the sea within the meaning of Art. IV, para. 2(*c*) of the *Water Carriage of Goods Act*:

The "Xantho"[1]; *Keystone Transports Limited v. Dominion Steel Coal Corporation*[2]; *Toronto Elevators Limited v. Colonial Steamships Limited*[3]; *Canadian National Steamships v. Baylis*[4]; *Grain Growers Export Co. v. Canada Steamship Lines*[5].

If this is so, and since it was established that the *David Barclay* was seaworthy at the commencement of the voyage and at all times prior to her contact with the canal-bank, the defendant was relieved of the responsibility in respect of such damage to cargo, if any, as resulted directly from the said collision. (*Water Carriage of Goods Act,* Art. IV, para. 2(*c*)).

Whether the damage to plaintiff's cargo was in whole or in part the result of collision or of what followed may be debatable. The position taken by plaintiff however is that the damage to its cargo was not the direct result of the collision, but was caused by the failure and neglect of those in charge of the vessel following the collision to properly care for and protect the cargo in compliance with Art. III (2) of the *Water Carriage of Goods Act.*

The defendant on the other hand, relying upon paragraph (*a*) of Rule 2 of Article IV of the *Water Carriage of Goods Act,* takes the position that, since it was proved that the vessel was seaworthy at the commencement of the voyage, even if there is evidence to support a finding of negligence on the part of the master or servants of the owner it is negligence in the navigation or management of the ship in respect of which the defendant is relieved of responsibility.

Stated in general terms what is deemed to be negligence relating to the navigation or management of the vessel (as distinguished from that which relates to the carrier's duty

1 (1887) 12 A.C. 503
2 [1942] S.C.R. 495
3 [1950] Ex. C.R. 371
4 [1937] S.C.R. 261
5 (1918) 40 O.L.R. 330; (1919) 59 Can. S.C.R. 643.

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to care for and protect the cargo) is negligence relating to something done or omitted which relates primarily to the care and preservation of the vessel.

The courts, on various occasions, have been called upon to distinguish between negligence relating to the care and protection of cargo for which the carrier is responsible and neglect in the navigation or management of the vessel in respect of which the carrier is exempted from responsibility. For example, in the case of *Gosse Millard Limited v. Canadian Government Merchant Marine*[1], it was held that the failure to properly cover a hatch with a tarpaulin amounted to negligence in respect of the care and protection of the cargo which rendered the carrier liable.

Similarly, in the case of the *Ferro*[2], where a cargo was damaged owing to improper stowage, it was held that the matter of stowage did not relate to the management of the vessel, and the carrier was therefore liable for negligent stowage.

When however the negligence is such as to satisfy the court that the primary concern of the master was the safety of the vessel, such negligence is deemed to be negligence relating to the navigation or management of the ship and the carrier is relieved of responsibility.

Thus, in the case of *The Rodney*[3], where a pipe became clogged and was improperly cleared with the result that water entered and damaged the cargo, the negligence and failure to properly clear the pipe was held to be negligence relating to the management of the ship for which the carrier was not responsible. (*The Glenochil*[4]).

The fact that the negligence may have related also to the protection of the cargo does not disentitle the carrier to the exemption afforded by Art. IV, Rule 2, if what was done or omitted related primarily to the navigation or the management of the ship.

I am convinced that the steps taken by the master of the *David Barclay* following her collision with the canal-bank related primarily to the safety and preservation of the vessel. The proof shows that her No. 2 starboard bilge filled rapidly and remained filled notwithstanding the operation

[1] [1929] A.C. 223. [2] [1893] P. 38.
[3] [1900] P. 112. [4] [1896] P. 10.

of the vessel's pumps. The ship developed a list and I have no doubt that the situation was such as to give the master concern for the safety of his vessel. The testimony of Mr. Crocker indicates that in his opinion the *David Barclay* was in jeopardy following the collision.

The Supreme Court in the case of *Kalamazoo Paper Company v. Canadian Pacific Railway*[1], which involved circumstances similar in some respects to those which pertain to the present case, held that, assuming that there was failure on the part of the ship to utilize the available pumping facilities and that damage to the cargo resulted, this was neglect on the part of the master "in the management of the ship" within the meaning of Rule 2(*a*) of the statute and the defendant was not liable. In that case the master, having brought his ship safely to the wharf with only a small quantity of water in the forehold, and having by causing her to be grounded on the mud bank obviated the danger of her sinking, did nothing to prevent the rise of water in the forehold other than to continue to use the bilge pump which was quite inadequate.

In *Kalamazoo Paper Company v. Canadian Pacific Ry.* (*supra*):

Estey J. page 371:

> The primary concern of the master in keeping the pumps going was to get out as much water as he could so that the bulkheads would not give way and that possibly the ship might continue her course. That being the primary concern the fact that the pumping did tend to preserve or affect "the safety of the cargo", as stated by Gorell Barnes J. in the *Rodney*, does not take the case out of the exception of Art. IV, Section 2 (*a*).

Rand J. at page 366:

> The further question is whether an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to care of cargo ....the necessary effect of the language of Article III (ii) "subject to the provisions of Article IV" seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may be also an omission in relation to cargo. To construe it otherwise would be to add to the language of Paragraph (*a*) the words "and not being a neglect in the care of the goods".

[1] [1950] S.C.R. 356.

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Locke J. at page 379:

Accepting the findings of fact by the learned trial judge, that there was negligence on the part of the master appears to me to be undoubted, That this negligence resulted in damage to the cargo is equally beyond question. Any negligence in failing to take prompt steps to avoid the inroad of seawater into the holds of a vessel carrying perishable cargo must, in my view, be also negligence either in the navigation or the management of the ship. It is said for the appellant that when the *Nootka* was run aground at Quatsino Wharf she was safe from sinking, so that the failure to operate the available pumps did not jeopardize the safety of the vessel and that the presence of the large accumulation of water in the forehold did not constitute a danger to the bulkhead, but I think it must be accepted upon the authority of *The Rodney* that this is not decisive of the matter. Navigation, as indicated by the decisions in *Good v. London Steamship Owners' Association and Carmichael v. Liverpool Sailing Ship Owners' Association,* does not refer merely to the time when the vessel is at sea. The decision in *The Accomac* (1890) 15 P.D. 208, is clearly distinguishable on the facts for there the voyage had ended at the time the events occurred giving rise to the claim. I think the failure to exercise reasonable diligence to prevent further water entering the forehold falls within the same category as the failure of the crew to close the bilge-cock in Good's case, and the port in Carmichael's case, and was "neglect in the navigation of the ship" within the terms of the exception. The learned trial judge considered the matter as one of negligence in the management of the ship and, having come to a conclusion on this aspect of the matter, no doubt considered it unnecessary to decide further whether there was not also negligence in the navigation of the ship. The same neglect may, in my opinion, be both in navigation and in management. Adopting the language of Gorell Barnes J. in *The Rodney,* there was here improper handling of the ship as a ship which affected the safety of the cargo and this was fault or error in management. The learned trial judge has said that the neglect was essentially a failure in a matter that vitally affected the management of the ship, a conclusion with which I respectfully agree.

It is my opinion therefore that if there was negligence on the part of the master of the *David Barclay* following the collision which caused or brought about the damage to plaintiff's cargo, it was negligence which related primarily to the navigation or the management of the ship for which negligence the defendant cannot be held responsible in view of the exemption afforded by Art. IV, 2(*a*) of the statute.

After the trial, counsel for plaintiff referred the court to the case of the *Isis*[1], thereby, in my opinion, introducing a proposition which until then had not been raised either by the written pleadings, or in the course of the argument at the trial. For this reason, counsel were invited to argue

[1] 48 Ll. L.L. Rep. 35.

the question of the applicability and effect of the holding in the *Isis* case. This was done and I have now had an opportunity of considering the case in the light of this argument.

Mr. McKenzie, basing himself upon the *Isis* case argued that after the collision of the *David Barclay* with the canal-bank her owners intervened and took over control of the vessel from the master, so that any fault or negligence there may have been thereafter was fault for which the owners are personally liable, their position being exactly as if the trip from Soulanges Canal to Montreal had constituted a new and independent voyage or, at least, a new and distinct stage of the voyage for which the owner was obliged to exercise all reasonable diligence to make the vessel seaworthy.

Nothing of this was alleged in plaintiff's statement of claim or elsewhere in the written pleadings. On the contrary, it was alleged that the contract of carriage was for a voyage from Port Colborne to Montreal.

To succeed on this ground it seems to me that the plaintiff was obliged to both allege and prove that the defendant had intervened and taken over control of the vessel in such a manner as to make it personally responsible for any unseaworthiness in the ship and for such negligence as there may have been in its subsequent navigation or management and, in the absence of such allegations, I do not believe that this proposition was available to the plaintiff as a basis for its claim. (*General Rules and Orders In Admiralty*, Rule 70; *Roscoe Admiralty Practice* 5th Edit. Order 19, Rule 15, p. 299.)

I propose, however, for the purposes of the argument, to consider the question of the applicability and effect of the *Isis* case as if this issue had been properly raised by the written pleadings.

There is at least some reason to doubt the applicability of the holding in the *Isis* case. In the first place, it was decided under the Harter Act and prior to the enactment of the *United States Carriage of Goods by Sea Act*, 1936, and one important difference between these statutes is that the latter enactment (as did the Canadian Act) did away with the obligation which rested upon the ship-owner under the Harter Act to warrant the ship absolutely seaworthy

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and rendered him liable for any unseaworthiness whether or not it was actually related to the damage complained of.

Assuming however that the principles upon which the *Isis* case was decided are applicable, it seems to me that the circumstances of the case now under consideration are very different from those which pertained in the *Isis* case.

It would appear that the testimony of Captain Walton, assistant marine superintendent of the defendant, heard as a witness for the defence, prompted the plaintiff to invoke the holding in the *Isis* case. At any rate the plaintiff's argument that the defendant had intervened while the vessel was in the Soulanges Canal and taken over control of the ship from the master is based entirely on the following portions of Captain Walton's testimony:

> Q. Will you tell the Court what you personally know about this incident in the Soulanges Canal during the night from the 9th to the 10th of November 1955?
>
> A. I had a call from Captain Sauvageau—I cannot recall the exact hour but it was early, before I went to work—reporting that he had damage, that he had struck the canal bank and suspected he had a hole in her, because his bilge was full of water; and that he had called a diver; and he had given instructions to tie up and make the inspection; and he reported to me later that the diver was unable to find anything.
>
> I asked him when he first called as to what the ship's draught was. He told me. I asked him if it had increased any from before. He said "No." I asked about list. He said "No, nothing noticeable" and so I asked him, after the diver had made his report to call me back to decide what we could do, which he did around eleven or twelve o'clock somewhere. I cannot recall the hour exactly but he did call. So, I asked him again about the list and the draught and he said there was no change; that the diver could not find any damage.
>
> So I instructed him under those circumstances to proceed to Montreal. He had to get her down here to get her unloaded and to get something done to protect the ship and cargo and I believe he arrived here the following evening sometime.
>
> Q. Now then, when did you next hear about the *David Barclay*?
>
> A. When she was unloading the next day. We heard she had damage and that things were being taken care of in Montreal.

It seems to me that the present case is distinguishable from that of the *Isis* case in a number of important respects.

First: The contract of carriage entered into between plaintiff and defendant was for a single uninterrupted voyage from Port Colborne to Montreal, whereas in the *Isis*

case the contract stipulated several stops en route to final destination for the discharging of cargo thereby suggesting the concept of a voyage by stages.

Second: Whereas in the *Isis* case facilities existed at Bremen, one of the stops en route, by the use of which repairs could have been effected to the vessel, no such facilities were available to the *David Barclay* in the Soulanges Canal. Moreover, in the *Isis* case (in which, as in the present case, the owner of the vessel was a limited company), the head office of the owner was immediately advised of the accident and of the damage to the vessel and the head office sent its marine superintendent to the scene with instructions to take charge which, in fact, he did.

In the present case, there is no evidence that the owner, Colonial Steamships Limited, was advised of the vessel's collision with the canal-bank or of any matter concerning her condition prior to her arrival at Montreal. The testimony of Captain Walton is that he received a telephone call at his home early in the morning of the 10th of November from the master of the *David Barclay*. There is nothing to indicate that Walton notified or communicated with anyone at the defendant's head office. On the contrary, it appears that he took it upon himself to obtain a further telephone report from the master concerning the damage to the vessel and its apparent effect on her draft, and, on the basis of these oral reports, he, on his own responsibility, instructed the master to proceed to Montreal.

The question which, of course, immediately suggests itself is whether or not Captain Walton, the assistant marine superintendent of the defendant, was not merely the "servant" of the defendant within the meaning of Article IV, para. 2(*a*) of the *Water Carriage of Goods Act*.

Was the action taken by Walton merely that of a servant of the defendant, or was it one to which the defendant was privy and for which it is therefore personally liable?

In the words of Lord Haldane in *Leonard Carrying Company v. Asiatic Petroleum*[1]. To make it the act of the company rather than that of the servant of the company "It must be fault of some one for whom the company is not

[1] [1915] A.C. 705 at 713.

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merely liable on the principle of *respondeat superior* but somebody for whom the company is liable because his action is the very action of the company itself".

Hamilton L.J. in the court of appeal[1] in the same case wrote that to be the action of the company and not that of a servant of the company it must be that of a person "with whom the chief management of the company resides".

In *Smitton v. Orient Steam Navigation Co.*[2], Channell J. held that it must be fault of the managing authority, e.g. the directors.

Applying these principles to the facts of the present case, I am unable to conclude that the action of Captain Walton, the defendant's assistant marine superintendent, taken without reference to the defendant's head office or any executive officer and solely on his own initiative and on the basis of the master's telephone reports, amounted to the taking over of control of the vessel by the defendant in such a way as to render it liable for any negligence there may have been thereafter on the part of the master, crew or other servants of the defendant in the navigation or management of the ship. On the contrary, I am of the opinion that what Captain Walton did was done by him on his own responsibility acting as one of the defendant's servants within the meaning of Article IV, para. 2(*a*) of the *Water Carriage of Goods Act*.

On the whole therefore I conclude that the defendant was successful in bringing itself within the exceptions provided by Art. IV of the *Water Carriage of Goods Act* and has therefore made good its defence to the present action.

Accordingly, the plaintiff's action is dismissed, with costs.

Judgment accordingly.

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[1] [1914] 1 K.B. 437.

[2] (1907) 12 Com. Cases 270 at 271.

1958 Apr. 10 — 1959 Oct. 30

BETWEEN:

LORD & CIE LIMITEE ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of right—Material supplied contractor used in public work—Written assurance of payment by Chief Engineer, Public Works Department—Liability of Crown—Public Works Act, R.S.C. 1952, c. 228, s. 18.

Section 18 of the *Public Works Act,* R.S.C. 1952, c. 228, provides that no deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding upon Her Majesty or be deemed to be the act of the Minister, unless the same is signed by him or by the Deputy Minister, and countersigned by the Secretary of the Department, or the person authorized to act for him.

The suppliant on January 24, 1952 wrote the Chief Engineer, Department of Public Works, that it had supplied a contractor with material used in the construction of a public work and the latter had ignored its demand for payment and asked an assurance that the Department would protect it by withholding the amount due out of any future payments to be made the contractor. The Chief Engineer by letter dated January 31, 1952, replied that the amount owing had been noted and would be retained out of any amounts to be paid the contractor. Despite this undertaking, when the contractor was declared bankrupt on August 9, 1952, it was found the Department had paid the latter amounts considerably in excess of the debt owing the suppliant and that the assets were insufficient to meet the claims of the unsecured creditors of whom the suppliant was one. In an action to recover the amount of the debt from the Crown.

Held: That since the suppliant in support of its claim relied solely on the letter dated January 31, 1952, the issue was to be decided by the provisions of s. 18 of the *Public Works Act* and it was for the suppliant to establish the requirements of the section had been strictly complied with, and this it failed to do.

PETITION OF RIGHT to recover a debt owing the suppliant by reason of a written assurance of payment by the Chief Engineer, Department of Public Works.

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

André Villeneuve for suppliant.

Guy Favreau, Q.C. and *Jean Paul Grégoire* for respondent.

DUMOULIN J. now (October 30, 1959) delivered the following judgment:

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Dans cette pétition de droit, la compagnie Lord, Limitée, de Montréal, fait valoir que, le 5 septembre 1951, elle accepta d'usiner une certaine quantité de matériel d'acier, à la réquisition et pour le compte de J. E. Côté, entrepreneur, qui, selon contrat, daté le 25 octobre 1950, (pièce nº 8), intervenu d'autre part avec Sa Majesté le Roi, représenté par le ministre des Travaux publics du Canada, assumait la tâche de construire un prolongement au quai de l'Île-aux-Grues.

Le coût de ces matériaux, subséquemment livrés à J. E. Côté, s'élevait à $3,521.33 (pièce nº 2), selon rectification de l'art. 4 des admissions conjointes, produites au greffe de la Cour, le 19 août 1958.

Le 7 janvier 1952, la requérante écrivit à son débiteur retardataire, Côté, une dernière demande de paiement, (pièce nº 3), qui demeura, c'est le cas de le dire, lettre morte.

Peu après, la complication commence à s'aggraver.

Le 24 janvier 1952, la compagnie Lord, Limitée, adresse à l'ingénieur en chef du ministère des Travaux publics, M. Robert Blais, une lettre (pièce nº 4) qui contient cette mention en suscription: "Quai Île-aux-Grues; Tirants—Échelles—Acier $3,521.33", et dont voici l'avant-dernier paragraphe:

> Vu les circonstances [Côté étant en défaut de payer], nous désirons par la présente vous demander de nous assurer la protection du Département en retenant le montant qui nous est dû sur les paiements futurs à être effectués à Monsieur J. E. Côté.

Une semaine plus tard, le 31 janvier 1952, l'ingénieur en chef Blais répondit à la pétitionnaire dans une lettre, (pièce nº 5), dont il importe de reproduire la teneur intégrale.

> Attention: Monsieur André Chabot, Comptable.
>
> Messieurs,
>
> En réponse à votre lettre du vingt-quatre janvier dans laquelle vous réclamez de monsieur J.-E. Côté, entrepreneur, un montant de $3,521.33 en rapport à son contrat de l'Île aux Grues, et un autre de $390.63—Stratford Centre—[ce second montant a été l'objet d'un retraxit] permettez-moi de vous informer que notre bureau du Trésor a pris note de ces chiffres.
>
> Nous retiendrons ces montants des paiements à faire à Monsieur Côté à moins que vous nous informiez qu'ils ont été acquittés.
>
> Votre bien dévoué,
> Robert Blais,
> Ingénieur en chef.
>
> Lord et Compagnie, Limitée
> 4700, rue Iberville
> Montréal, Québec

Malgré cet engagement explicite, nous constaterons que, loin de s'y conformer, les comptables du ministère versèrent à l'entrepreneur Côté des sommes d'argent au total de $12,618.50, *entre le 31 janvier 1952, et la faillite de cet individu, survenue le 9 août 1953.*

Afin de disposer de ce dernier incident en fonction de la créance alléguée, je noterai l'expédition certifiée d'un jugement de l'Honorable Juge Jean-Louis Marchand, séant en division de faillite, le 17 décembre 1957, où il est mentionné que: "aucun dividende n'a pu être distribué aux créanciers non garantis . . ." (pièce nº 11). La réclamante, créancière chirographaire simplement, n'a donc rien reçu du syndic.

En ce qui concerne le ministère des Travaux publics, la situation est loin de paraître aussi simple.

Un interrogatoire conduit hors de cour, selon permission accordée, a consigné, entre autres, les questions et réponses qui suivent, (pièces nºs 6 et 7), et que jai cru opportun de replacer dans leur ordre logique.

Q. Quel était le montant global du contrat?

R. $58,744.10

Q. Y avait-il un montant dû à Côté à la date du 31 janvier 1952?

R. $2,340.00.

Q. Quels ont été les paiements, et leur date, faits à Côté après le 31 janvier 1952?

R. July 18, 1952 .... $8,350.00
September 26, 1952 .... 4,268.50

En tout, près de quatre fois le montant dû à la pétitionnaire. Ces précisions se lisent à la pièce nº 7, sous la signature de monsieur C. R. O. Munro, chef des services légaux au ministère des Travaux publics.

Aussi voyons-nous sans étonnement, à l'art. 12 des "Admissions", que, forte de l'acquiescement à retenir, accordé dans la lettre du 31 janvier 1952, (pièce nº 5), la compagnie Lord ". . . ne vit pas à assurer l'exercice de ses droits à l'encontre de l'entrepreneur Côté, sauf en produisant entre les mains du syndic à la faillite de ce dernier une réclamation pour les montants susdits", qui demeura improductive.

Enfin, l'art. 11 de la pétition, allègue qu'à différentes reprises le ministère des Travaux publics, requis de payer la requérante, omit de respecter l'entente conclue à cette fin.

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Voilà le différend que je dois vider.

Les questions de droit soumises à la considération de la Cour se résument à ceci, c'est la pétitionnaire qui parle: "que le ministère ayant failli à sa promesse littérale doit répondre du préjudice causé"; subsidiairement, sans insister, elle y va d'une allusion à l'enrichissement sans cause (art. 16).

L'intimée réplique ". . . qu'un consentement présumé de la part de la Couronne est impossible à cause de la Loi des travaux publics (S.R.C. 1952, c. 228), qui est très explicite sur le sujet . . ." Comme preuve à l'appui, l'on indique l'art. 18 de ce statut, et aussi les clauses 31, 45 et 52 du contrat que relate la pièce nº 8.

Procédant selon l'ordre chronologique, je retiendrai pour étude ultérieure l'argument essentiel de la demanderesse, et je le confronterai avec les moyens de défense.

Mais, je puis, dès ici, disposer de l'éventualité d'un "enrichissement sans cause" de l'intimée, à qui l'on demande de payer à la compagnie Lord, une seconde fois, un montant de $3,521.33, qu'elle a, en premier lieu, versé à son créancier contractuel, le nommé J. E. Côté.

Acquitter deux fois la même dette est une façon peu pratique de s'enrichir, et payer son créancier contractuel n'est pas un paiement sans cause.

Des stipulations portées au contrat (pièce nº 8, l'une, la clause 31, prévoit précisément des complications de l'ordre de la nôtre, des réclamations impayées à leur échéance par des contracteurs de l'État et dénoncées au ministre, qui ". . . pourra, à son choix, . . . retenir sur tout argent dû ou à devoir à l'entrepreneur par Sa Majesté, tel ou tels montants que [lui] *le ministre* pourra trouver suffisants pour les acquitter . . ."

La clause 45 stipule que ". . . il est clairement compris et convenu que les contrats exprès, les conventions et les engagements contenus aux présentes et faits par Sa Majesté sont et devront être les seuls contrats, conventions et engagements sur lesquels tous droits contre Sa Majesté doivent être basés." Cette redondante déclaration, comme il y en a tant dans les rédactions de contrat, n'est, somme toute, qu'une lapalissade, si elle entend préciser que seul

ce contrat fera foi de son contenu. Par ailleurs, cette prohibition empêcherait-elle le gouvernement, maître de l'entreprise, de conclure, selon les formalités voulues, des ententes connexes? Je crois qu'il faut répondre négativement. De toute évidence, la solution contraire rendrait presque impossible l'exécution de travaux publics.

Quant à l'art. 54, il est sans application en l'occurrence. Et maintenant, voyons ce que prescrit la clause 18 (de ce chapitre 228 des Statuts Revisés de 1952), dont suit la reproduction textuelle:

> 18. Nul titre, contrat, document ou écrit se rattachant à quelque matière relevant du Ministre, ne lie Sa Majesté ni n'est réputé l'acte du Ministre, à moins qu'il ne soit signé par lui ou par le sous-ministre et contresigné par le secrétaire du ministère ou par la personne autorisée à le remplacer.

Est-il besoin de rappeler, qu'entre particuliers, l'acquiescement librement exprimé, de façon simple et précise, dans la lettre du 31 janvier 1952 (pièce n° 5), aurait engagé la responsabilité personnelle du souscripteur Robert Blais. Il convient de signaler l'incongruité de pratiques semblables qui, inconsciemment, sans doute aucun, surprennent cependant la bonne foi du public. Et que l'on n'objecte pas la fiction de la connaissance de la loi, sans auparavant reconnaître qu'elle s'applique pour le moins autant à l'ingénieur en chef du ministère qu'à un simple profane.

Ce blâme, qui n'est pas exorbitant des incidents de la cause, ne saurait, cependant, atténuer le fait essentiel que le problème à résoudre en est un de droit public et d'ordre statutaire.

N'eût été la lettre du 31 janvier 1952, portant la signature de l'ingénieur en chef Blais, jamais pareille difficulté n'aurait pu surgir. Il reste que la solution doit être recherchée en fonction de cet écrit et des prescriptions de la loi organique du ministère, particulièrement de l'art. 18, ci-haut récité.

Un précédent, qui date de la fin du siècle dernier, l'instance de: *Her Majesty the Queen and Henderson*[1], posait en principe, dans un cas analogue à celui-ci, que:

> The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R.S.C. ch. 37), which require all contracts affecting that Department to be signed by the Minister, the

[1] (1898) 28 Can. S.C.R. 425, 432.

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deputy of the Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in *writing* [c'est moi qui ai souligné] made by that Department.

Voici un aperçu de la transaction, donné par l'arrêtiste:

> *Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties,* payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing.

Cette décision de la Cour Suprême avait trait, nous venons de le lire, à l'achat de matériaux par des officiers ou fonctionnaires de l'État à l'occasion de travaux publics exécutés en régie, conjoncture forte différente de celle sous examen, l'entrepreneur Côté n'étant pas un employé du gouvernement. Puis aussi, distinction certes point sans importance, l'unique lien possible de responsabilité entre la pétitionnaire actuelle et l'intimée, la malencontreuse lettre du 31 janvier, n'est pas, à proprement parler, un contrat mais un "écrit" unilatéral, comportant l'engagement de faire ce que l'on sait et qui ne fut pas tenu.

Par application de ces mêmes motifs aux circonstances de la cause, il y a lieu de tenir que la Cour Suprême rendrait une décision identique en droit mais différente en fait.

Le Conseil Privé commentait favorablement ce jugement, en 1933, dans l'affaire: *Dominion Building Corporation Limited and The King*[1]. Le rédacteur officiel consigne le dispositif comme il suit:

> Sect. 15 of the Department of Railways and Canals Act (R.S. Can., 1906, c. 35), which provides that no deed, contract, document or writing relating to a matter under the control or direction of the Minister shall be binding upon his Majesty unless signed in accordance with the section, does not apply to a contract which *is not embodied in an instrument or instruments in writing* intended to be signed by some one on behalf of the Crown.

Ici encore le tribunal insiste sur le point que les formalités légales doivent être suivies quand il s'agit d'une obligation consignée par écrit.

Dans cette cause, l'un des appelants, Forgie, de son initiative et de concert avec ses partenaires, avait offert d'acheter un immeuble annoncé en vente, à Toronto, par le ministère

[1] [1933] A.C. 533, 539, 546, 547.

des Chemins de Fer et Canaux. Un dépôt de $25,000 fut versé en 1925, soit le cinquantième du prix accepté de $1,250,000.

Dès le mois de juillet 1925, les négociations progressant, quatre documents furent rédigés, à savoir: 1) l'offre d'acheter la propriété Corner, soumise par l'appelant Forgie à Sa Majesté le Roi, représenté à cette fin par le ministre des Chemins de Fer et Canaux du Canada; 2) un rapport relatif à cette offre transmis par le ministre au Gouverneur-Général en Conseil; 3) une formule de bail, partie intégrante de l'offre; puis 4) un arrêté ministériel (Order-in-Council), daté le 29 juillet 1925, autorisant la vente de l'immeuble Corner aux conditions proposées par le postulant acquéreur.

Le 5 octobre 1925, le ministère concerné avait expédié à l'appelant, pour approbation, un projet de lettres patentes le déclarant acquéreur de la propriété.

De cet ensemble concomitant de faits, dont quelques-uns officiels, les Lords du Conseil Privé ont déduit que:

> It is in their Lordships' opinion obvious, having regard to the dates of these documents, that the offer of July 27, 1925, embodied terms which, as the result of the negotiations, were then acceptable both to the appellant Forgie *and the Minister of Railways and Canals.*

L'acquéreur Forgie, incapable de satisfaire à tous les versements stipulés, avait, chaque fois, été relevé du défaut de payer. Mais, quand le 3 février 1926, il informa le ministre qu'il pourrait enfin acquitter le prix d'achat, si un délai final de huit jours lui était accordé, cette permission fut refusée et la transaction unilatéralement répudiée.

Le jugement de la Cour de l'Echiquier accueillant l'action compensatoire en dommages-intérêts, fut infirmé par la Cour Suprême, mais, on le voit, rétabli par le Conseil Privé pour les motifs que nous allons lire:

> That he [le ministre] did consent cannot be doubted, as in his report to the Committee of the Privy Council upon the offer of July 27, 1925, he stated that he had accepted such offer subject to the approval and authority of the Governor-General in Council.
>
> In these circumstances did s. 15 apply [disposition analogue à notre art. 18] to the contract in question? Their Lordships are of opinion that it did not. It is to be observed that the section does not say that every contract in order to be binding must be in writing, but only that no deed, contract, document or writing relating to any matter under the control or

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direction of the Minister shall be binding unless it is signed and countersigned by certain specified persons. Of the four things mentioned each one except "contract" must necessarily be something in writing. So long ago as in 1898 the Supreme Court of Canada in *Reg. v. Henderson* [*supra*] held that the section did not apply where the contract was not a written one. Their Lordships think that that conclusion was correct. They think that so far as "contract" is concerned the section has no application *except where the contract is embodied in an instrument or instruments in writing* intended to be signed by some one on behalf of the Crown. Here there was no such intention. On the construction of the offer which their Lordships adopt nothing further in writing signed by any of the parties was required. The making of the Order in Council was of itself sufficient to convert the offer into a binding contract.

De cette longue citation il découle que, premièrement, un contrat verbal, accepté ou ratifié par le ministre de façon suffisante, échappe aux formalités spécifiées par la clause 15, ou 18; puis deuxièmement, que tout autre titre littéral, c'est le cas ici, relatif aux affaires qui ressortissent aux directives ou au contrôle du ministre, doit, par contre, être signé et contresigné au désir du statut.

Dois-je répéter que le seul et unique "titre" apparent invoqué contre le gouvernement, la lettre du 31 janvier, (pièce n° 5), n'est pas un contrat, que ce titre est par écrit, et qu'on l'utilise pour engager la responsabilité pécuniaire du ministère.

La clause 31 du contrat, (pièce n° 8), intervenu le 25 octobre 1950, entre J.-Edgar Côté et S. M. le Roi, où mention est faite que *le ministre* seulement pourra ordonner la retention des versements dus aux entrepreneurs, rend plutôt équivoque l'autorisation à cet effet que prétendrait avoir l'ingénieur en chef. Mais la décision à laquelle j'en viendrai sur le point essentiel, me dispense d'élucider ce doute.

Je mentionnerai encore la cause de: *The Journal Publishing Co. Ltd. vs. The King*[1], soulevant sensiblement les mêmes questions de faits et de droit que l'instance: *Dominion Building Corporation vs. The King* (ci-haut). Deux arrêtés en conseil et une correspondance confirmative d'ententes convenues, émanant du sous-ministre, démontraient, dans ce cas, de façon évidente, l'adhésion officielle à ce bail.

Quant à l'allégation de la requérante que le sous-ministre aurait accordé son approbation "expresse ou tacite", je ne relève de cela nulle corroboration dans les pièces du dossier.

[1] [1930] Ex. C.R. 197.

Il y a bien sous sa signature une lettre aux procureurs de la compagnie, lettre qui, portant la date du 17 novembre 1954, (pièce n° 10), ne saurait influer sur le différend, lequel, nous l'avons vu, se situe dans la période comprise entre le 31 janvier 1952, et le 9 avril 1953, date de la faillite de J. E. Côté. La lettre de M. Young qui, du reste, nie la responsabilité de son ministère, n'est au mieux qu'un incident *ex post facto*.

En bref, la pétitionnaire exerce contre l'intimée un recours en dommages-intérêts par suite de l'inaccomplissement d'un engagement. Cette promesse est constatée dans un écrit qui, seul, constitue le "titre" sur lequel la demanderesse base son action. Toute demande du genre me paraît se rattacher à "quelque matière relevant du Ministre", puisque l'on voudrait qu'elle fût "réputée l'acte du Ministre", au sens de l'art. 18.

C'est donc cette s. 18 de la "Loi sur les travaux publics" qui entre en ligne de compte.

Malheureusement la pétitionnaire, dans l'ignorance de ce texte en a éludé les prescriptions, mais ne pourra en éluder aussi les conséquences.

Toutefois, puisqu'il s'agit d'un litige où l'équité et la loi s'affrontent, mais où la loi doit prévaloir, je rejetterai la pétition de droit sans frais.

Par ces motifs, cette cour ordonne et décide que ladite pétitionnaire n'a pas droit au recours sollicité dans sa pétition qui est rejetée sans frais.

Jugement en conséquence.

80667-9—4a

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Dec. 15

BETWEEN:

REGAL HEIGHTS LIMITED ....APPELLANT;

AND

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

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6, 81(1) and 139(1)(e)—Profits from land purchased for development of a shopping centre and later sold—Income or capital—"An undertaking"—A "venture in the nature of trade"—A business—Appeal dismissed.

A group of persons formed a partnership for the purpose of developing a shopping centre in the City of Calgary, Province of Alberta. Appellant company was incorporated and certain lands were purchased for the purpose of proceeding with the development. Due to the occurrence of certain matters the shopping centre plan was dropped and the holdings of the appellant were disposed of at enhanced prices resulting in considerable gain to appellant.

Appellant was assessed for income tax on this gain and an appeal by it to the Income Tax Appeal Board was dismissed. A further appeal was taken to this Court. Appellant contends that the amount of profit is a capital gain and not income.

Held: That the profits in question are the regular outcome of "an undertaking", a "venture in the nature of trade" within the Income Tax Act and in short of a business and so properly assessed for income tax.

2. That from its inception the sole subject of the partnership consisted in profit-making through the operation of a shopping centre; the profit was attained by a quick turnover of three transactions and the mode instrumental in ensuring this result though at one remove from the company's initial and most favoured ambition does not detract from a basic profit-seeking venture.

APPEAL from a decision of the Income Tax Appeal Board.

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

R. H. Barron, Q.C. for appellant.

Ernest S. Watkins and *T. E. Jackson* for respondent.

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

DUMOULIN J. now (December 15, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated December 5, 1957[1], dismissing Regal Heights' prior appeal in respect of its income tax assessment for taxation year 1955.

Appellant, for the year 1955, reported in its regular annual return a taxable income of $970.94.

By a notice of assessment dated May 15, 1956, appellant was told that the minister had calculated the income taxable in an amount of $138,690.98.

Even before any recital of facts, it may be readily conjectured that I am faced with the ever-recurring technical distinction between income, i.e. net profits, and capital accretion, within the purview, *inter alia,* of ss. 3, 4, 6, 81(1) and 139(1)(*e*) of the 1952 *Income Tax Act.*

The conclusions of both parties, as we shall see, encompass the whole problem. On the one hand, Regal Heights Limited argues that (*vide*: Statement of Facts, ss. 10.(*d*) and 11.):

> 10(*d*) The gains which arose on realization were the result of disposing of capital assets and are not taxable under the provisions of the Income Tax Act.
>
> 11. In any event sales made by the liquidator of capital assets for the sole purpose of carrying out his statutory obligations to distribute the assets of the appellant do not in law constitute income.

To which, on the other hand, respondent counters that (*vide*: Reply to Notice of Appeal, s. 7):

> . . . the profit of the Appellant arising from the sale of real estate in 1955 is a profit from a business within the meaning of that word as used in the Income Tax Act and thereby income by virtue of sections 3 and 4 of the said Act.

And now the material occurrences leading up to the actual issue. On September 1, 1952, one Ben Raber, then of Medicine Hat and presently residing in Los Angeles, Calif., learned that a 40-acre property, known as Regal Golf Course, situate at 6th Street East and 16th Avenue, North-East Calgary, was for sale.

This land, located along the proposed route of the Trans-Canada Highway, about one mile from the Hudson's Bay

[1] (1957-58) Tax A.B.C. 266.

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store, admittedly the central sector of Calgary, at once suggested many alluring potentialities to Mr. Raber's keen business acumen.

He, as prime mover of the scheme, envisioned the feasibility of using this site to provide North Calgary's growing population with a shopping centre. With this object in mind, Raber and his brother-in-law, Mr. Jacob Belzberg of Lethbridge, needed but very few days to organize a partnership with two more associates, Messrs. Harry Cohen and M. T. Riback, on an equal footing, and on September 8, 1952, the newly formed association purchased the 40 acres for $70,000 from Canada Permanent Mortgage Corporation of Edmonton. This land, as per the date of its acquisition, was under lease to Regal Golf Course until December 31, 1953.

However, this intervening period afforded the four partners ample time to further their plans for a shopping centre. At the end of November, 1952, Active Realty Company was retained to promote this shopping centre project and to negotiate in consequence with such commercial leaders as T. Eaton Co. Ltd., Hudson's Bay Co., Woodwards Ltd., and any other concern of comparable standing.

An application for rezoning the property from residential to commercial purposes was submitted to the Calgary Planning Board, on November 23, 1952, with an accompanying sketch plan (Ex. 3). Favourably considered by the Board, full approval of this request was withheld pending the start of construction work.

Two subsequent acquisitions took place, first, a corner property at 639 16th Avenue, N.E., bought on May 26, 1953, at a price of $14,700, in order to facilitate traffic conditions around the proposed enterprise; next, on March 1, 1954, "a one third undivided interest in additional property", paid $4,000, for advertising boards and commercial publicity. The total price of appellant's real estate holdings amounted to $88,700.

In the meantime, on February 15, 1954, the partnership above-mentioned had merged into a regularly incorporated company, under the provincial laws of Alberta (cf. Exhibits 1 and 2). At a subsequent stage of these notes, appellant's corporate status and more especially certain features of its Memorandum of Association, will require some scrutiny.

It should also be noted that newspaper publicity, consequent upon the application to the Calgary Planning Board, led some 60 business firms to inquire about available space; a list of these appears in the record as Ex. 5.

Early in June, 1954, a Winnipeg firm, that of David Slater Limited, conducted a survey of the site. David Slater & Co. specialized in these ventures and had assisted Simpsons-Sears Ltd. in planning their Winnipeg shopping centre. The consequent report dated October 27, 1954, and costing $3,000, proved a disappointment, since it concluded against the practicability, at this time, of the proposed scheme.

There may have existed several reasons for this adverse finding, one of which would amply suffice to explain it; a month before, on September 24, the press published as a news item Simpsons-Sears' decision to build a shopping centre in Calgary, on 16th Avenue and 14th Street N.W., some two miles from the Regal Heights' 40-acre estate.

Appellant's president, Mr. Harry Cohen, said in his testimony that Simpsons-Sears' unexpected move: "just took the wind out of our sails", and that it would be nothing short of temerity to erect, at tremendous cost, a second centre two miles distant from another major one.

Misfortunes usually happening in pairs, appellant's officers were told in December, that land taxes on the property ". . . would be revised upwards for 1955 because of the failure to commence construction of the centre", entailing a rise in valuation from $30,000 to $60,000.

For the above reasons: "the project as originally envisaged was thus frustrated and the only feasible alternative was to liquidate in an orderly fashion the capital assets of the appellant" (cf. Statement of Facts, s. 6(*h*), last paragraph).

Consequently, the four shareholders, on May 10, 1955, implemented their decision to wind up Regal Heights Ltd., and passed the necessary resolution, herein filed as Ex. 6.

According to Mr. Cohen's evidence, however, it would appear that appellant in December of 1954, five months or so previous to the voluntary winding-up of May, 1955, had disposed of 30 acres for $88,500, thereby assenting to "an unsolicited offer" from Quality Construction Ltd.

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Two other sales followed: Royalite Oil Co. Ltd., buying the property at 639, 16th Avenue N.E., for $21,000; and, in May, 1955, Lyle Brothers Ltd. taking 6.3 acres of the residue at the rather astounding price of $143,200.

Both these sales were negotiated through the intermediary of Mr. Robert H. Barron, the company's liquidator. Regal Heights Ltd. still holds a remainder of 1.48 acres.

The practical and monetary results of this venture's less than three years' active duration (September 8, 1952–May, 1955), bring to the fore an investment of $88,700, gross returns of $252,700, from which $8,000 of known expenses ($3,000 to David Slater Ltd., and $5,000 for publicity costs, according to Mr. Cohen), must be deducted leaving a net profit not far below $150,000, if liquidation disbursements are somewhat arbitrarily valued at $6,000.

Such are the facts in this case, and before any attempt at unravelling the complexities of law involved, I feel in duty bound to say that Messrs. Cohen, Raber and Belzberg's testimonies substantiate full well the averment inserted in para. 5(*b*) of the Notice of Appeal, which I quote:

> . . . The intent of the partnership was to develop and construct a shopping centre for investment purposes, and it was felt that to do this successfully it was first necessary to have a major chain department store to locate in the centre and to act as nucleus.

The primary and preponderant aim, this much I readily grant; on the other hand, was there not the alternate, unescapably foreseen loop-hole of a profitable disposal of the land, should major expectations fail to materialize as, for instance, recently found in the matters of *Fogel v. M.N.R.*[1], and more particularly still in *Bayridge Estates Limited v. M.N.R.*[2].

Counsel for appellant, at the inception of trial objected to any evidence of facts prior to the company's incorporation in February, 1954.

Even though this objection were upheld, I doubt whether it could appreciably bear upon the final outcome. As things stand, the appellant itself devoted three pages of its Notice of Appeal to a chronological narration of certain developments anterior to 1954. Moreover, the corporate status

[1] [1959] C.T.C. 227; [1959] Ex. C.R. 363.
[2] [1959] C.T.C. 158; [1959] Ex. C.R. 248.

obtained in 1954, in virtue of which the four partners became the four sole shareholders, limited their individual liability to the public, but remains a mere incident so far as the relevant law is concerned. Nothing began in 1954, matters simply continued on their course with a "provincial" modification, nowise detracting from the requirements and implications of the "federal" statute applicable, albeit enhancing, possibly, the commercial intent of this enterprise. Therefore, this objection should be overruled.

The ten witnesses heard were unanimous in their joint belief that Regal Heights, and its 1350 feet of frontage along the already begun Trans-Canada Highway, offered quite a promising site for a shopping centre, until Simpsons-Sears' decision to build one two miles distant.

A different line of inquiry gave rise to a certain amount of contradiction between respondent's main witness, one Gerhart Feil, and Messrs. Aubrey Edwards, Benjamin Raber and Jacob Belzberg, called by appellant.

Mr. Edwards, a Calgary real estate operator, said he approached Harry Cohen, in July of 1954, suggesting to buy the company's land for a house-building plan. "Mr. Cohen, according to this witness, absolutely rejected my offer, explaining that his company had other aims in mind".

Gerhart Feil, also a local real estate agent, next took the stand. A director of Active Realty Co., this man contacted Harry Cohen sometime in 1952, offering to purchase the property at a price of $90,000, which was turned down and a counter-proposal of $150,000 made by Cohen.

Feil goes on to say that: "a hitch occurred when the income tax question arose, a matter raised by Mr. Belzberg of the Cohen group. We approached Mr. Donahue of the Calgary income tax office, and since the problem remained unsettled. Mr. Cohen intimated I should increase the offer to $225,000; the stretch of $75,000 intended to defray income dues".

Active Realty Co. had deposited $10,000, with its initial tender and kept alive its interest in the project, even after the "hitch" just referred to. Feil went to Toronto where he met several Simpsons-Sears officials, whom he strove to win over to this Regal Heights shopping centre scheme in Calgary.

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On the other hand, and although hard to reconcile with Feil's preceding assertion, he also insisted, and I quote: "that at no time was I under the impression that I should find tenants for the proposed shopping centre. I always understood that I should attempt to dispose of this property piecemeal or otherwise".

At this same operator's request, on his own initiative, Mr. John Herbert Cook, a Calgary architect, was required, in February, 1953, to prepare with the greatest despatch, for the morrow, plans (now Ex. 8), of a commercial development on 6th Street East and 16th Avenue, North East Calgary.

Cross-examined as to these plans (Ex. 8), Feil was far from positive that he showed them to Harry Cohen who, questioned anew by counsel, flatly denied having ever seen them. The architect's bill, $190, was attended to by Feil out of his own money.

Mr. Cohen, whether anticipating or not Feil's statements, had nevertheless contradicted them in advance, maintaining that, in December of 1952, his partners and himself declined Feil's proposal to pay $164,000 for the estate, because ". . . we all were decidedly interested in our own development plan". No mention was made of a visit to Mr. Donahue, and no admission nor denial of any doubt or "hitch" having arisen concerning a possible tax complication.

Mr. Benjamin Raber, the real promoter, the *deus ex machina* of this venture, testified that he had arranged with Canada Permanent Trust Co. the purchase of these golf course links as a tentative spot for a shopping centre. Possessed of insufficient funds to personally handle the deal, he got in touch with Riback, Cohen, Belzberg and others, these latter of unrevealed identity assenting to join later on. Raber eventually met Gerhart Feil and told him his sole interest consisted in furthering a regional shopping centre and in nothing else.

At a meeting of the four partners, in January, 1953, adds Mr. Raber, "we unanimously resolved to refuse Feil's tempting offer of $164,500, so as to pursue our initial intention of investing in a commercial development.

Jacob Belzberg's evidence substantiated Raber's, with the additional information that, in October of 1952, Feil approached him with a view of buying the land at a price of $150,000, an attempt which, of course, also proved unsuccessful.

This ended the oral evidence.

Paragraph 4 of the Notice of Appeal recites some of the objects listed in appellant's Memorandum of Association (Ex. 2, s. 3, s-ss. (*a*) and (*b*)), inferring therefrom they "... do not include that of the business of selling real estate, and the appellant therefore did not have power to enter into such business and had it done so same would have been ultra vires".

This instrument contains other subsections, one of which, (*f*), to my mind, would refute such a restrictive connotation, since one of the company's objects is:

> (*f*) To transact or carry on all kinds of financial agency business, and in particular in relation to the investment of money, *the sale of property* [italics are mine] and the collection and receipt of money.

We have here another of those "frustration" cases which, of late years, seem to occur with increasing frequency.

I already spoke my conviction that Messrs. Cohen, Raber and Belzberg should be taken at their word that the motivating intention of this transaction was indeed to erect a shopping centre.

Even so, does a primary purpose necessarily exclude a secondary or ancillary one, meant to save the day should a "bolt out of the blue" shatter all else? Highly competent and experienced business men such as these surely did not ignore there was a second string to their bow: the estate's profitable resale, should, peradventure, the shopping centre one snap. A contrary opinion seems hardly tenable.

From its inception, the sole object of the partnership consisted in profit-making. This, it was hoped, would be achieved through the operation of a regional shopping centre. In the latter expectation, profit-taking could extend over a period of years. Fortuitously, the underlying intent of this enterprise, namely: profit, was attained by a quick turn-over of three transactions. The mode instrumental in

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ensuring this result, though at one remove from the company's initial and most favoured ambition, does not detract from a basic profit-seeking venture.

After sifting the component factors of the case, its substantive residue shows a real estate transaction involving an outlay of $88,700, as of September 8, 1952, and netting a disposal price of $252,700, less than three years later, an over-all profit of approximately $150,000 for the newly formed company. Again, what might have happened, but failed to do so, is no concern of mine.

If this undertaking falls short of being "... an adventure or concern in the nature of trade ..." or at the very least an "... undertaking of any kind whatsoever ..." and therefore a "business" as outlined in s. 139(1)(*e*) of our Act, I am at a loss to find a more suitable qualificative.

A quotation from Hannan and Farnsworth's treatise *The Principles of Income Taxation,* may aptly conclude this analysis of appellant's motives and actions. I quote from p. 186:

> Where a company has been formed for the purpose of acquiring real property and turning it to account—whether by holding the property and deriving rents therefrom, or by disposing of it to advantage—the courts in this country (England) lean strongly to the view that the whole of the company's activities amount to the conduct of a business. Consequently, the fact of incorporation assumes great significance, while the motives of the persons who formed the company are treated as of little or no consequence.

Two cases previously alluded to, bear a close resemblance to the instant one, *Fogel v. M.N.R.*[1] and *Bayridge Estates Limited v. M.N.R.*[2]. In the former, Thurlow J. wrote:

> ... it may well be that the partners preferred, as the course by which profit should be made from these particular lots, to carry out their schemes for building apartments on them and that, with this in mind, they held them, *preferring not to sell them even at a profit so long as any hope for the success of the scheme remained* [italics are mine]. But that is far from saying that the erection of apartment buildings to be held as income-producing investments was the sole purpose for which the lots in question were acquired.

[1] [1959] C.T.C. 227 at 234; [1959] Ex. C.R. 363.

[2] [1959] C.T.C. 158 at 160, 165; [1959] Ex. C.R. 248.

Several aspects of this and the *Bayridge* affair, also decided by Mr. Justice Thurlow, have in common several points strikingly alike, a few of which I quote:

> The case put forward on behalf of the appellant is that the land at Lachine was not purchased in the course of any business of dealing in real estate but was acquired for the sole purpose of constructing and operating a motel and service station thereon, *that it was only when such purpose failed* because of the appellant's inability to borrow the moneys required to carry out that purpose *that the appellant accepted an offer for the property and realized the profit in question, . . .*

Confronted with such a set of facts so closely allied with the actual matter, the learned judge held that:

> In my opinion, the sale of property for profit was one of the several alternative purposes for which the property was acquired, *and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose was unattainable, that the profit in question was made.* It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessed.

It could go without saying that in all of these so-called "frustration" matters, recourse is had by Bench or Bar to a *locus classicus* of fifty-six years' standing *Californian Copper Syndicate v. Harris*[1], in a fashion somewhat reminiscent of a devout Moslem's dutiful pilgrimage to Mecca. So as not to depart from a time-honoured custom, I will insert a very concise excerpt from Lord Justice Clerk's speech:

> There are many companies which in their very inception are formed for such a purpose (i.e. profit), and in these cases it is not doubtful that, where they made a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

Short of holding that appellant's four shareholders set out upon this financial venture merely as disinterested crusaders for the shopping centre ideal, a notion which, I am positive, these gentlemen would unhesitatingly repudiate, then, in all respects, the issue squares with the precedents above.

The profits in question are the regular outcome of "an undertaking", a "venture in the nature of trade", in short of a business, and were properly assessed.

Therefore, the appeal is dismissed with costs.

Judgment accordingly.

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

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BETWEEN:

MORRIS F. RIBACK ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

On December 15, 1959 the Honourable Mr. Justice Dumoulin also delivered judgment dismissing the appellant's appeal. Following are the reasons for judgment:

Counsel for both appellant and respondent agreed, when this case was called for hearing, that whichever way the decision went in the cognate matter of *Regal Heights Limited and the Minister of National Revenue, ante* p. 194 it should for parity of reasons similarly govern the present appeal. A copy of this admission may be found in the record of the case.

The appeal in *Regal Heights Limited and the Minister of National Revenue* having been dismissed, it follows that the instant one also fails, with costs against appellant, and the relevant assessment ought not to be disturbed.

Judgment accordingly.

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1960 Jan. 7

BETWEEN:

WILSON AND WILSON LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a), 85B(1)(b) and 139(1)(w)—The 1948 Income Tax Act ss. 3, 4, 12(1)(a) and 127(1)(v)—Contracting company—Completed contract basis of computing income not correct—Progress payments to be taken into account in year received—Method of computing income for years prior and subsequent to 1953—Valuation of inventory not here relevant—All expenses incurred deductible in year incurred—Appeal allowed.

Appellant's main business is that of contracting with government and municipal bodies for the excavation of ditches and installation of sewer and water systems. Appellant normally received throughout the life of the contracts and usually about the 15th of the month a payment "on account of the contract" of 85 or 90 per cent of the value of the work done and material furnished at the site in the previous month, following the issue of supervising engineers' certificate. Appellant used the completed contract method in computing its annual income tax return. According to that method the costs of the contract over the entire life of the contract are accumulated and nothing is taken into income. When the contract is completed the total cost over the years of that contract is deducted from the total receipts or billings on the contract and resulting item comes into profit and loss. In reassessing the appellant for income tax for the years 1952, 1953 and 1954 the respondent did so on the basis that the progress payments were taxable in the year of receipt and assessed appellant accordingly. An appeal to the Income Tax Appeal Board was dismissed and appellant appeals to this Court. Counsel for respondent admitted there were errors in the assessments, that further adjustments should be made for each year and requested that the matter be referred back to the respondent for re-assessment.

Held: That the 85 or 90 per cent of the progress certificates as certified by the engineer and actually received by the appellant in a taxation year, constitute income for the year in which they were received.

2. That the "completed contract" method used by appellant in computing its income is contrary to the express provision of the 1948 *Income Tax Act* (applicable to the year 1952) and *The Income Tax Act* (applicable in subsequent years).

3. That in computing the income of appellant for the years commencing 1953 in accordance with the provisions 85B(1)(*b*) of the *Income Tax Act* the full amount to be received for property sold or services rendered up to December 31 must be included whether or not it has been certified by the engineer's progress certificates.

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4. That for property sold and services rendered in 1952, (a) appellant must bring into income of 1952 only the amounts actually received by it in that year from each contract: (b) for services rendered and property sold in that year and for which the engineers' certificates were not issued until 1953, the 85 per cent or 90 per cent payable thereunder will be income of the 1953 taxation year: and (c) the holdbacks will be taken into income in the year in which the final engineers' certificate is approved and the holdbacks released.
5. That the question of valuation of inventory is in this case not relevant in computing appellant's income.
6. That all the expenses incurred by the appellant in connection with the contracts were deductible in full in the years in which they were incurred in accordance with s. 12(1)(*a*) of the *Income Tax Act*.

APPEAL under the *Income Tax Act*.

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

A. F. Moir and *J. P. Brumlik* for appellant.

M. E. Manning, Q.C. for respondent.

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

CAMERON J. now (January 7, 1960) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated November 26, 1957[1] by which the appellant's appeals from three re-assessments dated November 30, 1955, for the taxation years ending December 31, 1952, 1953 and 1954 (as amended by the Notification by the Minister following a Notice of Objection) were dismissed.

In its Notice of Appeal to this Court, the appellant asks that the appeals be allowed and that it be assessed on the basis of its original returns which were computed on the "completed contract" method of accounting. For the moment, it is sufficient to say that that method excludes from the computation all receipts and expenditures specifically relating to the contracts which had not been completed at the end of its fiscal year, namely, December 31. The Minister, by his Reply to the Notice of Appeal, admits that there were errors in the re-assessments as varied by his Notification, requests that the appeals be

[1] 18 Tax A.B.C. 245.

allowed and the matter be referred back so that he may re-assess the appellant in accordance with Schedule C to his Reply. At the hearing, counsel for the Minister agreed that Schedule C was incorrect and that further adjustments should be made for each year. He asked that the matter be referred back to the Minister for re-assessment on the basis of the Schedules to the Reply with the adjustments he proposed at the trial. The question for consideration, therefore, is the proper method to be used by the appellant in computing its income tax return.

For the appellant, it is said that the "completed contract" method of computing income is especially suitable in its case because of the nature of its business and the risks involved therein. The appellant was incorporated in 1951 to take over a similar business formerly carried on by its three main shareholders as a partnership. Its main business consists of entering into contracts with government and municipal bodies for the excavation of ditches and installing therein sewer and water lines. In some cases the appellant contracts to supply pipe and other materials and in others these are supplied by the owner or main contractor. In all cases, the contracts are on the "unit price" basis, e.g., the unit price is for a certain fixed sum per lineal foot of work done. In bidding for such work, the appellant takes into consideration the nature of the ground in which the work is to be done, with full realization that in certain areas where rock, gravel and quicksand are encountered, the work may be much slower and more costly than elsewhere, and the unit price is fixed at such an amount per foot as will probably enable a profit to be made on the contract as a whole. To a large extent, the work is seasonal, commencing in the spring when ground conditions permit and continuing until the ground is frozen in the late autumn. Adverse weather conditions may also slow up the work and increase costs.

Much of the dispute relates to the manner in which monthly payments made by the owner to the appellant should be treated. The provisions for such payments are not uniform in every contract, but the following may be

taken as an example. It is from Exhibit 2, a contract with Defence Construction (1951) Ltd., dated October 6, 1953, relating to the Griesbach Barracks in Edmonton.

> Cash payments not exceeding ninety per cent of the value of the work done, approximately estimated from progress measurements, and materials supplied and deposited on site, computed at the price or prices agreed upon or determined by the Engineer, will be made to the Contractor monthly if practicable, on the written certificate of the Engineer, stating the work done or materials supplied for, or on account of which the certificate is granted has been done and supplied and stating the value of such work completed and materials supplied as above mentioned, and the said certificate shall be a condition precedent to the right of the Contractor to be paid the said ninety per cent or any part thereof. Provided however, that when the sum so withheld plus the security deposit equals 15% of the overall cost, subsequent monthly payments duly certified by the Engineer may be made to the Contractor for the full value of the work done and materials supplied.
>
> The holdback mentioned above shall be released thirty-one (31) days after processing of Final Progress Claim indicating that the work has been completed to the satisfaction of the Engineer; PROVIDED, HOWEVER, that an amount of five per cent (5%) of the total contract price, including adjustments by Change Orders, shall be retained as a maintenance guarantee for a period of one year after completion of the work and its acceptance by the Engineer. The written certificate of the Engineer certifying to the final completion of the said work, to his satisfaction, shall be a condition precedent to the right of the Contractor to receive or to be paid the said holdback, or any part thereof.
>
> If the Contractor is required by the Minister to do work additional to the work as defined in the contract, the completion of such additional work shall not, unless otherwise determined by the Minister be a condition precedent to the payment of the holdback retained as above provided, but such moneys so retained may be paid to the Contractor upon written certificate of the Engineer certifying that the work as defined in the contract has been completed to his satisfaction. Five copies of all progress estimates or invoices in connection with the work are to be rendered to the Engineer.

Another payment clause common to many of the contracts is as follows:

> On or about the first day of the month the Engineer will make an approximate estimate of the value of the work done and the material furnished at site, to date and within fifteen days thereafter 90 per cent. of the value thus determined, less previous payments, and less any other deductions provided for in this Contract shall be paid to the contractor in cash and the balance retained by the Purchaser as security for the proper and faithful performance of the Contract, and for such other purposes as are provided in this Contract. Any such interim estimate shall not constitute a final acceptance of any portion of the work, it being made only for purposes of payment on account of the Contract.

The "engineer" referred to above is the engineer employed by the owner to supervise the work on his behalf. In some contracts the holdback is 15 per cent. rather than

10 per cent., as mentioned above. Counsel for both parties agree that no special consideration is to be given to the 5 per cent. retained by the owner as a maintenance guarantee, and I shall therefore treat it merely as part of the holdbacks. The evidence establishes that the appellant normally received throughout the life of the contracts, and usually about the 15th of the month, a payment "on account of the contract" of 85 or 90 per cent. of the value of the work done and the material furnished at site in the previous month, following the issue of the engineer's progress certificate.

As I have stated, the appellant used the "completed contract method" in computing its annual income tax return and it is that method which it now seeks to maintain. That method was defined by Mr. T. G. Halford, a chartered accountant who gave evidence for the appellant, as follows:

> In the completed contract method you accumulate your costs of the contract over the entire life of the contract and take nothing into income. At the time when the contract is completed you take your total receipts or billings on the contract, deduct from them the total cost over the years of that contract and that item comes into profit and loss. That is taken in only in the last year of the contract.

The appellant's tax return for the fiscal year ending December 31, 1952, will illustrate the method so followed. In its "operating statement" (Statement 2), it shows revenue from completed contracts of $79,936.09, and job costs for those contracts of $60,846.30. From the difference of $19,089.79 it deducted all administration and general expenses of $6,803.33, leaving a profit for the year on completed contracts of $12,286.46 which it carried into the balance sheet (Statement 1). After deducting a loss of $4,008.87 for the previous year and making a further small adjustment, it stated its taxable income at $8,327.59. In Schedule A to that return relating to some ten municipal contracts which were not completed by December 31, 1952, it is shown that progress estimates totalling $458,453.31 had been rendered and that costs to date totalled $480,348.84; the estimates receivable totalled $52,400 and the holdbacks aggregated $40,202.37. In computing its taxable income, the appellant did not take into account the receipts, receivables, holdbacks, disbursements or any

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other item relating specifically to uncompleted contracts, although it had actually received over $400,000 on account of the contracts and had incurred and presumably paid costs in excess of $480,000.

Mr. Baziuk, a chartered accountant in the firm of auditors employed by the appellant, and Mr. Halford, also a chartered accountant of Edmonton but having no connection with the appellant, stated that the "completed contract" method was the only proper method of computing the annual income tax return of the appellant. They agreed that due to the uncertainties regarding the cost of the unfinished parts of the contract, it was impossible to arrive at the true profit or loss for the year until the contract had been completed. They also agreed that the "completed contract" method, as outlined above, would be applicable in the case of a contractor who had entered into a single contract for the erection of a building, the construction of which might take six years, and with payments made to the contractor by the owner on the same monthly basis as in the present case. In such a case they agreed that in computing the annual income tax returns, they would defer all receipts and expenditures until the year of completion and then, when all the facts were known and no estimates required, and when the engineer in charge had given his certificate that the work had been completed to his satisfaction and had released the holdbacks, the profit and loss could be computed. In the earlier five years, the annual tax returns would show no receipts and no expenditures.

This method of accounting, however useful it may be for the purpose of the company itself as showing accurately the profit or loss on any one or more contracts, is, in my view, completely wrong when it is used for the purpose of computing the income of a taxpayer for a taxation year. By s. 3 of *The Income Tax Act,* the income of a taxpayer is his income *for the year,* including income from his business, and by s. 4, income for a taxation year from a business is the profit therefrom *for the year* (subject to the other provisions of Part 1).

Omitting for the moment any consideration as to the ten or fifteen per cent. holdbacks, as well as the amounts normally received in January for work done in the preceding

December, it is clear to me that 85 per cent. or 90 per cent. of the progress certificates as certified monthly by the engineer, and which were actually received by the appellant in a taxation year, constitute income for the year in which they were received. It is suggested that they were mere advances similar to loans made by a bank to a contractor to assist him in paying his current expenses. On the evidence, I am unable to find that such is the case. As stated by the contract referred to above, they were made for purposes of payment *on account of the contract*. There was no right in the owner to recover the payments as such and the appellant treated them as its own property, placing them in its bank account, and paying its expenses therefrom. It would be wholly improper to include them in a subsequent year merely because the engineer in a subsequent year gave his certificate that the entire work was then completed to his satisfaction, and released the holdbacks, because such payments were not in fact received or receivable in the subsequent year, having already been received. These considerations are equally applicable to the expenses made or incurred by the appellant for the purpose of gaining or producing income from the business during the year (s. 12(1)(*a*)). They cannot be deducted from income in a subsequent year because they were not made or incurred in a subsequent year.

For these reasons, therefore, I must find that the "completed contract" method used by the appellant in computing its income is contrary to the express provisions of the 1948 *Income Tax Act* (applicable for the year 1952) and *The Income Tax Act* (applicable in subsequent years), and must be rejected. The accountants who gave evidence for the appellant referred to another method of accounting called the "percentage of completion" method. Its deficiencies were pointed out both in the evidence and in argument and as counsel for the appellant did not urge that this method be accepted as an alternative method, I find it unnecessary to say anything further about it.

I turn now to a consideration of the method of computation now proposed by the Minister which, as I have said, is based on the schedules attached to his Reply to the Notice of Appeal with the variations proposed at the trial.

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In view of the conclusions which I have arrived at, it is unnecessary to refer to the amounts in question as these are matters of record.

The first submission of counsel for the Minister is stated as follows:

> The total amount of all progress estimates rendered or billed during the year should be brought into the operating statement as income, on the date at which the money payable under the certificates became a debt due to the contractor notwithstanding that they are not paid or payable in the year.

If this submission is upheld, it means that the total amount of the progress certificates (including all holdbacks) rendered or billed during a taxation year must be brought into the operating statement as income on the date on which the money payable under the certificates becomes a debt due to the contractor—and that, of course, is the date when the engineer's certificate is issued—and notwithstanding that they or any part of them (such as the holdbacks) are not paid or payable in that year. It would exclude from income in any given year the value of work done or materials supplied in that year and in respect of which the billings and engineer's progress certificates were not rendered or issued until the following year.

Now as I have stated above, the payments of 85 per cent. or 90 per cent. of the progress certificates as issued by the engineer (i.e., the amount of the certificates less the holdbacks) and which were actually received by the appellant in a taxation year, constitute income of the appellant for that year and must be taken into account in computing its income. Further questions arise, however, from this submission.

The first question is that concerning work and services performed by the appellant in one taxation year but in respect of which billings are not made and engineers' progress certificates are not issued until the next taxation year. As I have said, the appellant's taxation year ends on December 31 and normally none of the material supplied or services performed in December are billed for until the following January, and the engineer's certificates usually issue about January 15. Occasionally, and in special circumstances such as arose in the contract for the Griesbach Barracks, there is a much longer delay. That contract was

commenced in October 1953, but in November substantial changes—all permitted by the contract—were ordered by the owner. These changes involved a very considerable amount of extra work and material and while the substantial part of that work was performed in November and December of 1953, there was a long delay in securing authority from Ottawa for the change orders and in the result the engineer's certificates for that work and material were delayed some five or six months, the progress certificates not being issued till May or June of 1954.

The answer to this question in relation to the taxation years 1953 and 1954 is to be found in the provisions of s. 85B(1)(*b*) of *The Income Tax Act* which first became applicable to the 1953 taxation year and is as follows:

> 85B. (1) In computing the income of a taxpayer for a taxation year,
>
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year;

The proviso in the paragraph quoted is not here applicable. The all important word "receivable" is not defined in the Act, but after a most careful consideration of the paragraph, I have come to the conclusion that in both places where that word is used, it bears the ordinary meaning "to be received". It would appear, therefore, that in enacting this subsection, Parliament has extended somewhat the ordinary concept of "income" in relation to a business in which property is sold or services rendered and that from and including the 1953 taxation year, *every* amount to be received in respect of property sold or services rendered in the course of the business in the year *shall* be included notwithstanding that the amount is not to be received until a subsequent year, subject, of course, to the proviso and to the provisions of para. (*d*) thereof relating to the deduction of a reasonable amount as a reserve in some cases. The paragraph is drawn in very wide terms so as to include every amount so receivable and such amounts are to be brought into the computation of income for the year in which the property was sold or the services rendered.

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The inclusion of such amounts is not in any way contingent on the issue of the engineer's certificate, that a certain part of the work has been completed or certain materials supplied, or upon his later certificate that the whole of the work has been satisfactorily completed and the holdbacks released. In my view, the paragraph expressly requires that there shall be included in the computation of income of the appellant for the years commencing 1953, the full amount to be received for property sold or services rendered up to December 31, and whether or not it has been then certified by the engineer's progress certificates. I see no practical difficulty resulting from this view inasmuch as under ordinary circumstances the engineer's certificate quantifying the amount of work done and materials sold in the month of December is normally issued within a fortnight and long prior to the time when the tax return is to be filed. In the case of a longer delay, the amount can be closely estimated and, if necessary, corrected, when the certificates are actually received.

But in my view, different considerations apply to the 1952 taxation year when s. 85B(1)(*b*) was not in effect. In that year, no debt from the owner to the appellant was created until the issue of the engineer's certificates. The principle is stated in Halsbury, Third Edition, Vol. 3, p. 462:

> 884. Progress certificates are conditions precedent to the right to payment, if the contract provides that no interim payments shall be made to the contractor except on the production of such a certificate and does not provide for any appeal by the contractor against the withholding or insufficiency of such certificates.
>
> In the absence of some such provision as that "no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to the amount thereof, under the engineer's certificate (*Tharsis Sulphur and Copper Co. v. M'Elroy & Sons* (1878), 3 App. Cas. 1040, at pp. 1047, 1048), a progress certificate creates a debt due (*Pickering v. Ilfracombe Rail. Co.* (1868) L.R. 3 C.P. 235).

As will be seen from the terms of the Griesbach Barracks contract (*supra*) which may be taken as typical, the engineer's progress certificate was stated to be a condition precedent to the right of the appellant to be paid 90 per cent. of the amount certified; and his certificate certifying to the final completion of the work to his satisfaction was also a condition precedent to the right of the appellant to receive or be paid the amount of the holdbacks. In my

opinion, therefore, for property sold and services rendered in 1952, (*a*) the appellant must bring into income of 1952 only the amounts actually received by it in that year from each contract; (*b*) for services rendered and property sold in that year and for which the engineer's certificates were not issued until 1953, the 85 per cent. or 90 per cent. payable thereunder will be income of the 1953 taxation year; and (*c*) the holdbacks will be taken into income in the year in which the final engineer's certificate was given and the holdbacks released. In re-assessing the appellant for that year on this basis, the Minister may have to take into consideration the provisions of s-ss. (4) and (5) of s. 73 of c. 40, Statutes of 1952-3 if in the circumstances these subsections are applicable. That point was not discussed at the trial.

The other submission by counsel for the Minister is stated as follows:

2. From the progress estimates brought into the operating statement there must be deducted the job costs incurred by the contractor during the year.

3. As a matter of law, and for the purposes of computing profit from a business under the provisions of the Income Tax Act, the job costs are the sum of

(*a*) the lower of value or cost of the inventory on hand at the opening of the year,
(*b*) the cost of the work in progress for which no progress estimates had been rendered, at the opening of the year, and,
(*c*) all costs which during the year became debts owing by the contractor notwithstanding that they have not been paid,

and from this sum there must be deducted the following amounts,

(1) the lower of market or cost of the inventory on hand at the close of the business year, and,
(2) the cost of the work in progress which at the close of the year no progress estimates had been rendered.

It seems to me that the question of valuation of inventory on hand at the beginning and end of the taxation year does not arise in this case. In most of the contracts, the materials are provided by the owner or main contractor, the appellant providing only services; in such cases no inventories are maintained by the appellant. As I understand the evidence, the appellant, when it has contracted to supply pipe and other materials, immediately places its order for the precise amount and the particular material required in order to fulfill its contract and no more. In most cases, the materials are supplied to it on the job as needed.

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It does not stockpile inventory for later sale, but only as needed for the particular contracts which it has already entered into and by which the price of the materials has been definitely fixed. The cost of the materials is of importance in computing the appellant's profits, but that matter will be disposed of later. The rise or fall in value of the materials is of no importance to the appellant, the purchase and sale price of all such materials having already been fixed. In my view, the question of valuation of inventory is in this case not relevant in computing the appellant's income (see the definition of inventory in s. 127(1)(*v*) of the 1948 *Income Tax Act,* and s. 139(1)(*w*) of *The Income Tax Act*). The general principles as to valuation of inventory and which are applicable to merchants, manufacturers and traders, have here no application.

The remaining question is that of the job costs. The submission made on behalf of the Minister—excluding the reference to inventory valuation—is that in 1953, for example, there is brought in as part of the job costs the cost of the work in progress before January 1, 1953, and for which no progress estimates had been rendered at that date (normally for the preceding December), as well as all costs which during that year became debts owing by the contractor, whether paid or payable, but that from the total thereof there should be deducted the cost of the work in progress for which at December 31, 1953, no progress estimate had been rendered.

For the appellant it is urged that this method of tying in the job costs with the progress certificates is erroneous for a number of reasons. It is said that on some occasions an inexperienced engineer may not be willing to certify to the full amount of the work done; that his certificate relates only to the completed portion of the work, omitting therefrom all expenses for services or materials on installations such as catch-basins or hydrants, which may, in fact, be practically but not wholly complete, that it does not take into consideration such matters as moving equipment to the job site, or the construction of shacks for the workmen, these items on some occasions being of a substantial nature.

In my opinion, the matter is to be determined by a consideration of the provisions of s. 12(1)(*a*) of *The Income Tax Act* which is the same as in the 1948 *Income Tax Act*.

> 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.

As has been pointed out in a number of cases, this section is less restrictive than the former s. 6(1)(*a*) of the *Income War Tax Act* which prohibited the deduction of disbursements or expenses not wholly, exclusively and necessarily laid out for the purpose of earning *the* income. The word "the" in that section has been dropped and accordingly it is not now necessary to establish that the expense was made or incurred for the purpose of earning the income of the year in which it was made or incurred. It is sufficient to show that it was made for the purpose of gaining or producing income from the business.

In *Royal Trust Company v. M.N.R.*[1], the President of this Court said at p. 44:

> The essential limitation in the exception expressed in Section 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer "for the purpose" of gaining or producing income "from the business". It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income "from the business" in which the taxpayer is engaged. If these conditions are met the fact that there may be no resulting income does not prevent the deductibility of the amount of the outlay or expense. Thus, in a case under the *Income Tax Act* if an outlay or expense is made or incurred by a taxpayer in accordance with the principles of commercial trading or accepted business practice and it is made or incurred for the purpose of gaining or producing income from his business its amount is deductible for income tax purposes.

Now it cannot be disputed that all the outlays or expenses made or incurred by the appellant (and as set out in the records) from January 1 to December 31 in each of the taxation years in question, were made or incurred for the purpose of gaining or producing income from its business and included therein are not only wages and salaries, but such items as general administration and expense, moving-on costs, materials, and erection of work shacks at the job site for the employees. I cannot see that their

[1] [1957] C.T.C. 32.

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deductibility is to be determined by reference to the fact that the engineer's certificate for work completed did not issue until the following January or later. In my view, they are therefore deductible in full in the year in which they were made or incurred, and not in any subsequent year.

It may be suggested, however, that this view of the matter results in a lack of correlation between such expenses for December 1952 and the receipt of income in respect thereof in January of the next taxation year. This matter was also considered in *The Royal Trust Company* case (*supra*) in which the President stated at p. 43:

> It is not necessary that the outlay or expense should have resulted in income. In *Consolidated Textiles Limited v. M.N.R.*, [1947] Ex. C.R. 77 at 81; [1947] C.T.C. 63, I expressed the opinion that it was not a condition of the deductibility of a disbursement or expense that it should result in any particular income or that any income should be traceable to it and that it was never necessary to show a causal connection between an expenditure and a receipt. And I referred to *Vallambrosa Rubber Co. v. C.I.R.* (1910), 47 S.C.L.R. 488 as authority for saying that an item of expenditure may be deductible in the year in which it is made although no profit results from it in such year and to *C.I.R. v. The Falkirk Iron Co. Ltd.* (1933), 17 T.C. 625, as authority for saying that it may be deductible even if it is not productive of any profit at all. I repeated this opinion in the *Imperial Oil Limited* case. The statements made in the cases referred to, which were cases governed by the *Income War Tax Act*, are equally applicable in a case under the *Income Tax Act*.

For these reasons, the appeal will be allowed, the re-assessments made for each of the years 1952, 1953 and 1954 will be set aside and the matter referred back to the Minister to re-assess the appellant upon the basis of my findings.

The appellant will also be entitled to its costs after taxation.

Judgment accordingly.

1959
Nov. 27
1960
Jan. 13

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

ANNIE WEISS STERNBERG ....PLAINTIFF;

AND

HOME LINES INCORPORATED ....DEFENDANT.

Shipping—Action for damages for personal injuries to passenger—Jurisdiction—Admiralty Act, R.S.C. 1952, c. 1, s. 18(2).

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The plaintiff sought to recover damages for injuries suffered by her while a passenger on board ship when an armchair in which she was seated in the ship's library overturned throwing her to the floor.

On a motion to set aside the writ for want of jurisdiction.

Held: That since the plaintiff's claim as alleged in her statement of claim must be that the damages claimed are damages done by the ship, that is damages of which the vessel was the active cause, and the Court could find no such allegation, the action must be dismissed.

MOTION to dismiss the plaintiff's action for want of jurisdiction.

The motion was heard before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

Julian G. Gazdik for plaintiff.

Roland G. Chauvin for defendant.

A. I. SMITH, D.J.A. now (January 13, 1960) delivered the following judgment:

The court, seized of defendant's motion for the dismissal of plaintiff's action for want of jurisdiction, having heard the parties by their respective attorneys, examined the proceedings and deliberated:

Plaintiff by her action sues to recover damages which it is alleged she has suffered as the result of an accident which occurred on board the *S.S. Homeric* while she was a passenger on a voyage from Montreal to Southampton.

It is alleged that on or about October 16, 1957, she was seated in an armchair in the ship's library when the said armchair overturned throwing her to the floor and causing her several injuries.

The plaintiff's action is based upon the following allegations of fault and negligence:

3. That the overturning of the chair was due solely to the fault and negligence of the ship's captain and crew for whose acts the ship-owner is responsible in that:

(*a*) They failed to attach firmly the chair on which the Plaintiff was seated, to the floor of the ship's library;

(*b*) They failed and neglected to provide Plaintiff for safe accommodation and a safe place to stay on the ship;

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It is common ground that this Court has jurisdiction to hear and decide this case only if the damage complained of was "done by the ship". (S. 18(2) *Admiralty Act*, R.S.C. 1952, c. 1, s. 22 (iv) *Supreme Court of Judicature (Consolidation) Act, 1925*) (Imp. c. 49, s. 22).

It is well established that in order for damage to have been "done by the ship", within the meaning of the provisions above-quoted, the ship must have been the active cause or "the noxious instrument" of the damage. (*The Vera Cruz*[1]; *The Theta*[2].

The issue raised by the present motion must be decided solely on the basis and in the light of the allegations of plaintiff's statement of claim which, for the purposes of the motion, must be deemed to be admitted.

To give this Court jurisdiction the plaintiff's claim, as alleged in her statement of claim, must be that the damages claimed are damages done by the ship, that is damages of which the vessel was the active cause.

Applying this test to the plaintiff's statement of claim I find that there is no allegation that the ship or any part thereof did or brought about the plaintiff's alleged injury. The statement of claim is silent as to what caused the chair to overturn and it appears to me to be equally consistent with these allegations and just as probable that it was overturned as the result of some human intervention as it is that the ship or some part of the ship was the active agency which brought about the damage.

The Court in particular was referred by counsel for plaintiff to two cases, namely *Monks v. Arctic Prowler*[3], and *Wyman v. The Duart Castle*[4]. Both of these cases accept the test, as to whether or not the Admiralty Court has jurisdiction, laid down in the cases of *The Theta* and *The Vera Cruz*. In each of the cases relied upon by plaintiff the learned Judge came to the conclusion that on the facts of that particular case it appeared that the damage was done by the ship. In my view, however, the holdings in these cases, based upon facts and circumstances which are different from those involved in the present case, do not

[1] (1884) 9 P.D. 96
[2] [1894] P. 280.
[3] (1953) 32 M.P.R. 220.
[4] (1899) 6 Can. Ex. C.R. 387.

apply since, in my view, it does not appear that the damage claimed for by plaintiff herein was damage of which the ship was the "active cause." *The Nederland*[1]; *The Sneyd*[2]; *The Barge Neosho*[3].

I find therefore that the defendant's motion is well-founded.

Accordingly it is maintained and plaintiff's action is dismissed; the whole with costs against plaintiff.

Judgment accordingly.

1959
May 25
1960
Jan. 15

BETWEEN:

ROBWARAL LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 6(a)(b)(c), 28(1)(2)(3)(4), 139(5a)—Controlled Corporation—Dealing not at arm's length—Dividend is income when received not when declared—Declared dividend not payment of debt when received—"Related persons"—Corporation controlled by three brothers and another corporation controlled by their father are related persons and cannot deal at arm's length—Appeal dismissed.

Appellant company, incorporated on December 14, 1953, is a private company and describes itself as an Investment Holding Company. All its shares are owned by three brothers. On December 18, 1953, appellant purchased from the father of the three brothers 191 shares of the 200 common shares of the capital stock of Parsons-Steiner Limited, a taxable Canadian resident corporation. On December 21, 1953, the directors of Parsons-Steiner Limited declared a dividend of $1,250 per share on all the issued common shares of its capital stock, payable to shareholders of record as of December 31, 1953. No payable date was specified. The dividend was paid and on January 22, 1954, a cheque in the amount of $238,750 was drawn by Parsons-Steiner Limited and received by appellant. In the taxation year 1954 the appellant controlled Parsons-Steiner Limited within the meaning of the *Income Tax Act.*

The respondent in reassessing appellant for the 1954 taxation year assumed that the sum of $129,754.33 being part of the dividend received by it from Parsons-Steiner Limited was paid out of the designated surplus of that company and accordingly added that amount to appellant's

[1] (1909) 12 Can. Ex. C.R. 252. [2] (1895) 29 Ir. L.T. 317.
[3] (1919) 19 Can. Ex. C.R. 1; 47 D.L.R. 437.

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declared income. An appeal from this reassessment was dismissed by the Income Tax Appeal Board and appellant now appeals to this Court.

Held: That the dividend was received by appellant in the year 1954 and that Parsons-Steiner Limited was a company controlled by appellant at the time the dividend was received since the 1954 amendments to the provisions of the *Income Tax Act* s. 28 relating to arm's length dealings were applicable to the year 1954 and subsequent taxation years.

2. That the declared dividend did not cease to be a dividend on December 31, 1953 since s. 6(*a*) of the Act brings into income amounts received as dividends and not amounts receivable as dividends.
3. That all the appellant had on December 31, 1953 was a right to a dividend which it received in cash in the year 1954 and a right to a dividend is not income until the money is received, the cheque received by appellant on January 22, 1954 from Parsons-Steiner Limited was in payment of the dividend declared on December 31, 1953.
4. That Parsons-Steiner Limited was a company controlled by appellant within the provisions of s. 28(3) of the Act and as Parsons-Steiner Limited's financial year ran from July 1, 1953 to June 30, 1954 it was a company controlled by appellant when the dividend was declared in December 1953 as well as when it was paid and received in January, 1954.
5. That appellant corporation controlled by three brothers and Parsons-Steiner Limited another corporation controlled by their father are "related persons" within the meaning of s. 139(5*a*) of the Act and therefore cannot deal at arm's length.

APPEAL under the *Income Tax Act.*

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

H. H. Stikeman, Q.C. for appellant.

J. D. C. Boland for respondent.

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

FOURNIER J. now (January 15, 1960) delivered the following judgment:

This is an appeal from the decision of The Income Tax Appeal Board[1] dated January 2, 1958 in respect of the income tax assessment of Robwaral Limited for its taxation year 1954, whereby a tax in the sum of $57,210.32 was levied on the appellant's income for the above year. The appellant's appeal was dismissed and the relevant assessment was confirmed.

[1] 18 Tax A.B.C. 363.

I shall summarize the facts of the case which were admitted, agreed to or established before the Court. The appellant, described in its income tax returns as an Investment Holding Company, is a private company having been incorporated on December 14, 1953 under the *Ontario Corporations Act*. Immediately after its incorporation, it commenced business by securing a loan of $240,000. On December 18, 1953 it purchased 191 common shares of the 200 common shares of the capital stock of Parsons-Steiner Limited, a taxable Canadian resident corporation, for the sum of $285,650. The shares were purchased from Ernest A. Steiner, father of the three persons who are the sole owners of all the common and preferred shares of Robwaral Limited. The payment for the shares was made in cash.

On December 21, 1953, the directors of Parsons-Steiner Limited, at a duly constituted meeting of the board of directors of that company, declared a dividend of $1,250 per share on all the issued common shares of its capital stock, payable to shareholders of record as of December 31, 1953. On January 22, 1954 a cheque in the amount of $238,750 was drawn by Parsons-Steiner Limited and received by the appellant. In the taxation year 1954 the appellant controlled Parsons-Steiner Limited within the meaning of the *Income Tax Act*.

The respondent in reassessing the appellant assumed that it had received during its 1954 taxation year, as a dividend from Parsons-Steiner Limited, the sum of $238,750 and that $129,754.33 of the said dividend was paid out of the designated surplus of Parsons-Steiner Limited, so it allowed the appellant, for the purpose of determining its taxable income, the amount of $108,995.67, being the dividend of $238,750 less $129,754.33, the portion which was paid out of the designated surplus of Parsons-Steiner Limited at the end of its fiscal period or taxation year 1953. The appellant objected to the reassessment but the respondent confirmed the reassessment. The appellant appealed to the Income Tax Appeal Board, which dismissed the appeal. It is from this decision that the appellant appeals to this Court.

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In this appeal, the appellant submits that it did not receive any dividends in the taxation year 1954. The dividend declared by Parsons-Steiner Limited on December 21, 1953, payable to common shareholders of record December 31, 1953, was for the purposes of Section 28 of the *Income Tax Act* received on December 31, 1953, and not in the taxation year 1954. The declared dividend ceased to be a dividend on December 31, 1953, but became, in fact and in law, a debt due and payable by the company to the appellant on that date and was so recorded in the books of account and in the balance sheet of the appellant as of December 31, 1953. So, it concludes that the payment and receipt of funds on January 1954, in payment of the debt which was due and payable on December 31, 1953, did not result in the payment or receipt of a dividend in 1954.

On the other hand, the respondent contends that the appellant received in 1954 a dividend of $238,750 from Parsons-Steiner Limited, a company which appellant controlled at the time of the receipt of the dividend. To justify this contention the respondent relies on Section 6(*a*) and Section 139(5*a*), paragraph (*b*). Alternatively, it urges that, if the appellant did not receive a dividend of $238,750, on account or in lieu of payment of or in satisfaction of a dividend, which it was required by the provisions of section 6 of the Act to include in its income for the 1954 taxation year, it follows that it could not be allowed as a deduction from its income the sum of $108,995.67 in determining its taxable income pursuant to section 128 of the Act. So the appellant's taxable income for the 1954 taxation year would be in the amount of $238,750 and not $129,754.33.

At the hearing, counsel for the appellant admitted that Parsons-Steiner Limited, the payer corporation, had undistributed income on hand and that the sum of $129,754.33 was the part of the $238,750 which was paid out of what was known as "designated surplus".

The question to be determined is whether the dividend, in the amount of $238,750, declared by Parsons-Steiner Limited on December 1953, payable to its shareholders of record at the close of business on December 31, 1953, is includible in the appellant's income for its taxation year

1953 or whether the amount of $129,754.33, part of the sum of $238,750 received by the appellant on January 22, 1954, is includible in its 1954 taxation year.

In the *Income Tax Act*, under the heading "Amounts included in computing income", section 6, which deals with dividends and other matters, provides a general rule, namely:

Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(a) *Dividends, Annuities, etc.*—amounts received in the year as, on account or in lieu of payment of, or in satisfaction of
(i) dividends,

This general rule provides that, to establish a taxpayer's income for a taxation year, amounts received in the year in payment or part payment or in satisfaction of dividends must be included in the income for that year. It is interesting to note that the same rule does not apply to interest or income from a partnership or syndicate. As to the rule relating to interest I quote section 6(*b*):

Amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest, shall be included in computing the income of a taxpayer for a taxation year.

With regard to income from partnership or syndicate the rule reads:

Sec. 6(*c*) the taxpayer's income from a partnership or syndicate for the year whether or not he has withdrawn it during the year;

There is a special general rule in each case. Amounts received in the year as dividends shall be included in the taxpayer's income for that taxation year. Amounts received in the year or receivable in the year as interest shall be included in the taxpayer's income for that year, depending on the method followed by the taxpayer in computing his income. A taxpayer's income from a partnership for the year, whether or not he has withdrawn it during the year, shall be included in the taxpayer's income for that year.

The general rule applicable to dividends, read by itself, is simple enough, but it has to be interpreted in the light of other provisions of the Act to determine if the facts of this litigation fall within the ambit of the general rule or are covered by exceptions to this rule.

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But before considering the modifications or the exceptions to section 6 of the Act, the section should be read solely, having regard to dividends as amounts to be included in computing taxable income. Its meaning would be that the amounts received in the year as dividends shall be included in computing the income of a taxpayer for a taxation year. This section of the *Income Tax Act* may not be in accord with the provisions of company laws, which provide for the setting up of the balance sheet of the operations of companies; nevertheless, it indicates that amounts of dividends received in a year by a taxpayer are includible in that taxpayer's income for that year. This charging section is sweeping and does not distinguish between corporation or individual taxpayers.

This being said, I propose to examine the provisions of section 28 of the Act, which are relevant to this dispute and identical in wording with section 27(1) of the 1949 *Income Tax Act* and amendments. It creates a modification to the general rule of the charging section and applies to dividends received by a corporation. These provisions read as follows:

Sec. 28(1) Where a corporation in a taxation year received a dividend from a corporation that

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,

* * *

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

This section reads: "Where a corporation in a taxation year received a dividend . . .", while section 6 is thus worded: "Amounts received in the year as dividends". In both sections there is a question of dividends received or amounts received as dividends. So section 28(1) enacts that in certain instances dividends received by a corporation may be in part deducted in computing the corporation's income, whereas section 28(2) provides that when the facts therein described are applicable the provisions of section 28(1) have no effect. The section reads:

Sec. 28(2) Notwithstanding subsection (1), where

(*a*) a dividend was paid by a corporation that was resident in Canada and was controlled by the receiving corporation, and

(b) the payer corporation had undistributed income on hand at the end of its last complete taxation year before the control was acquired (which undistributed income is hereinafter referred to as the "designated surplus"),

if the dividend was paid out of designated surplus, no amount is deductible under subsection (1), and, if a portion of the dividend was paid out of designated surplus, the amount deductible under subsection (1) is the dividend minus the aggregate of

(c) the portion of the dividend that was paid out of designated surplus, and

(d) the part of any amount deductible under subsection (2) of section 11 in computing the receiving corporation's income reasonably attributable to the portion of the dividend that was not paid out of designated surplus.

The provisions of this subsection, as to the deductibility or non-deductibility of dividends paid out of, or a portion of, its designated surplus by a corporation resident in Canada and not exempt from tax to be applicable only if it is established that the payer corporation was, at the relevant time, controlled by the receiving corporation. In this case it has been admitted that the payer corporation Parsons-Steiner Limited was a resident of Canada not exempt from tax and had undistributed income on hand at June 30, 1953. Now, if the payer corporation was controlled by the receiving corporation at the relevant time, it is obvious that that should be the "control period" defined in section 28(4).

Sec. 28(4) In this section, "control period" means the period from the commencement of the payer corporation's taxation year in which the control was acquired to the end of the taxation year in which the dividend was paid.

In the present instance, the Parsons-Steiner Limited was the payer corporation. Its financial statement for the year ended June 30, 1954 is included in the record before this Court. "Fiscal period", under section 139(1)(*r*) of the Act, means the period for which the accounts of the business of the taxpayer have been ordinarily made up and accepted for purposes of assessment; and, in the absence of an established practice, the fiscal period is that adopted by the taxpayer. In the case of a corporation, no fiscal period may exceed 53 weeks. The financial statement shows that the fiscal period of Parsons-Steiner Limited is the period from July 1 to June 30 of the following year. It follows that its taxation year commenced on July 1, 1953 and ended on

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June 30, 1954. It is during that taxation year that on December 21, 1953 it declared a dividend of $1,250 per share on the issued common shares of its capital stock. The financial statement declares that the above dividend was paid in cash. The payment was made on January 22, 1954 during the payer corporation's taxation year 1953-1954.

The question arising is: how and when was control of the payer corporation acquired by the receiving corporation, the appellant in this case? Evidently, when the appellant purchased the common shares of Parsons-Steiner Limited and Parsons-Steiner Limited declared and paid the above dividend. The Act defines a controlled corporation as follows:

> Sec. 28(3) For the purpose of subsection (2), one corporation is controlled by another corporation if more than 50% of its issued share capital (having full voting rights under all circumstances) belongs to the other corporation or to the other corporation and persons with whom the other corporation does not deal at arm's length.

There is no doubt in my mind that when the three Steiner brothers had the appellant company (Robwaral Limited) incorporated and became the owners of all the shares of its capital stock and purchased 191 common shares of the 200 shares issued of Parsons-Steiner Limited, a company controlled by their father, the above definition of a controlled corporation could not apply to their case. The definition did not make one company controlled by a father and another company controlled by his sons related companies or controlled companies for the purposes of section 28(2). Had this situation prevailed until after June 30, 1954, I believe this dispute would not have arisen, but the statute was amended before that date.

Section 139(5) was amended by section 31(1), Statutes of Canada 1954, Chap. 57, by adding subsection 5(*a*) to section 139, to be applicable to the 1954 and subsequent taxation years. It reads:

> Sec. 139(5*a*) *Relationship defined.* For the purpose of subsection (5), (5*c*) and this subsection, "related persons", or persons related to each other, are
>
> (*a*) individuals connected by blood relationship, marriage or adoption;
>
> (*b*) a corporation and
>
> (i) a person who controls the corporation, if it is controlled by one person,

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

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

(c) any two corporations

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

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

These two subsections, which are applicable to the taxation year 1953-1954 of Parsons-Steiner Limited and the taxation year 1954 of the appellant, have the effect of making Mr. Steiner and his three sons a related group who between them control both Parsons-Steiner Ltd. and Robwaral Ltd., the appellant. Hence during the taxation year of Parsons-Steiner Limited, pursuant to the above provisions the corporations became related persons which were deemed not to deal with each other at arm's length.

By virtue of the amendment the father and the three sons fell in the group of persons who together rendered the Parsons-Steiner Limited controlled by the appellant, Robwaral Limited.

Following the reasoning that the amendment had the effect of giving Robwaral Limited control of Parsons-Steiner Limited pursuant to section 28(4) of the Act, the control of Parsons-Steiner Limited commenced with its taxation year and continued to the end at least of the same taxation year in which the dividend was paid. The appellant acquired control during Parsons-Steiner's taxation year 1953-1954. The dividend was declared on December 21, 1953 and paid on January 22, 1954, during that same year in which it was controlled by the appellant.

The dividend in question was declared by a resolution of the directors of the payer corporation which reads:

Upon motion duly made, seconded and unanimously carried, it was resolved that a dividend of $1,250 per share on the outstanding common shares of the Company be and the same is hereby declared payable to the shareholders of record at the close of business on the 31st day of December, 1953.

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The motion states that the amount of the dividend will be a sum of money of $1,250 per share and that the shareholders of record on the date *supra* will be entitled to receive the said sum of money on every common share they own. So, the word "amount" here means money and no other right of thing; in other words, a dividend is a right that qualifies shareholders to share in the profits of an undertaking whenever a distribution of profits is decided upon. When the distribution of the profits is expressed in terms of a sum of money, I do not believe it necessary to give the word "amount" any other meaning.

It is agreed that a shareholder entitled to receive a dividend expressed in terms of a sum of money has a right to sue for payment for the amount of the dividend if the company declaring same fails to meet its undertaking. This general rule is applicable when the facts indicate that there was failure on the part of the debtor and that a proper defence could not be made. I do not think that it can be said that the right to sue arises out of the declaration of a dividend. The recourse to justice flows from the fact of the non-payment of the sum of money which is the amount of the dividend.

Each dispute having to be decided on its own facts, I shall state the appellant's declaration as to why it did not receive the dividend on December 31, 1953. In its objection to the Minister's reassessment for the year 1954, it is stated that it was entitled to receive $238,750 of the dividend on December 31, 1953. On that date, it set up this amount of dividend as being receivable upon its books of account as at December 31, 1953. As it had no need to collect the sum payable to it by Parsons-Steiner Limited as of December 31, 1953, they did not request the payment of the amount until January 22, 1954. On that day a cheque was issued by Parsons-Steiner Limited payable for an amount of $238,750. This would be far from showing that the payer corporation was in default or had failed to meet its obligation. The amount covered by the cheque was not in payment of a debt which Parsons-Steiner Limited refused or was not in a position to pay. To my mind this would be incredible,

knowing that in its financial statement for the fiscal period July 1, 1953 to June 30, 1954 (page 3), Parsons-Steiner Limited declare the following earned surplus, viz.:

Cash dividends paid—
6% on first preferred stock ....$ 1,020.00
$1,250 per share on common stock $250,000.00

It is clear that the cheque of $238,750 which the appellant received on January 22, 1954 from the payer corporation was in payment of the dividend declared on December 21, 1953, and not in payment of a debt arising out of the non-receipt of the amount of the dividend in question.

Ignoring for the moment the provisions of section 28 of the Act, but keeping in mind the above facts, I believe the charging section 6, as applicable to the appellant, can logically be paraphrased as follows:

> There shall be included in computing the income of the appellant taxpayer for its taxation year 1954 the amount of $238,750 received in the year as a dividend or in satisfaction of a dividend.

It is admitted that the appellant did not receive the dividend declared by the payer corporation in 1953. All it had was a right to a dividend payable, which was not paid in cash until the year 1954. Section 6 clearly states "Amounts received" and not "Amounts receivable". I was referred to a rule laid down in the case of *Leigh v. The Commissioners of Inland Revenue*[1], where arrears of interest were paid in a lump sum, and it was contended without success that the sum should be apportioned over the period in which the arrears accumulated. Mr. Justice Rowlatt said (p. 595, *in fine*):

> . . . receivability without receipt for the purpose of Income Tax is nothing at all. There is no Income Tax or Super-tax upon a good debt or upon the value of a moderate debt. I am not speaking, of course, of mercantile accounts where these things are brought in, or anything of that sort; but there is no such thing as Income Tax upon a debt until it is paid. . . .

True this rule may be subject to exceptions, but the exceptions must be clearly expressed in the statute. Both sections 6(*a*) and 28 deal with "amounts received as dividends" and not "amounts receivable as dividends".

Taking for granted that the appellant was entitled to the payment on December 31, 1953, it appears from the evidence that it was not paid until January 22, 1954, date on

[1] 11 T.C. 590.

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which it was received by the appellant. When the section says "received" I do not believe that it means "receivable". I would say that a right to a dividend in an amount of money is not income until received.

To conclude this point, I shall quote what Lord Greene, M.R., said in the case of *Johnson (H. M. Inspector of Taxes) v. W. S. Try, Ltd.*[1] at page 181;

> ... It should be noted that in general tax is calculated on the basis of the receipts of a business. There is one notable exception to that and that is the case of trade debts. ...

Dividends in the present case are not trade debts but the right to a sum of money as a dividend and the statute says that amounts received as dividends are includible in the taxpayer's income for the year in which the amount of the dividend was received.

Within the meaning of section 6(*a*)(i) I find that as a general rule dividends expressed in terms of a sum of money are to be included in computing the income of a taxpayer, whether an individual or a corporation, in the taxpayer's taxation year in which it was received.

I also find that, by virtue of the amendment of June 1954 to section 139(5*a*) of the *Income Tax Act*, a corporation controlled by three brothers and another corporation controlled by their father are "related persons" and therefore cannot deal at arms' length. The effect of the amendment was to render Parsons-Steiner Limited controlled by the appellant Robwaral Limited during the period between the date the appellant acquired the shares of Parsons-Steiner Limited and the end of the latter's taxation year 1953-1954, in which the dividend in question was declared and paid.

When the respondent reassessed the appellant's income, he assumed that the dividend in the sum of $238,750 was paid in cash by the payer corporation on January 22, 1954, as it appears in the latter's financial statement for its taxation year 1953-1954. He also assumed that it was paid in part out of its designated surplus in the amount of $129,754.33. It was incumbent upon the appellant to prove that these assumptions were erroneous in fact and in law; it failed to do so.

[1] 27 T.C. 167.

Having found that the payer corporation was controlled by the appellant at the relevant time, to wit at the time of the declaration of the dividend and of its payment and receipt, and that it was paid in part out of the designated surplus of the payer corporation, I now find that the sum of $129,754.33 paid as a dividend to the appellant is includible in the appellant's taxation year 1954 as taxable income.

Therefore the appeal is dismissed with costs.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1959
Sept. 22
1960
Jan. 18

BETWEEN:

R. J. POLITO ....PLAINTIFF;

AND

GESTIONI ESERCIZIO NAVI SICILIA GENS .... DEFENDANT.

Shipping—Practice—Stay of action—Damage to cargo—Claim by cargo-owners against ship-owners—Provision in bill of lading that any suit be brought before Italian court—Jurisdiction.

The defendant moved for the dismissal of plaintiff's action or a stay of proceedings because of a clause in the bill of lading which provided that any action arising thereunder should be brought before the Italian Court of Genoa.

Held: That as it was apparent that the trial of the case before the Italian court would involve very considerable inconvenience and greatly increase the costs the Court would not be justified in giving effect to the clause. Motion dismissed accordingly.

MOTION to have action dismissed or stayed.

The motion was heard before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

Roland Chauvin for the motion.

A. K. Paterson contra.

A. I. SMITH, D.J.A. now (January 18, 1959) delivered the following judgment:

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The defendant moves for the dismissal of plaintiff's action or alternatively a stay of proceedings.

By his action the plaintiff claims the alleged loss sustained by him as a consequence of defendant's failure to deliver a cargo of onions in accordance with its obligations under a bill of lading issued at Valencia, Spain, on January 27, 1958.

It appears that this merchandise which was shipped on the defendant's vessel *M/V Maria Fausta G.* at Valencia for delivery at Halifax was found on its arrival at destination to be in a damaged condition.

The present action was instituted on August 3, 1959, in the Ottawa Registry of the Exchequer Court in Admiralty, but, with the consent of the parties, was transferred later to the Montreal Registry.

The defendant's present motion is based upon the following clause which is contained in the bill of lading:

> 26. Any legal action, suit or proceedings that the shipper, receiver or their assignees should intend to bring against the Carrier or his Agents in connection with or consequent upon this carriage shall have to be brought before the Italian Court of Genoa empowered to pass judgment, departing expressly from the jurisdiction of any other Italian or foreign Court, also in case of consolidation or actions.

The Fehmarn[1], Lord Denning at page 555:

> Then, the next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian Courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings; and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one, by his private stipulation, can oust these Courts of their jurisdiction in a matter that properly belongs to them.
>
> * * *
>
> I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned. Here the Russian element in the dispute seems to me to be comparatively small. The dispute is between the German owners of the ship and the English importers. It depends on evidence here as to the condition of the goods when they arrived here in London and on evidence of the ship, which is a frequent visitor to London. The correspondence leaves in my

[1] [1957] 2 Ll.L.R. 551.

mind, just as it did in the learned Judge's mind, the impression that the German owners did not object to the dispute being decided in this country but wished to avoid the giving of security.

I think the dispute is more closely connected with England than Russia, and I agree with the Judge that sufficient reason has been shown why the proceedings should continue in these Courts and should not be stayed. I would therefore dismiss the appeal.

The Athenee[1], Lord Justice Banks, at page 6

I think the learned Judge was justified, upon the materials before him, in refusing to exercise his discretion. It is not disputed that this contract is one of the class in which a judge of the Courts of this country has a discretion as to whether he will or will not stay the action to enable the parties to go to the tribunal which they selected. The learned Judge, in my opinion, is entitled to take all the circumstances into account, particularly the fact that the vessel is under arrest, and the fact of the dispute being in reference to the condition of the onions on arrival, and the fitness of the ship to carry them. Apparently there has been a survey at which both parties were represented; and the witnesses of the material facts are all in this country. I think there was an abundance of material upon which the learned Judge, if he thought right, could have exercised his discretion in the way he did.

Lord Justice Atkin:

I think that applies to a case of this kind. The question arises in respect of a clause to refer to a foreign tribunal as to a clause to refer to a domestic tribunal, whether there are proper reasons for not enforcing it. To my mind there were ample reasons for the learned President not enforcing it in this case. I think the balance of convenience and the substantial advantage which the plaintiffs have by suing in this country (and which they lose by not being able to proceed *in rem* against this ship), and many other advantages such as in respect of proof of loss, a matter which any commercial tribunal would wish should be decided, if possible, having regard to the evidence obtained at the time by inspection of the vessel and so on—all those grounds seem to me to afford ample reason for the learned President coming to the conclusion that, in the circumstances of this particular case, the clause in the contract should not be given effect to.

The Vestris[2], Lord Merrivale, page 86.

In the present case Italy is in no way involved, save that the company defendant has its head office in that country. The contract of affreightment was entered into in Spain from which country the merchandise was shipped to Halifax. It is noteworthy that the clause above-quoted does not include a provision that it is the law of Italy which is to be applicable.

It is apparent therefore that the trial of the case before the Italian Court would involve very considerable inconvenience and greatly increase the costs, since in that event,

[1] (1922) 11 Ll.L.R. 6. [2] (1932) 43 Ll.L.R. 86.

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all witnesses, who might be required to prove the condition of the cargo at the time of shipment, would have to be brought from Spain to Italy and all witnesses, having knowledge of the condition of the goods on their arrival at Halifax, would have to be brought from Canada, in addition to which it is not improbable that proof would have to be made of the law of one, if not both, of these countries.

In my view the circumstances of the present case are such as to bring it within the application of the principles laid down in the cases above cited, and to justify the refusal by this Court to give effect to the clause above-quoted and decline to either dismiss or stay the present action.

The Court was referred by counsel for defendant to the case of *The Stromboli*[1], where the Court dealt with a similar motion. In that case the clause in the bill of lading obligated the parties "to litigate any dispute arising thereunder by Italian law and before the judicial authority of Genoa, Italy, and not otherwise" and the learned judge decided on the authority of the *Cap Blanco* case[2] that, in the circumstances, it was "more convenient and much more inexpensive that the dispute should be determined by the Hamburg Court and therefore decided in favour of the motion. *The Stromboli* case therefore does not depart from the principles laid down in the other cases above cited or necessarily support the argument of counsel for defendant in the present case.

I conclude therefore that in the circumstances of the present case, I would not be justified in giving effect to the said clause and accordingly the defendant's motion is dismissed, with costs.

Judgment accordingly.

1959
Nov. 24
1960
Jan. 29

BETWEEN:

LEON ADLER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Capital or income—Purchase of land in excess of requirement—Profit on sale of excess land held to be income—Appeal dismissed.

[1] [1955] Ex.C.R. 1

[2] [1913] P. 130

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Appellant, a successful general building contractor, purchased a large tract of unoccupied land for the purpose of providing himself with a long term home for his business. The area purchased far exceeded his needs and after utilizing or retaining a portion of it at the rear of the property the remainder was disposed of by him at prices which netted him a profit.

This profit was added to appellant's income for taxation purposes for the year 1954. An appeal from that assessment was dismissed by the Income Tax Appeal Board and a further appeal was taken to this Court.

Held: That the appellant having entered into the business of a subdivider in exactly the same way as one engaged in that business would do and having retained a qualified surveyor to subdivide four lots the profit from the sale of the excess land constitutes income to the appellant for the taxation year in question, and was not the realization of a capital asset.

APPEAL from a decision of the Income Tax Appeal Board.

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

Philip F. Vineberg for appellant.

B. Robinson, Q.C. and *Paul Boivin, Q.C.* for respondent.

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

DUMOULIN J. now (January 29, 1960) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated August 22, 1957[1], dismissing appellant's prior appeal in respect of his income tax assessment for taxation year 1954.

In connection with this taxation period, the respondent increased appellant's assessable returns by adding $6,201.23 as net profit on the resale of a parcel of land in Ville St-Laurent, now the City of St-Laurent, one of the most thriving and progressive municipalities constituting the greater Montreal.

In his exception to this revised assessment, appellant counters that: (See Statement of Facts)

6. The purchase was motivated solely and exclusively in order to provide the appellant [a very successful general building contractor] with a long term home for his business.

* * *

[1] (1957) 17 Tax A.B.C. 419.

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11. The said gain constitutes a capital gain and not taxable income.

12. Acquisition of the land which gave rise to the said gain was not in any way an adventure in the nature of trade.

13. The sale of the said land constituted the realization of a capital asset.

In law, the respondent merely replies that: (Cf. Reply to Notice of Appeal, para. 7)

7. The amount of $6201.23, net profit on the sale of the above-mentioned parcel of land, constitutes income of the appellant for the taxation year 1954 and the tax thereon has been properly and accurately determined and assessed by the Respondent within the meaning of Sections 3 and 4 of the Income Tax Act.

Intrinsically considered, the facts leading up to this litigation remain largely uncontested, the moot question arising from the legal connotation attached to them by each of the contending parties.

As already said, the appellant, Leon Adler, carries on the business of general building contractor, presently occupying a rather spacious office in Ville St-Laurent, now the City of St-Laurent, off Authier Street, north of Côte-de-Liesse. It is a matter of general knowledge, I believe, that Ville St-Laurent is a rapidly expanding municipality on the Island of Montreal.

In 1953, Mr. Adler felt that his office space, on Manseau Street, in Outremont, no longer sufficed to the requirements of his trade which, according to the customary expression, had increased "by leaps and bounds".

He began inquiring about some suitable location in August of 1953, his attention being drawn, initially, to a vacant lot of some 10,000 feet on Davaar Street, Outremont, owned by a Mrs. Bessette.

This tentative deal did not eventuate, as Mrs. Bessette's title to the property was, in virtue of her late husband's will, subject to certain conditions of avoidance. Adler's second attempt, a 26,000 feet lot along Laurentian Boulevard, also proved unsuccessful, because a railway company held a servitude of passage over the land (Cf. Ex. A-3).

The appellant, who had agreed to vacate by May 1 his former premises, sold to Thrift Stores Inc., was under some pressure, when Notary Hart, his agent, got in touch with

Messrs. Scott and Paradis, or more precisely their representative, Federation Realties, entrusted with the bulk disposal of an unoccupied area, measuring exactly 196,847 square feet (Cf. Ex. A-4). This land was an unsubdivided portion of lot number 478 (Pt. 478) of St-Laurent Parish.

In his evidence, the only one adduced, Mr. Adler is quite explicit on the topic that a space of the above given dimensions far exceeded his needs, which some ten thousand feet or thereabouts would have met.

The explanation vouchsafed is that he tried to acquire the "smallest part they [i.e. Messrs. Scott and Paradis] would sell", but since this land could not be obtained piecemeal, he resolved to buy the entire lot, at a price of $0.40 per square foot, a total sum of $78,738.80 (Cf. Ex. A-4).

The purchase was duly executed on January 18, 1954, but Adler started building, before actually obtaining a legal right to the land, an office completed in June of that year.

The structure itself covers nine thousand (9,000) square feet, half of which is offices, and half warehouse and garage. A global space of twenty-seven thousand (27,000) square feet, roughly sixteen percent (16%) of the total ground, remains unsold and occupied by Adler, who also ceded to Ville St-Laurent "an area of about four hundred and fifty (450) feet by sixty-six (66)" for the opening of a road throughout the length of this property.

Four separate lots were subsequently included in a subdivision of the excess land and parcelled off to four purchasers, netting a profit of $34,748.88, although an item of $6,201.23 only is at stake in this appeal.

Regarding the portion of 27,000 feet utilized or retained by appellant, it lies at the rear of the property, and could be reached only by a road built for that purpose. Appellant, on cross-examination, refused to concede that this back section constituted a less valuable part. The fact remains, however, that, usually, the front portion of a piece of land, abutting on a street or roadway, is more saleable.

It would appear, and no blame attaches, that Mr. Adler surely does not belong to the hesitant type. In business matters, if the instant case offers a fair sample, his decisions are prompt and pertinent.

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He initiated constructional operations, we know, without waiting for due completion of the conveying instrument, and went one better in disposing of the unneeded ground. The following excerpts, taken from the transcript of his testimony at pages 24 and 25, bear out this impression. He is examined by his counsel.

Page 24—

Q. In connection with the property that you acquired under Exhibit A4, did you need that much land for purposes of your own construction?

A. No sir.

Q. What was your intention with respect to the excess land that you did not need?

A. I wanted to dispose of it.

Q. And did you want to dispose of it on a commercial basis or profit basis, or any other basis?

Page 25—

A. I just wanted to dispose of it. I did not care one way or another.

Q. What effort did you make to dispose of it?

A. Well, I almost disposed of half of it before I bought it.

We are aware that four purchasers bought the corresponding newly subdivided lots.

Reverting to the appellant's assertion (Statement of Facts, s. 6) that "the purchase was motivated solely and exclusively in order to provide . . . a long term home for his business", the admitted facts disclose a complete misconception of the matter. There may be in store, future alone will tell, "a long term" occupancy of the office and the land it rests on, and no dispute arises on this score, but the "long term" notion is patently missing in the lightning quick sale of those 170,000 odd feet of land, transacted even before Adler's ownership of them. Should time and continued retention of a property be, to a degree, a qualifying factor of an investment, and there is no dearth of authorities to that effect, then we might delete this element from the case without further ado. Even so, a brief reference will be had, particularly on the score of retention, to recent cases wherein its significance was attested.

Mr. Justice Hyndman, D.J. as he then was, wrote in re: *Minister of National Revenue v. McIntosh*[1], that:

> [McIntosh] Having acquired the property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

[1] [1956] Ex.C.R. 127 at 130.

McIntosh had contended the profit made on the sale of the 20 lots constituted a capital accretion out of an investment in the ordinary sense.

The lines immediately following, albeit dealing with another aspect, strangely enough dispose of a point raised on Adler's behalf, when he casually mentioned a loss of less than three hundred dollars on the resale of one of the four lots.

> It was said that the price received by him [McIntosh] was one or two hundred dollars less than the real value, and that this fact in some way negatived an intention of entering into a scheme to make a profit on the venture. I am unable to see any force in this argument. In view of all the circumstances, his insistence in obtaining the property could unquestionably only have been with the object of making a gain or profit.

Mr. Justice Hyndman's decision was unanimously affirmed by the Supreme Court of Canada[1].

Chief Justice Kerwin, delivering judgment for the Court, concluded his remarks by stating:

> In the present case I agree 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, but to dispose of the lots, if and when suitable prices could be obtained."

I do not question in the least Mr. Adler's assertion that he, or rather his business, required larger and more up-to-date facilities than those formerly obtaining. On the other hand, his claim that he positively could not find, in and about Ville St-Laurent, a smaller space, from the time he decided to move and January 18, 1954, sounds somewhat unconvincing. Even if that mild scepticism of mine be unfounded, the legal situation would remain unaltered. The pertinent facts: quick disposal, profit-taking, are proved; they stand as convincing witnesses, and as the Scots say: "So the facts go, so goes the law".

Now, in order that no confusion should, if possible, becloud this analysis, I repeat it was a perfectly legitimate and reasonable thing for the appellant to amortize, through some profitable disposal of unnecessary land, the cost of his new installation. Neither am I asked to pass judgment upon so natural and sound a venture, but to decide whether or not it falls within the purview of our income tax law.

[1] [1958] S.C.R. 119 at 121.

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The other case: *Day v. Minister of National Revenue*[1], dealt with a situation which, for all practical ends, may be fairly likened to the instant one. Mr. Justice Cameron cited at some length from Justice Hyndman's pronouncement in *McIntosh v. Minister of National Revenue* (*supra*), emphasizing the passage about the lack of intention to retain the property at issue. The learned judge wrote:

> I am unable to distinguish that case [*McIntosh v. M.N.R.*] from the one before me. Here Day had no intention of retaining the property as an investment, but did intend to sell it if and when a suitable price could be obtained. Having entered into the business of a subdivider in exactly the same way as one engaged in that business would do, and having been frustrated in completing his arrangements for disposing of it in one way—namely, in lots—he did sell it in another way—namely, en bloc.

It could go without mention that here the "frustration" angle is noticeably absent since the appellant is clear as to his decision of selling the excess land. I have already quoted on this topic from page 25 of the transcripted evidence, and might add to it replies appearing on page 58; Adler is under cross-examination.

> Q. And you built a road?
>
> A. That's correct.
>
> Q. And you did so with a view of trying to find somebody to buy. Otherwise, they would not have bought, is that right?
>
> A. Obviously, I did not want it all. There is no question about it. *I was very happy to sell it off.*

The appellant is very actively and successfully engaged in the contracting-building line. He agrees that his annual turn-over runs to a million or two million dollars (Cf. Transcript, p. 48).

During the past decade or so, in the pursuit of his trade, he bought land in several sectors of metropolitan Montreal, and also in Dartmouth, Nova Scotia, for hundreds of thousands of dollars. In 1954, his income tax return, page 3, in the liability entry, shows an item of $148,281.30, listed "Accounts Payable—Land". I note that this latter document, extensively read from at the trial, does not appear to have been fyled.

On the grounds purchased, Adler erected individual apartments by the hundreds (Cf. Transcript, pages 34 to 45 inclusive). His explanation, that he never acquired "vacant

[1] [1958] Ex. C.R. 44 at 51.

land" before on a purely speculative venture, does not detract from his occupational capacity of building contractor regularly engaged in buying land.

Mr. Justice Cameron's words in the case above suit the present appellant, for manifest reasons, with yet greater precision, than they suited Day, Adler being ". . . one engaged in that business . . ." and having retained a qualified surveyor to subdivide four lots, although, through some involuntary confusion, I presume, this information was not readily elicited (Cf. Transcript, pages 61, 62, 63, 64).

For the reasons above, I have no doubt whatsoever that the amount of $6,201.23 added by the respondent to appellant's income, due for the year 1954, does accrue from a business profit and was properly assessed within the meaning, *inter alia,* of ss. 3 and 4 of the *Income Tax Act.*

Therefore the appeal is dismissed with taxed costs in favour of the respondent.

Judgment accordingly.

BETWEEN:

1958
March 10, 11, 12, 13, 14
May 5, 6, 7 and 8
1960
Feb. 1

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

LEVIS FERRY LIMITED ....DEFENDANT.

Shipping—Collision in St. Lawrence River—Loss of icebreaker Lady Grey—Negligence of officers of both ships—Failure of both ships to comply with International Rules of the Road—Apportionment of blame—Damages—Recovery for loss of use of ship and replacement—Recovery for loss of personal effects of officers and crew—Defence of Act of God disallowed—Limitation of liability—Regulations for Preventing Collisions at Sea (1954) Rule 29—International Rules of the Road 15, 16, 27 and 30—Finance Administration Act R.S.C. 1952, c. 116—Regulation 19—Canada Shipping Act R.S.C. 1952, c. 29, ss. 657 and 659.

The action is one to recover from the defendant, owner of the Ferry *Cité de Lévis,* damages for the loss of the icebreaker *Lady Grey,* owned by the plaintiff in the right of Canada, which sank in the St. Lawrence River following a collision between the two ships. The collision occurred in very severe winter weather during which the fog was so thick that at times there was practically no visibility.

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Plaintiff contends that the collision and damage resulting were caused by the fault and negligence of the *Cité de Lévis* and the servants of defendant on board and employed by defendant. Defendant counters that the collision was due to an Act of God or *vis major* or the negligence of the navigators of the *Lady Grey*. The Court found that the collision was not due to inevitable accident but was caused by the negligent operation of both vessels and assessed blame to the plaintiff as sixty per cent and to the defendant as forty per cent.

Held: That it was bad seamanship on the part of defendant not to have had a proper look-out at all times during the operation of the *Cité de Lévis*, and such failure was a contributing cause of the accident.

2. That breaches of Rule 15(*c*)(1) of the International Rules of the Road by both vessels caused the collision and both vessels and those in charge of them were at fault in failing to send the mandatory signals prescribed by the Rule.

3. That the plaintiff is entitled to recover from defendant the amounts paid by the Crown to the officers and members of the crew of the *Lady Grey* for the loss of their personal effects resulting from the collision.

4. That plaintiff is entitled to recover compensation for the loss of the use of the *Lady Grey* and replacement, as well as for the loss of the *Lady Grey* itself.

5. That defendant is entitled to limitation of its liability as provided for in *The Canada Shipping Act* R.S.C. 1952, c. 29, ss. 657 and 659.

ACTION for damages resulting from a collision between two ships.

The action was heard before the Honourable Mr. Justice Fournier, sitting with assessors, at Quebec.

Paul Taschereau, Q.C., Roger Cordeau and *Paul M. Ollivier* for plaintiff.

Jean Brisset, Q.C. for defendant.

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

FOURNIER J. now (February 1, 1960) delivered the following judgment:

This is an action in which Her Majesty the Queen is seeking to recover from the defendant damages sustained as a result of the loss of the Icebreaker *Lady Grey* following a collision which occurred on February 1, 1955 between the Icebreaker *Lady Grey* and the Ferry *Cité de Lévis* in the St. Lawrence River abeam the City of Quebec. At the time of the collision, the plaintiff, in the right of Canada, was the owner of the icebreaker and the defendant was the owner of the ferry.

The following facts were well established before the Court.

The ship *Lady Grey,* of the port of Ottawa, Ontario, was a steel twin-screw steam icebreaker, 172 feet in length, 32.2 feet in breadth and 18.1 feet in depth, of 823.97 tons gross and 10.73 tons net register, fitted with two vertical inverted triple expansion engines of 2,300 indicated horse power. She was capable of a speed of approximately 12 knots. Built in 1906, her superstructure was rebuilt in 1943 and she was used for icebreaking and buoy tender service in the St. Lawrence River. She had a magnetic compass, but was not equipped with radar. Her navigating bridge located on top of a closed wheel-house was 90 feet abaft the stem-head or just abaft of amidship. She was painted black. At the time of the collision, her mean draft was 16 feet 6 inches and her freeboard 6 feet 8 inches. She was manned by a normal crew though a few replacements had been made on account of circumstances.

The *Cité de Lévis* is a car and passenger ferry registered in Quebec under No. O/N 161,922. She is a single screw steam vessel fitted with a right hand propeller. She was built in 1930 and is used during the winter in the ferry service between Lévis and Québec. Her dimensions are: length, 141.7 feet; beam, 50.1.5 feet; depth, 28.5 feet. Her gross tonnage is 1,259.07 tons and her net register is 467 tons. The tonnage of the space required for propelling power is 570.77 tons. She has a speed capacity of 10 knots. She has a magnetic compass, but no radar. She is manned by a crew of eleven men. Her navigating bridge is located 55 feet abaft the stem and 29 feet above the water line.

When the collision occurred the weather conditions were very severe, the temperature being from 30° to 35° below zero; the wind was light southwesterly. The cold air coming into contact with the warmer water caused a dense vapour to rise on the surface of the water. The fog was so thick that at times the visibility was practically nil. The fog or vapour were intermittent. Where there were large fields of thick ice, their density was greater. So at times the fog and vapour vanished suddenly or became thinner; in other words, they were whirling round in eddies. The waters of the St. Lawrence River at Quebec are tidal. At 12.09 a.m.

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on February 1, 1955 the tide was at low ebb; at 7.12 a.m. it would be flood. At all relevant times, large fields of heavy ice were floating downstream on the ebb tide (west-east) and there was solid shore ice extending into the river.

According to the entry in the *Lady Grey's* log book, the collision between the vessels described *supra* occurred at 6.45 a.m. on February 1, 1955. Witnesses heard mentioned the time as between 6.35 and 6.45 a.m. I am satisfied that 6.45 a.m. as the right time is as close as could be reasonably established under the circumstances. As to the time of the sinking of the *Lady Grey,* the evidence and the entry in her log book indicate 7.30 a.m.

The plaintiff submits that the collision and the damages resulting therefrom were caused by the fault and negligence of the *Cité de Lévis* and of the servants of the defendant on board her, while in the performance of the work for which they were employed. The grounds of fault were the lack of proper look-out; too great a speed in fog; the failure to blow proper signals and to take appropriate avoiding action in time. The amount claimed for damages is $677,000.

The defendant rested its defence on the assertion that the collision was due to an Act of God or *vis major* and was inevitable, or that, if it was caused by negligence, the fault was attributable to the navigators of the *Lady Grey* in that 1) they failed to give the proper signal indicating that the progress of the icebreaker had been blocked by ice, that she was working one or both of her engines astern and falling off with the current on the ferry's bows; 2) they failed to take appropriate or any avoiding action.

The important facts relating to the movements of the vessels and the actions of those responsible for their navigation were described and explained at length at the trial by Captain Blais of the *Lady Grey* and by Captain Pouliot of the *Cité de Lévis.* I shall summarize their evidence.

[The learned Judge here reviews the evidence and continues.]

This summary of the facts of the case is far from being exhaustive, but I have heard all the evidence and read it. Now, I may state that I find it impossible to arrive at the conclusion that the collision could be described as an inevitable accident. The facts before the Court, in my

opinion, do not meet the well recognized requirements necessary to constitute such an accident. I am guided in this finding by the accepted definition of such an accident.

In Marsden's *Collisions at Sea,* 10th ed., p. 10, the author says:

> The Privy Council, adopting the language of Dr. Lushington, defined inevitable accident to be "that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill," . . .

In two cases at least Dr. Lushington defined inevitable accident as follows:

> . . . where one vessel doing a lawful act without any intention of harm, and using proper precautions, unfortunately happens to run into another vessel.
>
> To constitute an inevitable accident it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence.

The facts may have been sufficient to show that the collision was inevitable immediately before or at the moment of its occurrence and that everything that could be done to avoid the impact at the time of the collision had been done. But to succeed it should have been established that the collision could not have been prevented even if proper precautions had been taken earlier. This, the defendant having failed to prove, he cannot succeed in having the plaintiff's action dismissed on that ground.

When two ships have been navigated into a position in which a collision is unavoidable, the question to be determined is by whose fault did they get into such a position? As a general rule a vessel is guilty of negligence causing or contributing to a collision by being in breach of the rules of the road or the regulations for the prevention of collisions or of the duty of good seamanship; by failing to give the proper signals in dense fog or vapour; by proceeding at too great a speed under certain circumstances or with no lookout, or because precautions were not taken to avoid danger or risks of collision which could reasonably be foreseen under known circumstances.

Now I propose to deal with the first charge made by the plaintiff against the *Cité de Lévis* and the defendant's servants on board her, while in the performance of the work for which they were employed, that of having negligently

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failed to keep a proper look-out. The evidence is to the effect that when the master of the ferry sighted the icebreaker he was on the port side and parallel with the *Cité de Lévis*. He was then in the wheelhouse with his mate, who was at the wheel. There was also a rating. He put on his lights and sent the rating to the look-out cabin. He stayed there till the *Lady Grey* had overtaken the *Cité de Lévis*. He then returned immediately to the wheelhouse and remained there. He left the look-out post because he was cold. The Captain lost sight of the icebreaker when it was about 75 feet ahead. From that time until the occurrence of the collision there was no look-out. When asked why, he said that he thought it was useless on account of the mist and dense fog. He mentioned that he had kept the window open in the wheel-house to enable him to hear the icebreaker's signals. Even so, he did not hear the 3-blast signal of the icebreaker when she proceeded backwards to open a second time a passage for the ferry. I believe this shows that there was no look-out on the ferry from the time the icebreaker started its rescue operation up to the moment of the collision.

In the *Regulations for Preventing Collisions at Sea (1954)* there is a general rule of the nature of a declaration, not to be ignored by seamen, setting forth the legal consequences of negligence.

> Rule 29. Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

I understand that in ordinary cases one hand at least should be specially stationed on the look-out by day as well as by night. The seaman acting as such must be of ordinary skill and intelligence, with proper use of sight and hearing according to circumstances. In dense fog and bad weather he must be more vigilant than in clear and fine weather. It is no excuse to say that during a dense fog a look-out is of no use or a proper look-out under those circumstances could not have avoided the collision. In the present instance, I think that at times the fog or vapour would have permitted to see the icebreaker at a distance. Witnesses stated that the fog or vapour was intermittent. The look-out, well

posted, could have heard signals, had signals been given. I have no doubt that it was bad seamanship to neglect having a proper look-out all through the vessels' difficulties.

Here are some rules, which were applied in numerous cases, describing what would constitute a proper look-out; these rules are summarized in Halsbury's *Laws of England*, 2nd ed., vol. 30, p. 802, No. 1042.

> . . . To constitute a good look-out on a ship there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty. As a rule, except doubtless in the case of very small vessels, there ought to be a look-out forward besides the officer on the bridge, even on a fine day. Sometimes the proper place for the look-out is not forward, but on the bridge. . . . In deciding what is a proper look-out, one must consider the state of the night and the proximity of vessels; the greater the necessity for the look-out owing to thick weather or otherwise, the more vigilant it should be. It is no excuse for a bad look-out to urge that no vigilance could have avoided the other vessel. In some cases it has been considered that a steamship proceeding at high speed in a thronged thoroughfare, or in fog, ought to have a double look-out forward. . . . Not having any look-out has been said to be a breach of the Sea Regulations, and it is no excuse that it was immaterial because the vessel had to keep her course. . . .

In my view, the master of the ferry would have shown good seamanship had he followed some of the above rules. His failure to do so was one act of negligence which contributed to bring his vessel to the position it was found to be a few moments previous to the collision.

The second ground of fault was that the ferry was proceeding at an excessive speed in the fog. This charge does not seem to me to have been established. Under the circumstances at the time, I believe it was practically impossible to determine the rate of speed of the vessels over the land. The evidence on this point is far from being convincing. No doubt it was necessary for both vessels to proceed at full speed to make headway through the fields of heavy ice. To say that the ferry ought to have stopped her engine at a given moment does not impress me. The moment she had begun to proceed, and knowing that heavy ice was floating downstream, she had to continue full speed to meet the challenge or stop her engine and find herself in the same predicament from which she had just been extricated. I do not believe the ferry's speed was the cause of the collision. At the distance at which the icebreaker was sighted, even at slow speed I do not think she had sufficient time to

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change her course and avoid the impact. The witnesses state that the blow when the vessels came into contact was not a heavy blow. At the time, the icebreaker was being pushed downstream by the current and the heavy ice, and she was drifting downstream when the collision occurred. As to speed, her master says that the ferry prior to the collision was proceeding at four or five knots and that the current was about two or three knots, so her speed over the ground could have been two knots, which cannot be said to be excessive speed. Even though I do not think the ferry was proceeding at an immoderate speed at the time of the collision, I am sure it would have been better seamanship to follow the rules which are set forth in Halsbury's *Laws of England* (*op. cit.*). I quote (p. 725):

> . . . Still more in a river, a fog may be so thick that it is the duty of a vessel not to get under way, and if under way to come to anchor as soon as possible. In a thick fog in a river, if there is an opportunity of coming to anchor, and an attempt to proceed involves danger to property and possibly to life, it is the duty of those who have the control of the steamer to anchor, notwithstanding the convenience and urgency of passengers. Even a ferry steamer, which proceeds in a river in such a fog, takes upon herself all the responsibility of such a course, and her owners must pay if by so doing she injures life or property. . . .

Before dealing with the charge that the ferry was not sounding proper signals, I must state that I find it most difficult to understand why the ferry when reaching clearer waters changed her course in a westerly direction without giving the signals required by the *International Rules of the Road*. I mention this because it would appear that the ferry ignored completely the *Regulations for Preventing Collisions at Sea* relating to signals.

The rules applicable to signals to be given by vessels proceeding in mist, fog or vapour are Rules 15 and 16 of the *International Rules of the Road*, which are worded as follows:

> Rule 15 (*c*) In fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, whether by day or night, the signals prescribed in this Rule shall be used as follows:
>
> (i) A power-driven vessel making way through the water, shall sound at intervals of not more than 2 minutes a prolonged blast.
>
> (ii) A power-driven vessel under way, but stopped and making no way through the water, shall sound at intervals of not more than 2 minutes two prolonged blasts, with an interval of about 1 second between them.

As both parties urged that both vessels were navigating in special circumstances, I shall cite Rule 27, which, it was submitted, is relevant to the facts of the case.

Rule 27. In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above rules necessary to avoid immediate danger.

After the icebreaker had given the 3-blast signal to indicate that it would proceed backwards to open for the second time a passage for the ferry, no other signal was given by either ship. To excuse the ferry's failure to adhere to Rule 15(*c*)(i), the defendant attempted to prove that during rescue operations by an icebreaker in the Quebec harbour a local special system of signals was in existence and that it was known to the masters of both vessels herein involved. But it was admitted that this special system of signals was neither discussed nor agreed to by the Captain of the icebreaker. When the witnesses were asked if these local regulations had been duly adopted and registered, the answers were in the negative, so it did not meet with the requirements of Section 646 of the *Canada Shipping Act*. In my opinion, to apply a special rule which interferes with Rule 15 it is compulsory that the special rule be duly made and registered. This rule reads thus:

Rule 30. Nothing in these rules shall interfere with the operation of a *special rule* duly made by local authority relative to the navigation of any harbour, river, lake, or inland water, including a reserved seaplane area.

Furthermore, I believe a well established international rule which has proven its effectiveness as Rule 15 should not be lightly disregarded, specially when the visibility at certain times and places was such that it was most difficult to ascertain the position of the vessels. In making this statement, I am mindful of the severe weather conditions and the lack of visibility. It is most difficult to establish circumstances which can justify departure from the rule. When vessels get under way under conditions as those described in this case, it is their duty to adhere to the rules of navigation, and one of these rules is to give the signals provided for by Rule 15. If it is not followed, the vessels take onto

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themselves the consequences of their negligence. The omission of giving the fog signals prescribed by Rule 15 is a statutory fault. Vessels violating this rule have to prove that the circumstances under which they were proceeding, had they given the prescribed signals, would have endangered navigation or that a duly adopted rule for local conditions had priority over the International Rule. This was not established in the present instance.

True, the collision occurred under abnormal weather conditions, but one has to keep in mind that the *Lady Grey* was an icebreaker, with a crew trained for and experienced in icebreaking and rescuing operations, and that the *Cité de Lévis* was a ferry specially built and equipped for winter service on the St. Lawrence River, between Lévis and Québec. When the *Cité de Lévis* called for help, it was not on account of danger to property or life, but because she could not return to her wharf without the help of an icebreaker. The *Lady Grey* answered the call because it was one of the operations for which she was equipped and manned. Both vessels in the past had been in similar predicaments. So, those in charge knew or should have known that vigilance under the existing circumstances was of the utmost importance.

The *Lady Grey* had a proper look-out. On the other hand the *Cité de Lévis* departed from the rule of good seamanship, namely, to provide a look-out at the most crucial time. In my view, though the look-out on the *Lady Grey* gave her no assistance to avoid the collision, it was no excuse for those in charge of the *Cité de Lévis* to say that the presence of a look-out on her board would not have aided to prevent the collision. It seems to me that at some time, when the fog or mist had decreased in density or disappeared, it would have been possible for a good look-out, well posted, to see the icebreaker and so notify the Captain.

Two experienced nautical assessors were appointed to hear all the evidence. At the conclusion of the trial they expressed the opinion that the breach to Rule 15(*c*)(i) was the real cause of the collision and that both vessels and those in charge were at fault on this point. I am of the same mind and concur in their opinion.

I find that the two vessels proceeding under the circumstances related to the Court, as well as the persons in charge of them, had been negligent in failing to sound the mandatory signals prescribed by Rule 15(*c*)(i) of the *Regulations for Preventing Collisions at Sea* and that this was the main cause of the collision. I also believe that the fact that the *Cité de Lévis* neglected to have at all times a proper look-out was to a certain extent a contributing cause of the collision for the reasons expressed *supra.*

I do not think that the manœuvres of the *McLean* while approaching or leaving the ship which was rapidly sinking had any effect on the ultimate fate of the *Lady Grey.* I believe that before the arrival of the *McLean* she was beyond help and that everything had been done that could have been done to save her under the circumstances.

I have given my best consideration to the proportion of liability of the parties in the light of all the evidence. I find that the defendant should bear three-fifths or 60 per cent of the blame and the plaintiff two-fifths or 40 per cent of the blame for the collision and the damages resulting therefrom.

It now becomes necessary to assess the damages to which the plaintiff is entitled. The plaintiff's total claim is for $677,000. The only two items about which some agreement could not be reached are:

(*a*) loss of the *Lady Grey* .... $350,000.
(*b*) loss of use of the *Lady Grey* and replacements .... $165,000.

These two claims will be dealt with later.

I shall now list the items of damages claimed in respect of which agreement was reached, to wit:

1. Cost of additional repairs to the *Walter E. Foster* as a result of her icebreaking services on the St. Lawrence River to replace the *Lady Grey* and to maintain her in proper condition to perform these duties.

These costs, amounting in all to $30,000, were claimed on the basis that the *Walter E. Foster* was not as well fitted as the *Lady Grey* for icebreaking services. It was agreed that $15,000 would be allowed.

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2. Expenditures amounting to $20,000 and incurred in connection with the bringing of the *Walter E. Foster* from Saint John, N.B., to Quebec, to replace the *Lady Grey,* and the reconditioning and commissioning of the *Franklin* to replace the *Walter E. Foster* at Saint John, N.B.

This amount was agreed to and is to be allowed in full.

3. Loss of stores, materials, crew's personal effects and belongings.

The amount claimed was $112,000 and for "loss of stores and materials" it was agreed that the sum of $75,000 should be allowed.

4. For "loss of crew's personal effects and belongings" it was agreed that the amount paid, namely $7,708.51, as appears from exhibit P-14, would not be contested, and that, if the plaintiff is legally entitled to claim for the crew's loss of effects, then the sum should be allowed.

Counsel for the defendant submits that the payments were made by the Crown as a result of a discretionary power exercised by the Treasury Board, as evidenced by plaintiff's exhibits Nos. 20 and 21. There was no subrogation obtained by the Crown and, even though the members of the crew themselves may have had a right of action against the ferry and her owners, assuming there were negligence on the latter part, the Crown had no direct right of action as is sought to be exercised here for the amounts paid to the crew, whether the payments were voluntary or were made obligatory by statute, executive order or otherwise.

On the other hand, counsel for the Crown contends that the value of the crew's effects lost in the sinking of the *Lady Grey* was paid in discharge of its statutory obligation, whether the *Lady Grey* was reimbursed or not for the collision, and, if the *Lady Grey* was jointly liable for the collision with the *Cité de Lévis,* it discharged its obligation under common law in addition to the above mentioned statutory obligation.

In support of this submission, he referred to the *Financial Administration Act*, R.S.C. 1952, c. 116—*Ships' Crew Regulations, Canada Gazette* (Part II) December 8, 1954, which reads as follows:

> 19. When an employee suffers loss of any clothing or personal effects because of a marine disaster or ship wreck, he may, with the approval of the Treasury Board, be reimbursed for the actual loss suffered by him.

Under this regulation the members of the crew had a right to claim the actual loss suffered by them and to be reimbursed. In my view, if the actual loss was established, the Treasury Board had no discretionary power but was bound by the terms of the Regulations to approve the payment, which it did in the present case.

A similar provision may be found in the *Financial Administration Act—Ships' Officers Regulations,* under the heading "Compensation for loss of personal effects resulting from marine disaster", regulation 22.

As to plaintiff's right of action, I believe the Supreme Court of Canada laid down a principle in *Regent Taxi & Transport Company* and *La Congrégation des Petits Frères de Marie*[1], which should be followed in the present instance. This principle was affirmed by the Privy Council[2]. It was held (Mignault and Rinfret JJ. dissenting):

> The plaintiff was within the purview of the word "another" ("autrui") as used in article 1053 C.C., and therefore entitled to maintain this action. Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal, Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 C.C. its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims. . . .

In this case, the members and officers of the crew were entitled to claim from the Crown damages for the loss of their personal effects resulting from a marine disaster. The Crown paid in accordance with the legal provisions *supra.*

[1] [1929] S.C.R. 650. [2] [1932] A.C. 295.

Now the Crown submits that the loss resulted from the negligence of the defendant and its employees. The evidence establishes that the defendant and its employees, through negligence, contributed to the collision and the damages resulting therefrom. I find that the plaintiff's action on this point is well founded.

There remain two disputed claims. The first one is for the "Loss of use of the *Lady Grey* and replacements, $165,000". In the months following the sinking of the *Lady Grey* the Department of Transport reconditioned and recommissioned its vessel, the *Franklin*, which was sent from Halifax to Saint John, N.B., to replace the *Walter E. Foster*, and the latter came up to Quebec to replace the *Lady Grey* for the remaining months of the winter 1955. The costs for reconditioning and recommissioning the *Franklin*, sending her to Saint John, sending the *Walter E. Foster* to Quebec, returning the latter to Saint John and decommissioning the former are all included in paragraph 10 of the Information. This claim is for $20,000, which amount has been agreed to and is allowed.

The *Walter E. Foster* left Saint John on February 4, 1955 and returned to Saint John on July 5, 1955. Then the *Franklin* came to Quebec from Saint John to do the summer work of the *Lady Grey* and worked there until September 5, 1955. After that she was laid up and later decommissioned and sold. There is no evidence as to the price of the sale.

The plaintiff claims that the Crown is entitled to general damages even if the operation of an icebreaker is a non-profit or a non-commercial enterprise. This seems to me to be in accordance with the decisions in *Greta Holme*[1]; *Mersey Docks and Harbour Board v. Owners of the S.S. Marpessa*[2]; *Admiralty Commissioners v. S.S. Susquehanna*[3]. In these cases it was made clear that a public body, not working for mercantile gain, which is deprived of its ship by a wrongdoer, is entitled to a substantial damage, irrespective of the special use which might have been made of her during the time she was under repair.

1 [1897] A.C. 596. 2 [1907] A.C. 241.
3 [1926] A.C. 655.

In Marsden's *Collisions at Sea*, 10th ed., p. 124, dealing with the question of non-profit earning vessels, it is said:

> In *The Chekiang* and *The Susquehanna*, Lord Summer and Lord Dunedin have expounded and elaborated the principle of awarding damages thus laid down. In the former of these cases, a warship was the sufferer and the House of Lords approved an award of damages arrived at by taking the warship's original cost, less depreciation, and allowing as damages 5 per cent. interest on the sum so arrived at, though Lord Summer emphasized the artificiality necessarily involved when dealing with a warship *pur sang*, in estimating a loss in terms of money. In *The Susquehanna*, where an Admiralty oil tanker suffered damage, the House of Lords refused to allow an award of damages based on the freight-earning capacity on mercantile charter of a ship which had not been and was not likely to be put on the market to earn freight. "All the same", said Lord Summer, "the *Prestol's* services during the time of repair were lost, and accordingly the principle of *The Greta Holme* . . . may be applied with such rates of interest and depreciation as the evidence may justify. . . ."

In the present case, counsel for the defendant submitted that the only juridical basis on which damages could be awarded to the plaintiff would be one which would allow interest on its capital investment in the *Franklin* together with depreciation and profit during the period of time her disposal for sale had to be delayed because of the use she was put to.

[The learned Judge here reviews the evidence concerning loss of the use of the *Lady Grey* and replacements and the net worth of the *Lady Grey* and continues.]

The damages claimed are assessed as follows:

Repairs to the *Walter E. Foster* for ice damage	$ 15,000
Reconditioning the *Franklin* moving the *Walter E. Foster*	20,000
Material stores and crew's personal effects	75,000
Damage for loss of use and replacement	5,775
Net worth of the *Lady Grey*	200,000
total:	$ 310,775

As I have found that the defendant should bear three-fifths or 60 per cent of the blame and the plaintiff two-fifths or 40 per cent of the blame for the collision and the damages resulting therefrom, the plaintiff should be entitled to recover from the defendant 60 per cent of $310,775, or a

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sum of $186,465. But in its defence, the defendant alleges that, if it is found fully or partly to blame for the collision, it is entitled to limit its liability under the relevant provisions of the *Canada Shipping Act* on the basis that its maximum liability, calculated at the rate of $38.92 per ton on the ship's tonnage for purposes of limitation, is equivalent to a sum of $40,390, and prays for a declaration to this effect.

So, the corporate defendant, as owner of the *Cité de Lévis,* seeks to limit its liability to $38.92 per ton of the ship's tonnage under the provisions of ss. 649 and 651 of the *Canada Shipping Act,* Statutes of Canada 1934, c. 44 (now found in ss. 657 and 659 of the Revised Statutes of Canada 1952, c. 29):

649. (1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity that is to say. . . . be liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

651. The limitation of the liability of the owners of any ship set by section six hundred and forty-nine of this Act in respect of loss or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship.

As 60 per cent of the damages in question were caused by the improper navigation or management of the vessel without the actual fault or privity of the owner, the latter would seem entitled to the benefit of those sections.

The latest decision on the question of limitation of liability which was dealt with by the Exchequer Court of Canada is the case of *The Queen v. Gartland Steamship Company* and *Albert P. LaBlanc*[1] (unreported—No. 82786 of the Exchequer Court records), in which Cameron J. held

[1] January 28, 1957 Unreported.

that as the damages were caused by the improper navigation or management of the ship and without the actual fault or privity of the owner the latter would seem entitled to the benefit of the above sections. His decision on this question was affirmed by the Supreme Court of Canada on January 26, 1960. The Court concurred in the following remarks of Honourable Mr. Justice Locke and decided accordingly. I do not think that any further comments by me on the subject would add to the solution of the debate, so I propose to quote *in extenso* his remarks at pp. 22, 23 and 24 of his notes:

The judgment at the trial held that the appellant company was entitled to restrict its liability in the manner provided by ss. 649 and 651 of the *Canada Shipping Act 1934*, c. 44. The respondent has cross-appealed against this finding on the ground that, as that statute does not specifically provide that those sections shall apply to Her Majesty, the sections do not apply. The learned trial judge rejected this contention and the judgment as against the company was restricted to $38.92 for each ton of the ship's tonnage. This reduced the damages found to have been sustained and awarded against the appellant LaBlanc of $367,823.49 to $184,383.50.

The Canada Shipping Act was enacted by Parliament in reliance upon the powers vested in it by head 10 of s. 91 of the *British North America Act*. It is not questioned that the sections referred to were within the powers of Parliament and restricted the liability of the owners of vessels for loss or damage occasioned by reason of the improper navigation of a ship owned by them where the event occasioning the loss occurs without their actual fault or privity. This was made applicable to the owners of all ships, except those belonging to His Majesty. This exception was provided by s. 712.

The purpose of s. 16 of the *Interpretation Act* to which I have referred above is, in my opinion, to prevent the infringement of prerogative rights of the Crown other than by express enactment in which the Sovereign is named. Section 712 of the *Canada Shipping Act* was held in the case of *Nesbit Shipping Co. Ltd. v. Reginam* (1955) 3 A.E.R. 161, to effectively prevent the exercise of the Royal prerogative. The effect of the sections of the *Canada Shipping Act*, however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative

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rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. I am accordingly of the opinion that the learned trial judge was right in permitting the amount of recovery to be restricted in the manner above indicated.

In the present case, the tonnage of a ship for purposes of limitation of liability is the aggregate of the register tonnage plus that of the space of the engine room under section 662 of the *Canada Shipping Act*. According to her certificate of registry, the register tonnage of the *Cité de Lévis* is 467 tons (exhibit P-2) and that of the space reserved for her propelling power is 570.77 tons, a total of 1,037.77 tons, which multiplied by $38.92 produces a figure of $40,390. This would be the amount to which the Crown would be entitled if the *Cité de Lévis* were to bear the full responsibility for the damages resulting from the collision. But having apportioned its responsibility to 60 per cent of the damage, the Crown is entitled to 60 per cent of $40,390, or the sum of $24,234, and interest at 4 per cent on that sum from the date of the collision, namely February 1, 1955 to the date the amount is deposited in Court after judgment.

Therefore the plaintiff is entitled to recover from the defendant the sum of $24,234 and interest as aforesaid, with costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN:

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Feb. 9

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

POUDRIER AND BOULET LIMITED ..DEFENDANT.

Crown—Soldier injured in Quebec by alleged negligence of defendant—Action by Crown to recover damages for loss of soldier's services and medical and hospital expenses—Liability to be determined under provisions of Civil Code—Common Law action per quod servitium amisit not applicable—National Defence Act, R.S.C. 1952, c. 184, s. 217(a)—Civil Code, arts. 1053, 1075, 1154.

A soldier, a member of Her Majesty's Forces, while on leave and working for the defendant in a civilian capacity in the Province of Quebec, was injured. He was treated in a civilian hospital until his leave expired when he returned to his unit. In view of his condition the military authorities placed him in hospital where he received prolonged medical care interspersed by several periods of sick leave. The Crown seeks to recover from the defendant damages suffered by way of pay and allowances paid to, and hospital and medical expenses paid for the soldier resulting from the injury caused by the alleged negligence of the defendant.

Held: That as the action had to do with the civil rights of the parties, it must be decided according to the law of the Province of Quebec.

2. That the liability of the Crown to provide care and treatment to an injured soldier arises solely under s. 217(*a*) of the *National Defence Act*, R.S.C. 1952, c. 184, a federal act which lies wholly outside the civil law of the Province.

3. That the Crown bases its claim on an action *per quod servitium amisit*, a proceeding peculiar to the English law, and acceptable in the sister provinces adhering to the common law but having no counterpart under the Quebec *Civil Code*.

4. That the Crown failed, as required by art. 1053 of the *Code*, to establish by a preponderance of evidence, negligence on the part of the defendant.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant damages suffered by the Crown due to the alleged negligence of defendant.

The action was tried before the Honourable Mr. Justice Dumoulin, at Quebec.

Robert Perron, Q.C. and *Paul Ollivier* for plaintiff.

Antonio Laplante, Q.C. for defendant.

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DUMOULIN J. now (February 9, 1960) delivered the following judgment:

Les faits en question dans cette action sont simples. Au mois d'août de l'année 1954, le caporal Raymond Bérubé, alors membre des forces armées du Canada, avait commencé, depuis le 2 de ce même mois, la période de son congé réglementaire de 30 jours. Désireux de procurer à sa famille des revenus additionnels, il sollicita de l'ouvrage de la compagnie défenderesse, dont il connaissait l'un des contremaîtres, M. Lemieux, pour qui il avait déjà travaillé.

Sa demande fut accueillie et le lendemain, 3 août, ses patrons l'affectaient, avec d'autres journaliers, au creusage d'une tranchée, à Charlesbourg, près de Québec. Ce fossé devait recevoir un drain agricole de six pouces (6) de diamètre. Les dimensions de ce canal étaient, en longueur, 350 pieds; en largeur, au sommet, 4 pieds, à la base, 2 pieds, et une profondeur que Raymond Bérubé dira être de 6 à 8 pieds.

Le 12 août, Bérubé, toujours à ce travail, fut soudainement entraîné par un glissement de la paroi et recouvert jusqu'à hauteur d'épaules par un amas de terre éboulée.

Par une malencontreuse complication, ce qui aurait pu être un simple incident devint un sérieux accident. Raymond Bérubé subit une fracture du tibia gauche qui, nous allons le voir, nécessita un long stage d'hospitalisation.

Transporté d'urgence à l'hôpital St-François d'Assise, Bérubé demeura sous traitement dans cette institution, du 12 août 1954 au 2 septembre, même année, alors que, sa permission expirée, il regagna son régiment, le Royal 22e.

A la date du 2 septembre, le coût du séjour à St-François d'Assise et les frais médicaux encourus à ce jour avaient été reportés au compte de la Commission des Accidents du Travail de la Province de Québec, qui en acquitta le montant: $382.22. La compagnie défenderesse, une importante firme de contracteurs généraux, est soumise à la loi provinciale des *Accidents du Travail* 1941 R.S.Q. c. 160, aux obligations contributives exigées du patronat, et, le cas échéant, elle bénéficie, tout comme ses ouvriers, de la protection correspondante.

La victime toucha personnellement une première indemnité totale temporaire de $136.36 pour la période du 13 août au 9 septembre 1954, puis un second versement de $1,922.44, cette fois, pour incapacité partielle permanente fixée à l'indice de sept par cent (7%). Ces précisions apparaissent à l'article 190, (*a*), (*b*), (*c*), de la défense.

Dès le retour de l'accidenté à son poste militaire, au début de septembre, il fut constaté que la fracture du tibia gauche dont il souffrait n'était pas consolidée.

La pièce documentaire P-1, produite par le capitaine Lucien Pichette, détaille la durée, premièrement, des cinq stages, 67 jours au total, que dut faire l'accidenté dans divers hôpitaux militaires de la région de Québec; deuxièmement, la répartition des trois congés d'invalidité ou "sick leave" de 30 jours chacun, accordés entre le 17 septembre et le 24 décembre 1954.

La demanderesse réclame $924.55 pour interventions chirurgicales et frais d'hôpitaux; $1,765.40, solde répartie sur une période alléguée de 194 jours, en tout un montant de $2,689.95. Ce paragraphe résume les articles 3, 4 et 5 de l'information.

Bérubé, retourné au régiment, le 2 septembre, n'avait pas informé la Commission des Accidents du Travail de ce changement d'état, et le Service des Réclamations dut entreprendre les recherches requises pour le retracer. Le 10 novembre, la nouvelle adresse connue, M. Joseph Delâge, Directeur du Service des Réclamations à la Commission des Accidents, écrivit au lieutenant-colonel L.-F. Trudeau, commandant du Royal 22e Régiment, cantonné au camp de Valcartier (Pièce D-2), priant cet officier de lui laisser savoir si l'autorité militaire avait décidé d'assumer dorénavant "les frais médicaux, d'hospitalisation, de radiographies" de l'accidenté.

Le 19 de ce même mois, le nouveau commandant, le lieutenant-colonel B.-J. Guimond, attestait réception de la lettre du 10 novembre, ajoutant ce qui suit:

> Vous serez avisés des dispositions prises dès que les résultats de la Commission d'enquête seront connus.

Cette lettre est erronément cotée D-1, sa numérotation chronologique eut dû être D-2.

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Malgré cette promesse d'informer, aucune autre communication, écrite ou verbale, ne parvint à la Commission des Accidents, nous déclare le témoin Delâge, qui n'est pas contredit. L'article 290 de la défense spécifie que: "Ni la Commission des Accidents du Travail, ni la défenderesse n'ont jamais reçu de réclamation supplémentaire."

Ces faits, je puis le dire sans crainte d'erreur, sont admis de part et d'autre. C'est donc à ce point que la controverse commence.

La demanderesse (article 6 de l'information) allègue que cet accident ". . . a été causé uniquement par le défaut de la défenderesse et plus particulièrement de son contremaître, Gérard Lemieux, de prendre les précautions voulues par la loi et par la prudence pour prévenir cet accident".

L'article 7 souligne le danger inhérent au creusage d'une tranchée et que ". . . cette tâche était surtout dangereuse pour le soldat Bérubé que ne connaissait pas ce genre de travail et les dangers qu'il pouvait comporter".

Et l'article 8 dit que: ". . . le caractère dangereux des travaux . . ." imposait à l'employeur le devoir "de prendre les mesures voulues pour assurer la sécurité de ses employés et prévenir un accident", tel celui qui est survenu.

La défenderesse n'aurait pas satisfait à cette obligation, soutient l'article 9 de l'action, et, omissions particulièrement fautives, elle se serait dispensée du soin d'établir des supports "pour retenir les parois de la tranchée en voie de construction", et de celui d'avertir les ouvriers "des dangers d'écroulement" et de leur indiquer la méthode de les prévenir et de s'en garer.

A ces reproches, la défenderesse plaide (article 13 de la défense) que "Bérubé a été assigné à creuser une tranchée d'environ 5 pieds de profondeur pour poser un petit tuyau de drainage, qu'il s'agissait d'une opération ordinaire ne comportant de sa nature aucun danger"; qu'absolument rien ne laissait présager ce qui est arrivé", et que "pour une tranchée aussi peu profonde, il n'est pas d'usage de poser des supports sur les parois de la tranchée".

Sept des neuf autres allégués, les articles 16 à 22 inclusivement, relatent l'intervention immédiate de la Commission des Accidents du Travail; les soins prodigués au blessé, les

montants payés pour les divers motifs ci-haut mentionnés, et encore que les moyens d'assistance de cet organisme public eussent été continués à l'accidenté si celui-ci les avait requis.

Enfin, aux dernières lignes de l'article 23, la défenderesse plaide qu'elle "n'a commis aucune faute"; puis, à l'article 24, que "les dommages réclamés dans l'information . . . sont trop éloignés . . .", avec cette conclusion: "il n'y a aucun lien de droit entre la demanderesse et la défenderesse".

La poursuite de la demanderesse procède de deux causes d'ordre distinct:

Bien que l'on ait omis, prudemment, de spécifier, dans l'information (voir aux articles 3, 4 et 5), le titre à la réclamation de $942.55 pour frais médicaux et hospitalisation, il reste quand même qu'il provient de l'obligation contractée par la Couronne, selon les termes de l'article 217 de la loi sur la défense nationale (S.R.C. 1952, c. 184, art. 217. Le second motif se fonde, on le sait, sur la perte par le maître des services de son serviteur, découlant de l'acte fautif d'un tiers, l'allégué, *per quod servitium amisit,* coutumier dans les provinces de "common law", que l'on voudrait ranger dans la catégorie des cas prévus à l'article 1053.

Disposons de suite de la première demande, celle de $924.55 qui, depuis la décision de la Cour Suprême du Canada[1] confirmant à l'unanimité celle de la Cour de l'Échiquier[2] dans l'affaire *His Majesty the King and Canadian Pacific Railway,* me semble, en droit, plutôt douteuse.

Je citerai d'abord le résumé très succinct des faits de cette cause tel qu'il se lit au rapport de l'arrêtiste de la Cour de première instance.

> The Crown seeks recovery from the defendant of certain sums of money paid out by the Crown to and on account of one, Christian, an employee of the Crown within the meaning of the Government Employees Compensation Act R.S.C. 1927 c. 30 injured by the negligence of servants of defendant.

C'est bien notre cas, sauf que l'engagement au même effet, pris par la Couronne envers le soldat Bérubé, résulte de l'article 217(*a*) de la loi sur la défense nationale.

[1] [1947] S.C.R. 185, 193. [2] [1946] Ex. C.R. 375, 378.

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Quant au recouvrement des sommes versées à l'accidenté, Herbert W. Christian, par la Couronne, selon que prévu dans la loi sur l'indemnisation des employés de l'État, M. le Juge Sidney Smith, de la Cour d'Appel de la Colombie-Britannique, séant alors en son autre qualité de juge adjoint de la Cour de l'Échiquier, décida que:

> What is here sought [c'est-à-dire les frais médicaux et d'hospitalisation] is the recovery of monies which by an act of the Dominion Parliament, the Crown is made liable to pay to its injured servant. This obligation does not arise under the common law of the province, but is created by a Parliament that is excluded by the British North America Act from legislating upon civil rights in the province. It seems plain that such an action will not lie.

La compagnie défenderesse fait aussi valoir le manque de connexité légale entre ce poste de $924.55 et les faits relatés dans l'information; je réfère à l'article 24 du plaidoyer.

M. le Juge Smith s'est déclaré, dans l'instance dont j'extrais ces citations, nettement d'avis que des dommages de cette nature n'avaient aucune relation causale avec le prétendu quasi-délit. Il écrivait ce qui suit:

> The compensation cannot be regarded as legal damages for it is not the proximate and direct result of the act complained of.

Et le savant juge concluait en ces termes:

> The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely an act of the Dominion Parliament, which lies wholly outside the common law of the province.

Cette décision, je le disais tantôt, reçut l'adhésion unanime de la Cour Suprême et M. le Juge Robert Taschereau écrivait que:

> As the Privy Council said in Workmen's Compensation Board v. C.P.R., 1920, A.C. p. 184 at 191, this right "arises, not out of tort, but out of the Workman's statutory contract". It is a benefit conferred on the employee as a result of his employment.

Cette conclusion me paraît péremptoire. Les gages payés par le patron régulier à l'ouvrier blessé par le fait d'autrui, lui sont accordés d'après une stipulation de son contrat de travail, et nullement comme suite directe du délit ou quasi-délit dont il fut victime.

L'Honorable juge Taschereau mentionne encore la décision de la Chambre des Lords dans l'affaire du sous-marin *Amerika*[1], perdu corps et biens après un abordage

[1] [1917] A.C. 38, 42, 60, 61.

en mer. Il cite longuement certains passages des notes de jugement de Lord Parker of Waddington et de Lord Sumner. On pourra lire avec intérêt le compte rendu de cette cause.

Mais je dois ajouter que, dès 1948, soit un an après la précédente décision, la Cour Suprême, dans l'instance *The King v. Richardson and Adams*[1], porta un arrêt difficilement conciliable sur certains points avec le sentiment exprimé in re: *The King v. C.P.R.* Ce litige provenait d'un acte fautif commis dans la Province de l'Ontario où le droit commun diffère de celui du Québec, et admettrait, le cas échéant, parmi les recours réguliers, celui du *"servitium amisit"*.

Le différend qui m'est soumis, ayant trait aux droits civils des parties, ne peut être vidé qu'à la lumière des lois provinciales, en l'espèce, celles de la Province de Québec (Acte de l'Amérique du Nord britannique, article 92 (13 et 14)). Or l'obligation de la demanderesse d'accorder les soins et traitements requis à un militaire accidenté provient uniquement, comme ci-haut indiqué, de l'article 217(*a*) du chapitre 184 des Statuts Refondus du Canada, 1952, une législation fédérale et, comme le dit l'Honorable Juge Smith, étrangère à ce débat. Même s'il n'y avait que ce motif, il en est un autre, basique, nous le verrons, je devrais de ce chef rejeter la réclamation initiale de la demanderesse d'une somme de $924.55, qu'elle paya, à l'acquit du soldat Bérubé, pour frais d'hôpitaux et le coût d'opérations chirurgicales.

Reste maintenant à juger la question de responsabilité directe, que l'article 1053 du code civil ferait peser sur la défenderesse, si la prépondérance de la preuve démontrait que la demanderesse "a perdu les services dudit Raymond Bérubé" ... par suite de l'imprudence ou de la négligence de ses employeurs.

Entendons la preuve relative à l'accident même.

Le principal témoin n'est évidemment nul autre que la victime de ce cruel contretemps, le caporal Raymond Bérubé qui, âgé de 40 ans, a quitté l'armée et exerce le métier d'entrepreneur en chauffage.

[1] [1948] S.C.R. 57.

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J'ai pris de son témoignage des notes, non pas sténographiques, mais très attentives et qui, j'en ai la conviction, relatent l'essentiel de chaque phrase probante.

Je reproduis ces notes, rédigées à la troisième personne, sans y apporter d'autres modifications que de rares rectifications de style ou de grammaire.

Au mois d'août 1954, Bérubé bénéficiait d'un congé de 30 jours en sa qualité de caporal dans l'armée.

Désireux de procurer à sa famille quelques revenus supplémentaires, il s'engagea en qualité de journalier chez MM. Poudrier et Boulet, à raison d'un salaire quotidien de $12.50.

Dès le 2 août, Bérubé fut affecté au creusage d'une tranchée pour la pose d'un drain agricole; ce fossé devant avoir de six (6) à huit (8) pieds de profondeur, une largeur de quatre (4) pieds à la surface et de deux (2) à la base; course totale, trois cent cinquante (350) pieds.

On procédait au creusage "à la petite pelle".

Soudain, la paroi s'éboulant, Bérubé fut entraîné et resserré entre une épaisseur de terre et l'extrémité inférieure alors atteinte. Le témoin, de stature médiocre, indique d'un geste de la main que la masse de terre atteignait à sa ligne d'épaules, une hauteur approximative de 4½ pieds.

Terre plutôt vaseuse; il avait plu ce matin-là, et il "brumassait" encore, vers midi, quand survint l'accident. Les jours précédant le 12 août, il était tombé de la pluie.

Le témoin continue: Le contremaître, Lemieux, avait donné instruction de prendre garde et de ne pas creuser trop grand à la fois, instructions qui furent respectées.

M. Lemieux, déclare Bérubé, réitéra, le matin même de l'incident, ces avertissements de ne pas creuser au delà de ce qui était requis à la pose d'une feuille de tuyau (un élément de tuyautage mesurant 1 pied).

Raymond Bérubé avait plusieurs fois travaillé, avant 1951, année de son enrôlement, à de semblables ouvrages. Il ajoute que les précautions prises "en général sur les travaux de Poudrier étaient très bien". Il précise que le contremaître Lemieux était "très consciencieux et possédait une longue expérience".

Bérubé n'a rien constaté de dangereux avant l'accident ni dans les conditions de travail ni dans l'ouvrage qu'il effectuait.

Telle est la version de l'accidenté.

Assigné par la défense, Gérard Majella Lemieux, 59 ans, contremaître de la défenderesse, possède une expérience de 38 ans comme conducteur et surveillant de travaux.

Il nous dit que, durant les huit (8) jours de son emploi, Bérubé fut affecté à cette tâche d'excavation. Le sol à creuser consistait en terre et en tuf; il fallait utiliser la pioche en maints endroits.

Quant aux instructions communiquées à ses ouvriers, dont Bérubé, voici comme il les résume: "Je leur ai dit à mes hommes que s'il se produisait des fissures de m'avertir et nous aurions boisé les bords [la paroi]".

Lors de l'accident, la tranchée avait été ouverte sur une longueur de 80 pieds.

Le témoin suivant, Joseph Roland Garneau, était, en 1954, journalier à l'emploi de la défenderesse. Le 12 août, occupé au même ouvrage que Bérubé, il creusait à cinq ou six pieds de celui-ci. Selon Garneau, le fossé, à l'instant du glissement de terre, avait de quatre pieds et demi ($4\frac{1}{2}$) à cinq (5) pieds de profondeur.

Ce témoin, également entendu par la défenderesse, affirme que le contremaître Lemieux, avant le travail du matin, donnait aux ouvriers des directives de prudence, leur recommandant de lui signaler tout signe d'effritement du sol, ajoutant que du bois, empilé sur le terrain, servirait aussitôt à remblayer les parois du canal.

Le président de la firme défenderesse, M. Marcel Boulet, témoigna que, la veille de l'accident, il avait dit au contremaître Lemieux: "Passé quatre pieds, surveillez, et si ça devient dangereux, boisez".

Ce même jour, 12 août, vers deux heures et demie de l'après-midi, M. Boulet se rendit mesurer la profondeur du canal au point d'effondrement, ce qui donna exactement quatre pieds et neuf pouces (4′ 9″).

J'ai préféré ne pas inclure dans le sommaire du témoignage de M. Lemieux, même si l'on n'a point objecté à cette déclaration de ouï-dire, le renseignement, assez significatif,

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dans les circonstances, que peu après le transport du caporal Bérubé à hôpital, une religieuse de l'institution pour le compte de qui on travaillait, la Sœur Sainte-Marie des Anges, lui apprenait que "autrefois un fossé avait été creusé près de cet endroit". Si tel était le cas, il se pourrait que Bérubé se fut trouvé au point d'incidence du vieux canal et de la tranchée.

La preuve matérielle que nous venons de lire permet-elle de retenir une faute délictuelle ou quasi-délictuelle contre la défenderesse?

Le creusage, "à la petite pelle", c'est-à-dire avec un maximum de lenteur et un minimum d'ébranlement du sol, comparé aux coups de boutoir de l'outillage mécanisé, me semble une opération assez simple. La demanderesse partage quelque peu ce sentiment quand, dans les articles 7 et 9 de l'information, elle précise des reproches explicites.

A l'article 7, elle insiste sur ce que ". . . cette tâche était surtout dangereuse pour le soldat Bérubé qui ne connaissait pas ce genre de travail et les dangers qu'il pouvait comporter".

Or, Bérubé témoigne, qu'avant 1951, il avait plusieurs fois travaillé à des ouvrages de cette espèce. Si donc, au dire de la demanderesse, cette besogne recélait un risque particulier pour qui n'eut pas connu ce genre de travail et les dangers possibles, la proposition alternative ne vient-elle point à l'esprit qu'il était d'autant moins aléatoire au journalier qui, à l'instar de M. Bérubé, connaissait, par expérience, " . . . les dangers qu'il pouvait comporter?"

Puis, la victime rapporte n'avoir "rien constaté de dangereux avant l'accident ni dans les conditions de travail ni dans l'ouvrage même" qu'elle effectuait. Si l'ouvrier sur les lieux et à la tâche n'a rien observé d'insolite ou d'alarmant, le patron serait-il blâmable de ne pas avoir vu l'invisible?

L'information, article 9, fait grief à la défenderesse de n'avoir établi aucun support pour retenir les parois de la tranchée et de n'avoir donné aucune instruction "aux employés" au sujet "des dangers d'écroulement de même que sur la méthode de prévenir et de s'en garer".

Avant de poser des supports ou palplanches, encore faut-il creuser suffisamment pour que la nécessité de ce faire apparaisse, et pour assujettir ce revêtement avec solidité. Rappelons-nous les versions non contredites de Lemieux, Garneau et Poudrier; le bois empilé sur place à cet effet; l'ordre d'avertir de toute fissure qui se produirait "et nous aurions boisé la paroi", a dit le contremaître.

Dans le cas actuel, aucun effritement antérieur ne s'était manifesté, car alors, Bérubé eut dérogé aux instructions reçues en omettant de le signaler.

L'éboulis se produisit de façon soudaine, quand une profondeur de quatre pieds et neuf pouces eut été atteinte, ce que pourrait expliquer l'hypothèse, suggérée par la religieuse, d'une intersection avec un ancien fossé.

Quant aux directives de prudence imparties, avant l'ouvrage, aux journaliers, le caporal Bérubé, redit trois ou quatre fois que, le matin même, le contremaître, avait recommandé à l'équipe la plus attentive prudence. Joignons à ce témoignage ceux déjà rapportés de messieurs Lemieux, Garneau et Poudrier.

Enfin, Bérubé relate que les jours précédant le 12 août, il avait plu et encore le matin du 12; qu'au moment de l'éboulis, il "brumassait".

Cet élément du témoignage de l'accidenté a retenu davantage, si possible, mon attention. L'interrogatoire sur ce point est bref; je citerai donc cet examen principal textuellement, tel que rapporté à la page 8 de la transcription officielle:

PAR Me PERRON [procureur de la demanderesse]

Q. Quelle température faisait-il à ce moment-là?

R. Il avait plu, puis il brumassait.

Q. Est-ce que ça faisait plusieurs jours que vous travailliez à ce canal-là?

R. Ça faisait quelques jours, oui.

Q. Dans les autres jours avant l'accident, quelle température avait-il fait?

R. On était dans une période plutôt pluvieuse.

Q. Est-ce qu'il avait mouillé la veille, l'avant-veille aussi?

R. Oui, je pense.

Q. Beaucoup?

R. Oui, je crois."

A plusieurs reprises, Bérubé souligne que le passage de six années a inévitablement estompé dans sa mémoire les particularités autres que le fait même de sa chute ou celles qu'il mentionne avec exactitude. Des expressions du genre de: "je crois, je pense", à six ans de l'époque, et au sujet de conditions climatiques sont loin d'avoir la valeur probante de rapports météorologiques, dont il n'eut pas été difficile d'obtenir la production. Tout bien pesé, il résulte que cette information demeure trop vague, insuffisamment précisée, pour que j'y puisse voir imprudence fautive de la part du maître des travaux.

"Terre plutôt vaseuse", a rapporté Raymond Bérubé, qui, toutefois, par inférence, se charge d'établir qu'à la reprise du creusage, "à la petite pelle", du reste, le sol ne devait pas être détrempé puisqu'il n'a rien constaté de dangereux avant l'accident ni dans les conditions de travail ni dans l'ouvrage même ou, comme il l'affirme à la page 18: "Moi, je n'en voyais pas, je n'ai jamais vu aucun danger".

Il incombait donc à la partie poursuivante d'établir, par une preuve prépondérante, au moins un élément tangible de faute chez la défenderesse pour que fut accueillie son action; je n'en puis apercevoir aucun.

Que penser, maintenant, de la procédure usitée? La Couronne, citant le sujet en justice, agrée, sans dérogation ni privilège, d'être soumise aux lois du lieu, tout comme sa partie.

L'action *"per quod servitium amisit"* est un recours propre au droit anglais, reçu dans les provinces sœurs qui adhèrent à la "common law".

Je ne sache pas que le droit civil de la Province de Québec ni la jurisprudence corollaire aient encore accueilli semblable moyen.

Quels en sont les éléments? Tout simplement la faculté reconnue au patron de recouvrer de l'auteur du délit ou quasi-délit, "tort feasor", le montant des gages dont il aura

continué le paiement à son serviteur temporairement invalide, que le maître ait déféré à un mobile de charité ou respecté telle clause du contrat d'engagement.

Sous l'empire du code civil, cette action transposerait les situations respectives de l'employeur et de son employé quant à l'exercice du recours pour salaire. En effet, si le maître discontinuait le traitement non gagné, le serviteur en inclurait avec raison la demande dans sa réclamation en dommages-intérêts contre l'auteur du délit. Or, ici, c'est le maître qui, ayant payé, réclame personnellement ce salaire de la partie en faute, mais le code civil, à l'article 1075, ne voit point en de tels dommages "une suite immédiate et directe . . ." du quasi-délit.

Cette analyse n'établit-elle pas que l'action *"servitium amisit"* est en définitive une manière de subrogation tacite du commettant aux droits du serviteur? A tout événement, le code civil (article1154) autorisant deux formes seulement de subrogation: conventionnelle et légale, omet toute mention d'une troisième.

Le titre de créance que la demanderesse prétend faire valoir pourrait être aisément régularisé au regard du code civil du Québec par le truchement fort simple de la subrogation conventionnelle, l'État obtenant du fonctionnaire, soldat ou commis, un transport en bonne et due forme de leurs droits et recours individuels contre le tiers délinquant. Cela fait, le libellé de la procédure: *"per quod servitium amisit"* ou action subrogatoire, importerait assez peu.

Sur la forme, comme sur le fond, il me faut conclure contre les soumissions de la demanderesse.

Par ces divers motifs, l'information de Sa Majesté la Reine est rejetée. La défenderesse aura droit de recouvrer ses frais taxables.

Jugement en conséquence.

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BETWEEN:

THE SHIP *PRINS FREDERIK WILLEM* AND HER OWNERS } APPELLANTS;

AND

GAYPORT SHIPPING LIMITED, OWNERS OF THE TANKSHIP *BRITAMLUBE* .... } RESPONDENTS.

Shipping—Appeal from judgment of District Judge in Admiralty—Collision in Port of Montreal—Failure to obtain permission of Harbour Master to enter channel—Failure to keep to right hand side of channel—Failure to sound warning blast—Links in chain of causation ending in collision—Appeal allowed and judgment of trial court varied.

Held: That failure to obtain permission from the Harbour Master at the Port of Montreal to enter what is a dangerous and busy channel, by steering a mid-channel course, particularly when two ocean-going vessels were tied up alongside sheds 18 and 19, and failure to sound a warning blast when opposite the Marine Tower were acts of negligence on the part of those in charge of the respondent ship *Britamlube* which contributed to the collision with appellant ship *Prins Frederik Willem,* thereby causing damage.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.[1]

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

Jean Brisset, Q.C. for appellants.

F. O. Gerity and *A. S. Hyndman* for respondents.

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

KEARNEY J. now (February 9, 1960) delivered the following judgment.

This is an appeal under the *Admiralty Act,* R.S.C. 1952, c. 1, s. 32, from a judgment rendered at Montreal on March 2, 1959, by the Hon. Arthur I. Smith, District Judge in Admiralty, sitting with Captain A. M. Lillis and Captain John M. Wilson as assessors[2]. The litigation concerned a claim by the respondents and a counter-claim by the appellants, arising out of a collision between the vessels *Prins*

[1] [1959] Ex. C.R. 205. [2] [1959] Ex. C.R. 205.

Frederik Willem and the *Britamlube* which occurred in the port of Montreal. By the aforesaid judgment the appellants were held solely responsible for the collision; their counter-claim was accordingly dismissed and the respondents' action maintained, with costs in each instance.

The only issues involved are whether the learned trial judge was justified in holding the appellants solely responsible for the collision; and if not, the extent to which the respondents should be held liable because of the contributory fault and negligence of those in charge of the *Britamlube* and for whose acts her owners are liable in law.

The broad facts of the case, which are dealt with in detail by the learned trial judge, are as follows. The locations of shed No. 24 and the McColl Frontenac dock mentioned later are to be seen on Exhibit D 13. Other places mentioned appear on Exhibit D 2.

On June 20, 1958, at about 11:45 a.m., the tankship *Britamlube,* arriving from the Great Lakes and bound for the McColl Frontenac dock in the town of Montreal East, entered lock No. 1 of the Lachine Canal which is a gateway to the Harbour of Montreal. She left the lock at 12:03 p.m. without permission from the Harbour Master; and at the same moment the *Prins Frederik Willem,* with the required permission, left her moorings at section 24 of Victoria Pier, bound for the Great Lakes via the Lachine Canal.

Ten minutes later, following a fruitless exchange of signals, when the *Prins Frederik Willem* headed cross-channel was coming out from behind Victoria Pier, her stem collided with the port side of the *Britamlube* forward of her afterhouse, at an angle of about 80°. The location of the collision is a subject of controversy which I will refer to later. The damages allegedly suffered by the appellants amounted to $20,000. The respondents' claim of $40,000 was referred by the learned trial judge to the District Registrar of the Court for assessment.

The distance from the mouth of lock No. 1 to section 24 is a little more than a mile, and section 24 is located about 750′ down-stream from the east end of Victoria Pier. About 1,500′ up-stream from the Clock Tower, and on the same side as this pier, stands the Marine Tower Jetty which is a signal point.

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Commencing at a point about 600′ up-stream from buoy 201M, a current known as St. Mary's Current with a velocity of five or six knots enters the south side of the channel at an angle of about 45°, causing an up-stream swirl on the opposite side of the channel where it meets Victoria Pier near the Clock Tower. The elements were in no way to blame, as the weather was fine and clear, the visibility good, and a light southeasterly wind was blowing.

In addition to the master and a pilot duly qualified for the district, the marine superintendent of the agents of the ship, the third mate and a radio operator were on duty in the wheel-house of the *Prins Frederik Willem*. In the wheel-house of the *Britamlube* were the master, a duly qualified pilot, a second mate and a sailor who was at the wheel.

The two ships are about the same size. The *Prins Frederik Willem,* a Netherlands ocean-going vessel registered at Rotterdam, is 258′ in length with a 42 foot beam. She is a motor ship fitted with a right-hand propeller, and her full speed loaded is twelve knots. She is both faster and more manœuvrable than the *Britamlube*. The latter is a lake motor tankship, 250′ in length and 44′ in breadth, with a maximum speed of about eight knots.

At the time of the collision two ocean-going vessels, *Thor No. 1* and *Whangaroa,* were tied up port side to at Victoria Pier alongside sheds 18 and 19 respectively, and the stem of the *Whangaroa* was protruding past the Clock Tower at the end of the pier. Down-stream from the Clock Tower the channel broadens and two ships, *Britamoco* and *Barrie,* bound up-stream and stemming the current near Jacques Cartier Bridge, about half a mile from Victoria Pier, were awaiting their turn to proceed up-stream to the Lachine Canal.

In the present case, as in nearly all cases where a conflict of interests is involved and quick decisions must be made in the face of imminent danger, there exists a considerable amount of contradictory evidence. The case is unusual, however, since the parties, except in a few instances, accept the findings of fact as made by the learned trial judge. Thus to justify an appeal based on alleged contributory negligence on the part of the *Britamlube,* the appellants point to the following findings in the judgment

appealed from. She failed to obtain permission of the Harbour Master to enter the Harbour of Montreal from the Lachine Canal, in breach of regulation 42 of the Montreal Harbour Regulations; she failed to blow one prolonged whistle blast when opposite the Marine Tower Jetty to warn upbound traffic, in breach of regulation 43(*b*); she failed to keep to her right-hand side of the channel (in contravention of regulation 43(*a*) and article 25 of the *International Rules of the Road*).

Counsel for the appellants conceded that the following faults committed by the *Prins Frederik Willem* contributed to the accident: her failure, notwithstanding that there was no statutory obligation under the harbour's rules to do so, to blow one long blast before coming out into the channel past the Clock Tower, and similarly her failure to give a radio security call; and the failure of her navigators to take full astern action as soon as the *Britamlube* was sighted. It was stated on behalf of the appellants that, immediately upon sighting the *Britamlube,* the *Prins Frederik Willem* was already irrevocably committed to a cross-channel course and had neither the time nor the space to avoid a collision. Speaking of this aspect of the case, the learned trial judge stated that, in his opinion, the evidence does not support such a view. I will comment on this finding later. The judgment then goes on to say:

> Moreover, regardless of whether or not the *Prins Frederik Willem* could by the exercise of reasonable care and skill have avoided the collision after she sighted the *Britamlube,* I am convinced, and I am so advised by the Assessors, that those in charge of the *Prins Frederik Willem* were negligent in entering and proceeding to cross the channel as they did without warning and without taking reasonable means to assure themselves that this manoeuvre could be made without risk of collision with downbound shipping.

I fully concur in the last mentioned finding because in my view this act of negligence on the part of the *Prins Frederik Willem,* though not admitted yet clearly proven, constituted not only a contravention of a statutory duty but a grave delinquency in good seamanship.

In further support of such finding it should be noted that the *Prins Frederik Willem* was headed in the direction of buoy 201M, admittedly with the intention of proceeding up-stream on the south side of the channel, which would

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contemplate passing any downbound vessel starboard to starboard. There is evidence to the effect that further downstream, in the vicinity of Jacques Cartier Bridge, ships by exception sometimes pass starboard to starboard, but such toleration does not extend to the narrow channel up-stream, beginning at the Clock Tower. Those in charge of the ship, before attempting to shape any course, much less the abnormal one which would take her in the normal path of downbound traffic and, notwithstanding a previous authorization by the Harbour Master's office to enter the channel, should have complied with Rule 12 of the *St. Lawrence River Regulations*, which reads as follows:

> A vessel navigating against the current or tide shall before meeting another vessel at any sharp turn or narrow passage, or where the navigation is intricate, stop, and if necessary, come to a position of safety below or above the point of danger, and there remain until the channel is clear.

I also agree that the weight of evidence indicates that those in charge of the *Prins Frederik Willem* were not sufficiently on the alert as they failed to hear the following radio-telephone warning calls given by the *Britamlube* just prior to leaving lock No. 1:

> Security call. . . . security call. . . . security call. *Britamlube* leaving Lock No. 1, going down the river.

It can likewise be said that the *Prins Frederik Willem* should have heard the warning blast given by the *Britamlube* just before she entered the channel from the canal, as required by the Montreal Harbour Regulations, since this signal as well as the security calls were heard by the *Barrie* and the *Britamoco* waiting on the south side of Jacques Cartier Bridge for the *Britamlube* to come down. That the *Prins Frederik Willem* was in a large measure to blame for the collision in my opinion has been proved beyond peradventure.

Before dealing with the main issues I wish to comment on the factual findings as appear in the judgment of first instance, which were the subject of contestation before me. The first concerns the down channel course followed by the *Britamlube* which the judgment dealt with in the following short paragraph:

> Although it was also alleged that the *Britamlube* was at fault, in that she failed to keep to her starboard side of the channel and was proceeding at an excessive speed, I am advised that in keeping to midchannel

and proceeding at the speed she did the *Britamlube* was acting in accordance with the usual practice, having regard particularly to the contour of the channel and the currents which characterize that area.

Counsel for the respondents met the issue by submitting that the best evidence indicated that the *Britamlube*, both before and at the time of the collision, remained close to the right-hand side of the channel and made no comment on the so-called practice of following a mid-channel course. Counsel for the appellants, while maintaining that the learned trial judge rightly held that the *Britamlube* had kept to mid-channel, submitted that he erred in holding that she was justified by practice in doing so, and that some misunderstanding between him and his advisers must have occurred because, although it is the practice for downbound vessels to go down-stream at up to ten knots, no practice exists to justify following a mid-channel course such as described in the judgment.

The evidence, particularly of the master and pilot of the *Britamlube*, indicated that their ship passed within 30 or 40 feet of buoys 205M and 203M and that, when the collision occurred, buoy 201M which is on the southern edge of the channel was not more than 40 to 50 feet off the starboard quarter of the *Britamlube*. It was probably this last piece of testimony which caused the pilot's evidence on the subject to be discredited by the learned trial judge. Those on board the *Prins Frederik Willem* and others testified that the collision occurred in mid-channel and such was the finding of the learned trial judge. With reference to usual practice, the only evidence in the record is found in the testimony of the pilot of the *Britamlube* who stated that as usual he followed a course very close to the southern limits of the channel, and my advisers tell me that the practice described is correct.

Another point of controversy was the location of the collision and the description which was made of it by the learned trial judge. The most conclusive evidence on the location of the collision, in my opinion, is to be found on Exhibit P 8 which is an on-the-spot colored photograph taken from the *Whangaroa*. It indicates that the collision occurred at about a ship's length down-stream from a point

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located midway in a line drawn between buoy 201M and the Clock Tower. Earlier in his judgment the learned trial judge stated:

> The evidence shows that the collision occurred approximately in mid-channel in the vicinity of Buoy 201M, about in line with the Clock Tower.

Since he was speaking in terms of approximation, his use of the words "in midchannel in the vicinity of Buoy 201M, about in line with the Clock Tower," though not exactly accurate, is inconsequential.

I will now deal with the remaining instances in which the learned trial judge's finding of fact was in issue and to which counsel for the appellants took strong objection. The learned trial judge found, and the appellants admitted that the *Prins Frederik Willem* was negligent in failing as a precautionary measure, though not required to do so by harbour regulations, to sound a warning blast when leaving shed 24, but he excused the *Britamlube* for her failure to give the signal required when passing the Marine Tower, because in his opinion it did not contribute to the accident as the ships sighted each other when the *Britamlube* was abeam of the Marine Tower.

Counsel for the appellants, with considerable justification I think, urged that the weight of evidence clearly indicates that the *Britamlube* was midway between sheds 18 and 19 when she heard the two blast signals given by the *Prins Frederik Willem.* All those on board the *Britamlube* testified that the *Prins Frederik Willem* was sighted at a distance ranging from 900′ to 1,200′. In the Preliminary Act it is stated for the respondents that the distance between the ships on sighting each other was 900-1,200′. All those on board the *Prins Frederik Willem,* with the exception of the master, testified that when the *Britamlube* was first sighted she was not more than 1,100 to 1,500′ off, and the master's evidence on the subject was as follows:

> Q. How far off was the other ship when you sighted her for the first time?
>
> A. I estimated six or eight ship lengths.
>
> Q. You are speaking of your own ship's length?
>
> A. Yes, but the *Britamlube* would be about the same length, I think.
>
> Q. That would be how many feet?
>
> A. About 1500 feet, I think; maybe a little more. I don't know.

The learned trial judge accepted the position of the *Prins Frederik Willem* when she reached the edge of the current as 500′ below Victoria Pier, and it is only the use of the outside figure of 2000′, i.e. eight ship lengths, that he could find that the *Britamlube* was "just about abeam of the Marine Tower" when she was sighted by the *Prins Frederik Willem;* and to say that "it is admitted by those on board the *Prins Frederik Willem* that the *Britamlube* was first sighted at a distance of from 1500 to 2000 feet" is hardly accurate. The word "about" is a term of approximation and possibly elastic enough to describe the position of the *Britamlube* when she heard the two blast signals of the *Prins Frederik Willem* even if, as seems to be the case, she was midway between sheds 18 and 19. In such event the *Britamlube* at the time in question would be some 700′ or 800′ below the Marine Tower (counsel for the respondents admits that she was "650′ east of Marine Tower Jetty"), and even this difference in distance, in my opinion, is an important factor which should not be overlooked. I think it is probable, but it cannot be said for certain, that, had the *Britamlube* in accordance with harbour regulation 43(*b*) given a prolonged blast when going past Marine Tower Jetty, it would have been heard from such close range. In the affirmative, the *Prins Frederik Willem* would not have reached the current and would have had advanced warning and additional reason for taking immediate hard-astern action instead of going boldly out into the current.

I am not unmindful that only in exceptional circumstances should an Appeal Court take upon itself to reverse the findings of fact made by a trial judge, particularly where credibility of witnesses is concerned. *Vide Landry v. Ray et al.*[1]; *Powell v. Streatham Manor Nursing Home*[2]; *Semanczuk v. Semanczuk*[3]; *The Steamship Giovanni Amendola v. Powell River Co. Ltd.*[4]. But in the present case it

[1] (1894) 4 (Can.), Ex. C.R. 280.
[2] [1935] A.C. 243, 250, 265.
[3] [1955] S.C.R. 658, 667.
[4] [1959] Ex. C.R. 1, 4.

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is mainly a matter of drawing proper inferences from facts as found by the learned trial judge and, as Lord Wright observed in the *Powell* case (*supra*), p. 267—

> The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge.

I will now direct my attention to the question of whether the learned trial judge erred in absolving the respondents of all blame and in concluding that their negligence in no way contributed to the collision.

In my opinion, which is fully shared by my advisers, the most significant finding against the master and pilot of the *Britamlube* is that they caused the vessel to enter the harbour and proceed down channel in violation of Montreal Harbour Regulation 42 which states:

> No vessel shall enter the harbour of Montreal from the Lachine Canal except at the time permitted by the Board.

The record shows that she arrived in lock No. 1 at about 11:45 a.m. and left at 12:03 p.m. and that a few minutes before leaving the pilot endeavoured unsuccessfully to communicate by radio-telephone with the Harbour Master's office in order to obtain the required permission, whereupon he and the master of the ship took it upon themselves to go down-stream on their own authority. Especially since, apart from a narrow channel, there were a treacherous current and blind spots to be encountered, such mode of action was by no means in keeping with good seamanship. When the pilot was asked in cross-examination if he did not know from his own experience that he could not leave lock No. 1 when another ship, upbound, was leaving shed 24 or 25, he answered affirmatively. He stated in evidence that they could not wait all day in the lock, but the master said that they could tie up at Bickerdike Pier and hold the basin all day if they so wanted. They apparently made no effort during more than a quarter of an hour to reach the Harbour Master's office by radio-telephone or, by making use of the city line which is in the Lock Master's office; and when during a few minutes they found the circuit engaged, their patience apparently became exhausted, and as already stated they could wait no longer. Instead of satisfying

themselves with the giving of a warning blast as required by regulation 43 and giving warning calls by radio, which are not required by the regulations, they should have waited until they had contacted the Harbour Master's office before entering the channel. The master of the *Britamlube* stated that, since the Lock Master opened the lock, he thought it was all right for him to proceed. The Lock Master was called by the respondents and testified that, although he did not so inform those in charge of the *Britamlube,* he himself had secured clearance for the ship. This statement which on its face is incredible, and which was categorically contradicted by the evidence of the captain who was Berthing Master for the harbour was inferentially discredited by the learned trial judge. The Harbour Master's office is the clearing house for ship movement in the harbour and, as might be expected, he testified that he would not have given permission to the *Britamlube* to come down-stream without informing each ship of the position of the other and giving appropriate instructions to both.

If, as the learned trial judge found, the *Britamlube* had maintained a mid-channel course, she was acting in contravention of harbour regulation 43(*a*) which states:

> At the harbour of Montreal, every downbound vessel shall, in order to warn upbound vessels, give one prolonged blast with its whistle or other aural warning device immediately upon leaving the entrance of the Lachine Canal and shall navigate to the right of the midchannel before rounding Alexandra Pier;

as well as in violation of rule 25(*a*) of the *International Rules of the Road* which states:

> In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

To keep to mid-channel, particularly when two large ocean-going vessels were tied up at sheds 18 and 19 and the stem of one of them was protruding down-stream past the Clock Tower, was not only a violation of rules but an act of improper seamanship, because it left the *Prins Frederik Willem,* if she had wished to turn to starboard, little more than her own length within which to navigate. A glance at Exhibit P 8 bears this out.

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The pilot of the *Britamlube* testified that he dared not steer his ship hard-to-port in response to a similar movement signalled by the *Prins Frederik Willem* because of the danger of being swept against the large vessel anchored alongside shed 19. I am advised that, once the *Prins Frederik Willem* had entered the current in the manner she did, for her to swing hard-to-starboard would have been a similarly dangerous manoeuvre. If the *Britamlube* had been far to the starboard side of the channel, she would have been visible to the pilot of the *Prins Frederik Willem* sooner than was the case and he would have plainly seen that he should immediately veer to starboard and would have had the necessary room within which to do it and would have been less taken by surprise.

I would attach more importance than did the learned trial judge to the violation by the *Britamlube* of harbour regulation 43(*b*) which reads as follows:

> Every vessel downbound from a point above Victoria Pier, to a point below Victoria Pier shall, in order to warn vessels leaving Market Basin, give one prolonged blast with its whistle or other aural warning device when opposite the Marine Tower Jetty at Elevator No. 2.

The pilot of the *Britamlube* gave as justification for his failure to blow a long warning blast that such action might have caused confusion and those in command of the *Barrie* and the *Britamoco* might have mistaken it for a signal to starboard. The nearer of the two ships was over half a mile away and their pilots who are no doubt as familiar with the harbour regulations as the pilot of the *Britamlube* would have recognized a prolonged blast as the warning which every downbound ship is required to give when opposite the Marine Tower, and not as a signal to starboard; and in my opinion this so-called justification merely constituted a lame excuse.

The pilot of the *Prins Frederik Willem,* because he had been given permission to enter the channel had some right to expect that any ship downbound, especially without permission, would give a signal warning at the Marine Tower of her approach. The pilot of the *Prins Frederik Willem* testified that, if the *Britamlube* had given such a signal, it would have been received while he was still behind Victoria Pier and he would have had time and opportunity to alter

his intention of crossing to the south side of the channel. A still earlier warning from the Harbour Master that a ship was bound down-stream would have given him correspondingly greater opportunity to avoid the course of action which he pursued. I think that on sighting the pilots of both ships were taken by surprise by the closeness of one ship to the other. The 65 foot beam of the *Whangaroa* cut off the view and the pilot of the *Britamlube,* at one point in his testimony, placed his ship about 900′ from the *Prins Frederik Willem* when he first sighted her. Indeed so close were the ships that the master testified as follows:

> Q. Now, Captain (master), when you saw the *Prins Frederick Willem* for the first time, I suppose you realized then and there that there was danger of a collision?
>
> A. As soon as he blew the whistle I knew there was going to be a collision.

Thereupon the master ordered a danger signal of five or six short blasts to be sounded, so that those on board who were in their cabins below would seek safety on deck.

In my opinion those in charge of the *Britamlube,* by their failure to obtain permission from the Harbour Master to enter what is a dangerous and busy channel, by steering a mid-channel course, particularly when two ocean-going vessels were tied up alongside sheds 18 and 19; and by their failure to sound a warning blast when opposite the Marine Tower, have been guilty of acts of negligence which, to borrow a phrase from Marsden's *Collisions at Sea* by Kenneth C. McGuffie (Tenth Edition, p. 15), "formed a link in the chain of causation ending in the collision, and thereby caused damage."

Having recovered from their initial shock and surprise, the pilots of the *Prins Frederik Willem* and the *Britamlube,* by giving a tardy full-astern order, and a hard-to-port order reversing a hard-to-starboard course, respectively, were attempting to act in the best interests of their ships and those aboard them and to minimize the effect of an inevitable collision; and I think it unnecessary to discuss these last minute efforts in further detail.

For the foregoing reasons, and with the benefit of expert advice from Captain Carl A. Bodensieck and Captain N. E. Rees-Potter, nautical assessors, I would vary the judgment

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appealed from and hold the appellants responsible for three quarters and the respondents for one quarter of the damages suffered by the *Britamlube* and the *Prins Frederik Willem.* I would consequently maintain the appeal and counter-claim with costs and I would refer the assessment of damages to the learned Registrar for the Admiralty District of Montreal in the event of the parties' failure to come to an agreement in respect thereto.

Judgment accordingly.

1959 May 20, 21, 22 — 1960 Feb. 19

BETWEEN:

ANGELSTONE LIMITED ....PLAINTIFF;

AND

ARTISTIC STONE LIMITED ....DEFENDANT.

Industrial Design—Industrial Design and Union Label Act, R.S.C. 1952, c. 150—Action for infringement and passing off—"Angelstone Limited" —"Shadow Stone"—"Artistic Stone Limited"—Sand-O-Stone—Design one of a building block lacking ornamental feature—Design not registrable—No evidence of passing off—Plaintiff's design expunged from register.

The action is one for infringement of plaintiff's duly registered Industrial Design of a building block. Defendant counterclaimed for expungement of the like. The Court found that the description of the design is that of an article of manufacture namely the building block in respect of which the certificate of registration of the design was issued, and that it also lacks novelty and was a reproduction with minor alterations of a design for building blocks that were in use before plaintiff's engineer and sales manager conceived the idea, and consequently not original. The Court also found that the plaintiff had failed to establish that the defendant, for purposes of sales, had manufactured building blocks to which it had applied the plaintiff's design or a fraudulent imitation thereof and had offered for sale or sold such building blocks.

Held: That the design in question was one for the article of manufacture itself and not for the ornamenting of such article; it is that of a building block itself and has no ornamental feature which could have resulted from the application or attachment or engraving of an ornamental design, and was not registrable and should be expunged from the register.

ACTION for infringement of plaintiff's Industrial Design.

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

G. D. Finlayson for plaintiff.

David Watson for defendant.

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

FOURNIER J. now (February 19, 1960) delivered the following judgment.

This is an action by the plaintiff for infringement of its duly registered Industrial Design of a building block and passing off and for an injunction restraining the defendant, its agents and workmen from applying, for purposes of sale, its industrial design or fraudulent imitations thereof, and from manufacturing, advertising or selling building blocks to which said designs or imitations thereof have been applied. The defendant counterclaims for expungement of the above Industrial Design.

The plaintiff is a company incorporated and carrying on business in Canada, having its head office at the City of Hamilton, Province of Ontario. Its business is the manufacture, sale and distribution of pre-cast building stone used in the construction of residential, commercial and institutional establishments. Its building blocks are intended to imitate natural cut stone.

As its general sales manager, Mr. Alan A. Camp was in charge of the development of its products and of its production and sales. He is a graduate engineer and a member of the Professional Engineers' Association.

During 1953, in the course of his functions and duties and to help expand the plaintiff's business, he conceived the idea of developing a pre-cast building block which would have a rustic appearance. His object was to manufacture an artificial stone which would imitate and duplicate natural cut stone as it came out of the quarry. He proceeded by casting a mixture of cement and other ingredients into a rectangular mould. When the substance began to solidify, with the aid of some instrument a groove was made upon its surface on the length of the rectangle so as to weaken one side of the block on a predetermined line. When the substance had hardened it was taken out of the

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mould. The result of the operation was a rectangular block of artificial stone twenty-four inches long, nine inches wide and two inches thick. At the beginning, the groove was a multiple wave (three waves). A little later, it was two waves. Mr. Camp stated that some of these multiwave building blocks were sold in October 1953. Finally the groove was made in the shape of an elongated letter S. The block was split with a chisel and hammer by striking two or three times on different parts of the opposite side of the block to that of the groove. The split generally followed the groove or the weakened line of the block. The plaintiff began production of these last building blocks late in the fall of 1953 and put them up for sale early in the spring of 1954.

It was found that the blocks which were split along the line of an elongated S had more similarity with cut natural stone than the others. When these blocks were used in buildings, they gave a certain effect of shadow and light; hence they were named "Shadow Stone". Designs of the "Shadow Stone" were prepared and an application was made for the registration of the said designs under the *Industrial Design and Union Label Act*, R.S.C. 1952, chap. 150. A certificate of registration of the Industrial Design for a building block No. 133 was issued on January 26, 1955 to the plaintiff as proprietor and owner.

The defendant is a company incorporated and carrying on business in Canada. Its principal place of business is Homeside P.O., Hamilton, Province of Ontario. In 1953 or 1954, its president and general manager, Walter Kazemekas, bought building blocks from the plaintiff for the building of a house. He thought these artificial stones were quite expensive, so he decided to experiment to see if he could develop a building block which would resemble sand stone. He examined very closely the plaintiff's product, with the intention of manufacturing a building block which would imitate natural hand cut sandstone. He tried different mixtures of material and experimented during seven months on the preparation and manufacture of his proposed product. He was not successful for quite a while, but at last he did succeed in processing a building block. There is no doubt that to arrive at his end he used a process

having the characteristics of the process used by the plaintiff. He then proceeded to manufacture and sell a pre-cast block, which he named "Sand-O-Stone", having a resemblance to the plaintiff's product and to natural cut sandstone.

In September or October 1956, Mr. Camp, the plaintiff's general sales manager, pursuant to an agreement with the defendant's general manager, visited the defendant's plant to investigate the processes followed by the defendant in the production of its ware. He did not see the actual manufacture of the defendant's building block, but the operations were explained to him by Mr. Kazemekas and a few pieces of the stone produced were exhibited to him. He states that the blocks were cast stone slabs like those of the plaintiff's, that the faces of the stones were similar to those of the "Shadow Stone" and that the name of the defendant's product was "Sand-O-Stone". He later saw samples of these stones on houses. Mr. Kazemekas says he told Mr. Camp, during the latter's visit, that at the outset he had used an instrument to make the groove on the surface of the block but that he had now developed a mould with a steel ribbon at the bottom which makes the groove.

Having succeeded in processing a building block which at least in his mind imitated natural cut sandstone, he proceeded to manufacture and sell his product on the general market.

On April 18, 1957 the plaintiff filed his statement of claim for infringement of its registered Industrial Design of a building block and for an order of restraint and damages.

The defendant denies infringement and passing off; in a counterclaim, he attacks the validity of the plaintiff's registered industrial design and prays that it be expunged from the register.

I shall deal first with the question of the validity of the plaintiff's registered industrial design, for should it be found that the registration is invalid there could be no infringement of the industrial design.

The defendant admits that the plaintiff is registered as the proprietor of Industrial Design No. 133, Folio 19756, for a building block registered January 26, 1955, but denies

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that it is the proprietor of the said industrial design. This action being brought under the *Industrial Design and Union Label Act,* R.S.C. 1952, vol. III, c. 150, s. 7 thereof deals with the effect of registration; s-s. (3) says:

7. (3) The said certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act.

So the onus of establishing that the person named as the proprietor is not in fact or in law the proprietor of the design rests on the defendant. The defendant did not adduce evidence to demolish the plaintiff's *prima facie* case that the certificate issued was evidence of the facts therein asserted.

The Act states:

25. Every certificate under this Act that any industrial design has been duly registered in accordance with the provisions of this Act, which purports to be signed by the Minister or the Commissioner of Patents shall, without proof of the signature, be received in all courts in Canada as *prima facie* evidence of the facts therein alleged.

Counsel for the defence did question Mr. Camp on this point. The witness stated that after examining natural cut stone as it came out of the quarry he conceived the idea that it would be possible to develop a process by which a cast stone building block could be manufactured so as to have the appearance of natural cut stone. Through trial and error, he reached a point where he thought he had devised the necessary process. He tried it on cast stone slabs and was satisfied with the results. He then started to make sketches of the product; he showed them to the president of the company and discussed their merits. With the help of specialized designers, the sketches became the design which was registered. Though there is no definition of the word "author" in the Act, I believe the witness to be the author of the design. This brings us to the section of the Act which deals with the proprietorship of a design:

12. (1) The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

This section is complemented by the provisions of s. 8, which reads as follows:

> 8. Where the author of any design has, for a good and valuable consideration, executed the same for some other person, such other person is alone entitled to register.

Mr. Camp, the author of the design, was the general manager of the plaintiff corporation, in charge of production and sales. Amongst his many duties was the development of existing and new products. In his evidence he enumerated a list of articles which he had developed alone or in conjunction with the president of the company. He was a full time employee and when he was working on the idea of the building block in question and experimenting the process he had devised it was on his employer's time and at his expense. He was working within the scope of the duties for which he was employed. He received his salary and in return, as part of his duties, he attended to the development of the plaintiff's products. I believe that he executed the design for the plaintiff for a good and valuable consideration, as Cameron J. states in the *Renwal Manufacturing Company, Inc.* and *Reliable Toy Co. Ltd. et al.*[1] (p. 194):

> . . . The good and valuable consideration is found in the salary paid by the plaintiff to Rosenbloom, part of the duties which were paid for by his salary being the designing and styling of new articles.

In the present instance, I have come to the conclusion that the development of the plaintiff's products by its general manager was an obligation arising from the contract of service and was one of the duties of this employee. Therefore his salary covered not only his production and sales duties, but also his endeavours to develop existing and new products.

The defendant also attacks the validity of the registration on the grounds that the design is neither novel nor original and that natural stone having the appearance of the building block shown in the design has been in use for many years. Counsel for the defence submits that the product which it manufactures under the name of Sand-O-Stone is not an infringement because it is not similar to the industrial design; furthermore, that the industrial design is invalid because the *Industrial Design and Union Label*

[1] [1949] Ex. C.R. 188.

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Act does not permit the registration of an article of manufacture itself but merely "for the ornamentation of any article of manufacture".

It is generally accepted that neither the mode of construction of a manufactured article nor the material from which the product is made are protected by the registration of an industrial design. A perusal of the application first filed for registration of the design will support the above statement.

The application, as filed, was entitled "An Industrial Design of a Cast Stone Building Block" and "the industrial design consists of a 'Cast Stone Building Block' having the following features of ornament."

The Registrar, in a letter dated January 12, 1955, made objection to this in the following words:

> The mode of manufacturing (cast) and the material used (stone) are irrelevant in design cases and should be omitted from the title. This title, it is believed, would be improved if restricted to "Building Block".

The letter continues:

> As a design cannot be an article of manufacture the words "Cast Stone Building Block" should not be used in the description of the ornamentation.

On January 18, 1955, the plaintiff's agent filed a letter stating:

> A revised application and duplicate originals is enclosed, with alterations suggested by the Examiner, except for a minor change in the description of the front face, the change having been made to improve the style of the description.

The application thus became a request for the registration of an Industrial Design for a Building Block the design of which has the appearance of a short plank. The drawings annexed to the application are described as follows:

> Fig. 1 is a perspective view looking downwardly at the block towards the front face;
>
> Fig. 2 is a sectional view along the line 2-2 of figure one showing the one bevel;
>
> Fig. 3 is a sectional view along the line 3-3 of Fig. 1 near the middle of the block; and
>
> Fig. 4 is a sectional view along the line 4-4, showing the opposite bevel.
>
> The application, the description of the design of the drawings and the registration are for an article, namely, "a building block".

The first paragraph of the application reads:

> We Angelstone Limited . . . hereby request you to register in our name an Industrial Design for a Building Block of which we are the proprietors.

Though in the application the design is described as having the appearance of a short plank, after the description of the front face it is added:

> . . . said face having the texture of a broken surface and the other faces of the block having the texture of cast surfaces.

Even the amended application and the descriptions of the design leave no doubt that the design was that of a building block manufactured by the plaintiff and that what was desired to be protected by the registration was the building block itself. I believe the evidence will bear me out when I say that the author of the design, after having devised what he thought was a novel and original process for splitting cast stone building blocks which gave them a certain appearance of natural cut stone, proceeded to make sketches and drawings of the shape and configuration of the product which was the result of their operations. The plaintiff then requested the registration of the finalized design. Many experiments were made before the final result of obtaining a building block which could meet the description used in the application.

At the trial, Exhibit No. 9 was filed by the plaintiff. It is entitled "Principle for producing Shadow Stone" (showing plans and cross-sections) and indicates the result of the different operations of manufacture of the above building block called Shadow Stone. The document is interesting in that it shows how the building block is produced. It has three sketches: the first demonstrates the basic known principle—which was the subject of cited patents—to obtain a rectangular stone with no pitch; the second is a variation of the basic known principle and is used to obtain an S shaped stone with no pitch; and finally what the designer calls the Unique Shadow Stone, with reversing pitch along face. A close study of the exhibit has convinced me that the Shadow principle is a combination of the two other principles and that principles two and three are variations of the first principle. All this to say that in my view the author charged with product development of the

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plaintiff corporation, after deciding to produce an imitation of natural cut stone, had to find a way to obtain the desired result. It is not the design which was important—he had models before his eyes—; it was the mode of construction that was essential and the material to be used. It is from this that he adopted variations of a basic known principle to split cast stone blocks to have the appearance of natural cut stone. After being successful in his endeavours, he proceeds to have the results finally designed and registered. I do believe that the design is that of a building block which the plaintiff commenced manufacturing in the fall of 1953 and selling in the early part of 1954.

It is Lord Moulton, in the case of *Phillips v. Harbo Rubber Co.*[1], who quotes Mr. Justice Parker in *Pugh v. Riley* (p. 239, *in fine*):

> . . . A registered design is not in any way a minor type of patent. It is something that is protected in respect of its appearance or form alone. It is for this reason that all attempts to make registered designs cover modes of manufacture have rightly failed, and that the Courts have so invariably insisted on the principle that designs must be judged by the eye alone.

I am not unmindful that these remarks were based on the British Statute, but they have been adapted to Canadian cases.

There being no definition of the word in the Canadian Act under which this action was brought, one has to refer to s. 16 of our Statute to determine what constitutes an infringement of a registered Industrial Design. The section reads:

> 16. (1) Every person who, in violation of the provisions of this Part, during the existence of the exclusive right acquired for any industrial design by the registration of the same under this Part, whether of the entire or partial use of such design, without the licence in writing of the registered proprietor, or, if assigned, of his assignee,
>
> (*a*) for the purposes of sale, applies or attaches such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached; or
>
> (*b*) publishes, sells or exposes for sale or for use any article of manufacture or other article to which an industrial design may be applied or attached and to which such design or fraudulent imitation thereof has been applied or attached;
>
> shall forfeit a sum not exceeding one hundred and twenty dollars and not less than twenty dollars to the proprietor of the design so applied or attached.

[1] [1920] 37 R.P.C. 233.

According to the provisions of this section, it would seem that the design should be something that can be applied or attached to any article of manufacture or any other article for its ornamentation.

In the *Renwal Manufacturing Company, Inc.* and *Reliable Toy Co. Ltd. et al.* (*supra*), Mr. Justice Cameron, at p. 196, states:

There is considerable uncertainty as to whether a design for shape or configuration which can only be applied to a thing by making it in that shape comes within the Canadian Act. According to the statute the design must, it would seem, be something capable of application to any article of manufacture or other article "for the ornamentation thereof."

And at p. 197:

I have been unable to find in the Act anything which would indicate that the shape or configuration of an article of manufacture may itself be the subject of a registered design.

The certificate of registration is for a design in connection with a building block. The description of the drawings indicates the shape and configuration of the building block, viz.:

one longitudinal edge of which is the front face, said face having adjacent one end a bevel formed by a downward and outward slope of the face, and having adjacent the other end an opposite bevel formed by a downward and inward slope of the face, the one bevel blending into the other whereby said face resembles a twisted surface, said face having the texture of a broken surface and the other faces of the block having the textures of cast surfaces.

I have come to the conclusion that this description is that of an article of manufacture, to wit the building block in respect of which the certificate of registration of the design was issued. It has been held on many occasions that an industrial design may be protected only when it is applicable to the ornamentation of any article and not to the article of manufacture itself.

I was referred to a number of English cases on this point. It seems generally agreed that the consideration of these decisions should be approached with caution, because the *English Design Act* is different from our Act and has been changed on a number of occasions. I believe the decisions of our courts and their interpretation of the sections of the Canadian Act dealing with violations of its provisions should serve as the basis of the decision sought in this case.

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The case most often quoted on the point at issue is that of *Clatworthy & Son Ltd.* and *Dale Display Fixtures Ltd.*[1] In his remarks at p. 162, Maclean J. says:

> The scope of this part of the Trade-Mark and Designs Act is difficult of definite ascertainment or construction. It is a piece of legislation that seems flimsy and incomplete, ill adapted for its intended purposes, and is seriously in need of amendment. I think it is clear that a design within the Act may be some ornament, printed, woven or produced on such articles as textile fabrics, paper hangings, floor cloths, lace, etc., or some ornament produced in such things as metal articles, glass or tiles. The Act seems confined to designs applicable to manufactured articles, and the application of such design to such articles; it does not apply to the things to which a design is applied. The Act is not clear when the design is merely for the shape of a thing, and it may be doubtful if a design for shape or configuration, which can only be applied to a thing by making it in that shape, comes within the Act. In the corresponding English Act, 1907, it does, but the statute there states that "Design" means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, etc., and the same was true of the English Act of 1883.

On appeal, the Supreme Court of Canada[2] affirmed the judgment. It decided the matter on the question of anticipation, the design not being novel. It did not rule on the question that a design could be registrable for the external shape or configuration of an article.

Three years later, in the case of *Canadian Wm. A. Rogers, Ltd. v. International Silver Co. of Canada, Ltd.*[3] Maclean J. dealt again with the above question (p. 65):

> I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd. v. Miner Rubber Co. Ltd.* ([1926] Ex. C.R. 26) I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design", under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture" were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned.

[1] [1928] Ex. C.R. 159.
[2] [1929] S.C.R. 429.
[3] [1932] Ex. C.R. 63.

The *Industrial Design and Union Label Act*, R.S.C. 1952, c. 150, under which the present case was brought, in its s. 16 (Violation of this Part) is an exact reproduction of s. 39 of the *Trade Mark and Design Act*. So the remarks *supra* can apply to the provisions of the present Act as they did to the former statute.

Now in the *Renwal Manufacturing Company, Inc.* and *Reliable Toy Co. Ltd. et al.* case aforesaid, Cameron J. states that he is in accord with the views of Maclean J. in the cases from which I have quoted excerpts, where it is said that an industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture. It is the design—not the article of manufacture—which is protected.

I believe this rule is applicable in this instance and amongst the reasons which give rise to that opinion is the evidence of Mr. Camp. It seems to me that he was more interested in finding what process of manufacture Artistic Stone Ltd., the defendant, followed in the production of Sand-O-Stone than in the design itself. According to his evidence, he visited the defendant's plant and found that it manufactured a cast stone building block by a process based on the same principle as the one developed by the plaintiff. The operation was explained to him by the president of the defendant corporation. Later he saw samples of the stone on houses. He then expressed the opinion that Sand-O-Stone was similar to the plaintiff's Shadow Stone. It was after that the plaintiff brought this action.

The principle underlying the process employed by both parties to fracture cast stone building blocks, so that they would have the appearance of natural cut stone, had not been patented by the plaintiff at the time of the filing of this action. But a patent had been registered under the Canadian Act on July 6, 1926 under No. 262,286 and granted to one Herman Besser for "Fractured blocks and method of making the same". The application, after describing the material of a cast stone building block, explains and describes the method used to fracture the block. The method used by the plaintiff and the defendant for splitting building blocks is only a variation of the basic principle

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applied on the Besser method, where the groove on one side of the block is on a straight line, whilst here the groove is on a curved line, as described by the witness. It is the face of the broken surface which the witness tried to design.

Cast stone building blocks have been in use for a long time by the construction people. The process to fracture these blocks in two, so that the broken faces of these two blocks would lose their appearance of cast stone and take on the appearance of natural cut rock or stone according to the application for Patent No. 262,286, has been known since 1926 or before.

At the hearing, counsel for the plaintiff agreed that a fair consideration of the matter of the design would be that the author, desiring to develop an imitation of cut stone having a rustic appearance, experimented with a process or method of splitting or fracturing cast stone slabs which gave a certain result. He repeated the experiment and the result, although not exactly similar, seemed to him to be about the same. It is the result of these experiments that he tried to represent in the design. Assuming these facts to be the case, I think the design is what the author thought was a copy or representation of a building block produced by a certain mode of construction.

What he discovered when visiting the defendant's plant was that it applied a similar mode of construction for the manufacture of its building blocks. Later he saw some of the defendant's building blocks which it had sold. I believe that it was for the protection of its building block and its method of manufacture that application for the registration of the design was made.

Furthermore, I have examined the models filed as exhibits and the design. There are dissimilarities between the models and between the models and the design. The same may be said about the models of both parties. This is quite understandable, because the shape, form and configuration of the front face of the building blocks were not brought about by the application or attachment of the design as an ornamentation thereof; they were the result of a process of manufacture of cast stone building blocks, to wit, the facture of the blocks, which result cannot be constant because the operation depends upon many factors and imponderables which are difficult to control.

The evidence has convinced me that in the case of the design here the objective of the designer was to reproduce a building block having the appearance and shape of other building blocks, with a variation obtained by using the groove method for fracturing the block, which was a known process of manufacture. It seems to me that the Act was enacted to protect persons who conceive something new and original and then express it on a design. The idea of fracturing a cast stone slab to obtain an imitation of natural cut rock or stone was nothing new or original: it had existed and been used for years. The only minor alteration effected by the author was to change a straight groove on the face of the slab to one having the form of an elongated S. I believe this to be a matter of detail which, in my opinion, does not justify the registration, seeing that it lacks novelty and was a reproduction with minor alterations of a design for building blocks that were in use before Mr. Camp conceived the idea.

Other facts have impressed me, which considered with those dealt hereinabove, may assist in determining the issue. The mode of construction of fractured blocks by way of one or more grooves had been known before the plaintiff made its original application for the registration of its design on August 13, 1954. Had the original description not been revised, I have serious doubts that the application would have resulted in the granting of its registration. It was amended on January 18, 1955 so as to eliminate any reference to the mode of construction or material of the building block. Still the certificate of registration is made with regard to a building block.

This being so, it was admitted by the witness, Mr. Camp, that a multiwave stone had been made which was the same as Shadow Stone, except that instead of having a single wave it had a double wave, and that the multiwave stone had been sold during October 1953. The purchasers followed the plaintiff's recommendation of breaking up a certain percentage of that stone in sizes which would be half or one third of its length. The witness agreed that the description of the industrial design was in accordance with the configuration of the multiwave stone but for one exception: there was a difference in proportion when the multiwave stone was broken. This would mean that at least

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in October 1953 there was a building block on the market having the configuration of the industrial design; the design was therefore neither novel nor original.

The plaintiff also claims that the defendant attempted to pass off and did pass off its building blocks for those of the plaintiff.

The evidence showed that the defendant, after having built a house with cast stone building blocks which had the appearance of natural cut stone, conceived the idea of developing a process to manufacture a cast stone sand block imitating natural cut sandstone. I believe the blocks were the products of the plaintiff, but I have doubts that the building blocks were Shadow Stone. At all events, he experimented for months with the mixture of material to be used, then with different processes of manufacture. At last he succeeded. I am satisfied that his process of manufacture is based on the same basic principle as the one having been followed by the plaintiff; besides, I am of opinion that, in both cases, the method was a standard one that was common to the trade. What is certain is that it was not the application or attachment or engraving of a design to an article.

Was there unfair competition? Was the manufactured building block advertised and sold in a manner which would amount to unfair practice?

The products of both parties had this similarity that they imitated natural cut stone. This does not mean that the result of the processes of manufacture of the blocks was a reproduction of the design. Every exhibited block that I have examined offers certain differences with the design, though they all have the appearance of natural cut stone. They have no other shape or form than that which resulted from the splitting of the cast stone slabs. The Canadian Statute does not provide that the shape and configuration of the article manufactured is a proper subject of registration.

The principle to follow in passing off cases is enunciated in *Macleans, Ltd. v. J. W. Lightbown, and Sons, Ltd.*[1] at page 239:

> . . . No trader can complain of honest competition, but no trader is entitled to steal the property of his rival by endeavouring to attract to his goods members of the public by inducing them to believe that the goods that are being offered for sale are the goods of a rival firm. . . .

There is no evidence before the Court that the defendant had made any express or implied false representations that could have given the public the idea the building block offered or sold was a product of the plaintiff corporation. The defendant's corporate name "Artistic Stone Limited" and the name of its product "Sand-O-Stone" could hardly be confused with "Angelstone Limited" and "Shadow Stone". There is nothing on record which would lead me to think that the defendant's name and that of its product were devised to confuse and deceive the public. I may add that no evidence was adduced to the effect that the goods of both parties had been confused in anybody's mind.

I fail to see how the defendant's article could be mistaken for that of the plaintiff. They may resemble each other, but they also resemble others that are on sale. They are imitations of natural cut stone the features of which are not always the same and which cannot be said to always have the same shape.

As to the question of the plaintiff's building block not having been properly marked after the registration, the evidence is far from being convincing. The plaintiff did mark his goods and, as time went on, developed a mark which, in my opinion, did meet the requirements of the statute.

For the reasons set forth in these notes I have come to the conclusion that I should follow the decisions handed down by this Court in the cases of *Kauffman Rubber Co. Ltd.; Clatworthy & Son Ltd.* and *Dale Display Fixtures Ltd.; Canadian Wm. A. Rogers, Ltd. v. International Silver Co. of Canada, Ltd;* and *Renwal Manufacturing Co., Inc.,* and *Reliable Toy Co. Ltd. et al.* (hereinabove referred to).

[1] (1937) 54 R.P.C. 230.

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In these cases the Court found that the applications and registrations were for the article of manufacture itself and not for the ornamenting of such article.

In the present instance, I am of the opinion that the design is that of a building block itself and has no ornamental feature which could have resulted from the application or attachment or engraving of an ornamental design. The shape and configuration and outline of the building block was the result of a mode of construction.

This is in accordance with the provisions of ss. 11 and 16 of the *Industrial Design and Union Label Act,* 1952, c. 150.

The design being contemplated is one which when applied or attached to any article of manufacture adds to the article some ornamentation.

I find that the design registered by the plaintiff lacks novelty, because imitations of natural cut stone have been in existence for many years and the process for obtaining such imitations was known long before the registration of the plaintiff's design. Therefore the design was not registrable.

I also find that the plaintiff failed to establish that the defendant, for purposes of sales, had manufactured building blocks to which it had applied the plaintiff's design or a fraudulent imitation thereof and had offered for sale or sold such building blocks.

I am of the view that there is no legal grounds for an action against the defendant based on unfair competition. I find that the plaintiff's industrial design was not registrable and should be expunged from the register.

Therefore, the plaintiff's action will be dismissed and the defendant's counterclaim will be sustained; the whole with costs to be taxed against the plaintiff.

Judgment accordingly.

BETWEEN:

1958 Oct. 15, 16, 17, 20 — 1960 Feb. 25

THE CANADIAN FISHING COMPANY LIMITED .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Shipping—Limitation of liability—Collision between fishing vessel and vessel owned by Crown—Actual fault or privity—Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(4) and 25(3).

In an action in damages arising from a collision between the suppliant's fishing vessel, *Cape Russell* and the *Laurier,* a vessel owned by the Crown and under the control of the Department of Fisheries, the Crown disputed its liability for any of the damages sustained by the suppliant, and in the alternative, pleaded limitation of liability under s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29. It also counterclaimed for a declaration that the Crown was entitled to limit its liability in accordance with s. 657 of that Act as read with ss. 3(4) and 25(3) of the *Crown Liability Act,* S. of C. 1952-53, c. 30.

Held: That the excessive speed at which the *Laurier* was proceeding under the circumstances and her failure to keep a proper and adequate lookout caused the collision.

2. That the master of the *Cape Russell* should have acted more promptly than he did in putting his ship in reverse, when had he done so, it was highly probable the collision might have been avoided. Accordingly the Court found contributory fault on the part of the *Cape Russell* and held her responsible to the extent of 25 per cent of the loss.

3. That in the circumstances the Crown was therefore entitled to a declaration of limitation of liability as claimed. *Blackfriars Lighterage & Cartage Co. Ltd. v. R. L. Hobbs,* [1955] 2 Lloyd's L.L.R. 554 referred to.

PETITION OF RIGHT to recover damages from the Crown resulting from a collision at the entrance to the Strait of Juan de Fuca between the suppliant's fishing vessel *Cape Russell* and the Fisheries Protection vessel *Laurier,* owned by the Crown and under the control of the Department of Fisheries.

The action was tried before the Honourable Mr. Justice Thurlow at Vancouver.

J. I. Bird and *C. S. S. Clyne* for suppliant.

F. U. Collier and *R. W. McKimm* for respondent.

THURLOW J. now (February 25, 1960) delivered the following judgment:

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This action arises from a collision which occurred on September 4, 1957 at the entrance to the Strait of Juan de Fuca between the suppliant's fishing vessel *Cape Russell* and the Fisheries Protection Vessel *Laurier,* which was owned by the Crown and under the control of the Department of Fisheries. The amount of the damage sustained by the suppliant is agreed upon at $18,230.50, but the Crown disputes its liability for any of the suppliant's damages and pleads in the alternative the provisions for limitation of liability contained in s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29. There is also a counterclaim for a declaration that the Crown is entitled to limit its liability in accordance with these provisions as read with s. 3(4) and s. 25(3) of the *Crown Liability Act,* S. of C. 1952-53, c. 30.

The collision occurred at a point from three to four miles to the southward of Bonilla Point and on or near to a line between that point and Tatoosh Island Light on the southern side of the Strait. This line had been prescribed by order in council made pursuant to s. 34 of the *Fisheries Act* as the westerly limit of an area wherein seiners such as the *Cape Russell,* of which there were many in the area, were permitted to fish. The day was warm. There was dense fog and a long, low swell from the west but no wind or tide sufficient to affect navigation.

The *Cape Russell* was a single screw diesel-powered wooden ship, 72 feet long, with 20-foot beam. She was fitted with clutch and throttle controls, both inside and outside her pilot house, and could be put directly into reverse from either of these points. Her superstructure in the forward part of the ship was about fifteen feet above the water and, for the most part, was painted white and contrasted with lower portions of the ship, most of which were black or a dark colour alternating with white. She had one mast with a long boom, located approximately amidships. Further aft was a turntable on which her seine was carried, and at the time of the collision there was a 21-foot power skiff, used for towing the seine, moored at her stern, with its bow drawn up so that it was raised a foot or so higher than it would ordinarily float. The master of the *Cape Russell* wanted to set her seine as near as possible to the westerly

limit of the fishing area and was waiting his turn to do so while another ship, the *Ellen K*, completed her set. The *Cape Russell* was moving forward very slowly in an easterly direction, with her engine idling and her clutch disengaged. Fog signals from other craft in the vicinity were being heard from time to time, and her master was on the outer bridge, keeping a lookout and operating an air whistle by blowing a single long blast at intervals of from one to two minutes. Similar signals were being made by other vessels, and still others were blowing three blasts, consisting of one long followed by two short, which indicated that the latter were towing their nets. The master of the *Cape Russell* knew the sound of the *Laurier's* whistle and had heard her some time earlier proceeding southward and, knowing that she was engaged in patrolling the Bonilla-Tatoosh line, could expect that she would soon be returning northward on or in the vicinity of the line. It was, accordingly, not a surprise to him to hear on his starboard side the whistle of the *Laurier* and a few seconds later to see her bow emerging from the fog. He estimated the distance at which he saw the *Laurier's* bow emerge at a "good 100 yards" and said that, if he had known at that moment that she was going to ram the *Cape Russell*, he could have avoided the collision by putting the *Cape Russell* in reverse. At that moment, however, though the *Laurier* was bearing down on him, he considered that "there was a lot of time for her to change course" and thought that she would alter her course to pass ahead of him and, accordingly, he took no action. The *Laurier* came on, however, without changing her course or speed, and when the master of the *Cape Russell* finally saw that a collision was imminent he went to warn his crew to stand clear and then put his ship in reverse. She was, however, not yet moving astern when the *Laurier* struck the *Cape Russell* at an angle of about 90° on her starboard side, about fifteen feet from her bow.

The *Laurier* is a twin screw diesel-powered steel vessel, 113 feet long, with a 21-foot beam and a cruising speed of 11 to 12 knots. Her engines were directly reversible, and she was equipped with radar and a radio telephone and was manned by a crew of 14 men, including the master. Her

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wheelhouse was 36 feet aft of her bow. Evidence given on discovery indicated that at six knots, by reversing her engine, she could be stopped in approximately 250 feet.

On the day in question, the *Laurier* was patrolling the Bonilla-Tatoosh line. Shortly before 2:25 o'clock in the afternoon, she proceeded southwardly and, after passing the locality of the fishing fleet, stopped for about 25 minutes while a radio telephone message from shore was being received. During this period, her radar and other electrical equipment, as well as her engines, were shut off. When the message had been received, her second officer, who was the officer on watch, was directed by the master to copy it, and he thereupon left the wheelhouse, and the master himself remained there with the helmsman. There was no lookout man stationed on the upper bridge or on the bow, nor was anyone but the master and helmsman keeping any lookout whatever. The master then switched on the radar and, after observing three ships about half a mile to the northeastward and satisfying himself from the radar that his ship was practically on the Bonilla-Tatoosh line, signalled the engine room for half speed ahead and ordered the helmsman to circle to port and put the ship on a course of 340° magnetic, that being the course of the line. At some point in the manoeuvre which followed, the master observed by radar that the Bonilla-Tatoosh line itself was clear of ships. Some fog signals were heard but appeared to come from the northeastward and from a distance of about half a mile. The master himself from time to time sounded the *Laurier's* fog whistle. The *Laurier* had been proceeding for about five minutes from the time when she started moving, had been steady on her course of 340° for less than a minute, and had reached a speed of about five knots when the helmsman suddenly saw the white portion of the superstructure of the *Cape Russell* through the fog, four to five degrees on his port bow. He could give no satisfactory estimate of its distance from him when he first saw it. On discovery, it had been stated that the *Cape Russell* was 25 feet ahead of the bow of the *Laurier* when first seen from her, but I am of the opinion that the distance must have been somewhat greater for, on seeing the *Cape Russell,* the helmsman warned the master, both the helmsman and the master

thereupon in succession signalled the engine room for full astern, and one of the engines was operating in reverse by the time the impact occurred. This, in my opinion, would take about eight seconds at least, in which the *Laurier* at five knots would move from 60 to 70 feet. No helm action was taken.

Following the collision, a conversation took place between the masters of the two ships in which, according to the version of the master of the *Laurier*, the master of the *Cape Russell* said he could have avoided the collision if his clutch had not been faulty. The master of the *Cape Russell*, however, stated that what he said was that, if his ship had had high speed engines like those in the *Ellen K*, he might have been able to avoid the collision. Regardless of what may have been said in the excitement following the collision, I accept the evidence of the master and engineer of the *Cape Russell* that there was nothing wrong with the clutch of the *Cape Russell* and find that there was nothing about its condition which caused or contributed to the collision.

On the facts outlined, I am of the opinion that no proper or adequate lookout was being kept on the *Laurier* and that, at five knots, she was proceeding at excessive speed under the circumstances and that her failure to keep a proper and adequate lookout and her excessive speed caused the collision. In my view, the lookout was bad in that there was no one on watch inside or outside the wheelhouse with no duty to perform but to watch and give warning or take necessary action. In a sense, both the master and the helmsman had the duty to watch, but such lookout as was being kept by them was not constant since the helmsman had the duty of steadying and keeping the ship on her course and the master had other matters on his mind and other duties to carry out, one of which was actually engaging his attention when the *Cape Russell* was sighted by the helmsman. Moreover, with many ships in the vicinity, in my opinion, it was not reasonable, when proceeding at five knots in fog which reduced visibility to about one hundred yards, to rely for lookout on radar which was not being constantly watched and upon such lookout as the helmsman might be able to keep in the course of steering the ship, rather than to have someone with no other duties to perform

detailed either to watch the radar constantly or to keep a lookout from some vantage point, whether from the fore deck or from the upper bridge. The master of the *Cape Russell,* who was keeping a lookout, and several members of his crew who were not on duty in fact saw the bow of the *Laurier* at distances variously estimated at from 50 to 100 yards or more. Possibly the whistle of the *Laurier* had attracted their attention in that direction, but the bow of the *Laurier* was a much smaller object to see than the side of the *Cape Russell,* and the evidence, in my view, leaves no satisfactory inference as to why the *Cape Russell* should not have been seen from the *Laurier* at 80 to 100 yards, other than that no one on board the *Laurier* was keeping a constant lookout. There was nothing wrong with the *Laurier's* radar and, having regard to the distance which the two ships were apart just before the *Laurier* began moving, which must have been in excess of 100 yards and probably was much greater than that, I think it is fair to infer that the reason why the *Cape Russell* was not seen in the radar before she was otherwise visible was that the machine was not being constantly watched and interpreted. If the radar would not show or would not show clearly ships that were close at hand, there was all the more reason to have a lookout posted to watch out for ships that might be nearby. And when in fact the *Cape Russell* became visible, she was not seen immediately—again, in my view, because no one was keeping a constant watch. The master, having satisfied himself by looking in the radar—though, in my opinion, on insufficient observation—that the Bonilla-Tatoosh line was clear of ships and that there were no ships nearer than those half a mile away, turned to other duties. The only other person who might see a ship ahead was the helmsman, and his attention was at least partially occupied with putting and keeping the ship on the course directed by the master.

I am also of the opinion that, at five knots, the speed of the *Laurier* was excessive in the circumstances described, and particularly having regard to the presence of other ships and the nature of the lookout that was being kept.

I turn now to the question whether there was contributory fault on the part of the *Cape Russell*. This, in my view, raises the question whether the failure of her master, on hearing the *Laurier's* whistle on his starboard side, to answer by blowing the *Cape Russell's* fog signal or his failure to reverse promptly on seeing the *Laurier* were faults which contributed to the collision. The master's evidence is that he does not know if he blew or not after hearing the *Laurier's* whistle but that he had blown just before hearing it. That the whistle had been blown shortly before the collision is supported by the evidence of at least one other witness. Apparently, this signal was not heard or, if heard, was not correctly evaluated by those on board the *Laurier*. It is conceded on both sides that to blow a single blast after the *Laurier* hove into view would have meant an alteration of course and might well have caused confusion. In the absence of any more definite estimate than that of a "few seconds", given by the master of the *Cape Russell*, of the time involved between hearing the *Laurier* signal and sighting her, and in view of the evidence that he had signalled just before hearing the *Laurier* signal, I am not satisfied that failure to signal again immediately on hearing the *Laurier's* signal was a fault or that it was a cause of the collision.

Whether or not it was fault for the master of the *Cape Russell* not to put his ship in reverse and get out of the *Laurier's* way as soon as he saw her is a more difficult question. The master said that, by so doing, he could have avoided the collision if he had known that the *Laurier* was going to ram him. By this, I think he meant he could have gotten out of the way, had he expected that the *Laurier* would keep her course and speed. He expected, however, that the *Laurier* would alter to starboard and pass in front of him, and it apparently did not occur to him that those on board the *Laurier* had not seen him at the same time as he saw the *Laurier* or that, with the *Laurier* in sight on a crossing course on his starboard side, he was under the duty prescribed by Rule 19 of the Collision Regulations to keep out of her way and, for that purpose, under Rule 22 to avoid crossing ahead of her. It would, no doubt, take at least a few seconds for him to observe the course of the *Laurier* and

ascertain that danger of collision existed if she did not alter her course, but in the circumstances prevailing at the time he first saw the *Laurier*, in my opinion, it was incumbent on the master of the *Cape Russell*, and particularly in view of his evidence that his ship was slow in getting moving in reverse, to act more promptly than he did act to put his ship in reverse and, having regard to the point of impact of the blow on his ship, had he put his ship in reverse promptly on seeing the *Laurier* and observing her course, I think it is highly probable that the collision would have been avoided. Accordingly, I find that there was contributory fault on the part of the *Cape Russell* and hold her responsible to the extent of 25 per cent of the loss.

It follows from the foregoing and from the *Crown Liability Act* (*vide* s. 3(1) and s. 3(5), as substituted by s. 25) that the Crown is liable for 75 per cent of the suppliant's damages unless on the facts the Crown is entitled to limit its liability pursuant to s. 3(4), as substituted by s. 25, of that Act, which enables the Crown to take the benefit of the provisions of s. 657 of the *Canada Shipping Act*. Sections 3(1), 4(2), and 3(4) of the *Crown Liability Act* are as follows:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

* * *

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (i) 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.

* * *

3. (4), as substituted by s. 25(3):

(4) Sections 655 and 657 to 663 of the *Canada Shipping Act* apply for the purpose of limiting the liability of the Crown in respect of Crown ships; and where, for the purposes of any proceedings under this Act, it is necessary to ascertain the tonnage of a ship that has no register tonnage within the meaning of the *Canada Shipping Act*, the tonnage of the ship shall be ascertained in accordance with section 94 of that Act.

Section 657(1) of the *Canada Shipping Act* provides:

657.(1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

* * *

(*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

liable to damages . . . in respect of loss or damage to vessels, goods, merchandise, or other things, . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

In proceedings for limitation of liability under s. 657, the burden rests on the shipowner to prove that the loss occurred without his "actual fault or privity." *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[1] In *Paterson Steamships Ltd. v. Robin Hood Mills Ltd.*[2] Lord Roche said at p. 39:

The burden of showing that no such fault or privity subsisted was said in Lennard's case to rest upon the shipowners, and the respondents here did not seek to question that proposition as applying to the present case. But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of *that which causes the loss* or damage in question, a proposition which was acted upon and illustrated in Lennard's case.

It was argued on behalf of the Crown that, as the Crown is not liable either at common law or under any statute for its own fault as owner of the ship, but only under the *Crown Liability Act* as the employer of the crew, for tortious conduct on the part of the crew, there could be no case for recovery against the Crown except to the extent that recovery could be had for the conduct of the crew and that, accordingly, *ipso facto,* the Crown would be entitled to limitation of liability under s. 657.

I do not agree with this submission, but in the view I take of the case it is not necessary to deal with it. While the burden resting on a shipowner seeking to have his liability limited is a broad and heavy one (*vide The Norman*[3]), in the present case counsel for the appellant, in the course of the argument, limited his contentions on this part of the case to one particular matter. It was said on behalf of the suppliant that senior officials of the Department of Fisheries, whose acts were those of the Department itself, were aware that no lookout was ordinarily stationed on the bow of the *Laurier* and that it was known to them that there would

[1] [1915] A.C. 705.
[2] (1937) 58 Lloyd's L.L.R. 33.
[3] [1959] 1 Lloyd's L.L.R. 1.

be no lookout stationed on the bow of the *Laurier* when she was proceeding in fog under circumstances such as have been described and that they approved of the ship being so navigated. That Mr. Whitmore, the Director of Fisheries for the Pacific Area, knew and approved of the navigation of the *Laurier* in fog without a lookout being stationed on the bow is supported by his evidence, and it has not been shown that his seniors, consisting of the Deputy Minister of Fisheries and the Minister of Fisheries, whose acts could, I think, be regarded in this instance as those of the Crown itself within the principles applied in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (*supra*) and *The Truculent*[1], did not also know and approve of it. But, in my opinion, failure to have a lookout posted on the bow was not *what caused the loss.* The need for lookout of one kind or another depends on the circumstances prevailing at the material time and must, of necessity, be a matter left (as, indeed, the evidence shows was done in this case) largely to the master of the ship. In broad daylight, with nothing to hinder visibility and with plenty of room to manoeuvre, there would be no occasion to have a lookout on the *Laurier's* bow, while in narrow, congested waters at night, such a lookout might well be required. The opinions of experienced seamen given at the trial on the desirability of having a lookout stationed on the *Laurier's* bow when proceeding through fog were in sharp conflict. In the circumstances that prevailed, with the *Laurier* proceeding at five knots, a lookout on the bow might have been expected to see an object ahead about four seconds earlier than it would become visible from the wheelhouse, and, on the whole, I prefer the view that, by the time a lookout on the bow had appreciated an object ahead and had transmitted a message to the wheelhouse, the advantage of such warning, if in fact it should be earlier than the moment when the object would be visible from the wheelhouse, would be slight and would be offset by the disadvantage of the lookout man on the bow interfering with visibility from the wheelhouse.

[1] [1951] 2 Lloyd's L.L.R. 308.

In my opinion, the collision was not due to the lack of three or even four seconds' earlier warning of the presence of the *Cape Russell* but to the failure to have a constant lookout maintained somewhere, whether on the bow, on the outer bridge, or even in the wheelhouse. Had such a lookout been maintained from any of these places by a man with no other duties to perform, in my opinion, the presence and position of the *Cape Russell* would have been detected much earlier and in time to take necessary action to avoid collision with her. The maintaining of a lookout suitable to the occasion was, in my view, a responsibility of the master of the ship, and the failure to maintain it was a fault in the course of navigation in a matter the responsibility for which was properly left to him. In this situation I see no reason to impute fault in this connection to her owner or to anyone in authority over the master. In *Blackfriars Lighterage & Cartage Co. Ltd. v. R. L. Hobbs*[1] Willmer J. at p. 561 summed up a situation similar in principle to the present one as follows:

> The facts lie within a very small compass: the lighterman in charge of the *Landeer* was not keeping a good look-out, and most unfortunately did not see that his barge was about to come into contact with this other barge.
>
> That, I think, is the beginning and the end of the case. As such it is purely a fault in navigation, and not one which can in any sense be laid at the owners' door.
>
> Although I have found that the accident was caused by the negligence of the lighterman, it should, I think, be made quite clear that no objection was, or could be, taken to the man concerned in so far as his competence was concerned. He was, in fact, a lighterman of considerable experience and had the usual qualifications required for his work. No blame can, therefore, be imputed to the owners for entrusting their barge to such a man. Unhappily, the best qualified and most competent people are sometimes negligent, and this, I am afraid, is one of those cases.
>
> For those reasons I do not think there is any answer to the plaintiffs' claim for the declaration of limitation of liability which they seek.

In the present case, Captain Earnshaw was a qualified and competent master mariner of long experience and one to whom one would expect that an owner would entrust such a matter as the maintaining of a lookout suitable to

[1] [1955] 2 Lloyd's L.L.R. 554.

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the occasion, and the evidence shows that this responsibility was in fact left to the masters of vessels under the control of the Department. That the officer on watch should be detailed temporarily to another duty at such a time, leaving the immediate responsibility for lookout on the master himself, and that the master would in this exigency allow his attention to be on another duty were matters of which I do not see how Mr. Whitmore or the Deputy Minister or the Minister could have knowledge, and I am accordingly satisfied that there was no "actual fault or privity" in connection with the bad lookout which can properly be attributed to the Crown. It follows that the Crown is entitled to the declaration claimed.

There will be judgment declaring that the suppliant has sustained damages to the extent of $18,230.50, of which 75 per cent are attributable to fault on the part of servants of the Crown, that the suppliant is entitled to recover 75 per cent of such damages subject to the limitation provided by s. 25(3) of the *Crown Liability Act* and s. 657 of the *Canada Shipping Act* and that the liability of the Crown for damages arising from the collision is limited pursuant to s. 25(3) of the *Crown Liability Act* and s. 657 of the *Canada Shipping Act* to $38.92 for each ton of the *Laurier's* tonnage, or $5,683.48.

The suppliant is entitled to the costs of the petition of right and the proceedings thereon, and the Crown will have the costs of the issue on its counterclaim.

Judgment accordingly.

BETWEEN:

1959 May 27 — 1960 Apr. 12

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

NATHAN STRAUSS .... RESPONDENT.

Revenue—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 6 and 127(1)(e)—The Partnerships Act R.S.O. 1950, c. 270, s. 2 and 3(1)(3)—Capital or income—Partnership interest is a capital asset—Proceeds of sale of partnership interest do not constitute taxable income—Appeal dismissed.

Respondent, a practising barrister, owned an interest in a partnership which was engaged in developing and selling real estate. He disposed of part of his interest in the partnership for a sum of money over and above what it had cost him. The Minister of National Revenue assessed him for income tax on this amount and an appeal from such assessment was allowed by the Income Tax Appeal Board from whose decision the Minister appeals to this court.

Held: That whilst the income of a partnership is taxable to a member of the firm annually whether such share is withdrawn or not, the sale of his interest in the firm or a part of it at a profit constitutes a capital gain.

APPEAL under the *Income Tax Act.*

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

J. D. C. Boland and *W. R. Latimer* for appellant.

John G. McDonald and *D. A. Ward* for respondent.

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

FOURNIER J. now (April 12, 1960) delivered the following judgment:

In this case, the appellant appeals from a decision of the Income Tax Appeal Board[1] dated February 7, 1957, allowing the respondent's appeal from the reassessment of his income for the taxation year 1951 under the 1948 *Income Tax Act.* In reassessing the respondent, the Minister added to his declared income the sum of $9,166.67 on the assumption that this amount represented the profit made by the respondent on the sale of a part of his interest in certain land acquired by him and others for the purpose of disposition at a profit.

[1] 16 Tax A.B.C. 417.

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The onus is on the taxpayer to establish in fact and in law that the reassessment is based on an incorrect assumption.

The respondent is a barrister who has practised his profession since 1928 and who has never been engaged in any other business or enterprise. Some time in February 1951, he was told by one of his clients that Active Subdivisions Limited, which had an agreement of purchase and sale for a piece of land in Scarborough Township, thought of disposing of their right to purchase the property. It was suggested that a partnership or syndicate be formed to acquire the right, which was done. The partners were Ruth Loveless who had a one-third interest, the respondent a one-third interest and Augusto Boem and A. Andreoli, each a one-sixth interest.

On or about February 14, 1951, the respondent acquired from Active Subdivisions Limited a right to purchase from R. Buchanan and Minnie Buchanan the south half of Lot 33 in Concession 1 in the County of York, Province of Ontario, at a price of $105,000. When he acquired this right he was acting for the partners in his capacity of solicitor and trustee. The transaction of purchase and sale was to be completed on or before April 1, 1952, on which date vacant possession of the real property was to be given to the purchaser. In fact, it appears the transaction was completed on or about February 1, 1952. At the time the right to purchase was acquired the partners intended to develop the property for sale in a housing development.

The original subscription of the partners to the partnership fund was $35,000. For his one-third interest in the partnership the respondent paid $11,666.66. The other partners paid in proportion of their interest in the association. In August 1951, Ruth Loveless sold her one-sixth interest in the venture to Augusto Boem and A. Andreoli. On or about November 15, 1951, the terms of the original agreement for sale of the Buchanan property were altered to provide for the payment of $20,000 cash on December 1, 1951 ($35,000 had been paid upon the acquisition of the right) and the balance of $50,000 to be secured by a mortgage on October 1, 1952. The total of these amounts would cover the sum of $105,000, the price of the property. Some time in November 1951, the respondent sold to Ruth Burritt,

for $15,000, one-half of his one-third interest in the partnership. The purchaser of this one-sixth ($\frac{1}{6}$) interest assumed her share of accounts payable by the partnership and outstanding at the time of the sale. The respondent had paid $5,833.33 for that one-sixth interest he sold to Ruth Burritt for $15,000, thereby realizing a profit of $9,166.67 on the transaction. This is the amount which was added to the respondent's income for the year 1951.

Some time later in 1951, Boem and Andreoli sold parts of their interest in the association to George Lipson, Jack Jacobson and Eddy & Son Construction Limited, the nominee of E. Green. So at the end of 1951 the partners and their interest were as follows:

Nathan Strauss	one-sixth interest
Augusto Boem and A. Andreoli ..	one-third interest
Ruth Burritt	one-sixth interest
George Lipson	one-ninth interest
Jack Jacobson	one-ninth interest
E. Green	one-ninth interest

Filed as exhibit is a memorandum dated the 24th of March 1952, signed and executed by the respondent and George Lipson, Jack Jacobson and A. Andreoli, in which they acknowledged and declared that they were in partnership for the purpose of developing and selling the Buchanan property and that the profits or losses of the partnership were to be divided or borne in proportion to the shares or interests held by each partner in the joint venture.

In 1952, the partnership commenced its selling operations. This must have started after the transaction of the purchase had been completed. The deed of the property was signed and delivered on February 19, 1952 and registered on February 22, 1952, as appears in Ex. 5 which was filed as part of the evidence before the Court.

The profits realized by the operating of the partnership were divided between the partners in proportion of their interest in the venture and the respondent alleges having paid income tax on same.

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The partnership which was organized in 1951 to purchase land for development and sale purposes is still in existence and the partners as of the end of 1951 are still the same. There have been no additions or subtractions and the matters of the partnership are still incomplete. Hence the adventure in the nature of a trade of the partnership, to wit, that of selling lots for housing purposes, has become a continuing business.

The question to be determined is whether the sum of $9,166.67 received by the respondent from the sale of one-half of his one-third interest in the partnership over and above the amount he had paid for same was a capital gain or a profit from an adventure in the nature of trade.

The appellant submits that the sale by the respondent to Ruth Burritt was a sale of a one-sixth interest in the land which had been purchased by the partnership or syndicate and that the profit realized therefrom was taxable income within the meaning of ss. 3, 4 and 127(1)(*e*) of *The Income Tax Act*, S. of C. 1948, c. 52. These sections provide:

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

(*a*) businesses,
(*b*) property, and
(*c*) offices and employments.

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

127. (1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

On the other hand, the respondent contends that what he sold to Ruth Burritt was a portion of his investment in the paid-up capital of a partnership which had been formed to purchase and sell land for building purposes. What he did was to dispose of a capital asset which had enhanced in value. The gain he made, he says, was made not as part of a scheme of profit-making or trade but resulted from the enhanced value of his investment.

The above mentioned provisions of the Act, on which the appellant relies, are to the effect that a taxpayer's income for a taxation year is his income from all sources and includes income for the year from business and property and that the income from a business is the profit therefrom for the year. "Business" also includes an adventure or concern in the nature of trade.

The respondent has been practising law for many years in the city of Toronto, where he is still practising his profession. He testified at the trial and filed documents to substantiate his oral testimony. Finding no reason to doubt his credibility, I am bound to consider seriously his uncontradicted evidence in determining the issue.

As the respondent's whole course of conduct in this matter is the best test to be applied under the circumstances, I shall point out certain facts which, in my mind, were well proven. As solicitor, he had a wide experience in general commercial practice and as such had often acted for supply companies and a number of builders in construction work. He was also well versed in conveyancing of properties. In 1951, he joined three of his clients in forming a syndicate or partnership which would acquire a certain property, have it subdivided and sell the lots to prospective builders. He acted in this matter as solicitor and trustee. The profits to be realized from the sale of the lots were to be divided between the partners in proportion to their share of interest in the partnership. The respondent undertook to acquire a one-third interest and to assume a one-third of the liabilities of the partnership.

It seems clear to me that the association formed by the respondent and his three clients and later extended to other parties was a partnership.

The Partnerships Act of the Revised Statutes of Ontario 1950, c. 270, s. 2, defines the expression "partnership" thus:

2. Partnership is the relation which subsists between persons carrying on a business in common with a view of profit, but the relation between the members of any company or association which is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

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The rules determining whether a partnership does or does not exist are set out in section 3 of the Act.

> 3. (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
>
> (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share or payment, contingent on or varying with the profits of a business, does not of itself make him a partner in the business, . . .

The subsections of s. 3 then enumerate the cases where a person, though receiving a share of the profits of the business, is not a partner.

In the present instance, at the outset four persons made a verbal arrangement by which they would join together to purchase for the group a certain property, subdivide it in lots and dispose of them at a profit. So the purpose of the arrangement was to carry on a business in common with a view to profit. It was not an agreement to purchase land for the purpose of becoming part or co-owner of it; it was to be sold at a profit by the partnership. No part of the property could be sold without the consent of all the parties to the arrangement. Each party was to contribute to the common fund in proportion to the interests or shares each person had in the association. The evidence of the respondent is corroborated by the memorandum signed on March 24, 1952 by four of the associates at the time. It reads:

> The said parties hereby acknowledge and declare that they are in partnership for the purpose of developing and selling the south half of Lot 33, Concession 1, Township of Scarborough, and that the profits or losses of the said partnership are to be divided or borne in proportion to the shares or interests as set out below opposite the names of the parties:

This acknowledgment and declaration was signed following the formalities of acquiring the property and having subdivided it in building lots. The unincorporated business association was then in a position to operate its business, that of selling lots at a profit if possible. There is no doubt in my mind that from the moment the interested persons formed a group to carry on a business in common with a view to earning profits their relationship was that of partners.

In the same line of reasoning, Mr. Justice Duff, in *Robert Porter & Sons Limited* and *J. H. Armstrong*[1], wrote (p.329, *in fine*):

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract.
>
> The real question is whether, from the evidence before us, one ought to infer an agreement in the juridical sense that the property these two persons intended dealing with was to be held jointly as partnership property, and sold as such. Is this what they contemplated? Had they in their minds a binding agreement which would disable either of them from dealing with his share—that is to say, with his share in the land itself—as his own separate property? A common intention that each should be at liberty to deal with his undivided interest in the land as his own would obviously be incompatible with an intention that both should be bound to treat the corpus as the joint property, the property of a partnership.... The partner's right is a right to a division of profits according to the special arrangement, and as regards the *corpus*, to a sale and division of the proceeds on dissolution after the discharge of liabilities. This right, a partner may assign, but he cannot transfer to another an undivided interest in the partnership property in specie.

In the present instance, four individuals made a verbal agreement by which they would join in the purchase and sale of a certain property for development purposes. This was not an arrangement to purchase land so that each individual would become co-owner thereof. The purchase of the land was made for business purposes by the parties acting not personally but as a group. The association among the persons concerned was an unincorporated business association. The property acquired was held and applied by the group exclusively for the purpose of the association, to wit for its sale and the realization of profits to be divided in accordance with the agreement and the terms of the memorandum.

Believing as I do that the arrangement between the respondent and the other parties was an agreement of partnership, it follows that legally the property, in part or in whole, could not have been disposed of without the consent of each and every partner. Each partner's right was not a right to dispose of the land but a right to participate in the division of the profits realized by the business

[1] [1926] S.C.R. 328.

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operations of the partnership. It being a partnership, it was subject to the rules provided for in the *Partnerships Act*, Revised Statutes of Ontario 1950 (op. cit.). True the Act does not give partnership a legal personality, but the 1948 *Income Tax Act* in different sections considers a partnership as an entity for tax purposes. The charging provision of the Act is s. 6(*c*) which reads as follows:

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (*c*) the taxpayer's income from a partnership or syndicate for the year whether or not he has withdrawn it during the year.

Consequently, the income which a taxpayer is entitled to receive or has received from a partnership or syndicate for the year must be included in the taxpayer's income for the year. This means that profits realized from the business or the property of the partnership for a year, whether or not the partner has withdrawn it during the year, is to be included in his income. The respondent stated that every amount to which he was entitled from that source had been computed in his income and that he had paid the tax.

Now the only income under our Statute which is not subject to tax is the profit realized from an investment. The test for deciding whether the profit is of a capital nature or income is always the same.

The rule laid down in *Californian Copper Syndicate v. Harris*[1] by the Lord Justice Clerk is well known (p. 165, *in fine*):

> 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 . . . the Income Act. 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 a gain, dealing in such investments as a business, and thereby seeking to make profits.
> . . . 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?

[1] (1903-11) 5 T.C. 159.

When the respondent joined the partnership and made the necessary outlay to acquire a one-third interest in it, he no doubt expected a return on his investment. He must have had in mind that the partnership would make profits from its business operations of selling lots and that he would share in these profits in proportion to his one-third interest. As I see it, the income expected from his outlay was the profits of the partnership's business of selling building lots. The adventure in the nature of trade was that of the partnership and not that of the partners. The partners were to receive their share of the profits realized from the business and their responsibility was, if necessary, to pay their share of its losses.

The respondent was not acquiring a share in the partnership to resell it, repeat the same with other partnerships and carry on a trade in shares or interests in partnership, but as an investment. After the partnership had been organized, the negotiations for purchasing the land were well on their way and the property was being subdivided, it would seem that its prospects of success were such that other parties were disposed to pay a higher price for the shares or interests in it than that paid by the original joiners.

So in November 1951, before the partnership started its selling operations, the respondent sold one-half of his one-third share in the partnership at a higher price than he had paid for it. The adventure in the nature of a trade in this instance was the purchase and sale of land. What the respondent did was not the sale of land, which he personally had not the power to sell, but the sale of his right to the profits of the sale of lots which would eventually be made by the partnership. The respondent's transaction had no effect whatsoever on the land which had been acquired by the partnership to be sold. The right he disposed of was a part of his investment in the capital structure of the partnership. It was not a business operation or a scheme of profit making. He sold part of his capital asset, kept the other part and later on derived therefrom taxable income.

The Court was referred to numerous decisions. The basic test applied in connection therewith is the same—Is an investment sold or is a trade being carried on? When in

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doubt, one has to scrutinize the whole course of the taxpayer's conduct to find out his intention and draw what may be considered as a proper deduction. This I have done.

What I have stated is that the sale of a source of income does not always give rise to taxable income, though under certain circumstances it may be considered as income and assessed as such.

In the case of *Minister of National Revenue v. Shaw*[1] Mr. Justice Duff (later Chief Justice), at p. 342 said:

> The Legislature, it seems to me, is at pains to emphasize the distinction between the income and the source of income. The income derived from the capital source is income for the purposes of the Act. The source is not income for the purposes of the Act.

The taxpayer in this instance had a potential source of income, his right to share in the profits of a partnership. He disposed of part of his source of income which in my opinion was a capital asset. I would readily admit that when a person makes a business of acquiring such sources of income with the intention of disposing of them at a profit and thus carried on a trade of that nature, or has embarked on an adventure in the nature of trade for the same purpose, the capital could be considered as income.

The evidence has convinced me that the transaction between the respondent and Ruth Burritt had no business character. The gain was not made through an operation of business in dealing in an investment in partnership's shares or interests, nor made in carrying out a scheme of profit making; it was an enhancement in value of the shares or interests of the partnership. There is nothing before the Court which could justify the conclusion that the respondent when he made the outlay to acquire a right to divide in the profits of the partnership had any intention of disposing of it at a profit. This he did for reasons he made clear in his testimony and which I have commented in these notes. In principle, to be taxable the profit must arise from trading activities, not from a sale of capital as such. In my opinion, the right which the respondent disposed of was an asset and does not constitute trading or an adventure in the nature of trade. This rule was applied in *Commissioner of Taxes v. British-Australian Wool Realization Association, Ltd.*[2]

[1] [1939] S.C.R. 338. [2] [1931] A.C. 224.

The sale herein provided a profit as compared with the price the respondent had paid for the right to participate in the profits of the partnership and does not constitute income subject to be taxed.

I have come to the conclusion that the amount of $9,166.67 added to the respondent's declared income did not represent a profit from the operations of the partnership and was not subject to taxation.

Therefore, the appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

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Oct. 29, 30, 31
1960
Apr. 22

HOLLINGER NORTH SHORE EXPLORATION CO. LTD., ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income tax—Whether payment of royalty to lessee by sublessee on ore shipped from leased mine "income derived from the operation of a mine" within the meaning of the Income Tax Act R.S.C. 1952, c. 148, s. 83(5) as enacted by S. of C. 1955, c. 54, s. 21(1).

Section 83(5) of the *Income Tax Act* provides:

"Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the 36 months commencing with the day the mine came into production."

The appellant corporation in 1953 secured an operating license in the form of a lease to mine iron ore from land in northern Quebec and thereafter subleased such right to another company. The consideration therefor included, *inter alia,* payment of an overriding royalty on all iron ore and specialties shipped by the sublessee from any mines on the leased land. Payment to the appellant under the agreement totalled $3,182,936, for the year 1956, the whole of which year was within the period of 36 months commencing with the day on which the mine operated on the property by the sublessee came into production. The Minister ruled that this sum was not income derived from the operation of a mine and thus exempted by section 83(5) and assessed the appellant accordingly. On an appeal from the assessment

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Held:That the sum in question was not "received" from the operation of the mine but "arose and accrued" by reason of the operation and was thus "derived" therefrom. It was therefore "income derived from the operation of a mine" within the meaning of section 83(5) of the Act and was exempted by that provision.

APPEAL under the *Income Tax Act*.

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

H. H. Stikeman, Q.C., H. F. White, Q.C. and *Jean Monet* for appellant.

P. M. Ollivier and *D. Andison* for respondent.

THURLOW J. now (April 22, 1960) delivered the following judgment:

This is an appeal from an assessment of income tax in respect of the appellant's income for 1956. In making the assessment, the Minister included in the computation of income an amount of $3,182,936.93 which the appellant received in the year from Iron Ore Company of Canada and the issue to be determined is whether or not he was right in so doing. The appellant's case is that this sum was *"income derived from the operation of a mine,"* etc., within the meaning of s. 83(5) of the *Income Tax Act*, R.S.C. 1952, c. 148, as enacted by S. of C. 1955, c. 54, s. 21(1), by which it was provided that

Subject to prescribed conditions, there shall not be included in computing the income of a corporation *income derived from the operation of a mine* during the period of 36 months commencing with the day on which the mine came into production.

The material facts are not in dispute. In February, 1953, the appellant, a corporation organized under the law of the Province of Quebec, was granted by the Crown pursuant to a statute of that province an "operating licence in the form of a lease" by which it obtained, *inter alia*, the right to mine and take iron ore from a tract of land in the northern part of the province. For the purpose of exploiting the rights so obtained, and pursuant to an elaborate arrangement made some years earlier between the appellant and a number of other companies for the exploration and development of the iron ore known to be located on the tract of land, the appellant shortly after obtaining the licence, by what is referred

to as a sublease, granted to Iron Ore Company of Canada certain proportions of the iron ore located on the tract of land with the right to mine and carry away the ore so granted. The consideration to be paid for this grant, as set out in the sublease, consisted of (*a*) a payment of $100,000 per year, (*b*) the sublessee's share of the duties payable under the *Quebec Mining Act*, and

(*c*) An overriding royalty on all iron ore and specialties shipped by the Sublessee under this Sublease from any mines upon the described lands (except iron ore and specialties shipped for the acount of the Sublessor) and sold and delivered each year by the Sublessee, of seven per cent of the then competitive market price f.o.b. vessels at Seven Islands, Quebec (determined as provided in Section 2 of the *Mutual Covenants* of this Sublease) for each grade and kind of such iron ore and specialties, which the Sublessee binds itself to pay to the Sublessor during the term hereof; provided however, that, in the event seven per cent of such competitive market price for any grade or kind of such iron ore or specialties shall be less than twenty-five cents a ton, then the overriding royalty on such iron ore and specialties shall be twenty-five cents a ton.

There was also a provision that, beginning with the year 1955, Iron Ore Company of Canada should pay royalty based on a certain minimum tonnage of iron ore per year, which minimum was in fact exceeded in the year in question.

In December, 1949, Iron Ore Company of Canada had entered into a contract with Hollinger-Hanna Limited by which the latter for consideration undertook to provide management services and supervision of the operations and properties of Iron Ore Company of Canada and in June, 1954, the appellant made a similar contract with Hollinger-Hanna Limited for the management by it of the appellant's iron ore operations and properties. In March, 1955, the appellant made a further contract with Iron Ore Company of Canada whereby the latter undertook for certain consideration to mine for the appellant iron ore from the appellant's remaining portion or proportion of the iron ore on the tract of land.

What followed was a single operation in the course of which iron ore was extracted by Iron Ore Company of Canada from a single mine on the tract of land, transported to Seven Islands and sold, the selling price being received by Hollinger-Hanna Limited, which after deducting its charges remitted to the appellant the amount representing the proceeds of sale of its share of the ore. This sum was not

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included in computing the appellant's income and no question arises in this appeal as to it. It was admitted in the course of argument that this sum was exempt under s. 83(5).

Hollinger-Hanna Limited also paid to Iron Ore Company of Canada the amount representing the proceeds of sale of its share of the iron ore and from this amount Iron Ore Company of Canada then paid to the appellant the overriding royalty payable under the sublease which in 1956 amounted to $3,182,936.93 and which, as previously mentioned, the Minister included in computing the appellant's income for that year. It is not disputed that the whole of the year 1956 was within the period of 36 months after the mine came into production.

Was this sum then "income derived from the operation of a mine" within the meaning of that expression in s. 83(5)? The contention put forward on behalf of the Minister was that s. 83(5) applies only to income immediately attributable to the operation of a mine by the corporation itself. In support of this construction it was argued that the expression "income derived from the operation of a mine" in s. 83(5) refers to income from a particular source, that in respect of any particular amount of income so far as any given taxpayer is concerned there can be only one source and the taxpayer must have some proprietary interest in it or dominion over it, and that in order to come within s. 83(5) the operation itself must be the source of the income to the particular corporation claiming the exemption. From this position, it was submitted that here the source to the appellant of the income in question was the sublease or the property right for which the royalty was paid, and that in the hands of the appellant the sum in question was not income from the operation of the mine.

I do not agree with this interpretation of s. 83(5). The subject being dealt with by the subsection is income of the corporation, but the exemption provided is given by reference to the derivation of the income rather than by reference to the kind of corporation or the nature of the business or activity, if any, which it carries on. The word "corporation" is not qualified by any adjective such as "operating" or "mining" which might have lent colour to the Minister's suggestion, nor is the word "operation" or

the word "mine" followed by the words "by the corporation" or any wording to the like effect indicating that the benefit of the section is to be limited to cases wherein the corporation taxpayer is the operator or an operator of the mine. The ordinary meaning of the words "income derived from the operation of a mine" is, in my opinion, broader than that contended for and, had Parliament intended that their meaning should be limited in the manner suggested, the appropriate words to so limit it would, I think, have been included in the section. In their absence, I see nothing in the language used or in the subject matter being dealt with to warrant reading the subsection as if such words were present.

Nor do I think the present problem is to be solved by endeavouring to determine the "source" of the income to the particular taxpayer. The word "source" does not appear in s. 83(5), but even assuming for this purpose that the words "the operation of a mine" refer to such an operation as the "source" of the income in question, nothing in the language used in s. 83(5) appears to me to require that the taxpayer have some proprietary interest in or dominion over the operation of the mine or that the operation and nothing else should be capable of being accurately described as the source of the income to the particular taxpayer, regardless of the context in which the word "source" might be used. "Source" is a term the meaning of which is largely determined by its context, and when it is used in relation to income its meaning may vary as well. There is not necessarily any single thing which in all senses is the source of income or of particular income. Nor is there necessarily a single source to any given taxpayer for particular income or for income of a particular kind. For example, the source of a sum received by a solicitor for preparing a document could in one sense accurately be said to be the client from whom the sum was received, in another sense the source of the same sum could be said to be the effort which the solicitor put forth to prepare the document. In yet another sense, it might be said to be the contract between the solicitor and

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his client. And finally, it might also be said to be the solicitor's practice. Lord Atkin appears to have had much the same thought in mind when he observed in *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes*[1] at p. 789:

> It is desirable also to point out that at any rate for different taxing systems income can quite plainly be derived from more than one source, even where the source is business.

Later in the same judgment, Lord Atkin said, with reference to the meaning of the word "source" in an ordinance imposing taxation in respect of income received or accrued from any "source" within the Territory:

> Their Lordships incline to view quoted with approval from Mr. Ingram's work on South African Income Tax Law by de Villiers J. in his dissenting judgment: "Source means not a legal concept, but something which a practical man would regard as a real source of income"; "the ascertaining of the actual source is a practical hard matter of fact."

In *Hart v. Sangster*[2] Lord Goddard C.J., with whom the other members of the Court of Appeal agreed, in delivering a judgment dealing with the meaning of source in a statute imposing tax in respect of income where the taxpayer had acquired a new source of profits or income or an addition to a source of profits or income, held that the source of interest on a savings account was not the contract between the customer and the bank, nor the deposit of money coupled with the contract, for in his opinion the contract by itself, without a deposit, would yield no income at all, nor would the deposit by itself yield income in the absence of an agreement to pay interest, express or implied. In his opinion, the source of the income was the deposit of money on the terms of the contract. By the same token, it seems to me that the source of the sum in question to the appellant was neither the sublease nor the property rights which the appellant granted to the sublessee by it, for neither by itself would have yielded the income here in question. Nor, for the same reason, was the source the granting of rights to the sublessee upon the terms of the lease, for even that, without the operation of the mine by the sublessee, would not have produced this sum. What appears to me to have been the source of the sum in question to the appellant (or the source in at least one of the senses of that term) was the operation of the mine by the sublessee in circumstances

[1] [1940] A.C. 774. [2] [1957] 2 All E.R. 208.

which included the existence of the sublessee's covenant to pay royalty in respect of the ore mined. I also think that the operation of the mine in such circumstances is what a practical man would, above all else, regard as the real source of the income in question. But while this view appears to lend support to the conclusion at which I have arrived, I prefer to rest this judgment more on the result of another approach to the question. The material words of the statute are "income derived from the operation of a mine," and it seems to me to be the safer and better course simply to apply to the facts what appears to be the ordinary meaning of these words.

The word "derived" has been considered in a number of cases in this Court, including *Wilson v. Minister of National Revenue,*[1] *Gilhooly v. Minister of National Revenue,*[2] and *Kemp v. Minister of National Revenue.*[3]

In *Gilhooly v. Minister of National Revenue,* Cameron J. held that the expression "income derived from mining," which appeared in s. 5(1)(*a*) of the *Income War Tax Act,* applied to income in the form of dividends received from a mining company and that the recipient of the dividends was, therefore, entitled to the deduction provided for by s. 5(1) (*a*) in respect of depletion of the mines owned by the mining company.

In *Kemp v. Minister of National Revenue,* the President of this Court discussed the meaning of "derived" in s. 4(*j*) of the *Income War Tax Act* as follows at p. 585:

> But even if the income received by the appellant under paragraph 4 of the will were not the same as that received by the Trustees as interest on income tax exempt bonds, it does not follow that it would be subject to income tax, for proper regard must be had to the meaning of the word "derived" in section 4(*j*). Counsel for the appellant contended that it must not be read as meaning "received in the first instance". I agree. In a taxing Act words must, generally speaking, be given their plain and ordinary meaning, and, according to such meaning, the word "derived" covers a wider field than the word "received", and when applied to the word "income" it connotes the source or origin of such income rather than its immediate receipt. In the New English Dictionary, Vol. III, page 230, its meaning is given as "Drawn, obtained, descended, or deduced from a source;" and in Webster's New International Dictionary, Second Edition, "Formed or developed out of something else; derivative; not primary;"

[1] [1938] Ex. C.R. 246. [2] [1945] Ex. C.R. 141.
[3] [1947] Ex. C.R. 578.

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I can see no distinction for the present purpose between the meaning of the expression "income derived from mining," which was considered in the *Gilhooly* case, and that of "income derived from the operation of a mine." In each case, I think the word "derived" is broader than "received" and is equivalent to "arising or accruing" (*vide Commissioner of Inland Revenue v. Kirk*[1]), but in neither case is the expression limited to income arising or accruing from the operation of a mine by the particular taxpayer.

In the present case, what the appellant stipulated for and was entitled to receive was not a share of the profits of the mining operation nor a portion of the mineral extracted, but simply a sum of money. This sum was to be equal to seven per cent of the competitive market price of iron ore f.o.b. vessels at Seven Islands, Quebec, as defined in the sublease, but it was not necessarily to be paid from the selling price of the ore, nor was it necessarily to be based on the price at which the ore was sold, and it was payable whether Iron Ore Company of Canada realized the sale price of the ore or not. Moreover, the sum in question came to the appellant pursuant to the sublease and was a payment for the rights which the appellant granted to Iron Ore Company of Canada by the sublease. But, while these features of the sum in question or of the obligation which the payment of the sum to the appellant discharged tend to dissociate the sum from the operation of the mine, to my mind they are not conclusive. Of greater importance is the fact that the sum was not a minimum royalty payment payable whether ore was mined or not, but one that had its origin in the operation of the mine. Neither the sublease nor the property right conferred by it brought this sum into existence or by themselves gave the appellant a right to it. The obligation of Iron Ore Company of Canada to pay the sum to the appellant and the right of the appellant to payment of it, in my opinion, came into existence as a result of the mine being so operated. Nor were this obligation and corresponding right merely measured by the operation of the mine. There was no fixed amount payable for each ton of ore nor was there any maximum limit to the amount which might become payable as overriding royalty. Subject only

[1] [1900] A.C. 588.

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to the minimum limits, the amount of overriding royalty could vary both with the quantity of ore extracted in the year and with the competitive market price of ore, which itself might vary from time to time in the year. As I see it, the sum in question became payable to the appellant not merely upon so many tons of ore being mined but because so many tons of ore were mined and shipped in a year when the competitive market price was such that the sum in question became payable, pursuant to the terms of the sublease. Apart from the operation of the mine, the sum in question was not payable in the year in question and would not necessarily ever have become payable. It was not "received" from the operation of the mine but, in my opinion, it arose or accrued by reason of the operation and was thus "derived" therefrom. I am, therefore, of the opinion that the sum in question was "income derived from the operation of a mine" within the meaning of s. 83(5) and none the less so because in different senses the sum may also be said to be derived from the sublease or from the property rights which the appellant granted to the sublessee.

In reaching this conclusion, I am not unaware that the reasoning of Latham C.J. in *Federal Commissioner of Taxation v. United Aircraft Corporation*[1] apears to point to the opposite result, but in that case the problem was one of the location of the source of the income and was so different from that in the present case as to offer little basis for comparison. In this situation, an observation of Lord Atkin in *Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes* (*supra*) seems to me to apply. He said at p. 788:

> Their Lordships have no criticisms to make of any of those decisions, but they desire to point out that decisions on the words of one statute are seldom of value in deciding on different words in another statute and that different business operations may give rise to different taxing results.

The appeal will be allowed with costs and the assessment vacated.

Judgment accordingly.

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[1] (1943) 68 C.L.R. 525.

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BETWEEN:

ROLLAND PAPER COMPANY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, s. 12(1)(a)—"An outlay or expense . . . made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer"—Legal expenses incurred in prosecuting appeal from a conviction under the Criminal Code for engaging in illegal trade practices are deductible in ascertaining income—Appeal allowed.

Appellant incurred expenses in prosecuting an appeal to the Ontario Court of Appeal from a judgment of the Ontario High Court finding it guilty of illegal trade practices. In its tax return for the fiscal year ended December 31, 1955, appellant claimed these legal expenses as deductions from income. The respondent disallowed these deductions and an appeal was taken to this Court.

Held: That the appellant's trade practices in the operation of its business were used and followed for the purpose of earning income from its business, and legal fees and costs incurred or made in defending such practices till a final decision on their legality or illegality was reached, were made for the purposes of their trade and for the purposes of earning income and are deductible in ascertaining appellant's taxable income within the meaning of s. 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act*.

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

H. Heward Stikeman, Q.C. and *Jean Monet* for appellant.

Guy Favreau, Q.C. and *Roger Tassé* for respondent.

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

FOURNIER J. now (May 17, 1960) delivered the following judgment:

This is an appeal from the Income Tax assessment for the taxation year 1955 of Rolland Paper Company Limited of the city of Montreal, in the province of Quebec, dated April 26, 1957, wherein the Minister of National Revenue disallowed the appellant's claim for deduction of certain legal costs paid in 1955.

The facts material and relevant to the issues involved in this appeal have been agreed upon by the parties and a statement to that effect has been filed and now forms part of the record before the Court. I shall summarize the statement.

The appellant, a corporation established under the laws of Canada, carries on business in Canada of manufacturing and selling fine paper. In 1953, the appellant and others engaged in the above business were charged under s. 498(1)(*d*) of the *Criminal Code* as in force prior to November 1, 1952 on an indictment reading in part as follows:

> During the period from 1933 to the 31st day of October 1952, both inclusive . . . did unlawfully conspire, combine, agree or arrange together and with one another and with . . . to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply . . . of articles or commodities which may be the subject of trade or commerce, to wit, book papers including general printing and converting papers, fine papers including rag content and sulphit writing paper, coated papers, miscellaneous fine papers including blotting and bristols, groundwood and other fine papers and thereby commit an indictable offence contrary to the provisions of the Criminal Code, section 498(1)(*d*).

On June 4, 1954, the appellant and the other parties named in the indictment were found guilty as charged by the Ontario High Court and sentenced to pay a fine of $10,000. The Ontario Court of Appeal dismissed the appeals of the appellant and the other parties against this conviction on the above charges. An appeal of this last decision to the Supreme Court of Canada by the appellant and one of the other parties on certain specific questions of law was dismissed on May 13, 1957.

During its 1955 taxation year, the appellant paid legal fees amounting to $5,948.27 as its share of the legal costs of appealing against the judgment of the Ontario High Court finding the appellant and others guilty of illegal trade practices. In its tax return for the fiscal year ended December 31, 1955, the appellant claimed these legal expenses as deductions from income. By notice of assessment dated April 26, 1957, the respondent disallowed the appellant's claim for deduction of the legal costs *supra*. The appellant duly

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objected to the disallowance but the Minister, by notification dated October 4, 1957, confirmed the assessment appealed from, on the ground that

> Legal fees amounting to $5,948.27 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 s. 12(1)(*a*) of the Act.

Section 12(1)(*a*) reads as follows:

> Section 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 subsection, which provides for an exception to the general rule that in computing income no deduction shall be made in respect of an outlay or expense, should be read in relation to ss. 3 and 4 of the *Income Tax Act.*

> 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 employment.
>
> 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.

These sections deal with the income from a business or property and not with taxable income which is the taxpayer's income for the year minus the deductions permitted by the Act among which are the outlays or expenses contemplated in s. 12(1)(*a*). The principle laid down in s. 4 of the Act is that income from a business is the profit therefrom; and it has been repeatedly held by the courts that this profit is the surplus by which the receipts from the business exceed the expenditure made for the purpose of earning these receipts. This rule is in conformity with the commercial and accounting practices followed by trading and business enterprises in establishing their balance sheet of operations.

The question to be determined is whether the legal expenses paid by the appellant in the amount of $5,948.27 in the year 1955 were made and incurred for the purpose of gaining income from its business and deductible in computing income within the meaning of s. 12(1)(*a*).

The appellant submits that these legal expenses were made in accordance with the ordinary principles of commercial trading and well accepted principles of business practice. It urged that they were made in the course of its business and incurred for the purpose of defending its day to day trade practices which gave rise to income and were directly related to the earning of its income.

On the other hand, the respondent contends that the amount sought to be deducted was the amount of the legal costs incurred for the purpose of defending against an accusation made under the provisions of the *Criminal Code* and that in such cases these expenses, from the point of view of the law, are not to be deemed to have been made or incurred for the purpose of earning income. They relate to the cost of unsuccessfully defending a criminal action and from the point of view of strict business practices and within the framework of the law such expenses could not be admitted as deductions.

At the opening of the trial the parties filed a Supplementary Statement of Facts dealing with the activities of the appellant which lead to its convicion under s. 498(1)(*d*) of the *Criminal Code*. It is in evidence before the Court. Here are some extracts from this document:

2. The appellant together with the other accused supplied at least 90% of the fine paper manufactured in Canada.

"It will be seen, therefore, that the accused mills did supply by far the greatest bulk of the fine paper manufactured in Canada and also supplied by far the greatest bulk of the fine paper used in Canada and the figure of 90% is a conservative average to use in each case."

3. From the year 1933 at least the appellant and the other accused mills together with the fine paper merchants entered into agreement covering their trade.

"I find as a fact that well before the year 1933 these seven accused companies and the J. R. Booth Company had entered into a firm agreement to control and fix prices and deal with the many other elements, to which I shall refer particularly, and that agreement has continued from then until the end of the period charged in the indictment, October 31, 1952."

4. The agreements referred to above included the controlling and fixing of prices; various services connected with the trade; classification of customers; loyalty and quantity discounts; tenders; disposal of odd lots; sectional division of Canada; miscellaneous.

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These extracts contain the findings of the trial judge relating to the agreements entered into by the appellant and others and the merchants covering their trade and the various services connected with the trade. The series of findings concern the practices agreed to and followed by the appellant in its business operations. These practices were found to be illegal in that they unduly prevented or lessened competition in the production, manufacture, purchase and sale of their product. These activities being part of their trade, it may be said that they applied to the day to day operations of the appellant's business.

Though the appellant and others were found guilty as charged in the indictment, and remembering certain arguments made before me, I believe it to be of interest to quote the remarks of the trial judge in *Regina v. Howard Smith Paper Mills Ltd.*[1] Mr. Justice Spence, in rendering sentence, said (p. 519):

> It is true that this Court, although it has found the guilt of the accused, prefers to use the words of Masten J.A. in *R. v. Container Materials Ltd.* [1941] 3 D.L.R. 145 at p. 183, 76 Can. C.C. 18 at p. 61, rather than the much harsher language used by other Judges in registering convictions in other cases which I need not read here but which we have dealt with during the course of the trial. Masten J.A. said: "In considering whether his finding was or was not warranted, I think it would be a mistake for this Court to look upon the appellants as guilty of moral turpitude or a wicked intention. Their directors are honourable men desirous of conducting successfully the affairs of their respective companies, and if in their efforts they have by mistake over-stepped the line set by Parliament and have *unduly* lessened competition they are responsible for their unlawful act . . . Breach of the statute is one thing, moral turpitude is quite another."

So, the trial judge who had found the appellant guilty thought that he should not look upon it as guilty of moral turpitude or of wicked intention. There had been a breach of a statute and the appellant was responsible for its unlawful act. That being the case, it becomes necessary to determine if unlawful acts committed in earning income from the operations of a business or trade are to be considered in computing the income of a taxpayer. The Act clearly states that the income of a taxpayer is his income from all sources. It is a sweeping and positive statement and it has been constantly held that income tax is a tax upon the

[1] [1954] 4 D.L.R. 517.

person measured by his income and that the source of his income should not be looked at when computing a taxpayer's taxable income.

In the case of *Minister of Finance* and *Smith*[1], wherein it was held that upon a literal construction of the Act the profits in question, though by the law of the particular province they are illicit, come within the words employed in s. 3(1), Lord Haldane in his remarks said (p. 197, *in fine*):

... There is nothing in the act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. . . .

Then referring to *Inland Revenue Commissioners v. Von Glehn*[2] he added (p. 198):

Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. . . .

According to the above remarks, it would seem that the income tax provisions are applicable to taxpayers carrying on business by means of unlawful practices as to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale . . . of articles or commodities which may be subject of trade or commerce, unless specifically prohibited by the *Income Tax Act*. Were it to be otherwise, it would be most difficult to bring within the ambit of the taxation statute taxpayers responsible for such unlawful practices. In the present instance, the appellant, though charged and later found guilty of the unlawful business practice *supra*, did report in its income tax return for its taxation year its income from its business in that year, in compliance with s. 3(*a*) of the Act. But in reporting its income, to arrive at the amount of its taxable income—s. 2(3)—it sought to deduct legal costs incurred and paid in defending its business practices. The only change to the appellant's income tax return made by the respondent was his refusal to allow the above sought deduction. No doubt was ever raised as to the respondent's right to impose and

[1] [1927] A.C. 193. [2] [1920] 2 K.B. 553, 572, 573.

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levy income tax on the appellant's taxable income from its business whether or not the income flowed from unlawful practices. But the tax to be levied is not on the taxpayer's income; it is on his income minus the deductions permitted by the Act. There are two general principles laid out in the Act itself.

In *Cox v. Rabbits*[1] at page 478 of the volume it is said:

> A Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed. . . .

Mr. Justice Duff in *Versailles Sweets Ltd.* and *The Attorney General of Canada*[2] said (p. 468):

> The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General.* Lord Cairns, of course, does not mean to say that in ascertaining "the letter of the law", you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume: "any governing purpose in the Act except to take such tax as the statute imposes" as Lord Halsbury said in *Tennant v. Smith,* [1892] A.C. 154.

I take these references to mean that when the statute says that taxable income is the income of the taxpayer minus the deductions permitted by the Act, the words cannot be construed as meaning that the taxable income is restricted to the income of a taxpayer from a lawful business nor that he is deprived of the benefit of the deductions permitted by the Act. Therefore income from a business, if taxable, has to be computed with the deductions when the claim comes within the exempting provision.

Thorson P. in *Lumbers v. Minister of National Revenue*[3] held (*inter alia*):

> . . . ; he must show that every constituent element to the exemption is present in his case and that every condition required by the exempting section has been complied with.

In the present instance, were the legal costs of defending a prosecution under the *Combines Investigation Act* claimed as a deduction from income, deductible in the computation of the appellant's taxable income as outlays or expenses incurred by it for the purpose of gainin,; or

[1] (1877-78) 3 A.C. 473. [2] [1924] S.C.R. 466.
[3] [1943] Ex. C.R. 202.

producing income from its business? The respondent disallowed the appellant's claim for deduction and relied on s. 12(1)(*a*) of the Act. This section applies to income from a business or property which section 4 states to be the profit therefrom for the year. There is no doubt that the profit to be assessed, though not defined in the Act, is the net profit contemplated by s. 2(3) and described as taxable income. "Profits and gains", according to Lord Halsbury in *The Gresham Life Assurance Society* and *Styles*[1], must be ascertained on ordinary principles of commercial trading.

When an expenditure is not expressly deductible under s. 11, the proper way to determine the deductibility of such an expenditure is to see if it is deductible according to ordinary principles of commercial trading and accepted business practice.

The President of this Court, discussing the meaning of s. 12(1)(*a*) in *Royal Trust Co. v. Minister of National Revenue*[2], at page 42 said:

> . . . Thus, it may be stated categorically that in a case under the Income Tax Act the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of Section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice. If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of Section 12(1)(*a*) and, therefore, within its prohibition.

And he continues at page 44:

> The essential limitation in the exception expressed in Section 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer "for the purpose" of gaining or producing income "from the business". It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income "from the business" in which the taxpayer is engaged. If these conditions are met the fact that there may be no resulting income does not prevent the deductibility of the amount of the outlay or expense. Thus, in a case under the Income Tax Act if an outlay or expense is made or incurred by a taxpayer in accordance with the principles of commercial trading or accepted business practice and it is made or incurred for the purpose of gaining or producing income from his business its amount is deductible for income tax purposes.

To establish that the legal fees that were incurred and paid by the appellant in 1955 to defend itself in an action taken against it under the *Combines Investigation Act*

[1] [1892] A.C. 309, 316. [2] [1957] C.T.C. 32.

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were incurred and made in accordance with ordinary commercial and accounting practice, an expert witness was heard. He had twenty-seven years' experience as chartered accountant and had dealt with the auditing of accounts of companies manufacturing paper, but had nothing to do with the auditing of books of companies involved in the above litigation. He expressed the opinion that in computing the revenue of the company the legal fees expended by the appellant and the others were properly entered in the loss side of a Profit and Loss Statement. He considered they were ordinary business expenses which under sound accounting and commercial practice would be deducted in the statement of profit and loss as an expenditure for the year. In the commercial context of carrying on the business of a paper industry there would be no material difference in the accounting theory which would prevail in the make up of financial statements of other industries. In general accounting, one endeavours to accept principles which are universal in application.

The qualifications and experience of the witness have convinced me that his evidence, as an expert in such matters, shoud be accepted. In my view the payments of the legal fees, claimed as deduction by the appellant, were made in accordance with principles of good business practice for a company in the fine paper industry.

Now, were the payments made by the appellant for the purpose of gaining or producing income from its business? Having dealt with the nature of the charge against the appellant and others and the findings of the trial judge and his remarks in rendering sentence, I shall simply add that all the findings relate to business practices agreed to and followed by the parties in their daily operations and activities. They were found to be contrary to the provisions of the *Combines Investigation Act* and unlawful under s. 498(1)(*d*) of the *Criminal Code of Canada*. The claim for the deduction is for the legal costs of appealing against the judgment of the High Court of Ontario which found the appellant guilty of the charge as laid in the indictment.

There are not many decisions of our courts on the question of the deductibility of legal costs in computing taxable income under our *Income Tax Act* in matters similar to

those which are the subject of this litigation. However, the Exchequer Court and the Supreme Court of Canada, in a case wherein a charge laid under the same section of the *Criminal Code* in respect of violations to the Combines regulations, dealt with this problem.

In the case of *Minister of National Revenue v. L. D. Caulk Co. of Canada Ltd.*[1], in 1947, the respondent, a manufacturer of dental supplies, at the invitation of the Commissioner under the *Combines Investigation Act* who was conducting an investigation into an alleged combine in the manufacture and sale of dental supplies in Canada, made representations before him, employing for the purpose solicitors to whom he paid a fee for their services. Later the respondent and others were charged under s. 498 of the *Criminal Code* that they did in fact constitute a combine in the manufacture and sale of dental supplies in Canada. At the trial the respondent was acquitted and an appeal taken by the Crown from such acquittal was dismissed. The respondent in 1948 paid legal fees to its solicitors and counsel who acted at the trial and appeal.

Although the facts dealt with in the dental trade as opposed to those dealt with in the fine paper trade were identical in terms of the indictment and charge, the result in the two instances were different. In the *Caulk* case (*supra*) the charge was dismissed and the company was not found guilty and was not fined. In the *Rolland Paper Co. Ltd.* case, the company was found guilty and fined. So the only difference material to this appeal between this case and the *Caulk* case is the difference between condemnation and acquittal.

Cameron J. held:

That the payments to its solicitors and counsel by respondent were made in the usual course of business and were made with reference to a particular difficulty which arose in the course of the year, namely, the investigation by the Commissioner, the charge laid against the respondent and the unfavourable and damaging publicity which resulted therefrom, and which would have been greatly enhanced had the charge been sustained: the disbursements had nothing to do with the assets or capital of the company but were made in an effort to establish that its trading practices were not illegal, and to enable it to carry on as it had in the past, unimperilled by charges that such practices were illegal. [1952] Ex. C R. 49.

[1] [1952] Ex. C.R. 49.

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The learned judge affirmed the decision of the Income Tax Appeal Board and held that certain legal expenses incurred by the respondent were deductible under the *Income War Tax Act* in ascertaining this taxable income.

On appeal from this decision to the Supreme Court of Canada[1], Rand J., who delivered the judgment, said (p. 56):

> The question here is whether expenses incurred by the respondent company in defending itself against charges of violating the criminal law by combining with others to prevent or lessen unduly competition in the commercial distribution of dental supplies, are deductible in ascertaining taxable income. The agreement or arrangement alleged to have been unlawful purported to regulate day to day practices in the conduct of the respondent's business. It formed no part of the permanent establishment of the business; it was a scheme to govern operations rather than to create a capital asset; and the payment to defend the usages under it was a beneficial outlay to preserve what helped to produce the income. These expenses included legal fees both for appearing before the Commissioner under the *Combines Investigation Act* and at the trial which resulted in acquittal.

After reading carefully the judgments of both Courts from which I have cited extracts, I have come to the conclusion that the facts therein stated are identical to those contained in the Supplementary Statement of Facts which is part of the record in the present case.

In each case, the parties' claim is for the deduction of legal expenses in the computation of their taxable income. Both claimants had been charged and prosecuted under the same section of the *Criminal Code* for having illegally conspired and combined to prevent or lessen competition in their respective trades of manufacturing, selling and distributing their commodities. The agreement or arrangements made or arrived at were to regulate their day to day practices in the conduct of their business activities. Their scheme was one to govern their operations from which they derived their income. The legal expenses were paid to defend their way of doing business and preserve the system under which they operated.

Certain remarks of Cameron J. of the Exchequer Court in his notes and which were concurred in by Kellock J. of the Supreme Court were discussed at length by counsel

[1] [1954] S.C.R. 55.

for both parties. The opinions expressed related to the fact that a conviction on the charge might have made a difference on the decision which was arrived at.

I quote the remarks of Cameron J.:

> . . . In view of the fact that the respondent was acquitted, I do not think that *in this case* the mere fact that the charge against the respondent was made under the Criminal Code has any bearing on the deductibility or otherwise of the expenses incurred in defence of that charge. The result might have been different had the respondent been found guilty of the charge, but as to that I need say nothing. [1952] Ex. C.R. 58.

Mr. Justice Kellock made these observations:

> It must be assumed in the case at bar, by reason of the acquittal, that the trade practices involved were not illegal, and, as pointed out by Cameron J., it is not necessary to consider the situation had the contrary been the case. The difference for present purposes is substantial. [1954] S.C.R. 60.

I do not believe that Mr. Justice Cameron meant to express the opinion that his decision would have been different had the respondent been found guilty. He might have had doubts, but he did not choose to give the reasons for any doubts he may have had because the fact was not an issue in the case submitted to his judgment. As to Mr. Justice Kellock, there is no doubt that he thought the difference would have been substantial had the trade practices been illegal. He also refrained from expanding on this matter because the issue did not call for a decision on that point. I fail to see, in the remarks referred to, the expression of an opinion which could be binding in a case where the trade practices were illegal. In one instance, there was doubt; in the other, there was a statement which, in my view, was made to mean that illegal trade practices would have been considered in a different way than legal trade practices in the computation of the taxpayer's income under the *Income Tax Act*.

In the present case, I am not called upon to decide if the appellant's trade practices were legal or illegal. My duty is to determine whether the legal fees incurred and paid for by the appellant in defending itself on a charge alleging that its trade practices were illegal are deductible as having been incurred and made for the purpose of gaining or producing income from its business. Legal expenses

in the course of a taxpayer's business have been considered by the Supreme Court as being deductible. It is the purpose of the legal expenses which is material in this issue.

It appears from the record that the income tax law, as a fact, applied to the appellant taxpayer. The tax was imposed and levied upon the taxpayer measured by his income. The income was derived from its business operations. Its expenditures were deducted to ascertain its profit. The income and the expenditures were for the taxation year 1955. Among the expenses deducted under the heading "General Expense" were legal and audit, $23,198.27. This amount comprises a sum of $5,948.27, for legal fees and costs involved in this litigation, the deduction of which was disallowed by the respondent in his reassessment. The other legal and audit costs were allowed.

On the evidence adduced, I have found that the legal fees and costs claimed as deductions had been properly entered in the profit and loss statement in computing the taxpayer's revenue; that according to sound accounting and commercial practice they were to be considered as business expenses; that in the carrying on of a fine paper business there would be no material difference in the accounting theory which would prevail in the make up of financial statements of other industries.

I find that the indictments and charges in this case and the *Caulk* case were identical in terms and based on the same section of the *Criminal Code* and that the facts stated in the judgments of the Exchequer and Supreme Courts are identical to the facts related in the Supplementary Statement of Facts which was filed in the present instance. In my view, there is no material difference between the facts relevant to the appellant in this case and those upon which the Supreme Court of Canada made its decision. The decision as set forth in the headnote of the judgment reads thus:

> The legal expenses incurred by the respondent companies in connection with an investigation into an alleged illegal combine and in successfully defending a charge under s. 498 of the *Criminal Code* regarding the operation of such alleged illegal combine, were deductible in ascertaining taxable income as they were "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning

of s. 6(1)(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (*Minister of National Revenue v. The Kellogg Company of Canada Ltd.* [1943] S.C.R. 58 followed).

Mr. Justice Rand, commenting on the proper test to be applied in determining the deduction claim in that case, said (p. 56, *in fine*):

> The provisions of the *Income Tax Act* are imposed on the settled practices of commercial accounting, but they create in effect a statutory mode of determining taxable income. Deductions from revenue must have been "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Each word of this requirement is significant, and decisions based on different statutory language are strictly of limited assistance.

The provision of the *Income Tax Act* to be considered in this instance is to the effect that deductions from revenue must have been made for the purpose of gaining or producing income from the business, whilst the provision of the *Income War Tax Act* considered in the *Caulk* case limits the disbursements or expenses as shown to have been laid out wholly, exclusively and necessarily for the purpose of earning the income. These terms seem to me to be more restrictive than the terms of s. 12(1)(*a*) which exclude deduction of outlays or expenses that are not made or incurred for the purpose of gaining or producing income from the business. Business purpose remains the test, but need not be exclusive.

In *Bannerman* and *Minister of National Revenue*[1], Chief Justice Kerwin of the Supreme Court of Canada said (p. 564, *in fine*):

> 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*).

In the *Caulk* case, where the facts were identical in terms of the indictment and charge to those of the present case, both the Exchequer Court and the Supreme Court found that the disbursements of legal expenses incurred to defend its right to use certain trade practices had been laid out for

[1] [1959] C.T.C. 215; [1959] S.C.R. 562.

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the purpose of its business and for the purpose of earning the income and were deductible in computing the taxpayer's taxable income.

Believing as I do that the appellant's trade practices in the operations of its business were used and followed for the purpose of earning income from the business, I find that lawful legal fees and costs incurred or made in defending such practices till a final decision on their legality or illegality was reached were made for the purposes of their trade and for the purpose of earning income and were deductible in ascertaining the appellant's taxable income within the meaning of s. 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952.

Therefore there will be judgment allowing the appellant's claim for the deduction of the legal costs amounting to $5,948.27 paid in the year 1955 and disallowed by the respondent in computing the appellant's taxable income for the taxation year 1955 and referring the assessment back to the Minister for reconsideration and reassessment, with costs to be taxed in the usual way.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1960
March 31
Apr. 1
—
Apr. 6
—

BETWEEN:

THE STATES STEAMSHIP COMPANY ..PLAINTIFF;

AND

THE SHIP *ELISABETH BAKKE* ....DEFENDANT.

Shipping—Negligence of vessel in moving out of her berth—Damage caused to ship "at home"—Judgment for plaintiff.

Held: That defendant vessel was negligent through improper manoeuvring on her part when moving out of her berth, thereby causing a wash which resulted in damage to plaintiff's vessel in the cost of replacement of mooring lines, dock repairs and other items, for which plaintiff is entitled to recover.

ACTION to recover damages caused through negligence of defendant ship.

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

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Vernon R. Hill for plaintiff.

C. C. I. Merritt for defendant.

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

SIDNEY SMITH D.J.A. now (April 6, 1960) delivered the following judgment:

On May 20, 1958, the plaintiff's steamship *California* was made fast alongside Berth 1 C of the Pacific Coast Terminals' wharf, New Westminster, her port side being to the wharf. Astern of her and also with her port side to the wharf was the motor vessel *Elisabeth Bakke.* The *Elisabeth Bakke* in moving out of her berth, caused a wash which resulted in the *California* breaking away from the wharf. Although the two vessels did not collide, the *California* suffered loss in the cost of replacement of mooring lines, dock repairs, and so forth. The plaintiff claims damages accordingly.

As I pointed out in the *Salvage Princess*[1]:

> On the day of the occurrence the plaintiff ship may be regarded as being "at home", and entitled to assume she was in a place of safety, (*The City of Seattle* (1903) 9 Ex. Cr. R. 146 at p. 149).

I hold that the *California* was properly made fast alongside by no less than eight sufficient mooring lines, and hold any evidence to the contrary unconvincing. The damage was therefore solely caused by improper manoeuvring on the part of the defendant vessel. This may have been due to her excessive speed in close quarters, or failing to make allowance for the current, or perhaps to insufficient power in the tug that was being used at the time, or a combination of all three. A somewhat comparable case is that of the *S.S. Roman Prince*[2]. I am of opinion that due care in the circumstances was not taken by those on board the *Elisabeth Bakke.*

I therefore hold for the plaintiff with costs and direct a reference to the Registrar on damages if necessary.

Judgment accordingly.

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[1] [1949] Ex. C.R. 230, 231.

[2] [1924] Ex. C.R. 93.

1959 Nov. 26

1960 Apr. 22

BETWEEN:

FRONT & SIMCOE LIMITED ....APPELLANT;

AND

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

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Money paid to lessor under terms of lease to be held by it under certain conditions—Terms of lease altered by later agreement—Money retained by lessor is rent and was not paid for waiver of a right—Money paid to lessor held to be income from property within the provisions of ss. 3 and 4 of the Income Tax Act, R.S.C. 1952, c. 148—Appeal dismissed.

Appellant leased a hotel property to another company, incorporated for the purpose of operating it, for a term of ten years from September 1, 1949, at a "minimum annual rental" of $75,000 payable in monthly instalments of $6,250. Provision was made for increasing the rent dependent on the lessee's total gross receipts. Upon the signing of the lease the sum of $75,000 was paid to appellant to be kept by it as lessor and to be forfeited on non-payment of rent or as damages in case of bankruptcy, otherwise to be applied as rent. By a later agreement between the parties this lease was altered in certain respects and on March 10, 1954 a new lease was entered into between the parties which was substantially the same as the original 1949 lease but contained the following clause:

30. In consideration of the Lessor entering into these presents and releasing the Lessee from its obligations under the said Indenture of Lease dated the 22nd day of August, 1949, as amended by the said Indenture dated the 30th day of April, 1950, the Lessee hereby waives and renounces any and every claim for the sum of Seventy-five Thousand Dollars paid to the Lessor as hereinbefore set out to be applied on account of future rent and to be retained by the lessor upon the happening of certain contingencies, and acknowledges that the Lessor is entitled to retain the said sum of Seventy-five Thousand Dollars free from any claim or demand by the Lessee. The Lessee further waives and renounces any and every claim for the payment of interest on the said sum of Seventy-five Thousand Dollars.

It also provided for a reduction in rent and for renewal privileges. This sum of $75,000 was added by respondent to the appellant's declared income for the year 1955. Appellant asserts that it is a capital asset received for the surrender of the original lease and for the grant of a new lease and appeals from the re-assessment made by respondent. The parties agree that the money was received by appellant in its 1955 taxation year.

Held: That it is the real character of a transaction and not the name given it which governs its taxability under the *Income Tax Act* and to discover the real purpose of the transaction all the surrounding circumstances may be examined; here the real purpose of the agreement was that the lessor should accept lower rent and that the

agreement was for the payment of rent and not a waiver of a right, consequently the sum of $75,000 was income from property within sections 3 and 4 of the *Income Tax Act* R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act*.

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

W. D. Goodman for appellant.

G. D. Watson, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (April 22, 1960) delivered the following judgment:

This is an appeal from a re-assessment dated April 15, 1958, and made upon the appellant in respect of its taxation year ending March 31, 1955. By that re-assessment, the respondent added to the declared income of the appellant the sum of $75,000, said to be "rental deposit forfeited". Following a Notice of Objection, the respondent confirmed the said assessment, in particular on the following grounds:

> The amount of $75,000 received by the taxpayer from Barclay Hotels (Toronto) Ltd. has been properly taken into account in computing the taxpayer's income in accordance with the provisions of ss. 3 and 4 of the Act.

There is no dispute as to the facts and the only question for determination is whether the said amount in the circumstances to be mentioned constitutes income in the hands of the appellant or, as the latter submits, was a capital receipt. The only evidence given at the hearing was that of Saul Salzman who has been president of the appellant company since its incorporation, and documents tendered by him.

The appellant was incorporated under the *Ontario Companies Act* on May 17, 1946 (Exhibit 1), its purposes and objects being stated as follows:

> Subject to the provisions of any statute or regulations passed thereunder in that behalf for the time being in force, to conduct and operate a hotel business at the northeast corner of Front and Simcoe Streets, in the said city of Toronto.

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The hotel referred to and which I shall refer to as the Barclay Hotel, was operated by the appellant under the management of Salzman from 1946 to 1949. In the latter year, Salzman found that he could no longer carry on the business and it was decided to rent the property. On August 4, 1949, the appellant received and accepted an offer to lease the Barclay Hotel as a going concern, with all its contents, from Messrs. Gould and Torno as trustees for a company to be incorporated under the name of Barclay Hotels (Toronto) Ltd. Exhibit 2 is the lease dated August 22, 1949, subsequently entered into between the appellant and the new company, and attached thereto is a copy of the said offer to lease. The lease was for a period of ten years from September 1, 1949, at a "minimum annual rental" of $75,000 payable in advance in equal monthly instalments of $6,250 on the 1st of each month. Provision was also made for payment of additional rental (which I shall hereinafter refer to as "further rental") in certain circumstances.

> And in addition thereto by way of further rental for each complete year of the said term, the amount, if any, by which the minimum annual rental for such year is less than the percentages of the Lessee's Total Gross Receipts hereinafter set forth derived during such year from the business carried on upon the demised premises, and for any fraction of the year, the amount, if any, by which the proportion for such fraction of a year of the minimum annual rental is less than the percentages of the Lessee's said Total Gross Receipts for such fractions of a year.

Then followed a detailed statement of the percentages of the lessee's total gross receipts, above referred to, the details of which are not here of importance. Provision was also made by which the lessee could secure two five-year extensions of the lease "provided the lessee is not in default hereunder" and "at the same minimum rental and percentages of gross sales and revenue as aforesaid, and otherwise upon the same terms and conditions as are in the Lease set out, *but without any obligation to pre-pay any rent*". (The italics are mine.)

The provisions in the lease regarding pre-payment of rent are found on pp. 20-21:

> Forthwith upon the execution of these presents, the Lessee shall pay to the Lessor the sum of Seventy-five Thousand Dollars ($75,000.00) of lawful money of Canada (the receipt whereof is hereby acknowledged)

to be applied on account of rent as hereinafter provided to be retained by the Lessor and to be forefeited to the Lessor as liquidated damages (in addition to any other rights or remedies that the Lessor may have) for the Lessor's trouble and expense in giving up possession of the said premises, in case the Lessor shall be entitled to determine the term hereby demised because of non-payment of rent by the Lessee, or because the Lessee has made an assignment for the benefit of creditors or become bankrupt, or an order has been made for the winding up of the Lessee, or a final judgment has declared that the Lessor is entitled to determine the terms hereby demised because of the Lessee's failure to observe any other of the provisoes, covenants and agreements herein contained. Provided, however, that if the term hereby demised is not determined by the Lessor for any of the causes aforesaid, or if the Lessor has not obtained a judgment declaring that it is entitled to determine this Lease as aforesaid, the Lessor shall apply the said sum of Seventy-five Thousand Dollars ($75,000.00) on account of rent due, as follows:

Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1954, to the thirtieth day of November, 1954; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1955, to the thirtieth day of November, 1955; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1956, to the thirtieth day of November, 1956; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1957, to the thirtieth day of November, 1957; and the remaining Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1958, to the thirtieth day of November, 1958.

The said sum of Seventy-five Thousand Dollars ($75,000.00) or any part thereof remaining from time to time unapplied on any rent payments shall bear interest at the rate of two percentum (2%) per annum, payable yearly on the first day of September in each year to be computed from the 22nd day of August, 1949, and to run until the 30th day of November, 1959. The first payment of interest to be made on the 1st day of September, 1950.

The said sum of $75,000 was paid by the lessee to the appellant in cash in 1949 and placed in the latter's bank account. It appears to have been used for the general purposes of the appellant, including large payments for the transfer of the liquor license in 1949, and again in 1958.

Within six months of the date of the lease, the lessee found itself in financial difficulties and by the terms of an agreement dated April 30, 1950 (Exhibit 3), certain variations of the lease were agreed to, and subject thereto the original lease remained in effect. By that amendment, it was recited that the lessee had observed all the covenants of the lease up to November 1, 1949, but that thereafter

and up to April 30, 1950, had paid only the minimum monthly rental of $6,250 which the lessee agreed to accept in full of rent to that date.

It was further provided that for the months of May, June and July and August, 1950, the lessor would accept a fixed monthly rental of $6,250, waiving any right to the "further rental" for that period; and that for the four-year period commencing September 1, 1950, and ending August 31, 1954, the fixed annual rental would be $65,000, payable in equal monthly instalments in advance, any right to "further rental" being waived for that period also. It was agreed also that the lessor should pay all realty taxes (under the original agreement the Lessee was not required to pay any part thereof), but that if such realty taxes in any of the years 1951 to 1954, inclusive, should exceed those payable by the lessor in 1950, such excess taxes should be paid by the lessee. The original proviso by which the lessee was entitled to 2 per cent. interest on the sum of $75,000, or on that part thereof not applying to rent, was deleted and the following clause substituted:

"The said sum of Seventy-five Thousand Dollars ($75,000.00) or any part thereof remaining from time to time unapplied on any rent payments shall bear interest at the rate of two per centum (2%) per annum, payable yearly on the first day of September in each year to be computed only from the first day of September, 1954. The first payment of interest to be made on the first day of September, 1955."

The Lessee hereby waives and renounces any and every claim to the payment of interest on the said sum of Seventy-five Thousand Dollars ($75,000.00) from the 22nd day of August, 1949, to the 31st day of August, 1954.

The final clauses of that agreement read as follows:

6. All the other terms and conditions of the said indenture of lease dated the 27th day of August, 1954 (obviously an error for 1949) save as herein amended, shall remain in full force and effect and be binding upon the parties hereto, their successors and assigns.

7. It is hereby agreed and acknowledged by the parties hereto that for the period commencing from the 1st day of September, 1954, all the terms and conditions as set forth in the indenture of lease of the 22nd day of August, 1949, shall again come into effect and be binding on the parties hereto from the said 1st day of September, 1954.

The original lease as so amended remained in force until August 31, 1954. If no new arrangements had been entered into, all the terms of the original lease would have been

in effect for the period September 1, 1954, to August 31, 1959, including the right of the lessor to receive not only the "minimum annual rental", but also the "additional rental" if the circumstances warranted. The appellant would also have been entitled to apply the sum of $75,000 in its hands on account of rent as originally provided. The lessee would have been entitled to receive 2 per cent. interest on the portion of that sum not applied to rent.

However, on March 10, 1954, a new lease of the same property (Exhibit 4) was entered into between the same parties—three individuals, all of whom were shareholders of the lessee company, joining therein to guarantee the due performance by the lessee of all its covenants. It was for a term of five years commencing September 1, 1954, and ending on August 31, 1959, as the original lease had done; it was for a fixed annual rental of $65,000 payable in equal monthly instalments in advance. By clauses 25 and 26 thereof, the lessee had the right to two five-year extensions of the lease on the terms set out in the draft lease attached thereto and called Schedule B. Essentially, the terms of such five-year extensions appear to be the same as those provided for in the original lease of August 22, 1949, the rental reserved being "the minimum annual rental" of $75,000, and "further rental" again being on the basis of the percentages of the lessee's total gross receipts. Clause 30 of the new lease reads as follows:

> 30. In consideration of the Lessor entering into these presents and releasing the Lessee from its obligations under the said Indenture of Lease dated the 22nd day of August, 1949, as amended by the said Indenture dated the 30th day of April, 1950, the Lessee hereby waives and renounces any and every claim for the sum of Seventy-five Thousand Dollars paid to the Lessor as hereinbefore set out to be applied on account of future rent and to be retained by the Lessor upon the happening of certain contingencies, and acknowledges that the Lessor is entitled to retain the said sum of Seventy-five Thousand Dollars free from any claim or demand by the Lessee. The Lessee further waives and renounces any and every claim for the payment of interest on the said sum of Seventy-five Thousand Dollars.

It is the nature of this sum of $75,000 so received by the appellant which is now in dispute. The parties have agreed that it was received by the appellant in its 1955 taxation year.

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Before considering the legal questions involved, it becomes necessary to refer to two other documents put in evidence by the appellant. Attached to the original lease (Exhibit 2) is a copy of the "Offer to Lease" dated and accepted by the appellant on August 4, 1949. It provides for payment to the lessor of $75,000 in cash to be applied by the latter only on account of rent then due, namely, $15,000, on account of the first quarter's rent in each of the last five years of the ten-year lease; it contained no provisions for forfeiture to the appellant of any part thereof in the event of the lessee failing to carry out its agreement or going into bankruptcy, or otherwise. It is apparent, also, that notwithstanding the general release given by the lessee to the appellant of all rights in the sum of $75,000 as set out in clause 30 of the new lease (Exhibit 4), it never was the intention of the parties that it should have that effect. On the same date that the new lease was signed, a further and separate agreement was entered into by the same parties and prepared by the same firm of solicitors. While it is referred to as "an addendum to the said lease", the terms thereof were apparently in the contemplation of the parties at the time the lease was signed. Its operative terms are as follows:

1. Paragraph 13 on page 6 of the said lease of the 10th day of March, 1954, is amended by providing that in the event that the lease is terminated under the provisions of the said paragraph 13 the Lessor will forthwith pay to the Lessee the sum of Fifteen Thousand Dollars ($15,000.00) for each year, or a proportionate amount for part of a year remaining of the unexpired term of the said lease.

2. Paragraph 24 on page 13 of the said lease of the 10th day of March, 1954, is amended by providing that in the event the said lease is terminated under the provisions of the said paragraph 24 the Lessor will forthwith pay to the Lessee the sum of Fifteen Thousand Dollars ($15,000.00) for each year, or a proportionate amount for part of a year, remaining of the unexpired term of the said lease.

3. All the other terms and conditions of the said lease are to remain in full force and effect.

Paragraph 13 so referred to related to the right of the lessee and the lessor to terminate the lease in the event of the demised premises being destroyed by fire, lightning or tempest, or other casualty, act of God, or the Queen's enemies to such an extent as to render them unfit for the lessee's business, and incapable of restoration within 180

days thereof. Paragraph 24 so referred to related to the option given to the lessee to determine the lease if without fault on its own part, it lost the right to sell beer, wine and liquor on the demised premises.

In its Notice of Appeal, the appellant stated its reasons as follows:

> 11. The Appellant claims that the said sum of Seventy-five Thousand Dollars ($75,000.00) was not received as rent, but as security for the proper performance by the Lessee of its covenants under the said Lease dated the 22nd day of August, 1949. Under certain conditions, which never materialized, the said sum was to have been applied in five equal instalments on acount of rent for the quarter-years commencing the 1st day of September in each of the years, 1954 to 1958, inclusive. However, before the time arrived when the Lessee could avail itself of its right to have the said sum applied on account of rent, the Lessee surrendered all its rights to the said sum, in consideration of the Appellant's accepting the surrender of the lease dated the 22nd day of August, 1949, and granting a new lease dated the 10th day of March, 1954.
>
> 12. The Appellant claims that, in all the circumstances of the case, the said sum of Seventy-five Thousand Dollars ($75,000.00) constitutes a capital receipt of the Appellant and that it is not income within the meaning of any of the provisions of the Income Tax Act.

The respondent relies on ss. 3 and 4 of *The Income Tax Act* and says that the sum of $75,000 received by the appellant was income from property; alternatively, that it was income from a business; and in the further alternative that it was income from a source. He says that in adding to the income of the appellant for the 1955 taxation year, in the course of re-assessment, the sum of $75,000, he acted on the following assumptions:

> (*a*) that the said sum of $75,000.00 was received by the Appellant from Barclay Hotels (Toronto) Limited at some time prior to the beginning of the 1955 taxation year of the Appellant.
>
> (*b*) that the said sum of $75,000.00 was *beneficially* received by the Appellant during its 1955 taxation year, and
>
> (*c*) that the said sum of $75,000.00 represented part of the income of the taxpayer for the said taxation year within the meaning of Sections 3 and 4 of the Income Tax Act.

While the original lease (Exhibit 2) provided for the forfeiture of the sum of $75,000 to the appellant as liquidated damages if the appellant terminated the lease because of a breach of certain covenants by the lessee, it is not suggested in the pleadings, evidence or argument that such a forfeiture did in fact occur. In the new lease (Exhibit 4), there

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is a recital that the lessee was unable to carry out the terms of the original lease, but no evidence was given on that point and clause 30 thereof expressly states that the consideration for the lessee's renunciation of all claim to the sum of $75,000 was the grant of the new lease and the release of the lessee from the obligations under the original lease. It is not necessary, therefore, to consider the problem that might have arisen had the appellant terminated the original lease by reason of the lessee's breach of its covenants, and had retained the sum of $75,000 as liquidated damages.

Put briefly, the submission by appellant's counsel is this. He says that a lump sum payment received for the surrender of the lease and/or for the grant of a new lease, is not of an income nature but a receipt on capital account. In support of that contention, he cited a number of cases, but in view of the conclusions which I have arrived at as to the real nature of the payment, I do not find it necessary to consider them.

In *Simon's Income Tax*, Second Ed., Vol. 1, p. 50, the author, after referring to a number of decisions, states:

> The true principle, then, is that the taxing Acts are to be applied in accordance with the legal rights of the parties to a transaction. It is those rights which determine what is the "substance" of the transaction in the correct usage of that term. Reading "substance" in that way, it is still true to say that the substance of a transaction prevails over mere nomenclature.

Earlier, the author had referred to the statement of Viscount Simon in *I. R. C. v. Wesleyan and General Assurance Society*[1], in which he expressed the principle in these words:

> It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. Secondly, a transaction which, on its true construction, is of a kind that would escape tax is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax.

[1] 30 T.C. 11, 24, 25 H.L.

The question for determination, therefore, is "What is the real character of the receipt?" and in answering that question I am entitled to regard the surrounding circumstances. In that connection, reference may be made to the speech of Lord Tomlin in *I. R. C. v. Westminster (Duke)*[1], where he referred to "the undisputable rule that the surrounding circumstances must be regarded in construing a document."

In my view, the evidence which I have set out above clearly establishes that when the new lease (Exhibit 4) was signed, the parties thereto, notwithstanding the form and language of the agreement, intended that the sum of $75,000, the right to which in form only was waived by the lessee, should be accepted by the appellant in return for the lower rental which the new lease reserved. The original Offer to Lease dated August 4, 1949, clearly stamped the proposed deposit of that sum with the character of pre-paid rent only. Then, by the terms of the original lease, it was to be applied on account of future rent unless the lessor determined the lease for any of the causes referred to or secured a judgment declaring that it had a right to determine the lease, neither of which events actually occurred.

Prior to the signing of the new lease of March, 1954, the parties were aware that the reduced fixed annual rental of $65,000 provided for in the agreement of April 30, 1950 (Exhibit 3) would be at an end on August 31, 1954; that on that date the original rental terms providing for a "minimum annual rental" of $75,000, as well as "further rental", would be in effect for the succeeding five years; and that in each of these five years, unless a forfeiture occurred, the lessor out of the $75,000 previously paid to him was bound to apply $15,000 annually on account of rent. All this was in accordance with the terms of their contract.

Mr. Salzman, the president of the appellant company, made no attempt to explain the circumstances under which the terms of the new lease were agreed to or why the very large sum of $75,000 (the exact amount of the pre-paid

[1] [1936] A.C. 1, 20.

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rent) should have been agreed to as the consideration for the grant of the new lease and the release of the lessee from the terms of the original lease; and counsel for the appellant was content to rely entirely on the wording of the lease itself. It is clear, however, from the terms of the new lease that the lessee not only waived the right to any claim to the sum of $75,000, but, by the same document, received the benefit of a rental for the ensuing five years substantially below that which it would otherwise have been obliged to pay. The new rental was fixed at $65,000 per annum, replacing the original provision for a minimum annual rental of $75,000, plus "further rental", the amount of which latter item might vary from year to year.

I attach considerable importance, also, to the provisions of Exhibit 5, the agreement signed on the same date as the new lease, and the terms of which I have set out above. That agreement does not in terms refer to the pre-paid rent of $75,000; it does provide, however, for payment by the lessor to the lessee of $15,000 "for each year or a proportionate amount for a part of the year remaining of the unexpired term of the said lease" (the term being for five years), in the event that the lease is determined because of the destruction of the property by fire, or is determined by the lessee should it without fault on its own part lose its liquor license. In certain circumstances, therefore, the lessor under these conditions might be required to pay the lessee as much as $75,000—the precise amount of the pre-paid rent. The amount to which the lessee was entitled under these provisions was based on the unexpired portion of the five-year term at the time the lease would be so terminated. Conversely, the appellant was released from liability for payment under that agreement for such part of the five-year term as the lessee remained in possession.

No explanation was given for entering into this agreement. In my view, only one inference may be drawn from its provisions, namely, that the parties thereto, notwithstanding the provisions of the new lease, regarded the sum of $75,000 as pre-paid rent which in the circumstances

mentioned in Exhibit 5, the lessee could recover in whole or in part, if through no fault on its part, its lease was terminated under the provisions of paras. 13 and 24 of the new lease.

In my opinion, therefore, the substance of the transaction by which the lessee purported to waive its right in the deposit of $75,000 was that all the parties to the new lease intended that sum to be a pre-payment on account of rent, an amount payable in respect of the user of the appellant's capital asset, the Barclay Hotel. It was therefore received on revenue and not on capital account.

A somewhat similar case came before Lawrence J. in *Greyhound Racing Association (Liverpool) Ltd. v. Cooper (H. M. Inspector of Taxes)*[1]. The facts are stated in the headnote as follows:

In July, 1927, the Appellant Company acquired the lease of a racing track for 14 years expiring in 1941. From June, 1928, a receiver for debenture holders carried on the business as agent of the Company.

In March, 1932, the Appellant Company granted to another company a licence to use the track from 1st May, 1932, to 29th April, 1941, in consideration of a percentage of the gross takings, with certain minimum weekly payments. The licensee company went into voluntary liquidation in March, 1934, and after negotiations the receiver, on behalf of the Appellant Company, agreed to a surrender of the hiring agreement if a new company to be formed would take over the track at a rent to be agreed and provided that a sum was paid equal to the difference, on an actuarial basis, between the old and the new rents. The sum so paid was included in the Appellant Company's accounts for the year ending 31st March, 1934, as a revenue receipt.

On appeal against an assessment under Schedule D on the Appellant Company for the year 1934-35, it was contended on behalf of the Company that the sum so paid was a payment of a capital nature in respect of the diminished value of the goodwill of the Company for the period from 1934 to 1941.

Held, that the sum was a trading receipt in respect of which the Company was assessable to Income Tax.

In that case it was argued that the license of March 11, 1932, was a capital asset of the appellant company and that the sum paid for the surrender of that license was a part realization of that capital asset. There as here, the appellant cited the cases of *Van den Berghs, Ltd. v. Commissioners of Inland Revenue*[2] and *Mallett v. Stavely Coal*

[1] 20 T.C. 373. [2] 19 T.C. 390.

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Company[1]. Lawrence, J. distinguished both these cases from the one he had under consideration. In his judgment he said at p. 378:

> The question as to what receipts are revenue and what are capital has given rise to much difference of opinion; but it is clear, in my opinion, that, if the sum in question is received for what is in truth the user of capital assets and not for their realisation, it is a revenue receipt, not capital.
>
> . . . But here, in my opinion, the only capital asset in fact acquired by the Appellant Company was the track and its equipment. The user of that track, whether by the Appellant Company or its licensee, did not create new capital assets, nor did it realise the original capital asset, which remains the property of the Appellant Company, for which it has received, in the year 1934, the sum of £15,640 and is to receive the new rents provided for by the agreement of March, 1934. The sum of £15,640 was nothing more than a lump sum payment in place of future rents similar to the payments in question in *Short Bros., Ltd. v. Commissioners of Inland Revenue,* 12 T.C. 1955, and similar cases.

In the instant case, the appellant company retained the full ownership of its only capital asset—the Barclay Hotel. In my view, the receipt of the sum of $75,000 by the appellant in its 1955 taxation year, was entirely referable to the future user by the lessee of the appellant's property. It represented the fruit of the tree and not the realization by sale of the tree itself. In my opinion, it was therefore income from property within the provisions of ss. 3 and 4 of *The Income Tax Act.*

For these reasons, the appeal fails and will be dismissed with costs.

Judgment accordingly.

[1] 13 T.C. 772.

1959
Sept. 25
1960
June 21

BETWEEN:

ALUMINIUM UNION LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax Act R.S.C. 1952, c. 148, s. 4—Income or capital—Profit on foreign exchange—Money used in operation of business—Buying and selling of foreign exchange necessary for purpose of business transactions—Profit realized on settlement of indebtedness is taxable as income—Appeal dismissed.

Appellant, a Canadian company, carried on the business of selling aluminium and related products in foreign countries. It commenced trading operations in these commodities in Japan in 1934 and through this branch office promoted the market for its goods, served its customers and made its sales. The office was closed in April 1942. To finance the trading operations of its Japan branch it obtained through that branch loans and advances in Japanese currency from the National City Bank of New York through the branches of that bank maintained in Japan. The borrowings were for payment of import duties and for general purposes. A final settlement of indebtedness was effected in 1952 by the purchase by appellant of the necessary Japanese money. As a result the appellant made a profit of $172,927 which was shown in its income tax return for 1952 but which appellant claims to not be taxable income within the provisions of the *Income Tax Act* or the *Income War Tax Act*. The respondent assessed the appellant for income tax on this amount and an appeal to the Income Tax Appeal Board was dismissed from which decision the appellant now appeals to this Court.

Held: That the profit realized from the use of the funds was income within the meaning of s. 4 of the *Income Tax Act* since the money borrowed from the bank was not borrowed for capital purposes but to pay the current expenses of carrying on the business, it was not borrowed for investment purposes but to meet the expenditures incurred in the operation of appellant's business activities and was circulating capital used in its trade.

2. That the amount of indebtedness of the appellant to the bank at the time of the settlement of the debt consisted of sums borrowed on demand loans and on advances by way of overdraft on its current account which sums had been used by appellant to finance its trading operations and was circulating capital used in the trade and the profit made on the exchange of dollars for Japanese yen when it settled its account with the bank in Japan was made on funds which had been borrowed and used to pay expenses of its trading operations.

3. That though the buying and selling or the exchanging of dollars for yen was not the primary business of the appellant that operation was necessary for the purpose of its transactions on revenue account and the settlement of its debt with the bank in Japan was a part of its trading operations.

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APPEAL under the *Income Tax Act*.

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

C. Antoine Geoffrion and *Raymond Y. Décarie* for appellant.

Lovell C. Carroll, Q.C. and *Maurice Regnier* for respondent.

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

FOURNIER J. now (June 21, 1960) delivered the following judgment:

In this case the Minister of National Revenue in his assessment of the income tax of Aluminium Union Limited for the taxation year 1952 included as taxable income the sum of $172,927 on the ground that it was profit on settlement of pre-war Japanese yen loans. The Income Tax Appeal Board in a decision dated February 18, 1957 confirmed the Minister's assessment. The taxpayer now appeals to this Court from the above decision.

The appellant claims that the aforesaid amount was not profit from its business and was not taxable income within the meaning of and for the purposes of any part of the *Income Tax Act* or the *Income War Tax Act* for the 1952 taxation year or any other year.

At the hearing of the appeal it was agreed that the evidence set out in the transcript of proceedings before the Income Tax Appeal Board and the supporting documents should be evidence before this Court. I shall summarize the important and material facts constituting the basis of the litigation.

The appellant, a company incorporated under the laws of Canada with head office in Montreal, since its inception has carried on the business of selling aluminium and related products in foreign countries. It commenced its trading operations in those commodities in Japan during the year 1934 and opened a branch office at Osaka, Japan, headed by its representative. Through this branch office, it promoted the market for its goods, served its customers

and made its sales. These trading operations went on from 1934 until shortly after the outbreak of war with Japan. The office was finally closed in April 1942.

To a large extent, the appellant's trading activity is limited to placing the production of associated companies in the export market through the medium of branch offices and agents or representatives. The trading operation involves the obtainment of orders, the placement of these with suppliers and the sale to customers. The financing of such transactions is made largely by arrangement of credit terms with suppliers to meet the credit terms extended to the customers. The branch offices receive credit for profits resulting from their activities. It appears that the appellant to finance the trading operations of its Osaka (Japan) branch office, obtained through the said branch office loans and advances in Japanese currency from the National City Bank of New York through the branches maintained in Japan by this bank. The financial statements of the Osaka office show the initial loan to be of June 1936 with continuance at varying amounts until November 1938. The borrowing on overdraft account began in July 1938 and continued in varying amounts until closure of its operations. The appellant's business activities in Japan consisted of trading operations. Its borrowings were for the payment of import duties and for general purposes.

In November 1938, the balance due on the bank loan was ¥575,000; at the outbreak of war with Japan and at the date of settlement it stood at the same amount.

The borrowings on overdraft account started in July 1938. In November and December of the same year, an amount of ¥300,000 was drawn on that account to meet a call on Aluminium Sumitomo Limited shares held in the name of Aluminium Limited. The payment was made by the Osaka branch office at the request of the appellant on behalf of its parent company Aluminium Limited and charged by the appellant to Aluminium Limited in March 1939 (Exhibit 1) in the amount of $86,437.50. This dollar equivalent was recovered by the appellant by being credited for same by its parent company Aluminium Limited, to which the appellant was indebted. So the appellant instead

of receiving dollars reduced its liability to Aluminium Limited by so many dollars. To complete the picture, at the outbreak of hostilities the balance due by the appellant to the bank was ¥575,000, acknowledged by a promissory note dated September 22, 1941 and ¥122,000 on the current account, which in May 1942 was reduced to ¥118,989. These loans were recorded and carried in its accounts as liabilities every year, from 1941 up to the date of settlement, at the Canadian currency rate, at a sum of $175,635 and later at $174,805. Attempts were made by the appellant after the war to repay the balance still owing, but without success until the year 1952. The settlement at that time was effected by purchasing the necessary yen at the prevailing Canadian currency rate. The amount of the purchase for the foreign currency was $1,878. Copy of the certificate of receipt for ¥713,014.05 is annexed to the appellant's notice of appeal.

In its income tax return for 1952, the appellant's statement of "Profit and Loss" for the year ended December 31, 1952 adds to its net profit, after deduction of certain expenses, the item "As exchange profit on settlement of bank loans in Japan, the sum of $172,927" but claims that it was not taxable income within the meaning of the provisions of the Act.

The tests to be applied in determining if a gain resulting from the variations in foreign exchange rates is taxable income are the same as those applicable to other profits. If the exchange profit is derived from funds forming part of capital assets, it is not taxable; but if it results in respect of funds received on revenue account, the profit is income.

In this instance the appellant's business is the promotion and sale of aluminium and other related products in foreign countries. In Japan it carried on its trading operations through a representative at its branch office in Osaka. To finance its Japanese business activities it borrowed money from a bank. It had no other funds at its disposal. The borrowed monies were in Japanese currency and were used to pay duties on the goods imported in Japan from Canada and elsewhere. The duties were added to the sale price of the goods sold to the clientele. The loans were also used for business purposes, such as general administration, salaries,

travelling expenses and office furnishings. At the outset, the appellant made time loans through its branch office. This method of borrowing was discontinued in November 1938. The balance due on these loans remained the same from that time until the outbreak of war. It then gave its promissory note to cover this liability. In July 1938, it opened an overdraft current account to meet its expenses. As all such current accounts, it showed the deposits and the withdrawals made during each month. The sum of ¥300,000 to pay for the call on the shares in the name of Aluminium Limited appears to have been borrowed in August 1938 on the overdraft account. Repayments on the overdraft account pursuant to that loan are as follows:

1938		
	September	¥200,000
	October	50,000
1939		
	January	50,000
	March	100,000
	April	50,000
	May	50,000

and so on. Exhibit A12 shows that the appellant paid ¥935,000 between September 1938 and August 1939.

I shall attempt to describe the ¥300,000 transaction in the light of the evidence before me.

Aluminium Limited is the parent company of the appellant. A call was made on it to pay ¥300,000 on shares of a certain company which were in its name. The appellant was indebted to its parent company; I assume the indebtedness was consequential to their commercial operations. The appellant sold the products of the parent company. It did business in Japan; it had Japanese currency. The call on the parent company was to be met in Japanese money. It requested its subsidiary to make the payment. It then relieved its subsidiary of its debt to the extent of the amount of the payment. So the parent company creditor was paid in part and subsidiary debtor was relieved of part of its obligation. The ¥300,000 having been paid at the request of the parent company was drawn from an overdraft current account purporting to meet its business obligations. The above sum was paid not only to meet a

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call made on the parent company for the shares it had purchased but also to pay off part of its indebtedness to the parent company. The ¥300,000 was repaid to the bank by the appellant long prior to the closing of its office in Japan. I believe this to be the only logical explanation which can be made of the whole deal.

A certain number of leading cases on the subject of foreign exchange profits were referred to by counsel for both parties in their argument. It goes without saying that the appellant relied on those cases where it was found that the exchange profits arose in respect of funds which were considered as part of the taxpayer's capital assets and therefore not taxable. On the other hand, the respondent laid stress on the decisions dealing with foreign exchange derived from revenue or trading assets which were taxable income. In my opinion, the facts herein contained should be considered in relation to the facts which were the basis of the above decisions.

I shall deal with two English cases in which the exchange profit was held to be of the nature of a capital gain.

The first case is that of *McKinlay v. H. T. Jenkins and Son, Limited*[1] where it was held that the exchange profit was not a profit arising out of the contract for the supply of marble, but was merely an appreciation of a temporary investment, and was not assessable as part of the profits of the Company's trade. This decision was based on the following facts.

Under an agreement for the supply of a quantity of marble by a company of marble and stone merchants to certain building contractors, the contractors agreed to advance part of the price, percentage deductions to be made from the amount due on each consignment until the advance had been repaid. The amount of the advance paid to the company was credited to an account at a London bank. In anticipation of the required marble being purchased in Italy, the company arranged for the conversion of the greater part of the advanced pounds into lira. Later the lira having appreciated in value, the company sold the lira at a profit. The lira were subsequently repurchased for

[1] 10 T.C. 372.

the purpose of the contract for a lesser price than that at which they had been sold. The profit arising from the exchange transaction was, for the purposes of assessment, computed in the company's taxable income. The Court ruled that the amount was not taxable.

The second case is that of *Davies v. The Shell Company of China, Ltd.*[1] in which the Court of Appeal upheld the findings of the Special Commissioner that an exchange profit arising from deposits in the nature of performance guaranty made by the company's selling agents abroad was a capital profit. The company, in this instance, was free to use the money in its hands for investment purposes and it was found that it did, in fact, so use it, and not as circulating capital for the purpose of carrying on its trade of dealing in petroleum products.

The appellant herein, through its branch office, had with the bank an overdraft account which was used for the purpose of carrying on its trade dealings in aluminium and related products. Among the companies with which it dealt in its business activities was the parent company to which it was indebted following their commercial transactions. The appellant was requested by the parent company and agreed to pay off a debt of the parent company. To do so, it drew an amount of ¥300,000 from its overdraft account. In return the parent company credited the appellant for the said sum on account or in part payment of its debt. As time went on, the appellant paid back to the bank the amount disposed of as stated above by making deposits in its overdraft account from the proceeds of its trading operations. All this was done some time before the appellant closed its Japanese office. In my view, there is no comparison possible between these facts and those before the Courts in the above cases.

The *Tip Top Tailors* case[2] was discussed at length before the Court. In that case the company was in the business of manufacturing and selling clothing at retail. . . . It purchased large quantities of cloth and other supplies and for many years followed the practice of paying for such goods immediately after receipt. . . . A very substantial part of

[1] 32 T.C. 133.
[2] [1955] Ex. C.R. 144; [1957] S.C.R. 703.

its purchases were made in the United Kingdom and for many years the suppliers had been paid in a somewhat different manner. The accounts of these supplies were all payable in sterling funds and it was necessary for the company to purchase and remit sterling funds. Believing that the pound sterling would be devalued, it made an arrangement with its bank in London for an extended line of credit. It made remittance in sterling to this bank, but not in sufficient amounts to take care of the suppliers' accounts. The overdraft progressively increased and in 1949, when the pound was devalued, it paid its overdraft to the bank by purchasing sterling at the lower rate and thereby settled its liability at less than it would have been required to pay had sterling not been devalued.

In that case, Cameron J. of the Exchequer Court held (*inter alia*):

> That the profit received by respondent was one made in the course of its normal business operations while carrying out a scheme for profit-making.
>
> That the loan by the bank was used to pay trade accounts and was circulating capital used in the trade; the fixed capital of the respondent was at no time employed in the transactions and the profit when made did not affect the capital structure of respondent in any way but was an increase in its trading profit and available for distribution to its shareholders.

The Supreme Court of Canada upheld this decision. Rand and Fauteux JJ. found:

> That the profit was not to be regarded as one on a collateral borrowing of capital but rather as one derived from the "business" in which the company was engaged. The loan produced working capital used in the course of the company's business and in substance the creation of debt in the bank was merely a substitution of creditor for the actual transactions. There was no temporary investment in foreign capital.

The evidence adduced by the appellant is to the effect that its trading operation was the obtainment of orders, the placement of these with suppliers, the purchase of the requisite metal by the head office or by other associated offices and the sale to the customer. The financing of such transactions was largely made by arrangement of credit terms with the suppliers compatible with those extended to the customer. Branch offices such as the Japanese office received credit for the profits resulting, with flow of cash to head office from customer remittances. The financing of

these offices was generally limited to an amount sufficient to meet selling and administrative expenses and other local currency outlays. For the financing of its Japanese operations, at the outset the appellant borrowed monies from the bank on a time basis, but in 1938 it borrowed on current account advances by way of overdraft. It was stated that in Japan the appellant's office had no other funds than the above mentioned and that they were used for import duties, salaries, general administration and furnishings for the office. It was from the overdraft account that an amount of ¥300,000 was drawn to make a payment in the name of another company, to wit, its parent company.

As the documents on file show that the amount of ¥300,000 was repaid to the bank in yen currency before the closing of the Japanese office, the only question to be determined is whether the exchange profit on settlement of the Japanese Yen Loans is includible in the appellant's taxable income.

There is no doubt in my mind that the monies borrowed by the appellant from the bank were for the purpose of carrying on its business operations. The debt due to the bank was incurred for the purpose of gaining or producing income from its business. The profit realized from the use of the funds obtained for the purpose of carrying on a business and of producing income from the business seems to me to meet the requirements of s. 4 of the Act.

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.

At the time of the settlement of the yen borrowings, the appellant was indebted to the bank in the amount of ¥713,014.05. The amount had been borrowed not for capital purpose, but, as stated in evidence, to pay for the current expenses of carrying on the business. The borrowings were not made for investment purposes but to meet the expenditures incurred in the operation of its business activities. In other words it was circulating capital used in its trade.

As a matter of fact, the appellant carried on its trading operations in Japan through a branch office, not through a distinct entity, and all its activities there were in the nature of trade financed by borrowed funds in local currency. Its

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dealings with the bank were in Japanese yen. It seems well established that the funds secured from the bank were intended to be used for and were used for non-capital purposes. Even the ¥300,000 payment for the parent company was used to cover part of the appellant's indebtedness to the parent company, resulting, no doubt, from their business transactions. In its books the appellant carried its indebtedness to the bank as a current liability and not as a capital debt. It treated the profit realized in the settlement of the bank loans as a profit in its profit and loss account and it was only later that, in reconciliation for income tax purposes, it treated it as a capital profit. All the facts established have convinced me that the exchange profit herein resulted from trading or dealing in foreign exchange and from funds received on revenue account.

It could not be otherwise under the system which was followed by the appellant in its trading operations. It sold the products for Japanese yen which, in the final analysis, had to be converted in dollars when the flow of cash arrived at its head office from the remittances of its customers. The reverse had to take place when the appellant had to meet the expenses of its dealing operations in Japan. It had to buy or borrow Japanese yen to meet its obligations. So it is reasonable to conclude that part of its business activities was dealing in foreign currency. The profit or loss from these financing operations, a necessary element of its business, was in the nature of revenue account and to be considered in assessing the taxpayer for income tax purposes.

I have come to the conclusion that the amount of the indebtedness of the appellant to the bank at the time of the settlement of the debt consisted of sums borrowed on demand loans and on advances by way of overdraft on its current account. The sums thus borrowed had been used by the appellant to finance its trading operations and was circulating capital used in the trade. The profit made on the exchange of dollars for yen, when it settled its account with the bank in Japan, was made on funds which had been borrowed and used to pay expenses of its trading operations.

Though the buying and selling or the exchanging dollars for yen was not the primary business of the appellant, that operation was necessary for the purpose of its transactions on revenue account and the settlement of its debt with the bank in Japan was a part of its trading operations.

That is why I find that the profit realized by the appellant on the settlement of its debt to the bank was includible in its revenue income and assessable for income tax purpose.

Therefore the appeal is dismissed and the respondent's assessment of the appellant's taxable income is affirmed, the whole with costs to be taxed in the usual way.

Judgment accordingly.

1959
Feb. 2, 3, 5
June 4, 5

1960
March 15

BETWEEN:

STANDISH HALL HOTEL INC. ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Expropriation—Abandonment of part of expropriation—Compensation—Expropriation Act R.S.C. 1952, c. 106, ss. 9, 23, 24(1)(4).

Respondent expropriated suppliant's property consisting of a hotel and a house in Hull, Quebec, and nearly two years later abandoned the expropriation of the major portion. Prior to the date of the expropriation the buildings on the property had been severely damaged by fire. By its petition of right suppliant seeks recovery from the respondent for loss suffered by reason of the abandonment and the alleged value of the land which remained expropriated. Suppliant also claims damages for the deprivation of a registered servitude consisting of a right of passage over neighboring land acquired by respondent who erected a building thereon which blocked suppliant's right of way. During the period title to the property was held by respondent the suppliant, while remaining in undisturbed possession of it, was restricted in effecting substantial repairs to the property and in the operation of it. Claims for loss of goodwill and patronage, for loss of potential profits and additional profits, for recovery of expenditures on temporary repairs, for architect's bill for preparation of plans for a new structure which were never used, for additional costs of works executed and for expert valuator's and legal fees are also put forth by suppliant.

Held: That there was insufficient evidence to justify any allowance for loss of good will.

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2. That there is no assurance that had suppliant been permitted to make earlier the expenditure it laid out in restoring the pre-fire earning capacity of the suppliant profits similar to those of the pre-fire era would have been realized.
3. That there is no evidence to justify an award for loss of additional profits since it was not established that but for the expropriation proceedings suppliant would have proceeded with the erection of a larger structure.
4. That the cost of temporary repairs was too remote a claim and in any event the suppliant had the benefit of them.
5. That the matter of expert valuator's and legal fees are to be considered as parts of the taxable costs and not for the Court to award.
6. That the claim for damages due to deprivation of the use of the right of way should be based on injurious affection provided for in s. 23 of the *Expropriation Act.*
7. That the respondent cannot be held responsible in tort for deprivation and subsequent abandonment because it was acting within its statutory powers. Compensation should consist of the value of the property to the suppliant at the time of the expropriation compared with such value on revesting, bearing in mind the reduced earning capacity due to the fire.

PETITION OF RIGHT to recover the alleged value of property expropriated by the Crown.

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

John Ahern, Q.C. and *Harold Maloney, Q.C.* for suppliant.

Guy Favreau, Q.C., T. Labbé, Q.C. and *Paul Ollivier* for respondent.

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

KEARNEY J. now (March 15, 1960) delivered the following judgment:

This action concerns a claim for compensation made by the suppliant and arising out of expropriation proceedings taken by the respondent but which were later in a large measure abandoned.

By deed of sale in notarial form dated September 29, 1925, the suppliant became the registered owner of a property situated in ward 2, District of Hull, Que., consisting of part of lot 304, lot 306 and part of lot 307, having a total area of 86,536 square feet, on which had been erected a house bearing civic number 16 Montcalm Street and a hotel known as the Standish Hall Hotel.

On July 19, 1952, the respondent caused to be deposited in the Registry Office for the District of Hull a notice of expropriation, together with a plan and description which included among properties belonging to others, the said property of the suppliant, the whole in conformity with the *Expropriation Act,* R.S.C. 1927, c. 64, s. 9 (now R.S.C. 1952, c. 106, s. 9), whereupon the said property became vested in the respondent.

On May 18, 1954, twenty-two months later, the respondent, in the manner contemplated in s. 24 of the Act, caused to be registered in the aforesaid Registry Office a declaration in writing that the expropriation in question, except in respect of a portion of lot 304, comprising 2007 square feet of vacant land, was abandoned, whereupon title to the abandoned portion became revested in the suppliant.

The suppliant, in its petition of right dated January 7, 1956, sought to recover from the respondent a sum of more than $500,000 for loss suffered by reason of the abandonment and revesting of over 84,000 square feet. Counsel for the respondent pleaded that the suppliant suffered no loss or damage as a result of the abandonment of the expropriation which was made of the major part of its property, as it remained in continuous occupation thereof throughout the twenty-two months in question.

In regard to the 2,000 odd square feet which remained expropriated, the suppliant sought to recover a sum of $36,126, being the alleged value of the land in question. The respondent states that the value of the above-mentioned land did not exceed $5,017.50 and that the suppliant is not entitled to any sum in excess of the said amount for the said land.

During the hearing counsel for the suppliant sought and was granted permission to amend the petition of right by adding thereto a claim of $36,000 for damages arising from the deprivation of a registered servitude consisting of a right of passage over neighbouring land acquired by the respondent who erected thereon a building which blocked the suppliant's right of way. The respondent admits that the suppliant was cut off from its right of way but denies that it thereby suffered any damage.

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Adjudication of the value of the small parcel of land expropriated presents only the usual difficulties encountered in expropriation cases, and the same is true with respect to the claim in connection with the loss of a right of way; but the legal aspects of the larger claims arising out of the abandonment of the expropriation, I find, are many and are rendered more complicated in some instances by the unusual counterbalancing facts and circumstances revealed in the record.

I will deal immediately with the larger claim. It is in the light of s. 24(1) and (4) of the Act that this portion of the suppliant's claim is to be determined.

24(1) Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

(4) The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken. R.S., c. 64, s. 24.

The facts of abandonment and revesting are admitted and I will endeavour to set out in chronological order all further circumstances and factors which, in my opinion, in some measure may be said to be related thereto.

For some time prior to 1949 James Maloney was the president of the suppliant company and the sole owner of 1,483 shares of the capital stock, being all of its issued stock, with the exception of three qualifying shares. On December 25, 1949, by deed passed before Notary Henri Desrosiers at Hull, Que., Mr. Maloney promised to sell to Charles Coulombe who promised to purchase the said 1,486 shares for the sum of $675,000, but by an indenture later entered into between the same parties the sale price was altered to $775,000. The purchase price was payable as follows: $2,000 on February 1, 1951, and a like sum on the first day of each subsequent month for a period of twenty years, at the expiry of which any balance owing was to be paid. The promising purchaser was also required to pay on the first day of each month, beginning February 1, 1951, during the

twenty years, two per cent interest on any unpaid balance of the purchase price. Should the promising purchaser fail to make any payment when due, then the promising vendor could require him by notice in writing to make good the default within thirty days and, in the event of his failure to do so, the agreement would lapse and the promising purchaser would forfeit to the promising vendor as liquidated damages any monies paid on account. During the pendency of the agreement, the endorsed shares were to remain deposited in escrow at the main office of the Banque Provinciale until payment had been made in full, whereupon they would become the property of and be delivered to the promising purchaser, or until a default occurred, whereupon they would be returned to the promising vendor.

Mr. Coulombe took over the presidency of the suppliant company in December 1949 and on August 5, 1951, a serious fire occurred in the hotel, and as a result the buildings alone suffered damages to the extent of almost $200,000. Some time between the date of the fire and the end of the year Charles Coulombe defaulted and under the provisions of the sale agreement Mr. Maloney resumed the presidency of the suppliant company in January 1952.

During the eleven and a half months which elapsed between the fire and July 19, 1952, when the respondent expropriated the property, the suppliant, while awaiting payment of fire insurance benefits, made repairs of a temporary nature which enabled it to retain its liquor licence, but the kitchen and dining room were almost, if not totally, destroyed and most of the bedrooms rendered unusable, with the result that revenues from meals and room rentals were greatly curtailed. A short time prior to receiving the notice of expropriation, the suppliant had caused plans to be prepared for building an enlarged hotel at an estimated cost of $590,000, excluding architects' fees based on two per cent of such cost. This project was later replaced by a less pretentious one, more or less involving a restoration of the original structure which was completed in 1955 at a cost of $175,000.

Between the notice of expropriation of July 19, 1952 and the notice of abandonment of May 18, 1954, the respondent filed an information in this Court which was served upon

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the suppliant on September 24, 1953, wherein the respondent offered to purchase the property expropriated, free and clear of all encumbrances, for the sum of $300,000 in full payment thereof including any real or pretended damages which the suppliant might claim; and wherein, failing acceptance, the Court was asked to declare either that the said sum constituted a just indemnity or, if not, that it determine the amount payable to the suppliant. No further proceedings were taken under the information which was withdrawn by consent and replaced with proceedings under the instant petition of right.

Throughout the twenty-two months during which the respondent retained title to the property, the suppliant remained in undisturbed possession of it. On the other hand, while it is true that the original cause of any alleged loss of earnings and goodwill was the fire, its effects were aggravated and prolonged because so long as the respondent retained title to the property the suppliant dared not expend the monies required to restore its earning capacity.

The suppliant claims that, as a direct result of the expropriation and its inability to rebuild throughout the period of nearly two years during which the respondent retained title to the property, it suffered damages described under various headings; but the petition of right omits to set forth to what extent, if any, these claims when considered alongside counter-claims had the effect of diminishing the value of the property to the suppliant on revesting. Undoubtedly this Court has wide powers to deal with a case of this kind. Chief Justice Fitzpatrick in the leading case on revesting, *Gibb v. The King*[1], made the following pronouncement concerning s. 23(4), R.S.C. 1906, c. 143, which corresponds to s. 24(4) of the present Act:

> The power conferred upon the Minister by this section is a very exceptional one since it enables him to vest the land in a person even against his will. We might expect that the rights of persons affected by this arbitrary power would be carefully safeguarded by the legislature and that is what in fact we do find, for I do not know that protection in a wider form could be afforded to their interests than it is by subsection 4 of section 23. This gives the court the most ample and general authority by simply providing that in estimating the compensation to be paid for the land taken the fact of the abandonment is to be taken into account.

[1] (1916) 52 Can. S.C.R. 402, 407.

A question arises as to the proper form of approach and, for reasons which appear later, I think it is expedient, if not essential, in this case to make an estimate of the value of the property to the suppliant at the time of expropriation compared with such value on revesting. This is what was done in the case of *Mathys v. The King*[1] which is a case of revesting not unlike the present one. In the *Mathys* case it was the market value of the property which went down but in the present instance it is the value to the owner which, I think, should govern, and Mr. Maloney testified that its value to the suppliant had diminished on revesting. Before making the above-mentioned estimate I will enquire whether and to what extent the items claimed under the following headings are justified by the proof.

(1) Loss of goodwill and patronage.

While conceding that goodwill is an intangible asset and difficult to evaluate, counsel for the suppliant submitted that between $35,000 and $40,000 should be allowed under this heading, based on ten per cent of the average yearly gross revenue or sales over a five or six year period of operations. In the first place, the inconveniences, lack of facilities, services and unsightliness of the hotel, which were the result of the fire (see Ex. O) and which had existed for nearly a year prior to expropriation, could not do otherwise than adversely affect goodwill and patronage.

Evidence was led for the purpose of showing that other hotels in the vicinity, because of the expected demolition of the Standish Hall, hastened to expand their premises, making it all the more difficult for the suppliant to regain its former popularity. Mr. Maloney stated in evidence that several hotels in the vicinity were enlarged, even doubled in size, during the time of the expropriation and he mentioned five such places. From the testimony of Mr. Adéodat Lambert, Inspector of Buildings for the City of Hull, it would appear that only three building permits were issued to hotels during that period, including one for $4,000 to cover repairs to a vestibule; and the other two for a total of some $31,500.

[1] [1934] Ex. C.R. 213, 215.

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It is because public patronage is fickle, particularly where service accompanied by entertainment is sought, and because revenues in this field are so dependent on costly expenditures, such as $80,000 and $47,000 spent by the suppliant in 1951 (Ex. H), that goodwill, if mentioned at all, is usually carried on a company's books at a nominal figure. Kohler in *A Dictionary for Accountants,* second edition, p. 238, speaking of goodwill, states:

> . . . Various methods exist for computing goodwill on the basis of earning power. Since its value cannot be verified by reference to objective evidence, and since it is, moreover, subject to constant change because of economic conditions generally and other uncontrollable factors, it has been the general practice in recent years to eliminate good will from the accounts.

In my opinion there is insufficient evidence to justify any amount for loss of goodwill.

(2) Loss of potential profits.

The next item is a claim for prospective profit which the suppliant was prevented from realizing during the twenty-two months preceding the abandonment of the expropriation. This item, which is an important one, is difficult to resolve. I am unaware of any hard and fast assessment formula which properly could be applied to the unusual circumstances prevailing in the instant case and any improvised one will, I am sure, not result in anything more accurate than an approximation. One approach whereby an assessment might be made of the likely profits that the suppliant would have realized in twenty-two months but for the expropriation is to refer to the financial statements of the company covering the period from January 1, 1945, to December 31, 1957 (Exs. D to N and Ex. 17), in order to establish and use as a yardstick the average amount of the net profits made during that period. To do so would reflect two full years' operations following the restoration of the premises which was completed in September 1955, and would on my calculations establish the amount of the average net profit at approximately $700 per month or $15,400 for twenty-two months. I do not think that the results of the operations carried out in 1951, which begot a loss of $49,000, should be looked upon as those of a normal year because of the destructive fire which occurred in mid-year. The six months of 1951 preceding the fire might well

be taken into account but no breakdown of operations for that year on a monthly basis has been made available. Counsel for the suppliant submitted that the calculations should be based on the difference between the average net profit per month realized during 1945 to 1950 compared with the monthly average net losses incurred during 1952 to 1955, which would amount to $1,840 per month, or approximately $40,500 for twenty-two months.

If the period from 1945 to 1950, both inclusive, were considered as an aceptable norm, the average net monthly earnings would amount to $1,180, and for twenty-two months almost $26,000. The more speculative the business involved, the less reliable are past earnings as a reflection of those which may be expected in the future. There are unquestionably speculative elements in the suppliant's business, but there is at least one facet of its operations which can be reasonably relied upon to produce net revenue at low cost.

An examination of the financial statements (Exs. D to N) show that room rentals were realized with little overhead expenditures. Rodolphe Maheu, a member of the Institute of Chartered Accountants, and auditor of the suppliant company, testified that the most paying proposition in a hotel which is well organized are the rooms, because expenses directly pertaining to the rooms are very, very low, and consequently gross rental receipts though small compared with overall sales can have a very important bearing on the net income of the enterprise.

The suppliant company was in a position, once the proceeds from the fire insurance policies began coming in in 1952, to rebuild *inter alia* the bedrooms which had been destroyed. As appears by exhibits I, J and K, bedroom returns were low during part of 1952, 1953 and 1954, but during the twelve months following their restoration in 1955 the net revenues compared favourably with those of the best previous year (Ex. M). Room rental returns for 1945 and 1946 were not produced but for 1947 to 1957, both inclusive, they averaged nearly $21,000 per annum; and room rental is probably the most reliable and stable source

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of revenue which the suppliant may depend on. In connection with the dining room revenue, Jacques Smits, a manager of hotels under trusteeship, who in 1952 was in charge of the Windsor Hotel which is not far from the Standish Hall, stated in evidence that, in his opinion, the hotel business to be successful must be built around its dining room. The overhead in respect of dining room service is much larger than in the case of room rentals, and to a lesser extent it can be considered as a fairly stable source of revenue.

The overall picture of the situation, as reflected in the financial statements stretching over thirteen years, requires careful study, in the course of which, I think, the following circumstances should be borne in mind. The fire of August 1951 greatly reduced the earning capacity of the suppliant and, notwithstanding that certain temporary repairs were made, the same conditions largely remained at the date of expropriation as well as at the date of revesting. The pre-fire earning capacity of the suppliant could be restored only by a delayed expenditure of approximately $175,000, and the added cost of building due to the delay should be reckoned with; but this same increase in building costs would serve to increase the value of that portion of the building unaffected by the fire because its replacement cost would be increased. I will deal with the last-mentioned factors later when I endeavour to estimate the value of the property to the suppliant at the time of the expropriation compared with such value on revesting. The suppliant, by expending $175,000 during part of the years 1954-55, reaped a net profit of $45,000 in round figures on 1956 operations which dropped to $21,000 in 1957, or an average of $33,000 a year. There is no assurance, however, that if the suppliant had been permitted to make the same expenditure during 1952, similar profits would have been realized. It is possible but not likely that a loss such as took place in 1950 would have re-occurred. In my opinion, however, it is more probable that the net profit would have exceeded the 1945-50 average by about ten per cent. Under the circumstances, including those considered later, I think that the suppliant, owing to the expropriation followed by revesting,

was deprived of a profit of $1,300 a month or $28,600 which it otherwise would have realized during the intervening twenty-two months in question.

(3) Loss of additional profits.

Additional profits allegedly totalling $220,000 would have been realized if, instead of spending $175,000 (including architects' fees of $7,500) on renovations as was done, the suppliant had expended $590,000 on a greatly enlarged structure as was at one time contemplated. The suppliant, in my opinion, has failed to establish that, but for the expropriation proceedings, it would have proceeded with the larger structure, which makes further consideration of this claim unnecessary.

(4) Recovery of expenditures on temporary repairs.

A sum totalling about $30,000 (Ex. 16), representing repairs, alterations, decorations to the existing building and a temporary entrance is claimed under this heading. As I read the evidence, the repairs in question began in August 1951, shortly after the fire, and continued throughout the remainder of that year. They were undertaken chiefly, if not exclusively, to maintain in good standing the suppliant's liquor licence and turn it to account in order to partially offset the reduced earning capacity of the hotel attributable to the fire. The suppliant had the benefit of the said repairs which as a stop-gap served a useful purpose and, for what they were worth, acquired title to them on revesting. Under the circumstances any claim under this title is too remote to merit recognition.

(5) Architect's bill for preparation of plans for new structure which were never made use of.

Architect W. E. Noffke rendered an account to the suppliant amounting to $11,800 for architects' fees, on which nothing has been paid. Mr. Noffke testified that about a month prior to the notice of expropriation he received a rush order from the president of the suppliant to prepare sketch and blueprint plans (Exs. 2 and 3) for the enlarged hotel project already referred to, upon which he immediately commenced to work. It appears that a couple of days before the expropriation notice was filed he saw a newspaper item announcing the intended expropriation of

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the instant property and he thereupon ceased work on the plans. His fees were based on two per cent of the estimated cost of $590,000 for the new structure. It was proven that two per cent of the estimated cost of the structure is recognized in architectural circles as a proper fee for the preparation of complete plans; but it is admitted that in the instant case no specifications or calls for tenders were prepared, and completion of the plans would have required about another three weeks. A fee for the preparation of plans based on two per cent of the estimated cost of the structure was allowed in the case of *Federal District Commission v. Henri Dagenais*[1] but in that case the plans were further advanced than in the present instance and no revesting occurred. Under the circumstances I think that a fee of $3,500 would be adequate compensation. After some hesitation I am prepared to place this item in the same category as item (2) and look upon it as a factor tending to decrease the value of the property to the owner on revesting. According to the evidence, because of non-payment of his fees, Mr. Noffke had a falling-out with Mr. Maloney, and the former tendered at the hearing an assignment from the suppliant covering any award made by this Court in connection with the above-mentioned architects' fees. I do not think this Court should concern itself with the assignment, particularly as I understand it is the practice for the Crown, in effecting payment in like circumstances, to make the cheque payable jointly to the suppliant and to the architect.

(6) Additional costs of works executed in 1955 over 1952.

I will have occasion to review the above item, allegedly amounting to $26,250, when determining the value of the suppliant's property on revesting.

(7) Expert valuator's and legal fees.

Mr. Noffke was also engaged as an expert valuator by the suppliant to estimate the value of the expropriated property at the date of its expropriation and of its return and to testify in respect thereof as required. He claimed a sum of $22,500 for his services based on three per cent of his estimate of the value of the entire property at the date

[1] [1935] Ex. C.R. 25.

of expropriation amounting to $750,000. I will have reason to comment later on expert valuations made of the property; but, as this item is a matter of fees of an expert which form part of the taxable costs in the case, I consider that it should be referred to the Registrar of this Court for assessment.

The remaining item is a claim for legal services amounting to $7,000 which the president of Standish Hall Hotel Inc. paid on its behalf to the estate of the late Senator Elie Beauregard said to have been rendered in connection with expropriation proceedings. Legal fees, like experts' fees, are subject to taxation; and I likewise refer this item to the Registrar, as I think that the respondent should be required to pay taxable costs for services rendered by the late Senator Beauregard in respect of the information that was laid by the respondent and later withdrawn.

I will now deal with the item amounting to $36,000 which the suppliant added to other claims made under the title of damages, namely, the deprivation of the use of a right of way. It is an admitted fact that the suppliant's property enjoyed a right of passage over a portion of lot 303 which led from the rear of its property to Rue Principale; and that the respondent, by building a post office on that portion of lot 303, deprived the suppliant of this right of way. The evidence shows that the passage way had occasionally been used in connection with car parking at the rear of the hotel but that otherwise it had been rarely used; and that, apart from this right of way, the suppliant property had almost unlimited access to Rue Principale. This item, in my opinion, should be based on injurious affection, as contemplated in s. 23 of the Act which reads as follows:

> 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. R.S., c. 64, s. 23.

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I consider the compensation to which the suppliant is entitled by reason of the injurious affection suffered does not approach the amount claimed, and I would estimate it at $1,500.

I will now revert, for final disposition, to the amounts of $28,600 and $3,500 which I have already allowed, and also to the item of $26,250 claimed for added cost of construction which I have not dealt with. The respondent cannot be held responsible in tort for having deprived the suppliant of its title to certain properties and for having abandoned all claim to them after a lapse of nearly two years. In virtue of ss. 9(1) and 24(1) of the Act, the Crown was only doing what was specifically permitted and which, but for s. 24(4), might be done with impunity. In *Gibb v. The King*[1], which reached the Privy Council, Lord Buckmaster stated:

> Their Lordships are therefore unable to accept the view that the true measure of the appellants' right is something in the nature of a claim for damages for disturbing or injuriously affecting.

Commenting on the judgment rendered in the same case by the Supreme Court of Canada (*supra*), wherein the Court was equally divided, His Lordship went on to say:

> . . . that the judgment of Fitzpatrick C.J. was accurate in all respects, . . .

And the latter, at p. 409 (*supra*), speaking of the judgment rendered by the trial judge, said:

> The form in which the proceedings were brought before the court, may have induced the error into which I think the assistant judge of the Exchequer Court has fallen. It is not, as he says, an action for damages resulting from the abandonment.

As I mentioned earlier, an important element to be considered in this case is the value of the property to the suppliant at the time of revesting. In the *Gibb* case, the Chief Justice observed at p. 408 (*supra*):

> The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co. v. Lacoste,* to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of

[1] [1918] A.C. 915, 922.

the taking. *If, by the inverse process of expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.* (Emphasis supplied)

In endeavouring to arrive at the value of the property to the suppliant, its fair market value can be used as a guide. Messrs. Sherwood and Noffke admitted that with few, if any, comparative sales on which to base their fair market valuation, their only guide was their own knowledge and experience. In the opinion of Mr. Sherwood, the market value of the property at the date of expropriation was $440,743; and at the date of its abandonment, after taking into consideration the rise in building costs less depreciation, it was $458,050, being a net increase of $17,307. Mr. Noffke's figures, as of the same dates, were $750,000 (Ex. 12) and $764,979 (Ex. 13), showing a net increase of $14,979. Mr. Noffke made a miscalculation which vitiated his valuation on revesting when he misplaced a decimal point and deducted $7,305 in depreciation instead of $73,050. In addition, in my opinion, he overestimated the rate of depreciation and unlike Mr. Sherwood, failed to allow for the increase in land values and in the replacement value of the buildings. William Frazer Hadley, a real estate expert called by the respondent, testified like Mr. Sherwood that between July 1952 and May 1954, owing to a growing scarcity of vacant land the value of the unimproved portions of the suppliant's lot had increased, and so had the value of the improvements owing to increased cost of replacement. Neither is Mr. Sherwood's report (Ex. KK) free from error but, subject to certain corrections, I am prepared to accept his estimates of the fair market value of the property. In support of his calculations the following is found, beginning at p. 4 of Mr. Sherwood's report:

During the twenty-two months in which the property was held by the Crown, additional depreciation accrued to the buildings, so that when it was handed back it was less valuable to the extent of 1.8%, based on slightly more than 1% per annum (Montreal's Table of Structural Depreciation, as set forth in McMichael's Appraisal Manual, 4th Edition.)

On the other hand, the overall cost of construction index had risen throughout Canada by 6.4%, according to a recognized authority, (MacLean Building Report). As a result, the buildings were 4.6% more valuable at the date of return.

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	Value as of Date of Expropriation	*Value as of Date of Abandonment*
	July 1952	*May 1954*
LAND	$ 97,405.00	$ 99,851.00
BUILDINGS	$343,338.00	$358,199.00
	$440,743.00	$458,050.00

Increase in value during the twenty-two month period = $ 17,307.00

An extract from MacLean's *Building Reports,* which is annexed to Mr. Sherwood's appraisal, indicates that between July 1952 and May 1954, based on 1939 prices, the price index of materials fell while the wage rate index rose with the result that the index for the overall cost of construction was 252.7 for July 1952 and 259.1 for May 1954. The difference between these figures is 6.4 but it is expressed in points and not in percentage as assumed by Mr. Sherwood. In terms of percentage it amounts to 2.5 which, if substituted in the report for 6.4 per cent, would reduce Mr. Sherwood's increased value from $17,307 to $4,707. Mr. Noffke, relying on the MacLean *Building Reports,* stated (Ex. 7) that the same reconstruction carried out by the suppliant in 1954-55 at a cost of $175,000 could have been made in 1952-53 for $26,250 less. In coming to this conclusion Mr. Noffke misapplied the MacLean *Building Reports* in the same way as Mr. Sherwood. He also failed to confine his calculations to a comparison of costs as of July 1952 with corresponding costs as of May 1954 and, in addition, erroneously included architects' fees in his calculations. Had he properly applied the *Building Reports,* he would have arrived at $4,187 instead of $26,250. As already mentioned in my criticism of Mr. Sherwood's report, the proper figure to be employed is 2.5 per cent which, when applied to $167,500 ($175,000 less architects' fees of $7,500) results in an increase in overall building costs on May 18, 1954, as compared with July 19, 1952, of $4,187 instead of $26,250, which is based on 15 per cent of $175,000, as stated by Mr. Noffke. By deducting $4,187 from $4,707, the resulting figure of $520 represents, in my opinion, the net increase in the market value of the suppliant's property at the time of revesting compared with the market value at the date of expropriation.

Considering that, as of July 1952, the value of the suppliant's property had been reduced previously by the fire, I think Mr. Sherwood's estimate as of the date of taking, amounting to $440,743, represents its fair market value at the time; and that its corresponding value at the date of revesting was $441,263, but in my opinion this does not represent its value to the suppliant at these respective dates.

The promise of sale of all the issued stock of the company in 1949 for $775,000 may be regarded as some criterion of its worth to the suppliant in July 1952 but because of its unusual terms it is not convincing. The promising purchaser made no immediate cash payment, had control of the suppliant company for a year before the first instalment became due and was not personally liable in the event of default. I consider that as of July 19, 1952, the business as a going concern had, exclusive of fixed assets, a value in equity to the suppliant of approximately $100,000. This amount added to $440,743 would raise its value at the time of expropriation to $540,743. In my view, the value to the suppliant of the property on revesting had depreciated because of deprivation of profits amounting to $28,600 plus the sum of $3,500 which I would allow for the cost of plans less the sum of $520, previously referred to, and I would accordingly fix the value of the property to its owner as of May 18, 1954, at $509,163. Because of the foregoing factors included in items (2), (5) and (6) of its claim, I think the suppliant is entitled to succeed to the extent of $31,600, being the depreciation in value to the owner which the instant property suffered in the twenty-two month period during which the respondent retained title to it.

The last item to be dealt with is the parcel of land on the southeast corner of lot 304, comprising a total of 2,007 square feet. Mr. Noffke identified it on exhibit 10 by outlining it in pencil and marking it with an "X". It is more clearly shown on exhibit Q. Examples of comparable sales in the neighbourhood are practically non-existent. Mr. Sherwood in his written report (Ex. JJ) stated that in his opinion this property was worth to the owner at the date of expropriation $2.50 a square foot, or $5,017. During cross-examination Mr. Sherwood sought to shy away from that

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valuation, but I disregard this portion of his evidence. Mr. Noffke placed a valuation of $36,000, or $18 a square foot, on this small piece of property, although the highest sale on record in the neighbourhood was at $5.50 a square foot, and this sale occurred as late as 1958.

Mr. Hadley testified that he was interested in the Scott property which is on the east side of St. Redempteur Street and bears lot No. 715-1 and also in parts of lots 304-3 and 303-3 (see Ex. Q), which are contiguous to the instant property and belong to the E. B. Eddy Co. Mr. Hadley also stated that he had placed a valuation of $3.50 a square foot on the Eddy property to a depth of 100′ from Rue Principale and that, in his opinion, because of the smallness and irregular shape of the 2,007 square foot lot, he would value it at less than $3.50 a square foot. Although it is true that the lot in question is small, it is well located, fronting on Rue Principale, and I would place a valuation on it of $3.00 a square foot, or $6,021; and in addition I would allow ten per cent because of forcible dispossession, making a total of $6,623 for this piece of land, with interest from the date of expropriation.

Apart from this amount of $6,623, I consider that the suppliant is entitled to the difference in the valuation which I have placed on the revested portion of the property at the date of abandonment compared with the valuation as of the date of expropriation, which amounts in round figures to $31,600, with interest from May 18, 1954; and $1,500 for injurious affection due to loss of the right of way hereinbefore described, with interest from July 19, 1952. In addition to the three above-mentioned amounts totalling $39,723, the respondent will be required to pay such further amounts in respect of the two items of assessor's and legal fees as may be determined on taxation by the Registrar of this honourable Court. The whole with costs to be taxed in the usual way.

Judgment accordingly.

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May 26
1960
March 14

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

MARY ORLANDO .... RESPONDENT.

Revenue—Income—Income Tax Act—Sale of topsoil from property liable to expropriation proceedings—Whether proceeds capital gain or taxable income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(j), 139(1)(e).

The respondent in 1944 purchased a run-down farm on the outskirts of Toronto. The purchase was made as a long term investment in the belief the land would increase in value and also that it might be used for a mushroom farm, if the mushroom company owned by her husband in which she was a shareholder and then operating within the city limits, should be obliged to relocate. Between the years 1945-1953 the farm itself was operated at a loss but from 1945 to 1948 and from 1950 to 1952, respondent sold topsoil from the farm to the mushroom company but refused to sell to other would-be purchasers. In 1953 the Ontario Department of Highways notified her that it would require the 37 acres of the north part of the farm for highway purposes and offered her $1,500 an acre with the alternative of expropriation proceedings in the event of refusal. Shortly after receiving the notice she sold the parcel in question to a paving company and as part of the consideration the purchaser agreed to remove the topsoil therefrom to the unsold portion of the farm. The respondent then sold the topsoil so removed, realizing $18,500 in 1953 and $1,500 in 1954. The Minister assessed the amounts so received as income within the meaning of the *Income Tax Act*. On an appeal from a judgment of the Income Tax Appeal Board allowing the respondent's appeal from the assessment.

Held: That the whole course of the taxpayer's dealing with the topsoil indicated that she was disposing of it in a way capable of producing a profit and, with that object in view, the transactions were of the same kind and carried on in the same way as those of ordinary trading in the commodity and she therefore was engaged in an adventure or concern in the nature of a trade or scheme of profit making.

2. That the sums received from the sale of topsoil in the years 1953 and 1954 were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to taxation.

THE APPEAL was heard by the Honourable Mr. Justice Fournier at Toronto.

V. K. Colebourn and *W. R. Latimer* for appellant.

Hon. S. A. Hayden, Q.C. and *John G. McDonald* for respondent.

FOURNIER J. now (March 14, 1960) delivered the following judgment:

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This is an appeal from the judgment of the Income Tax Appeal Board[1] allowing an appeal by the respondent herein (appellant before the board) from income tax reassessments by the Minister of National Revenue for the years 1953 and 1954. The issue before the Court is whether the sums of $18,500 and $1,500 having been respectively realized in 1953 and 1954 by the respondent on the sale of topsoil, under the circumstances of the transactions, were income for the purposes of the *Income Tax Act*, R.S.C. 1952, c. 148, or capital gains.

The appellant contends that the sums of $18,500 and $1,500 received by the respondent in the 1953 and 1954 taxation years constitute income from a business within the meaning of ss. 3 and 4 of the *Income Tax Act*. He further contends that these sums constitute income from an adventure or concern in the nature of a trade and, therefore, income from a business by virtue of s. 139(1)(*e*) of the Act. As an alternative, the appellant submitted that the amounts received by the taxpayer were dependent upon use of or production from the property and therefore taxable under s. 6(*j*) of the Act.

The respondent disputes the appellant's contention on the ground that the sale of the topsoil was fortuitous and merely represented the advantageous disposition of a valuable capital asset upon the compulsory taking of a portion of land that had been held for a decade as a permanent investment. The respondent contends that the provisions of s. 6(*j*) do not apply because the amounts received were payments for a portion of the land sold to the purchaser.

As to the facts of the case, it is incumbent upon the respondent to establish, to the satisfaction of the Court, that the sums received were not profits from a business nor from an adventure or concern in the nature of a trade.

Here are the facts of the case. In 1944 the respondent was a shareholder of Maple Leaf Farm Limited of which her late husband was the majority shareholder and president. The company's mushroom farm was located in the metropolitan area of the city of Toronto. The rapid development and growth of this district and the continuous increase of its population gave her the idea that the company in which

[1] [1958] D.T.C. 534.

she was interested and from which her husband derived his livelihood would have some day to relocate its establishment and activities on a site farther away from the city and its dense population. The nature of the material and fertilizers used for the growing of mushrooms had an offensive odor which spread far and large. She thought this would not be tolerated forever by the authorities and the people of the community. For those reasons and also the fact that she believed the land situate not too far away from Toronto would eventually increase in value, she decided to invest in a farm 4½ miles distant from the mushroom farm.

She acquired a farm in Agincourt, Township of Scarboro, for the sum of $18,000. If it ever became necessary to discontinue the growing of mushrooms on the Company's land, its operations could be resumed on the property she had acquired. As a stockholder she was most interested in the continuous and successful operations of the company. In addition, its operation was her husband's chief occupation and source of revenue. On the farm that she bought was a stone house, a cattle barn with hay-loft, a silo and other smaller buildings or sheds. It was provided with all the necessary implements for raising crops and was well equipped for cattle raising. At the time, the only crop on the farm was hay; in season, she hired men to harvest and bale it. She sold the hay. The land being in poor condition, she left it in summer fallow for a while. Then she hired a man part time to take care of the buildings and attend to the chores on the property. He did the plowing, sowing and harvesting. Wheat was grown and it gave a fairly good crop. This went on from 1944 to 1953.

From 1945 to 1948 and from 1950 to 1952, inclusive, the respondent sold topsoil to the Maple Leaf Mushroom Farm Company. The receipts for the sales are enumerated in the reply to the notice of appeal and were admitted as accurate by the appellant.

The respondent explains how these sales came about. Every year, the company had been buying, from different parties, topsoil which it conditioned and used for the growing of mushrooms. After she had purchased the above property, her husband had suggested that if she were willing

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he would test the topsoil on parts of her farm and that if the tests established that the loam was suitable for the growing of mushrooms the company would consider buying some of the topsoil. She agreed that the experiments could be made and when the results became known she consented to sell to the company some topsoil from a designated area of the property. The company undertook to remove, condition and cart away the topsoil, paying $2 per cubic yard for same. Those were the only sales of topsoil from her property that were ever made by her. She was never engaged in the business of selling topsoil. She was not equipped to do so and was not interested. As a matter of fact she was approached by gardeners and landscapers in need of topsoil; she always refused to sell because she had acquired the farm as a long term investment and to replace the company's farm if it became necessary to do so. This went on for nearly ten years and, as appears on a summary of the farm operations for 1948 to 1954, at a loss most of the time for the respondent.

In 1953, the Government of the Province of Ontario decided to build a 4-lane highway to by-pass the City of Toronto. The highway was to cross quite a portion of the respondent's farm. She received a letter from the Department of Highways of the Province of Ontario advising her that it required 37 acres of her land and offering her $1,500 per acre for the necessary land. In the event of her refusal of the offer, the land would be expropriated. The amount offered was far less than what she thought her land was worth. Shortly after receiving the above notice and offer she was approached by a contracting firm which had been awarded a contract for building part of Highway 401. Miller Paving Ltd. offered to buy the 37 acres of land. After negotiations she agreed to sell, subject to certain conditions, a portion of her land.

Her farm was intersected in two parts by some land which had been expropriated by the Provincial Government for its highway and by a right-of-way of the Canadian Pacific

Railway. The sale to Miller Paving Ltd. was the portion north of the intersection. The agreement contains the following stipulations:

> And whereas the vendor and the purchasers have entered into a contract for the sale and purchase of the North Parcel and as part of the consideration therefor the Purchaser has agreed to remove topsoil therefrom to the South Parcel as hereinafter set forth.
>
> Notwithstanding anything herein contained, the purchaser will not use the North Parcel or any part thereof for the purpose of obtaining subsoil until the removal of the topsoil in accordance with the provisions of the next preceding paragraph.

After the above mentioned agreement had been signed, sealed and delivered, the respondent proceeded to dispose of the topsoil covering the 37 acres of land sold to Miller Paving Ltd., this at the rate of $500 per acre, or a total sum of $18,500. The appellant claimed this amount of $18,500 to be income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Act in respect of the respondent's taxation year 1953. Though these facts are the important ones, other facts will be noted in considering the reasons for judgment.

The sections of the Act on which the appellant relies 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)(*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 above sections particularize the meaning of the words "a taxpayer's income". In a word, it is stated that his income includes his profits from a business and that an adventure or concern in the nature of a trade should be considered as a business. The definition of business includes also a profession, calling, trade, manufacture, or undertaking of any kind whatsoever. The definition, as indicated by the words "undertaking of any kind whatsoever", does cover a very wide field and is not limitative. It goes far afield and extends the meaning of carrying on a business.

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It follows that any profit realized from an "undertaking of any kind whatsoever", unless otherwise excluded by the Act, must be considered as income. Under our *Income Tax Act,* though "capital gain" is not defined, it is generally recognized that the only receipts which do not attract taxation are the profits derived from the realization of an investment. The difficulty is that the distinction between an income receipt and a capital receipt is not always easily determined. In such cases the taxing authorities generally assess the receipts and the taxpayer is bound to show that the profit was derived from the disposal of a capital asset and not from a business.

In *Californian Copper Syndicate v. Harris*[1], the Lord Justice Clerk said:

> 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?

Where in doubt, to find the solution of the problem two main tests should be applied to the facts of the case. The intention test must not be limited to the object the taxpayer had in mind at the time of the purchase of a property but must extend to the time when it was disposed of. In other words the test should be applied to the investment from its inception to its termination. That is why the taxpayer's whole course of conduct in dealing with the investment must be scrutinized. The taxpayer's intention at the outset may have changed during the life of the investment or at its disposition.

In the present instance, at the time the respondent bought the property she was a shareholder and secretary of the Maple Leaf Mushroom Farm Ltd., a corporation which had to purchase regularly topsoil for the growing of mushrooms. Her husband was the principal shareholder and president of the above company. She was also a shareholder or partner in Scorsone Fruit Co. Ltd., which specialized in the purchase and sale of fruits and vegetables.

[1] (1904) 5 T.C. 159 at 166.

She stated that she had acquired the farm as an investment, believing that the property would increase in value and that eventually she would sell it to the company to replace the farm which the company operated to produce mushrooms for commercial purposes. Pending that time, she would maintain the property in a good condition and farm the land on a moderate scale. This she did, so at the outset it may be said that her intention was to keep the property for the purposes above mentioned. My opinion on this point is strengthened by the fact that after nearly ten years, and not of her free will, she did dispose of a portion of the farm and obtained a greater price for it than she had paid. She thus realized on the enhanced value of her investment a profit which in my view was a capital gain. But this is not the issue before the Court.

The gist of the dispute is the fact that, say one year after she bought the farm, she agreed to sell to the Maple Leaf Mushroom Farm Ltd. topsoil from her property at a price of $2 per cubic yard. As I have said, the company in which she had an interest was in need of topsoil for its gardening operations. Before the respondent had purchased her farm, the company bought its topsoil from different parties and this to the respondent's knowledge. Having acquired the farm as an eventual replacement of the company's establishment, it is logical to conclude that she knew that its topsoil was suitable for the growing of mushrooms. At all events, during the years 1945 to 1948, inclusively, and from 1950 to 1953, she sold topsoil to this one customer.

As established by the evidence, in 1953 the respondent sold a parcel of some 37 acres of her farm to a road construction company. As part of the consideration, the purchaser agreed to remove, at its own expense, from the land it bought the topsoil to a maximum depth of six inches and deposit and spread the same over on a part of the remaining portion of the respondent's property. After the signing of this agreement, the respondent sold this topsoil to the mushroom farm company for a sum of $18,500. The company, at its own expense, undertook to condition this topsoil deposited on the respondent's property and to cart it away. The sum of $18,500, price of the topsoil, was received

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by the respondent in the year 1953. In the same year, the respondent had sold topsoil to the company for an amount of $1,500. This sum was received by the respondent in 1954.

So part of the consideration for the disposal of a parcel of her land was a sum of money paid by the purchaser and a mortgage guaranteeing the payment of the balance of the sale price. The other consideration was the removal of the topsoil of the parcel sold to the remaining part of the respondent's property. I repeat, the profit realized from the transaction seems to me to have been considered as a capital gain. Now, what happened to the monetary consideration is not known; but what became of the topsoil, a marketable commodity in the district, is revealed by the evidence.

This topsoil, after its removal to the respondent's property, could have been incorporated to her land, become part thereof and enhance the value of her remaining farm. This was not done. When she agreed to sell the 37 acres and insisted that the topsoil be removed to her property, she knew that she could readily dispose of it. She had been selling topsoil to the mushroom farm for years and had on several occasions been approached by landscapers and market gardeners who wished to buy topsoil. She had refused these offers, but decided, under the prevailing circumstances at the time, to sell the commodity to the Maple Leaf Mushroom Farm Co.

Though the respondent acquired the farm as an investment, the manner in which she dealt with the asset in the period during which she held it is an important test to determine if the profits realized from its disposal are of an income or of a capital nature. Here we have a case where the respondent began selling topsoil from her farm about one year after its purchase. She repeated the same transactions year in and year out from 1945 to 1952 inclusively with the exception of 1949. In that year she did not sell topsoil to the mushroom farm, but in 1950 she sold topsoil in an amount of $2,600, twice the yearly average sold to the same party in the other years up to 1952. How should one consider repeated transactions when deciding if a party is carrying on a business or is engaged in a scheme for profit making?

Here is what Lord Hanworth had to say on this point in the case of *Pickford v. Quirke*[1] (p. 269, *in fine*):

> ... Now you may have an isolated transaction so independent and separate that it does not give you any indication of carrying on a trade. ... When, however, you come to look at four successive transactions you may hold that what was, considered separately and apart, a transaction to which the words "trade or concern in the nature of trade" could not be applied, yet when you have that transaction repeated, not once nor twice but three times, at least, you may draw a completely different inference from those incidents taken together.

In the *Cragg* and *Minister of National Revenue*[2] case, the President of this Court, Honourable J. T. Thorson, discussing the question of multiple transactions in which each of the profits realized could, by itself, have been properly considered a capital gain had become a profit or gain from business, said:

> ... Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances.

When the whole course of conduct of a taxpayer who had an investment in a farm indicates that in dealing with the topsoil of his property he is disposing of it in a way capable of producing profits and with that object in view and that the transactions are of the same kind and carried on in the same way as those of ordinary trading in that commodity, I am of opinion that he is engaged in an adventure or concern in the nature of a trade or in a scheme of profit making. In my view the fact that he is not advertising his goods nor selling them to the public at large is immaterial. On many occasions it has been held that a single transaction having the badges of an adventure or concern in the nature of a trade was sufficient to attract tax on the income realized therefrom.

The repeated sales of the topsoil in the manner described by the respondent, in my opinion, had, with some refinement, all the characteristics of ordinary trading in the commodity in question. She did not buy the topsoil and sell it, but she acquired a farm the topsoil of which was found suitable for the producing of mushrooms and she sold it to

[1] (1927) 13 T.C. 252.
[2] [1952] Ex. C.R. 40 at 46.

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the owners of a mushroom farm. She sold it on the property at $2 per cubic yard and the buyers undertook to take delivery on the farm at designated places, to condition it and cart it away. She incurred no expense in the operations involved and the sales went on for years.

When she had to dispose of a parcel of her farm, the agreement provided that the topsoil would be removed by the purchaser to another part of her land and this at his expense. This being done, she sold it at a fixed price on the condition that it be removed from her property at the purchaser's expense. There again there was no expense to the respondent in the operations involved.

In the final analysis, the respondent, when dealing with the Maple Leaf Mushroom Farm Ltd. in 1953, was not disposing of her land but was dealing with a commodity which had been deposited on her property and which was delivered, carted away and paid for by the buyers. As this transaction was preceded by many other sales during a long period of time and at a price and in a manner which could produce a profit, it cannot be said that the profit realized from the sale was a casual profit made on an isolated sale. The respondent incurred no expense nor made any outlay in these trading operations. The 1953 sale was one of many which from the moment when merged with all the others, in my view, clearly indicates that the respondent had embarked on a scheme for profit making, the profits of which are subject to taxation.

My conclusion is that the sums of $18,500 and $1,500 received by the respondent in the taxation years 1953 and 1954 were profits derived from an adventure or concern in the nature of a trade and not capital gains. They were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to taxation. I see no need of considering the alternative submitted by the appellant.

Therefore, the appeal is allowed with costs.

Judgment accordingly.

BETWEEN:

1960
Jan. 21
Mar. 21 & 22
Aug. 2

STERLING PAPER MILLS INC. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income or capital gain—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Purchase of wood lots with paper mill—Business not successful and assets disposed of—Sale of cutting rights on wood lots to recoup part of investment not a venture in the nature of trade—Money received from disposal of cutting rights is realization of part of capital and does not constitute income but is a capital gain—Appeal allowed.

Appellant purchased a paper making mill from Dominion Paper Company and in order to do so was compelled to purchase from the same vendor as a part of the transaction certain wood lots owned by the vendor and not required by the appellant and of no value to it. Later appellant sold the cutting rights on the wood lots in order to save some of the money paid for the entire estate, after it had vainly tried to dispose of all the assets purchased by it and had decided to cease operations.

Respondent assessed appellant for income tax on the "net proceeds on the sale of standing timber on a stumpage basis" as calculated by respondent. From this assessment the appellant appealed to this Court.

Held: That the appellant did not deal with the wood lots in the same way as a dealer in timber limits or cutting rights would have dealt and the transaction was not a venture in the nature of trade. The timber formed part of the entire assets purchased by appellant and the money it received from the sale of the cutting rights was the proceeds of the realization of part of its capital and did not constitute income but was a capital gain.

APPEAL under the *Income Tax Act*.

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

H. H. Stikeman, Q.C. and *P. N. Thorsteinsson* for appellant.

Paul Boivin, Q.C. and *Albert Sauvage* for respondent.

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

FOURNIER J. now (August 2, 1960) delivered the following judgment:

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In this case the appellant appeals from the income tax assessments of the Minister of National Revenue bearing dates March 7, 1957 and March 5, 1958 respectively, whereby a tax in the amount of $34,308.99 was levied in respect of the appellant's income for its taxation year 1955.

The facts alleged by the appellant, with a few exceptions, were admitted by the respondent. The Minister does not admit that the respondent, in July 1953, decided to sell all the assets it had acquired from Dominion Paper Company, or had attempted at the time to dispose of same, or that the sale made in 1954 of cutting rights on wood lots was its first opportunity to begin to recoup part of the capital it had invested in purchasing the assets. The burden of establishing these facts rests on the appellant.

The appellant is a corporation having been incorporated on May 12, 1952 under the laws of the Province of Quebec. From the date of its incorporation until the sale of all its assets in 1957, it carried on the business of making paper. In 1952, it purchased for $285,000 all the assets of the Kingsey Falls, Quebec, paper mill of Dominion Paper Company except inventory. The purpose was to obtain the Kingsey Falls paper mill and to produce paper.

Among the assets purchased were wood lots of approximately 4,673 acres in the Province of Quebec. The appellant did not wish to purchase the wood lots but Dominion Paper Company would not sell the mill at Kingsey Falls without the said wood lots. The appellant in fact never used the wood on these wood lots. It operated the mill and manufactured paper thereat from May 1952 until February 1957 and reported and paid tax on the operating profits in the intervening years in which profits were earned. The appellant or its representatives were motivated to purchase these assets by the fact that when the negotiations were commenced in 1950 and continued in 1951 there was a shortage of paper products on the market. The supply could not meet the demand and at one stage a quota system had to be applied to the clientele.

The assets were purchased in 1952, though the balance between supply and demand of papers manufactured by the appellant had been reestablished, because the negotiators had previously agreed to the sale and purchase and

on the conditions of the deal. After the acquisition of the mill, the appellant made improvements to the mill and its equipment. But the appellant was not successful in its enterprise: it had difficulty in marketing its products. It decided to sell all the assets it had purchased from Dominion Paper Company and to cease its operations at the Kingsey Falls mill.

On the facts which were not admitted by the respondent, Mr. J. I. Oelbaum was heard as a witness. He had experience in the manufacture of Kraft papers and knew that the then projected corporation, the appellant in this instance, would need a paper mill. He negotiated the deal with Dominion Paper Company on behalf of the appellant. He stated that in 1950 he had been informed that the above company had advertised that it had a paper mill for sale. He approached that company and offered to purchase their mill at Kingsey Falls. He was not successful because the company would not dispose of its mill without other assets including certain wood lots. Not needing the wood lots, he tried to interest other parties in their purchase. Among the companies he solicited was the St. Regis Paper Company, which, after having the lots surveyed and investigated, declined to make a deal because it would not be profitable to their operations. The other parties approached decided against the transaction for various reasons. This oral evidence is substantiated by documents filed as exhibits at the trial. I am satisfied that the appellant did not need the wood lots and accepted to purchase them as part of the other assets in order to acquire the paper mill.

On the point that the appellant decided to sell all the assets it had purchased from Dominion Paper Company and made repeated attempts to dispose of same, the evidence, oral as well as documentary, establishes beyond a doubt this to be a fact. Eventually, on October 27, 1954 the appellant did succeed in selling to one Paul Vallée cutting rights on the wood lots. It was the first real opportunity the appellant had of disposing of something of which it had become the proprietor by the purchase of the assets of Dominion Paper Company at Kingsey Falls, Province of Quebec. In 1957, it sold the paper mill and its equipment to the Quebec Government.

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The evidence establishes that the appellant, by the purchase contract of March 12, 1952 (Ex. A3), bought all the assets of Dominion Paper Company at Kingsey Falls, except inventory, for a lump sum of $285,000. This purchase included the wood lots in question but the contract did not allocate any part of the total purchase price thereto or to any other assets involved in the purchase. Only after the purchase was made did the appellant's auditors make an allocation for internal purposes of $17,200 to the wood lots in question.

During its operations of the mill, the appellant invested approximately $32,000 in improvements to the mill. So the total outlay for the purchase of the above assets and the improvements to the mill amounted to the sum of $317,000. These assets were disposed of in two sales: 1) sale of cutting rights, $100,000; 2) remainder assets, $112,500, or a total of $212,500.

The cutting rights were sold to one Vallée. The memorandum of agreement between the appellant and the latter is on file as Ex. A10; the important provisions thereof are as follows:

1. The company accords to Vallée the right to cut and remove standing timber on its lands and to retain for his own use any fallen timber on the said lands, which lands are more fully described . . .

2. The rights to cut timber as stated in paragraph 1 are limited to the following:—soft wood 3 inches and over in diameter on the stump.

3. The total consideration payable by Vallée shall be $100,000 payable as follows:

$50,000 in cash or by certified cheque at the time of the signing of these presents.

Payment of the balance of $50,000 shall be made as deliveries are made by Vallée to Waterloo Plywood Lumber of Waterloo, Quebec, and in any event the following amounts shall be paid not later than the dates specified:

$25,000 by July 1, 1955, without interest until July 1, 1955, and subsequent to that date with interest at the rate of 6% per annum on any unpaid balance of purchase price during the period July 1, 1955 to June 30, 1956;

The remaining $25,000 not later than July 1, 1956, with interest payable as stated in the clause immediately aforegoing.

19. The right accorded to Vallée in accordance with these presents to cut timber on the lands of the company as stated in paragraph 1 hereof shall endure for a period of six (6) years from the date of signing of these presents as long as he conforms with his obligations under the present agreement. . . .

These clauses of the agreement deal with the object of the transaction, to wit, the right to cut and remove timber from the appellant's lands during a period of six years for a total consideration of $100,000 to be completely paid by or on July 1, 1956, notwithstanding any other stipulation of the agreement, in the words of the document, "and in any event . . . the amounts shall be paid not later than the dates specified."

During its fiscal period or its taxation year ended June 30, 1955, the appellant received from Vallée a sum of $75,822.79 for the right to cut and remove timber from its land. In its taxation year ended June 30, 1956 it received from Vallée a sum of $24,177.21 as a balance for the same rights. In its 1955 income tax return the appellant disclosed receipt of the sum of $75,822.79 but did not include it in its taxable income. The respondent reassessed the appellant on two occasions for its taxation year 1955. The first reassessment, dated January 18, 1956, was for a total tax of $3,309.01 and no tax was levied on the basis of the sum of $75,822.79 received for the right to cut and remove timber from its lands. The second reassessment, dated March 7, 1957, added to appellant's income the sum of $51,373.79 on the ground that this amount constituted "net proceeds on the sale of standing timber on a stumpage basis." To arrive at this amount, the respondent had allowed as deductible the cost of the wood lots at $17,200 as allocated by the appellant in its opening book entries after it took over the assets of the Kingsey Falls paper mill.

The appellant objected to the notice of reassessment of March 7, 1957, but the respondent advised the appellant that it had reconsidered the assessment objected to and enclosed another notice of reassessment dated March 5, 1958, adding to the appellant's taxable income for the taxation year 1955 a further amount of $24,177.21 as follows:

	Taxable income previously assessed		$ 73,146.33
Add:	Sale price of timber as a stumpage basis ..	$100,000.00	
Less:	Amount revised to June 30, 1955	75,822.79	24,177.21
	Taxable income revised		$ 97,323.54

The appellant submits that there was no profit in the circumstances, because it suffered an overall loss on the purchase and subsequent resale of the Kingsey Falls paper

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mill assets. If there was a gain, it was outside the taxing provisions of the *Income Tax Act*, to wit, it was a capital gain and not a profit from carrying on a business or concern in the nature of trade. Furthermore, such gain, in any event, was not taxable, because it was realized in the course of liquidation of the appellant's assets carried out pursuant to a decision to cease operations and wind up its business.

On the other hand, the respondent contends that the appellant was assessed for the amounts received from the sale of the timber cutting rights because the cutting rights sold by the appellant were disposed of in the course of carrying on business and that the profit realized therefrom is taxable in the year of sale pursuant to ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

The provisions of these sections of the Act read,

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

(*a*) businesses

(*b*) property, and

(*c*) offices and employment.

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)(*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 difficulty in cases of this category is to determine if the facts established before the Court fall within the meaning of the terms of the above provisions of the Income Tax Act. Was the purchase of the wood lots in question and the sale of the timber cutting rights on same a business, an adventure or concern in the nature of trade or the acquisition and disposal of a capital asset? In the first instance the profit realized from the sale would be taxable, while in the second case it would not be subject to the taxing provisions of the Act. In other words, profits made in the sale of merchantable timber cutting rights are income if the timber lots constitute part of the trading rather than the capital assets of the taxpayer.

As there are seldom two cases wherein the facts are identical, it is generally acknowledged that each case must be determined upon the evidence adduced. Though decisions in similar matters are not always helpful, they should be kept in mind when considering the facts which form the basis of the issue before the Court. Seeing that the case of *Sutton Lumber and Trading Co. Limited and Minister of National Revenue*[1], heard in the Exchequer Court and appealed to the Supreme Court of Canada, was quoted by both parties in their argument, I think it useful to state the following words of Locke J., speaking for the Court (p. 93),

> The question as to whether or not the present appellant was engaged in the business of buying timber limits or acquiring timber leases with a view to dealing in them for the purpose of profit is a question of fact which must be determined upon the evidence. . . .

In that case a company sold a block of fir standing timber in 1946 after holding it for about fifty years. The only manufacturing operation carried on was the running of a cedar saw mill in 1907 on another tract. This Court held that the profit on the sale was subject to excess profit tax under the *Excess Profits Tax Act 1940,* but the Supreme Court of Canada reversed the decision on the ground that the company did not engage in the business of buying and selling standing timber.

It is apparent in the present case that the facts are most unusual. The taxpayer was intent on acquiring a paper mill to produce a special kind of paper. It was not interested in wood lots. Its production was based on sulphate pulp which it bought. The timber on the wood lots was not suitable for its purpose. It did its utmost to acquire the mill, the machines and equipment without the wood lots, but was not successful. It then approached several parties whom it thought would be interested in the timber lots before the deal was agreed to. Wrongly or rightly, it decided to purchase all the vendor's assets so that it could become the owner of a paper mill which it needed for its business of manufacturing and selling paper.

[1] [1953] C.T.C. 237; [1953] 2 S.C.R. 77.

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From these proven facts, in my view, one can draw the inference that the appellant invested $285,000 in the purchase of capital assets which would bring forth income from its business operations. True, part of the assets could not be used in the production of the special paper, but its inclusion in the assets was a *sine qua non* condition of the transaction. It was not included so that it may be disposed of at a profit or for the purpose of trading in wood lots or timber cutting rights. It was a part and parcel of the entirety of the capital assets acquired. So the capital in the amount stated *supra* was an investment in capital assets acquired by the appellant for the purpose of manufacturing and selling its special kind of paper. In other words, it was an investment in a property for the purpose of earning income which would attract taxation. I believe this to be a proper inference from the proven facts as to the appellant's intention when the assets were acquired and the manner in which the assets became its property.

Then when the appellant came in possession of the assets, it made improvements to the mill and the equipment and proceeded to manufacture its product. The operation had no success due to lack of market for its paper and to its poor quality. Eventually it decided to dispose of the assets as a whole. In 1953 it had prolonged negotiations for the sale of the entire operation and had advertised and negotiated for the sale of the wood lots, but without success. It decided to close down the operations in Kingsey Falls, dismantle the paper machine and have it removed and operated in Toronto. It was then that the Kruger Paper Company of Montreal said it would consider the purchase of the whole outfit. The purchase price was to be $285,000, the sum originally paid for the assets of the Dominion Paper Company at Kingsey Falls. The deal fell through because the Kruger brothers would not personally guarantee the transaction. After that it attempted to sell to the Canadian National Railway, the Quebec Government and some larger paper firms. It was only in October 1954 that it sold the timber cutting rights for $100,000, the Quebec Government taking over in 1957 the remainder of the assets for $112,000.

Those are the material facts which have been established and which are to be considered in determining if the amount of $100,000 received from the sale of the timber cutting rights on the wood lots, less the amount of $17,200 allocated by the appellant's auditors in its books for internal purposes, e.g., to determine the capital cost allowance which it would claim on the other assets, was a profit from a business or adventure in the nature of trade and taxable or a profit from the disposal of a capital asset and non taxable.

Counsel for both parties referred the Court to several decisions which may help to solve the problem at issue. They each gave what they thought was the proper interpretation to be given to the findings in the two hereinabove mentioned decisions. I shall now express my opinion.

The outstanding case is that of *Sutton Lumber and Trading Co. Limited* and *Minister of National Revenue* (*op. cit.*).

In that matter the company had acquired a number of timber limits and had disposed of them in three different sales, because, although they had been acquired for the purpose of being used in the operation of its saw mill, it found that they were unusable in connection therewith. In the present instance the wood lots were not acquired for the purpose of the manufacturing operations of its paper mill, but only to enable it to purchase the paper mill to be used in the manufacture of kraft paper.

Here are some remarks of Locke J. (p. 94),

> In the present case, the Nootka limits which were sold in 1946 were assets in which the company had invested with a view to cutting the merchantable timber into lumber in a mill to be erected by it in the Clayoquot District and the sale merely a realization upon one of its capital assets which was not required and did not fit into the company's plans for the operation of its main property and one which was not made in the course of carrying on the business of buying, selling or dealing in timber limits or leases.

The Supreme Court of Canada acknowledged that the sale of merchantable timber at an agreed stumpage rate could give rise to a capital gain.

Another case on which the appellant relied was that of *Thomson* and *Deputy Federal Commissioner of Taxation*[1], involving an appeal from the Supreme Court of Western Australia to the High Court of Australia. The facts being the basis of the appeal are as follows:

The appellant, Elizabeth Viola Thomson, was the lessee of a grazing lease of 1,000 acres of land selected from the Crown under ordinary grazing conditions and included in the farm of her husband. It had been acquired in 1903, and had been used for agistment purposes. In 1925 the appellant and her husband entered into an agreement with a timber company to sell to the company the growing timber not less than 4 feet 6 inches round the butt at a height of 3 feet from the ground, on her property and part of the property of her husband. The company was to cut and take away the timber for five years, for which the company paid £1,800, and of this sum the Commissioner of Taxation allocated £1,400 to the appellant and assessed her for income tax on that amount as income from property for the financial year 1926-1927. An appeal by the appellant to the Supreme Court of Western Australia against this assessment was heard by Draper J., who dismissed it on the ground that the proceeds of the sale of the timber after severance assessable as income in the same way as the proceeds of crops were grown and sold from cultivated lands or grass consumed by sheep on agistment.

This decision was reversed by the High Court of Australia. The judgment reads in part thus (p. 363):

> . . . She had taken up this land as far back as 1903. Neither she nor her husband took up the land with a view to growing or selling timber, and at first they had used it for grazing. It had, however, been eaten out by overstocking. There is therefore no question in this case of a business, trade, pursuit or avocation; and this the Commissioner in effect admits by treating the sum in question as income from property. Upon these facts we see no reason why the proceeds of the sale of the timber should be considered as income. The timber formed part of the asset which the appellant acquired when she took up the land. It is true that timber increases by growth, but that growth is not an increase in the value of the asset which may be detached and yet again recur annually or periodically. It would be contrary to facts to regard the land as a capital asset by which timber was produced with regularity as something in the nature of a recurring profit from the land.

[1] (1929-30) 43 C.L.R. 360.

The Court held that the money received by the appellant on such sale was the proceeds of the realization of part of her capital, and not assessable under the *Income Tax Assessment Act*, 1922-1927.

Two other cases, decided by the Exchequer Court, were quoted and dealt with by counsel for both parties. The first one is that of *C. W. Logging Company Limited* and *Minister of National Revenue*[1].

The appellant company was incorporated in 1934 under the *British Columbia Companies Act* with powers including that of carrying on business as timber merchants as well as conducting logging operations. Since incorporation the company confined its operations to logging on Vancouver Island except for two separate contract land clearing jobs. In 1950 it sold the merchantable timber of certain dimensions standing on a block of approximately 300 acres of land for $4,500. This block had been purchased by the company in 1936 and had been logged in that year. In 1952 the persons who purchased the cutting rights to the standing timber in 1950 also purchased the freehold title to the land on which the timber stood for $6,500. The Income Tax Appeal Board dismissed the company's appeal from assessments for 1950 and 1952 and included the two payments in income. On appeal to the Exchequer Court, Ritchie J. held (*inter alia*),

> That the 1950 sale of the cutting rights to the merchantable timber was a sale of the residue of the mature timber crop and was made in the course of carrying on a business of dealing with timber either by logging operations conducted by the appellant itself or by the sale of stumpage;
>
> That the 1952 sale by the appellant of the freehold lands was the sale of a capital asset purchased with a view of realizing a profit from logging them and not for the purpose of resale at a profit.

In the first instance, the profit realized from the transaction was held to have been made in the course of carrying on a business and taxable, on the ground, I believe, that the company's business was logging and dealing in timber. In the second finding, the profit was not considered taxable, being the sale of a capital asset.

[1] [1956] C.T.C. 15.

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The second case is that of *Gillies Bros. & Co. Ltd.* and *Minister of National Revenue*[1], in which Thurlow J. analyses the difference between the sale of the cutting rights and the sale of the timber itself. This company was upon a Crown land. It logged the trees and sold the timber; it also permitted contract loggers to do the same. The business of the company, however, was established to be of logging and therefore the proceeds were held to be taxable. In his judgment he said (p. 215),

> In this view, the appellant's business included the process of trading in British Columbia timber licences and the profits in question, insofar as they arose from sales of licences made by the appellant, were profits arising from such trading. With respect to them, the basis of the assessments has thus not been demolished. This feature distinguishes the case, so far as the profits from such sales are concerned, from *Sutton Lumber and Trading Company v. M.N.R.* [1953] 2 S.C.R. 77; [1953] C.T.C. 237.

The hereinabove cited decisions demonstrate clearly that a person who owns properties or commodities and deals with them in the same way as a dealer is considered as engaged in trading activities or that his transaction is an adventure or concern in the nature of trade and the profits derived therefrom taxable. If not, they were considered as the sale of a capital asset or disposal of an investment and the profits realized, if any, non taxable. I believe this to be the best test to be applied to the facts and circumstances of each case wherein it must be determined that the result of a transaction is of a capital or income nature. But this must be considered with the test of intention at the time of purchase or acquisition and disposal of the assets, whether property or commodity.

At the time of the purchase of the Dominion Paper Company's assets at Kingsey Falls, the appellant's sole object was to become the owner of a paper mill, because it had a market for its production. It was not in the business of buying or selling wood lands nor trading in timber cutting rights. The evidence clearly establishes that at the time it had no intention of trading in timber rights. True it tried to dispose of the wood lots, but it seems logical to believe that this was to recoup part of the amount invested in the total assets. This brings us to the time of sale. When the appellant realized that the operation of the assets acquired

[1] [1957] C.T.C. 190.

could not be a success, it decided to close the mill and use the machinery and equipment elsewhere. It then got an offer from a paper company to purchase the whole outfit. The price was to be the same as that the appellant had paid. This deal and others did not materialize for the reason explained *supra*.

In 1954 it did sell the cutting rights on the wood lots for a lump sum, but not on a stumpage basis, because the price of $100,000 of the rights was payable, at all events, within a short period of time, though the rights extended to six years.

These facts, to my mind, do not indicate that the appellant dealt with the wood lots in the same way as a trader in timber limits would have proceeded. A trader in timber cutting rights or timber limits does not buy timber limits in a block or bulk sale with a number of assets with the intention of never using or selling the timber. He generally buys something which he intends to deal with commercially. He buys it with the intention of trading in it and thereby realize a profit. He does not buy a timber limit which he does not need because he is intent on getting something else in the deal, and then has to dispose of it because he never wanted it. This would be foreign to any commercial *animus*. The appellant herein forcefully realized that the land on which timber stood had no value. It sold the cutting rights because there was nothing else it could dispose of to save at least some portion of the sum it had paid for the entire assets. It had been forced to buy the wood lots without wanting or needing them and did not sell them for a commercial reason. It succeeded in disposing of the cutting rights after it vainly tried to dispose of the entire assets and had decided to cease its operations. It did continue its operations until the Government of Quebec acquired the balance of the assets for reasons of employment of the local people.

I am of the opinion that the appellant did not deal with the wood lots in the same way as a dealer in timber limits or cutting rights would have or that the transaction was a venture in the nature of trade. The timber formed part of the entire assets purchased by the appellant and the

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money it received was the proceeds of the realization of part of its capital and should not be considered as income but as a capital gain.

For these reasons I would allow the appeal, vary the assessment and refer the matter back to the Minister for reassessment accordingly, with costs to be taxed in the usual way.

Judgment accordingly.

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BETWEEN:

AUDREY QUINN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

AND BETWEEN:

JAMES C. SHORTT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Business carried on by testamentary trustee for beneficiaries under a will—Whether net profits "investment income" or "earned income"—Income Tax Act, R.S.C. 1952, c. 148, ss. 32(1), (3), (4), 5(b).

For the purpose of the investment income surtax imposed by s. 32(3) of the *Income Tax Act,* R.S.C. 1952, c. 148, "investment income" is defined in s. 32(4) as "the income for the taxation year minus the aggregate of the earned income for the year . . ."; and, "earned income", for the purpose of s. 32, is defined by s. 32(5) as meaning "(*b*) income from the carrying on of a business either alone or as a partner actively engaged in the business".

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Under the provisions of a will a trustee carried on a business the net profits of which belong under the terms of the will to a son and daughter of the testatrix. The Minister treated the whole of the income from the business as investment income and assessed investment surtax accordingly.

Held: (Allowing the appeals of the son and daughter) That the material words used in clause (*b*) of s. 32(5) are simply "Income from the carrying on of a business either alone or as a partner actively engaged in the business" without specifying that the carrying on must be by the taxpayer. Here, the income in question, was income which arose from the carrying on of a business by the trustee alone and fell within the meaning of clause (*b*) of s. 32(5) and therefore was deductible from income in computing "investment income" as defined in s. 32(4).

APPEALS from the judgments of the Income Tax Appeal Board[1] affirming in each case income tax assessments for the years 1953 and 1954. The appeals were heard together.

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

W. Z. Estey, Q.C. for appellants.

H. H. Guthrie, Q.C. and *J. D. C. Boland* for respondent.

THURLOW J. now (April 6, 1960) delivered the following judgment:

These are appeals from judgments of the Income Tax Appeal Board[1], affirming in each case income tax assessments for the years 1953 and 1954. The appeals were heard together. The appellant Audrey Quinn is the sister of the other appellant, James C. Shortt, and the issue on which each case turns is whether or not the appellant is liable to pay the four per cent investment income surtax on the profits to which he or she was entitled of a business carried on under the name and style of James McTamney & Co.

The appellants' mother, Olga Margaret Shortt, died on January 14, 1952, leaving this business as the principal asset of her estate. By her will, she gave the whole of her estate to her husband, Maurice J. Shortt, whom she named her executor and trustee, upon trust as to the residue after paying certain charges and providing for specific bequests, to pay certain sums each month to each of the appellants until they reached thirty years of age and thereafter to pay to each of them half of the net income from such residue until the "date of division". At the "date of division", the residue

[1] 19 Tax A.B.C. 144; 58 D.T.C. 243, 249.

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was to be divided into two equal shares, and Audrey Quinn was given the net income for her life from one of such shares, with remainder as to both income and capital to others. James C. Shortt was given the net income from the other share and would become entitled to the capital of such share, as well, in four payments maturing respectively on his attaining thirty, thirty-five, forty, and forty-five years, and there were provisions disposing otherwise of the remaining capital if he should die before attaining the specified ages. The "date of division" was defined as the date of the testator's death if her husband predeceased her, and if he survived her, the date during his lifetime which he should in writing fix and, in default of such fixing of the date by him, the date of his death. The trustee among other powers was given authority to carry on the James McTamney & Co. business for as long as he, in his absolute discretion, considered desirable and to use money or assets of the estate in the business for any purpose which he should in his absolute and uncontrolled discretion deem in the interest of the business. There was also a provision that "net income" from the McTamney business should for the purpose of distribution of net income to beneficiaries entitled thereto in any year mean such portion (not less than 40 per cent thereof) of the earnings after all taxes for such year as the trustee should in his absolute discretion determine. The will is a lengthy one, and in the foregoing I have but summarized what I consider to be the effect, in events which have occurred, of the provisions that appear to me to be material to the problem to be determined.

Maurice J. Shortt survived the testatrix, undertook the trust, carried on the business through the remainder of 1952 and the years in question in these appeals, and fixed December 31, 1952, as the date of division. In all three years, substantial profits were made in the business and were credited at the end of each year in the accounts of the business equally to the appellants.

With respect to the profits earned in 1952, I am unable to discover in the will any clause warranting such a division, but no question arises as to this. These profits were assessed as income of the trustee and the tax was paid by the trustee, but the remainder was not withdrawn by the appellants

and, save for payments therefrom of income tax, the profits earned in the business in 1953 and 1954, as well, remained in the business and thus in the hands of the trustee throughout the years in question and for some time thereafter.

In making the assessments under appeal, the Minister treated the whole of the income from the business credited to the appellants at the end of each of the years 1953 and 1954 as investment income and assessed four per cent investment income surtax accordingly, pursuant to s. 32(3) of *The Income Tax Act,* R.S.C. 1952, c. 148, and the question to be determined is whether this income is properly treated as investment income for that purpose.

By s. 32(1) of *The Income Tax Act,* "the tax payable by an individual under (Part I) upon his taxable income" is declared to be at certain specified rates. Section 32(3) then provides that "there shall be added to the tax of each individual computed under s-s. (1) for each year an amount equal to four per cent of the amount by which the taxpayer's investment income for the year" exceeds the greater of two amounts. Investment income, however, is not necessarily what that expression might connote but is defined as follows by s. 32(4):

(4) For the purpose of this section, "investment income" means the income for the taxation year minus the aggregate of the earned income for the year and the amounts deductible from income under paragraphs (*a*), (*c*) and (*d*) of subsection (1) of section 27.

Earned income, as well, is not necessarily what the expression might connote but is defined thus by s. 32(5):

(5) For the purpose of this section, "earned income" means

(*a*) salary or wages . . .

(*b*) income from the carrying on of a business either alone or as a partner actively engaged in the business.

It is, I think, important to observe that, while the James McTamney & Co. business was, by the will, vested in Maurice J. Shortt as trustee, with wide authority reposing in him alone to employ in the business assets of the estate the net income of the estate which accrued after the date of division fixed by him pursuant to the will belonged to the appellants. This income included the profits of the business earned after December 31, 1952, which the trustee

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had determined to be net income for the purpose of distribution. It has already been mentioned that, in the books of the business which were under the control of the trustee, the whole of the profits of the business was credited to the appellants in equal shares, and this, I think, may be taken as indicating that a determination of the net income as contemplated by the will had been made in each year. There is also evidence given by the trustee, Maurice J. Shortt, that income or profit from the business was divided equally between the children, from which I would infer that a determination had been made. Such a determination having been made, however, the right of the appellants to the profits of the business earned by the estate, in my opinion, arose under the will itself, and from the moment of such determination the power of the trustee, derived from the will, to employ such profits in the business, except by the consent of the appellants, was at an end. Moreover, while within the limits prescribed by the will the determination of the amount of business earnings available for distribution as income was left to the trustee, the making of such a determination could not change the nature of the amount as income from the carrying on of a business. *Vide Syme v. Commissioner of Taxes*[1], *Baker v. Archer-Shee*[2], and *Minister of National Revenue v. Trans-Canada Investment Corporation Ltd.*[3] And the immediate right of the appellants to the sum when determined was not dependent upon any further act or determination by the trustee to pay it. Accordingly, the factual situation, as I view it, is one wherein the income in question was income from the carrying on by the trustee of a business which was vested in him as trustee for the appellants and others, but wherein the net income from such business, as determined by the trustee, belonged entirely to the appellants.

Is this income then "income from the carrying on of a business" within the meaning of clause (*b*) of s. 32(5)? business either alone or as a partner actively engaged in the That the question so posed is a close one is, I think, brought out by two cases which were cited in the course of the argument. On the one side, there is the judgment of the

[1] [1914] A.C. 1013. [2] [1927] A.C. 844.
[3] [1956] S.C.R. 49.

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Privy Council in *Syme v. Commissioner of Taxes* (*supra*), where the words "income arising or accruing from any trade carried on in Victoria" were qualified by "although the income has not arisen or accrued or been . . . derived from the taxpayer's own personal exertion or trade" and were held to include income of a *cestui que trust* arising from a business vested in and carried on by trustees. On the other side may be placed the judgment of the Court of Session (Scotland) in *Fry v. Shiels' trustees*[1], where the statute defining "earned income" required that it should be "immedately derived by the individual *from the carrying on* or exercise *by him of his* profession, *trade* or vocation either as an individual or in the case of a partnership as a partner personally acting therein", and the Court held that income which was earned by trustees in carrying on a business and which in the exercise of a discretion the trustees paid over to the guardians of children not otherwise absolutely entitled thereto was not "earned income" of the children within the meaning of the statutory definition. On the same side is the judgment of the Court of Session (Scotland) in *M'Dougall v. Smith*[2], where income earned by the curator of an incompetent person in carrying on the latter's business was held not to be income of the incompetent person "earned by him in the carrying on of his trade" within the meaning of the same statutory provision. It will be observed that this case was in some respects stronger on its facts in favour of the taxpayer than the present case, in that the business belonged outright to the incompetent person and was carried on entirely on his behalf, but the judgment turned on the terms of the applicable statute, which, in my opinion, were as materially different from those now under consideration as were those interpreted in *Syme v. Commissioner of Taxes* (*supra*).

The main submission put forward on behalf of the Minister was that clause (*b*) of s. 32(5) contemplates only a business carried on by the taxpayer himself whether alone

[1] (1914) 6 T.C. 583. [2] (1918) 7 T.C. 134.

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or as an active partner. In support of this submission, counsel referred to the earlier subsections of s. 32 where, in s-s. (1), are found the expressions "individual" and "his taxable income", and he contended that the subsequent subsections referred to the same individual when speaking of "income" and the sources from which it arose. The difficulty with this, as I see it, is that, even if one inserted the words "of the taxpayer" after the word "income" in clause (*b*) of s. 32(5), it would still be necessary to add further wording which is not therein expressed in order to exclude income of the kind here in question.

While the words of s. 32(5)(*b*) are not the same as those interpreted in *Syme v. Commissioner of Taxes* (*supra*), some of the considerations referred to in the judgment appear to me to apply in the present case with much the same force. Lord Sumner says at p. 1018:

> In saying "any trade carried on in Victoria" the definition does not say by whom such trade is carried on. The amending section enlarges "personal exertion" and extends it to trade carried on by vicarious exertion without stating the legal relationship between the real and the vicarious trader, or defining the capacity in which the business must be carried on by the latter. Their Lordships were informed that the provision in the Act of 1896 was inserted to settle a doubt whether a person could claim the lower, or personal exertion, rate, when all the work in his business was done for him by his agents. Be this as it may in fact, the enactment is general in form: it does not make the definition of 1895 affirmatively include business carried on by agents, but it provides negatively that a business may be carried on by personal exertion for the purposes of this Act, even when there is no personal exertion on the part of the person who benefits by the business, but everything is done for him. Again the Act does not say for whom the trade is carried on. When a trade is carried on by trustees there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by the trust deed. Unless the definition clause, as amended, is interpreted as though it ran "any trade carried on by the taxpayer or his agents", for which the language of this taxing Act affords no sufficient warrant as against the subject, the definition of "income derived from personal exertion" is wide enough to cover the present case. What the appellant gets is "income arising . . . from a trade carried on in Victoria" by trustees, for the benefit of himself and others, entitled equally with him, "although the same has not accrued . . . from his own personal exertion" in his capacity as such a beneficiary.

The material words used in s. 32(5)(*b*) of the *Income Tax Act* are simply "income from the carrying on of a business either alone or as a partner actively engaged in the

business". Nowhere does the subsection say by whom the carrying on must be done, or for whom it must be done, or whose the business must be. The word "alone", in my opinion, is not equal to "by the taxpayer alone". In its position and context, it qualifies the words "carrying on", and its purpose appears to me to be to distinguish a business carried on by a single party from one carried on by several persons in partnership. It serves also to emphasize, in the words which follow and which deal with partners, a distinction between actively engaged and other partners, but it is noteworthy that the word "actively" is not made applicable in the case of a business carried on by one "alone". To give effect to the Minister's submission, it would be necessary to make the subsection read "income *of the taxpayer* from the carrying on *by the taxpayer* of the *taxpayer's* business either alone or as a partner actively engaged in the business". Undoubtedly, the subsection refers to the taxpayer's income, for that is the subject with which the statute is concerned, but as I read it, s-s. (5) of s. 32 is concerned with classification of the taxpayer's income for a statutory purpose, and the subject being dealt with is not the taxpayer or what he does, but the nature of the several sources of his income. It is, I think, clear that a business may be a source of income to a taxpayer whether or not it is carried on by him either alone or as a partner actively engaged in it, and when, therefore, the subsection simply refers to "income from the carrying on of a business" without specifying that the carrying on must be by him, I can see no warrant for limiting the application of the natural meaning of the words which Parliament has used by, in effect, reading in words that are not there. Given the fact that the income arose from the carrying on of a business either by a person alone or, in the case of a partnership, by a person who actively engages in the carrying on of the business, the income appears to me to be of the kind which falls within the meaning of s. 32(5)(*b*), whether or not the taxpayer is the person or one of the persons who carry it on.

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I am, accordingly, of the opinion that the income in question of both appellants for the years in question being income which belonged directly to them and which arose from the carrying on of the James McTamney & Co. business by the trustee alone falls within the meaning of clause (*b*) of s. 32(5) and, accordingly, is deductible from income in computing investment income as defined in s. 32(4).

The appeals will be allowed with costs and the assessments referred back to the Minister to be revised accordingly.

Judgment accordingly.

BETWEEN:

1959
Sept. 22, 23, 24

ESPIE PRINTING COMPANY LIMITED .... APPELLANT;

AND

1960
Apr. 25

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Unreported income—Unclaimed expenses—Alleged illegality in payment of wages no bar to their deductibility for the purpose of ascertaining net profit or gain—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 and 6(1)(a).

The appellant company failed to report the whole of its income for the years 1944 to 1953 inclusive and the Minister, following an investigation, added substantial amounts to its reported income and assessed accordingly. On an appeal from the assessments on the grounds that the amounts added were in excess of the unreported receipts, and that the amounts expended to earn income, for which no claim had been made, should have been deducted, the Minister submitted that no expenses in excess of those claimed had been made, and if they had, they were not deductible since they were made in carrying out illegal transactions.

Held: That on the evidence the appellant had established that some of the amounts added were not income of the appellant and that since on the material before the Court it was impossible to estimate how much, the matter should be referred to the Minister for reconsideration and reassessment.

2. That the Court was satisfied that certain cheques put in evidence, as well as additional debits, were in fact incurred for overtime wages, salesmen's commissions and other items, and were not claimed in the appellant's income tax returns as deductions.

3. That the alleged illegality in connection with the payment of overtime wages did not affect their deductibility for the purpose of ascertaining net profit or gain within the meaning of the *Income War Tax Act*.

APPEAL under the *Income War Tax Act*.

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

J. G. McDonald and *D. A. Ward* for appellant.

W. G. Cassels and *J. D. C. Boland* for respondent.

THURLOW J. now (April 25, 1960) delivered the following judgment:

These are appeals from reassessments made on August 7, 1957, of income tax for the years 1944 to 1953 inclusive, in respect of the appellant's income. For each of the years in question, the appellant failed to report the whole of its income and, after an investigation, the Minister added substantial amounts to the income as reported and reassessed tax accordingly. It is admitted by the Minister that the amount so added was in each case an amount which the Minister assumed represented the unreported gross receipts for the year. The appellant now questions the amount so added for each of the years 1944 to 1948 inclusive as being in excess of the unreported receipts and further claims that for all ten years it is entitled to reduce the income so assessed by the amount of expenses incurred for which deductions have not been claimed in its income tax returns. The Minister denies that any expenses in excess of those claimed were in fact incurred and further disputes the right of the appellant to deduct any such expenses as may have been incurred on the ground that the evidence shows them to have been incurred in carrying out illegal transactions.

The appellant was incorporated prior to 1944 and throughout the years in question carried on a job printing business in Toronto. Omitting two shares held by a solicitor who does not appear to have had any beneficial interest in the company, from the time of incorporation until February 28, 1948, one-half of the issued shares of the appellant were held by Robert J. Espie and the other half by John J. Lynch. Mr. Espie was the President of the company and was engaged chiefly in its selling activities. Mr. Lynch was

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Treasurer of the company and Superintendent of its office and plant. On the date mentioned, Mr. Espie sold his interest in the company to Mr. Lynch, who thereupon became President and thereafter was for practical purposes its sole owner.

Throughout the years 1944 to 1953, there was a current account in the name of the appellant at a branch of the Royal Bank of Canada in Toronto in which moneys of the company were deposited and from which disbursements were drawn. Robert J. Espie had a personal savings account numbered 544 at the Guaranty Trust Company of Canada and John J. Lynch had a savings account numbered 429 in his name at a branch of the Canadian Bank of Commerce. From sometime prior to January 1, 1944 until March 9, 1948, there was also a joint savings account numbered 1415 at the same branch of the Canadian Bank of Commerce in the names of Robert J. Espie and John J. Lynch. Withdrawals from this account required the signatures of both Mr. Espie and Mr. Lynch.

It is conceded that substantial amounts which were payable to the appellant and formed part of its revenue receipts were not deposited in its account at the Royal Bank of Canada and were not included in the revenues reported in its income tax returns but were in fact deposited in either savings account 1415 or 429 in the Canadian Bank of Commerce and that these moneys or portions of them were subsequently divided equally between Mr. Espie and Mr. Lynch. Some of the amounts representing Mr. Espie's share of such moneys were then deposited in his account number 544 at the Guaranty Trust Company of Canada. Both Mr. Espie and Mr. Lynch were associated with E. R. Buscombe in another company known as Buscombe and Dodds Limited, in which income was also being suppressed and divided among the three, and some of this money, as well, found its way into Mr. Espie's personal account. In 1954 an investigation of the appellant's income took place, in the course of which efforts were made to trace the source of the moneys deposited in account number 544 and ultimately a list of amounts deposited in it, the source of which could not be identified, was prepared. The list so prepared was submitted to an agent of Mr. Espie, who was

no longer associated with the appellant, but no explanation of the source of the unidentified moneys was given, and in making the reassessments the Minister included the whole of such unidentified deposits in the income in respect of which the appellant was reassessed. The issue as to the amount representing gross receipts added by the Minister in making the assessments is limited to whether or not the unidentified deposits in this account were correctly added.

This issue is one of fact. The Minister has assumed that these unidentified deposits were part of the income of the appellant, and the onus is on the appellant to show that this assumption was not correct. *Vide Johnson v. Minister of National Revenue*[1] and *Dezura v. Minister of National Revenue*[2].

From the beginning of 1944 to the end of February, 1948, there had been 82 credits to account 544, of which eight were credits for interest on the account and the other 74 were deposits the total amount of which was $45,800.57. Of these, some 60 deposits, ranging from $14.31 to $2,409.49, were listed on Exhibit 7 as unidentified to the total extent of $28,406.69.

Evidence as to this savings account was given by Mr. Espie, who at the time of the trial of the appeal was in his 78th year. He had held for many years a high office in a fraternal order, and he and Mr. Lynch and the appellant, as well, had been convicted and fined for offences pertaining to the failure of the appellant to properly report its income. There was no evidence that he had any financial interest in the outcome of these proceedings. He appeared to me to be willing to tell the whole truth and anxious to tell nothing but the truth, but, as might be expected, he could not recall all of the details of deposits made in his personal account more than ten years earlier. He stated, however, that no payments from customers of the appellant had been deposited in account number 544. When asked the source of the deposits listed as unexplained, he referred to a number of sources from which they might have come, including savings from his salary—which had been $2,600 per year or thereabouts—repayment of expenses incurred in

[1] [1948] S.C.R. 486. [2] [1948] Ex. C.R. 10.

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travelling for the fraternal order, dividends and other payments from Buscombe and Dodds, rental from property, and repayments of loans.

I regard as credible Mr. Espie's evidence that he received moneys from such sources and have no difficulty in reaching the conclusion that moneys from such sources did account for some, and perhaps a substantial part, of the moneys so deposited, but I am not satisfied that any one or all of these sources combined is likely to account for deposits totalling in the vicinity of $28,000 over the period of four years and two months in question. There is, however, evidence that, over the four-year period, cheques drawn on accounts 1415 and 429 and totalling in the vicinity of $27,750 were received by Mr. Espie, some of which, amounting to about $10,000, were traced to account 544 and were thus identified, and others of which bear the endorsement of the Guaranty Trust Company, indicating that they or some of their proceeds may have been deposited there, and on the whole it seems to me not unlikely that a considerable portion of the unidentified deposits may be accounted for by such cheques. After a lengthy examination of the exhibits and consideration of Mr. Espie's evidence, I am, however, unable to conclude that these cheques, together with moneys from the other sources mentioned, would account for the frequent and substantial deposits to account 544 and, having regard to the admitted fact that Mr. Espie was a party to practices in which income of the appellant was being diverted to accounts other than its own and divided between himself and Mr. Lynch and, despite an inclination derived from the impression he made on the witness stand to regard his evidence as generally reliable, I find myself unsatisfied and unpersuaded that none of the money represented by the unidentified deposits belonged to the appellant. There is thus no satisfactory basis either for a sweeping conclusion that the whole of the money was suppressed income of the appellant or for an equally sweeping conclusion that none of it represented income of the appellant. The position, as I find it, accordingly is that the appellant has met the onus by showing that some of the moneys which the Minister included were not properly added but that, on the material before the Court, it is not possible to ascertain or to

estimate, otherwise than arbitrarily, how much of the sum so added was income of the appellant and how much came from other sources.

In this situation, I am of the opinion that the best course is not to accept or reject the claim of either side *in toto* nor to attempt to divide the amount arbitrarily but to refer the matter back to the Minister to reconsider the several items making up the unidentified deposits in the light of this opinion and to reassess accordingly.

The next issue is that respecting expenses which were not claimed as deductions in the appellant's returns. It is claimed that such expenses were in fact incurred for overtime wages, for paper purchased in black market transactions and used in the appellant's business, and for salesmen's commissions and other items. The evidence satisfies me and I accordingly find that between July 14, 1944 and November 14, 1947 the amounts represented by the cheques which were put in evidence and which are listed in Schedule A to these reasons were in fact paid for overtime wages of persons employed in the appellant's business and were not claimed as deductions in the appellant's returns. Moreover, from January 7, 1944 account 1415 shows additional debits at weekly intervals of amounts most of which are under $100 and for which no cheques were offered in evidence. Having regard, however, to Mrs. Bates' evidence, these, as well as the cheques listed in Schedule A, appear to me to have been withdrawals for paying overtime wages. I am also satisfied and find that the amounts represented by the cheques listed in Schedule B were paid for salesmen's commissions and other expenses of the business and were not claimed as deductions in the appellant's returns.

In addition, evidence was given by Mr. Lynch that he paid in cash employees who were unwilling to punch the time clock and that he paid salesmen's commissions and purchased paper from time to time for which he paid cash. No record was kept of any such payments, nor was evidence given of their amount, but it was argued that the Court should estimate the amount allowable as deductions in computing income on the basis of information as to the average relationship between profit and gross revenue of businesses of this kind.

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Evidence was given that the appellant's profit, as assessed, compared with the average as follows:

Year	*Appellant*	*Average for the Industry*
1944	41.00 %	9.82 % of gross revenue
1945	35.90	8.89
1946	30.90	10.53
1947	28.40	9.58
1948	20.70	8.19
1949	19.30	3.80
1950	24.80	4.98
1951	22.50	9.37
1952	15.28	6.05
1953	14.47	4.37

It was brought out in cross-examination, however, and indeed it is obvious, that the ratio of profit to gross revenue could vary considerably for a variety of reasons, such as whether the plant was new or old, the amount of expenses incurred for executive salaries, and for pension and fringe benefits to employees, the efficiency of the management, and the volume of work done, and it appears as well that the companies from which information was obtained and used in computing the average for the industry included some whose businesses were not of the same type as that of the appellant's business. A considerable discount must, accordingly, first be applied in comparing the average with the results of the appellant's operation. Secondly, it is apparent that, if the Minister has included too much gross revenue, as I have found, with respect to the years 1944 to 1948, the appellant's profit ratio for such years will be somewhat less. Next, it appears that the appellant's total expenses for items other than wages and materials were generally lower than the average and this, as well, appears to account for a portion of the difference between the ratio of the appellant's profit to its revenue and that of the industry. The fact that these other expenses were low compared with the average suggests the probability that the long experience of both Mr. Espie and Mr. Lynch in the printing business enabled them to run the appellant's business generally at lower than

average costs. Moreover, the study shows the appellant's reported expenses for materials to have been higher than the average in 1945, 1946 and 1949, and its expenditures for wages to have been higher than the average in 1949, 1950, 1951 and 1952. I am, accordingly, of the opinion that no firm conclusion can be drawn from the information presented either that additional expenses for paper and wages were in fact incurred or, if they were incurred, how much they amounted to, or in what years they were incurred and, while I do not discount entirely the evidence of Mr. Lynch that he paid additional expenses in cash, his evidence falls short of satisfying me that any such additional expenses were incurred in all the years in question and leaves me with no means of determining either the years in which such additional expenses were incurred or the amounts incurred. On the whole, I doubt that any substantial additional amount was paid in any year for wages or for salesmen's commissions, but I think it not unlikely that a considerable amount may, on occasion, have been paid for additional paper. I doubt, however, that even this occurred on many occasions or with any regularity or that it occurred in each year, and in the absence of evidence as to when it occurred or how much was expended, or even of how much paper was so purchased, I see no reasonable basis on which it may properly be estimated. With respect to such additional expenses, the appeals accordingly fail.

There remains the question whether the sums which I have found were paid for overtime wages are deductible in computing income, in view of the fact that they, or some of them, were incurred in circumstances suggesting that there was something illegal about them. Just what the illegality was was not clearly brought out. In the earlier years, there were war-time regulations which probably were infringed and, for the years 1944 to 1948, there is evidence on which one may conclude that, in the case of some, if not all, of the employees in question, there was an illicit arrangement between the appellant and the employee to enable the employee to avoid payment of income tax. In these circumstances, the Minister submits that the taxpayer's expenses

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for wages paid were illegally incurred and that it would be contrary to public policy to permit the appellant to deduct them in computing its income for income tax purposes.

I do not think it can seriously be questioned that the profits of illicit businesses were subject to tax under the *Income War Tax Act*. In *Minister of Finance v. Smith*[1], the Privy Council held that profits of a business carried on in violation of a provincial statute were taxable and, while some of the reasons for the judgment in that case applied only to cases involving the violation of provincial statutes, others were not so limited. Lord Haldane said at p. 197:

> Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

The present problems is, however, not quite the same, since the appellant's business itself is not shown to have been an illegal one, and the taxpayer shows the illegality of what it has done not in the course of claiming that the statute does not apply but in the course of asserting a claim for a deduction in computing the income therefrom which is subject to the tax. If what the appellant did illegally were to have effect by way of reducing an amount of tax which was otherwise imposed by the statute, I should think that the principle asserted by the Minister might well apply to bar the taxpayer's claim. But I do not think that is the situation. In *Minister of Finance v. Smith,* Lord Haldane went on to say at p. 197:

> There are certain expressions at the end of the judgment of Scrutton L.J. in *Inland Revenue Commissioners v. Von Glehn* as to the scope of the British Income Tax Acts. Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. *The question is never more than one of the words used.*

[1] [1927] A.C. 193; 95 L.J.P.C. 193.

In *Inland Revenue Commissioners v. Von Glehn*[1], the Court of Appeal had held that a statutory penalty incurred in the course of carrying on a business which was not of itself illegal was not deductible. It is noteworthy, however, that the grounds of the decision were not that the penalty was incurred for doing something illegal in the course of the business but that the penalty was not a commercial loss and thus not "a loss . . . connected with or arising out of such trade" within the meaning of an exception to a general statutory prohibition against deduction of losses and that the penalty was not "money wholly and exclusively laid out or expended for the purposes of such trade" within the meaning of an exception to a general prohibition against the deduction of expenses.

The provisions of the *Income War Tax Act,* which was applicable to the years 1944 to 1948, were quite different. Income for the purposes of that Act was defined by s. 3 as:

> the annual net profit or gain, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being . . . profits from a trade or commercial or financial or other business directly or indirectly received by a person . . . from any trade, manufacture or business . . . .

The expression "net profit or gain", in my opinion, connoted not gross receipts from a business but gross receipts less the expenses incurred to obtain such receipts. *Vide Imperial Oil Limited v. Minister of National Revenue*[2] and *Daley v. Minister of National Revenue*[3]. In the latter case, the President of this Court said at p. 521:

> The correct view, in my opinion, is that the deductibility of the disbursements and expenses that may properly be deducted "in computing the amount of the profits or gains to be assessed" is inherent in the concept of "annual net profit or gain" in the definition of taxable income contained in section 3.

The ordinary connotation of "net profit or gain" was, however, to be taken subject to s. 6, by which it was provided that

> In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively, and necessarily laid out or expended for the purpose of earning the income.

[1] [1920] 2 K.B. 553; 12 T.C. 232; 90 L.J.K.B. 590.
[2] [1947] Ex. C.R. 527.
[3] [1950] Ex. C.R. 516.

Among the commonest of the expenses which are ordinarily deductible for the purpose of ascertaining net profit or gain from a business and which are not prohibited by s. 6(*a*) are the wages of employees engaged in carrying on the business and, apart from the point raised as to the illegality in the present case of the arrangements with the employees and of the payments to them, there could be no question but that these wages would be proper deductions for the purpose of ascertaining the profit or gain from the business in the ordinary sense and that their deduction was not prohibited by s. 6(*a*). The prohibition of s. 6(*a*), however, did not turn on the legality or otherwise of the payment in question but simply on the question of whether or not the expense was wholly, exclusively, and necessarily laid out or expended for the purpose of earning the income. For my part, I do not see how the illegality of the arrangements with the employees or of the payments has any bearing on the question whether these wages were wholly, exclusively, and necessarily laid out or expended for the purpose of earning the income. Whether the expense was or was not so incurred seems to me to be a question on which the illegality or otherwise of the payments or of the arrangements under which they were made leads to no conclusion one way or the other, and since, apart from this, the deduction of such wages was not prohibited by s. 6(*a*), it seems to me that the judgment in *Inland Revenue Commissioners v. Von Glehn* (*supra*), where general statutory prohibitions were applicable, has no bearing and that, for the present purpose, there is nothing in the language of the applicable statute to impose tax on anything beyond what would, in its ordinary acceptance, be contemplated in the expression "net profit or gain". This expression, as I have already said, in my opinion connotes not gross receipts but what is left after the expenses incurred to secure such receipts have been deducted and the question being, to use the words of Lord Haldane, *never more than one of the words used* in the statute, I do not see how the net profit or gain can be properly computed without deducting such expenses whether they or some of them bear the taint of illegality or not. I am accordingly of the opinion that the wages in question are deductible in computing the appellant's income for

the years 1944 to 1948 inclusive. There was no illegality suggested in connection with the commissions and other items mentioned in Schedule B, and in my opinion they are deductible as well.

The appeals, excepting those from the reassessments for 1949 and 1953, will be allowed with costs and the reassessments referred back to the Minister to be reconsidered and revised in accordance with these reasons. As the appellant obtains no relief from the reassessments for 1949 and 1953, the appeals against these reassessments will be dismissed with costs.

Judgment accordingly.

BETWEEN:

1959
Oct. 19, 20
1960
June 16

THE MINISTER OF NATIONAL REVENUE
APPELLANT-RESPONDENT;

AND

JOHN COLFORD CONTRACTING COMPANY LIMITED ....RESPONDENT-APPELLANT.

Revenue—Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 85B(1)(b)—Final payment under contract made on issuance of certificate of architect or engineer—Progress payments—Holdbacks—"Amount receivable"—Taxation year in which to include income—Appeal allowed in part—Cross-appeal dismissed.

Respondent, carrying on most of its business as a sub-contractor, is engaged in furnishing and installing plumbing, heating, air conditioning and ventilation equipment. It receives from the prime contractor monthly progress payments for 85% or 90% of the work done, the remaining 15% or 10% being withheld as a holdback. Final payment is made when the project is completed and the certificate of an architect or an engineer named in the contract is issued that the work is satisfactory.

For the taxation year 1953 respondent did not report progress payments of $80,000 actually received or holdbacks of $67,000 not yet received, related to three incompleted contracts, a large one in Ontario and two smaller contracts in Quebec. The Minister of National Revenue added both amounts to respondent's 1953 income. The Income Tax Appeal Board held that the progress payments were taxable in 1953 but that the holdbacks were not so taxable. The Minister appealed to this Court and the respondent cross-appealed. The respondent contends that its profits, if any, cannot be determined until after the completion of each of the three projects to the satisfaction of the supervising architect or engineer.

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Held: That the cross-appeal must be dismissed and the progress payments were taxable in 1953 since the *Income Tax Act* does not provide that a taxpayer may reckon his income according to the duration of each individual contract especially when payments received thereon during any year exceed the aggregate of the taxpayer's direct costs applicable to them, and thus contain an element of profit.

2. That the holdbacks related to the larger Ontario contract were "amounts receivable" in 1953 since the certificate of the supervising architect or engineer was issued in the respondent's 1953 taxation year and not withstanding that by the terms of the contract such amounts only fell due in a subsequent taxation year they must be included in the company's income for the year in question, but the holdbacks related to the two Quebec contracts were not amounts receivable in 1953 as the certificates for them were not issued until later years.

3. That "amount receivable" means an amount which the intended recipient has a clearly legal, though not necessarily immediate right to receive, and the clause in each contract dealing with the architect's or engineer's certificate constituted a binding condition precedent which prevented respondent claiming the holdbacks until the certificate was issued.

APPEAL and CROSS-APPEAL under the *Income Tax Act.*

The appeal and cross-appeal were heard before the Honourable Mr. Justice Kearney at Montreal.

Guy Favreau, Q.C. and *Paul Boivin, Q.C.* for appellant.

H. H. Stikeman, Q.C. and *J. N. Turner* for respondent.

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

KEARNEY J. now (June 16, 1960) delivered the following judgment:

This is an appeal and a cross-appeal from a decision of the Income Tax Appeal Board[1] rendered on January 9, 1957, in respect of a re-assessment of taxable income for the taxation year 1953 made by the appellant-respondent (hereinafter called the "Minister") against the respondent-appellant (later referred to as the "taxpayer").

The taxpayer is engaged in the furnishing and installation of plumbing, heating, air conditioning and ventilation equipment. In the computation of its taxable income for its fiscal year ended March 31, 1953, which is the only year in issue, the taxpayer excluded therefrom all receipts and

[1] (1957) 16 Tax A.B.C. 252

expenditures (but we are here concerned only with gross receipts) directly related to three then incompleted contracts. The issue is not whether the excluded amounts are taxable but when they are taxable. The amounts in question fall into two categories: progress payments actually received and unreceived holdbacks. According to the taxpayer, the provisions of the contract were such that profits and losses in connection therewith could only be determined if and when each entire project had been completed to the satisfaction of the owner, as witnessed by a certificate to that effect signed by an architect or engineer selected by the owner and mentioned in the contract.

As a result the taxpayer, in its income tax return for the fiscal year in question, showed its taxable income as $21,150.84; but by notice of reassessment dated November 24, 1954, it was informed by the Minister that, upon taking into account the excluded items, the said sum of taxable income had been increased by $146,819.53. On January 12, 1955, the taxpayer filed a notice of objection to this addition to its declared taxable income, but the Minister reaffirmed it, and on September 23, 1955, the taxpayer was notified accordingly. On November 3, 1955, the taxpayer appealed to the Income Tax Appeal Board which allowed the appeal with reference to an unspecified part of the $146,819.53, representing unreceived holdbacks which, the parties agree as of March 31, 1953, amounted to $67,728.24. It is in respect of the amount thus allowed that the Minister now appeals. The Board dismissed the appeal as to the balance of approximately $80,000 which, it is conceded, was made up of amounts actually received by the taxpayer during the taxation year 1953 by way of progress payments, or by what has been called in the evidence gratuitous payments made in advance of the completion of the three contracts in issue. The taxpayer by way of cross-demand herein appeals from the decision of the Board in respect of the above-mentioned balance of $80,000.

In respect of the taxability of the progress payments, the Minister relies on ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148, and amendments. As to the holdbacks, the Minister claims that they are amounts receivable within the meaning of s. 84B of the Act. The so-called gratuitous

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payments arose because there were instances in which the taxpayer was the sub-contractor and where the prime contractor, instead of insisting on its right to retain holdbacks, made partial payments on account thereof to the taxpayer notwithstanding that the contract had not yet been completed.

The facts in this case are not in dispute. The taxpayer carries out most of its work as a sub-contractor but occasionally enters into a contract directly with the owner as, for instance, when plumbing and heating apparatus is to be renewed or installed in a building otherwise completed, in which case it acts as a prime contractor, though not in the ordinary sense that it undertakes to construct an entire building.

We are here concerned with the following three contracts which are known in the trade as lump sum contracts: contract dated February 13, 1951, for $999,166 (subsequently increased to $1,084,655.14) between the taxpayer acting as sub-contractor and Anglin Norcross (Ontario) Limited as contractors in connection with the installation of "heating, plumbing, fire protection, kitchen equipment, refrigeration, ventilation, air conditioning, pneumatic controls and insulation" in the Dominion Bureau of Statistics in Ottawa (Ex. A); contract dated July 28, 1950, for $69,218 (subsequently increased by a change order to $101,711) between His Majesty, represented by the Minister of Trade and Commerce, and the taxpayer as contractor, covering a steam distribution project in nine buildings located at Bouchard, Que. (Ex. B); contract dated June 7, 1950, for $89,778 (subsequently increased on several occasions) between the taxpayer as sub-contractor and Héroux & Robert Limited as general contractor, for the supply of all labour and materials for the heating of the Basilica of St. Joseph's Oratory in Montreal (Ex. D).

The taxpayer follows the practice of submitting a tender wherein it offers to complete a job for a specified price. In fixing the amount of its tender, it estimates the overall cost of performing the work and adds thereto a certain percentage for profit which varies between $4\frac{1}{2}$ and $6\frac{1}{2}$ per cent, depending on the amount involved and the particular nature of the undertaking.

The provisions of the three contracts which have most bearing on this case are not identical. The following is a relevant extract from the Dominion Bureau of Statistics contract (Ex. A):

As the work progresses payable on or about the twentieth day of each month an amount equal to 85 percent of the value of the completed work done during the preceding calendar month, provided that a proper requisition in triplicate therefor be delivered to Contractor on the last day of the month during which the work covered thereby was done and provided further that the unpaid balance of the contract price shall at all times be sufficient in the judgment of Architect to complete the work.

Final payment to be made within 30 days after satisfactory completion of the entire building and acceptance by the Architect.

Exhibit B is a contract in which the taxpayer appears as prime contractor. The provisions regarding the certification of the work required designated an engineer instead of an architect for this purpose, and the holdback instead of being 15 per cent, as in the Bureau of Statistics contract, was 10 per cent. Section 1 of the said agreement contains a provision that form C.C.C. 34A, entitled *Department of Trade and Commerce—General Conditions—(construction)*, shall form part of the present contract. Copy of the said *General Conditions* is annexed to exhibit B. Section 41 of the *General Conditions* read in part as follows:

The written certificate of the Engineer certifying to the final completion of the said work to his satisfaction, shall be a condition precedent to the right of the Contractor to receive or to be paid the remaining ten per cent, or any part thereof. Provided that if the Contractor shall be required by His Majesty to do work additional to the work as defined in the contract, the completion of such additional work shall not, unless otherwise determined by the Minister, be a condition precedent to the payment of the remaining 10 per cent retained as above provided, but such moneys so retained may be paid to the Contractor upon the written certificate of the Engineer certifying that the work as defined in the contract has been completed to his satisfaction. . . .

By reason of section 1 of the agreement the Director of Works and Accommodation of the Department of National Defence of Canada was appointed as the engineer. The same section also provides that—

any act on the part of the Director of Works and Accommodation, in connection with and in virtue of the present contract, and any instructions or directions or certificates given, or decisions made by the Director of Works and Accommodation, or by anyone acting for him, shall be subject to approval or modification or cancellation by the Minister of National Defence.

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In exhibit D, in which Héroux & Robert Limited are contractors and the taxpayer is the sub-contractor, the provisions regarding progress payments and holdbacks are very simple and are contained in Article 2 which reads as follows:

> The General Contractor agrees to pay to the Sub-Contractor the sum of $89,778.00 Eighty Nine Thousand, Seven hundred and Seventy Eight Dollars Tax Included on the Certificate of Architect or owner as the work progresses to the value of ninety per cent (90%) of the work done as estimated by the Architect or owner. Final payment to be made within thirty days after the completion of the work and acceptance by the Architect or owner.

According to an analysis (Ex. E) of payments and holdbacks prepared by Mr. C. H. Bray, C.A., who testified on behalf of the taxpayer, of the amount of additional income totalling in round figures $147,000 which the Minister sought to take into the taxpayer's fiscal year 1953, approximately $134,000, $5,000 and $8,000 were related, respectively, to the Statistics building, the Bouchard contract and the Oratory contract.

Without the Minister's knowledge, the taxpayer with the approval of its auditor did not take into account for the year in question the above-mentioned income on the ground that, according to accepted accounting principles and good business practice, its profits, if any, could not be determined until after the completion of each project and a final certificate to that effect had been issued by the architect or engineer appointed for the purpose by the owner.

We are concerned with a question of principle rather than one of amount. If the amounts in question were not included in 1953, they had to be taken into account in a subsequent year. The taxpayer included the sum of $134,000 in his 1954 return instead of 1953, and the ensuing monetary consequences to either party were negligible. The issue in respect of progress payments turns on whether the taxpayer is justified in ignoring the payments actually received during 1953 until the architect or engineer has given the certificate referred to in the contract. Sections 3 and 4 of the *Income Tax Act* provide:

> 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.

Judson J. in *Interprovincial Pipe Line Co. v. Minister of National Revenue*[1] observed:

Sections 3 and 4 of the Act do not require a separate computation of income from each source for the taxpayer is subject to tax on income from all sources. The deduction against income given by s. 11(1)(c) is attributable to all sources of income and there is no authority to break it up and relate various parts of the deduction to various sources.

I think the above reasoning is applicable *mutatis mutandis* in the present case and it is my view that progress payments, whether made on demand or otherwise during the course of any year in connection with the contracts in question, must be reckoned with in the year in which they are received, and may not in effect be ignored by placing them in a suspension account as was done in the present case.

The *Income Tax Act*, in my opinion, contains no provision which will allow a taxpayer to reckon his income according to the duration of each individual contract, especially when payments actually received thereon during any year exceed the aggregate of the taxpayer's direct costs applicable to them, and thus contain an element of profit. This is what occurred in respect of the Dominion Bureau of Statistics contract, as appears in the analysis thereof shown on p. 2 of exhibit E. As of March 31, 1953, the taxpayer had received in excess of direct costs an amount of $77,532.48. According to the evidence, this occurred because, when filing application for progress payments, it was aware that four to six weeks would elapse before payment would be made; and, in order to be able to finance in the interval, it would anticipate its expenditures beyond the end of the previous month.

Subsequently to the hearing in the present case, Cameron J. held in *Wilson & Wilson Ltd. v. Minister of National Revenue*[2] that moneys paid before the completion of any contract during any year must be regarded as income and

[1] [1959] S.C.R. 763, 768.
[2] [1960] C.T.C. 1.

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not as mere advances, and that the completed contract method of reporting is contrary to ss. 3, 4 and 85B of the Act, unless the Minister accepts such method of reporting. In the *Wilson* case the contracts in question were on a unit price basis and not on a lump sum basis as in the instant case, but in respect of progress payments I do not think this distinction is material. Although in the present case it was alleged that the completed contract method of reporting had been accepted by the Minister, no proof was offered to support this allegation.

The second point in issue, namely, whether the holdbacks amounting in the aggregate to $67,728.24 should have been included as taxable income by the taxpayer in 1953, hinges on a narrow issue which is not easily resolved. It depends on the interpretation to be given to the word "receivable" found in s. 85B(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148, which reads as follows:

> In computing the income of a taxpayer for a taxation year, every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.

In the *Wilson* case (*supra*) Cameron J. came to the conclusion that before s. 85B became effective holdbacks were taxable only after the issuance of a final certificate by the architect or engineer appointed by the owner, but that, after the passage of s. 85B(1)(*b*), this was no longer true because, in his opinion, as a result of it a holdback became "receivable" within the meaning of the said section. Although admittedly the section is drafted in broad terms, I am disposed to add to the above statement the proviso that the facts in each particular case are such as to give to the holdback the quality of a receivable.

As "amount receivable" or "receivable" is not defined in the Act, I think one should endeavour to find its ordinary meaning in the field in which it is employed. If recourse is had to a dictionary meaning, we find in the *Shorter Oxford*, Third Edition, the word "receivable" defined as something "capable of being received." This definition is so wide that

it contributes little towards a solution. It envisages a receivable as anything that can be transmitted to anyone capable of receiving it. It might be said to apply to a legacy bestowed in the will of a living testator, but nobody would regard such a legacy as an amount receivable in the hands of a potential legatee. In the absence of a statutory definition to the contrary, I think it is not enough that the so-called recipient have a precarious right to receive the amount in question, but he must have a clearly legal, though not necessarily immediate, right to receive it. A second meaning, as mentioned by Cameron J., is "to be received," and Eric L. Kohler, in *A Dictionary for Accountants,* 1957 edition, p. 408, defines it as "collectible, whether or not due." These two definitions, I think, connote entitlement.

This leads to a consideration of whether, legally speaking, each of the holdbacks in the instant case possessed the quality required to bring it within the meaning of a receivable. Speaking of the quality required to constitute income, the learned president of this Court stated in *Robertson Ltd. v. Minister of National Revenue*[1]:

> Did such amounts have, at the time of their receipt, or acquire, during the year of their receipt, the quality of income, to use the phrase of Mr. Justice Brandeis in *Brown v. Helvering*[2]. In my judgment, the language used by him, to which I have already referred, lays down an important test as to whether an amount received by a taxpayer has the quality of income. Is his right to it absolute and under no restriction, contractual or otherwise, as to its disposition, use or enjoyment? To put it in another way, can an amount in a taxpayer's hands be regarded as an item of profit or gain from his business, as long as he holds it subject to specific and unfulfilled conditions and his right to retain it and apply it to his own use has not yet accrued, and may never accrue?

I might here interpose that in the present case the amounts of the holdbacks eventually were paid to the taxpayer, but to say that they might never have accrued to him would be to express something far beyond a mere figure of speech. As illustrative of the risks of the trade, proof was made that, in connection with the installation of plumbing in the Queen Elizabeth Hotel in Montreal, the taxpayer was required at its own expense to remove and replace immediately 600 bath-tubs out of a total of 1,200

[1] [1944] Ex. C.R. 170, 182. [2] (1934) 291 U.S. 193.

installed, because three or four months subsequent to the installation a hair-line flaw was discovered in them. Material and labour costs amounted to $263,000. The owner could not be held responsible and, at the date of hearing, the taxpayer had been unable to recover anything from the supplier of the bath-tubs. In connection with the power house attached to the Printing Bureau at Hull, Que., the engineers of the Department of Public Works refused to accept the layout and construction of the steam lines installed, and the taxpayer without recourse was obliged to remove and replace them at a cost of $77,000.

There is no doubt that, insofar as the provisions of the Dominion Bureau of Statistics contract are concerned, it is the law of Ontario which applies, and with regard to the other two contracts it is the law of the Province of Quebec which governs. The jurisprudence in respect of the status of holdbacks in the Province of Ontario is similar to that found in England and is little different from the case law of Quebec, at least insofar as the present case is concerned. In both provinces much depends on the wording of each individual contract.

In this case each contract must be scrutinized in order to ascertain whether in law the clause dealing with the procurement of an architect's or engineer's certificate either expressly or by implication constitutes a binding condition precedent on the taxpayer which prevents him from claiming a holdback until the certificate is issued. In Ontario it has been held that the contractor has no legal right to the amount of the holdback until the issuance of the certificate, and no suit can be properly commenced by him before certification unless it is clear that the certificate has been improperly withheld by the architect. See *McDonald v. Oliver*[1], *Quaintance v. Howard*[2], *Coatsworth v. Toronto*[3], *Ferguson v. Galt*[4].

The above-mentioned jurisprudence deals with the relationship between a contractor and the owner, but I think it applies with even greater force between a sub-contractor

[1] (1884) 3 O.R. 310.
[2] (1890) 18 O.R. 95 (C.A.).
[3] (1858) 7 U.C.C.P. 490; (1858) 8 U.C.C.P. 364.
[4] (1873) 23 U.C.C.P. 66 (C.A.).

and a prime contractor. Mr. W. E. Williams who has been engaged in the construction business for several years and is a past president of the Montreal Building Exchange gave evidence as an independent expert regarding the usual provisions found in construction contracts and how they operate. He stated that a sub-contractor is never paid by the prime contractor until the latter has secured the certificate of the engineer or architect appointed by the owner and until the whole construction, which may include the work of many sub-contractors, has been completed to the satisfaction of the owner, and a certificate of the architect or engineer chosen by him has been issued. It will be seen therefore that, notwithstanding that a sub-contractor may have carried out his sub-contract perfectly, insofar as payment is concerned, he must wait until every other sub-contractor has done so to the satisfaction of the prime contractor and the latter has received a certificate to that effect from the architect or engineer.

The law of England regarding the nature and effect of an architect's certificate is described together with supporting jurisprudence in *Law and Practice of Building Contracts* by Donald Keating, 1955 edition, pp. 62 *et seq.* At p. 68 the following is found:

> It is a question of construction in each case to determine whether it was intended that a particular certificate should be conclusive upon the matter with which it purports to deal. Express words are frequently used such as, for example, that "the certificate of the engineer . . . shall be binding and conclusive on both parties." It seems that prima facie a final certificate which is a condition precedent to payment is conclusive. Progress certificates are usually not conclusive. . . .

At p. 69 the author states:

> The architect's decision may be conclusive on some matters but not on others.

It is provided in article 3 of the Dominion Bureau of Statistics contract that the amount of the holdback is to be 15% of the progress payments, and the article concludes in these words:

> Final payment to be made within 30 days after satisfactory completion of the entire building and acceptance by the architect.

Although it does not add that such completion and acceptance by the architect are conditions precedent which must be fulfilled before the taxpayer is entitled to final payment

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of the holdback, in my opinion, under the jurisprudence such meaning is to be implied. As a corollary, I consider that the holdback does not, as far as the taxpayer is concerned, take on the quality of a receivable until the work has been accepted by the architect. This does not, however, dispose of the issue in regard to the contract under consideration.

Ross, Patterson, Townsend and Fish, as appears by the contract, had been named by the owner as the "architect;" and on March 9, 1953, the above-mentioned firm, *per* J. K. Ross, certified that all the work in connection with the Dominion Bureau of Statistics, which totalled some $6,000,000, had been completed by the prime contractor according to plans and specifications; and that no holdback was to be retained. The above-mentioned certificate, of course, covered the work done by several sub-contractors, including the taxpayer. It will thus be seen that the condition precedent ceased to exist before the termination of the taxpayer's fiscal year 1953 and the holdbacks payable under it acquired the quality of a receivable as of the date of the certificate. It is to be recalled that final payment was to fall due thirty days after the issuance of the certificate which would bring it into the taxpayer's subsequent fiscal year, and it was in fact paid on April 11, 1953. I do not think that the latter can rely on the delay allowed for payment as justification for bringing the amount of the holdback into the fiscal year in which it fell due. In my opinion, a term or instalment account must be included in the taxation year in which it could be said that it had the quality of a receivable since s. 85B(1)(*b*) provides that it shall be thus included "notwithstanding that the amount is not receivable until a subsequent year."

It was alleged by counsel for the taxpayer that, because of article 4 of the contract, the holdback in question did not become a receivable in the true sense of the word until April 11, 1953, the date on which the taxpayer received it from the general contractor, since the taxpayer was not aware of the issuance of the architect's certificate to the

prime contractor until he had received payment of the hold-back. In support of the foregoing submission reference was made to *Price v. Forbes*[1] wherein it was held that—

> An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal, in *Smallwood Brothers v. Powell*[2], that result by no means follows if the contract itself affords evidence that the certificate is not finally to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted.

I do not think that the reference to the *Smallwood* case is particularly applicable in the present instance because it dealt with progress payments and the architect issued a certificate to the builder, knowing there was nothing due to him by the owner. Article 4 of the contract reads in part as follows:

> No Payment made under this contract shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper materials or to relieve Sub-Contractor of responsibility for any guarantee or maintenance for which he may be liable under this contract or the specification applicable thereto.

In my opinion, article 4 notwithstanding, the architect's certificate given in the present case on March 9 is sufficiently conclusive to give to the holdback in question the character of a receivable as of that date.

On April 11 the taxpayer could have ascertained, as he did later, that the architect's certificate had been issued on March 9. It is not the date on which he obtains knowledge of the existence of the certificate but the date of its execution which governs. I am accordingly of the opinion that the holdback of approximately $56,000 which was paid on April 11, about thirty days after the issuance of the architect's certificate, as contemplated in the contract, must be considered as an amount receivable in the taxpayer's fiscal year 1953.

I will now pass on to a consideration of the relevant law applicable to the two Quebec contracts. As to the effect of the acceptance by the architect of the work done constituting a condition precedent, the most recent case which

[1] (1915) 23 D.L.R. 532. [2] (1910) 1 O.W.N. 1025.

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has been brought to my attention is that of *Bertheau v. Gagnon*[1] in which it was held that, once the work undertaken has been accepted either by the architect or the proprietor, this acceptance implies a recognition that the contract has been fulfilled and dispenses the contractor from otherwise proving the fulfilment of his obligations. The judgment then deals with the ensuing consequences when the contractor's work has been refused, but this situation does not arise in the present case. In *Traité du Droit civil du Québec* by L. Faribault, a notation in respect of Art. 1686 C.C. to the following effect is found in vol. 12, p. 432:

> In the following cases it has been decided that when an undertaking must be completely fulfilled and delivered, the contractor cannot make claim for the amount of his contract before the work has been completely terminated and accepted.

A long list of cases follows, among which is *Rochon v. Favreau*[2] wherein it was held that, when a job had to be perfected and delivered within the meaning of Art. 1686 C.C., the contractor could not claim the price of a contract before the work had been completed and accepted. Keating at p. 34 (*supra*) observed that the rights of contractors to be paid in the fact of a condition precedent has greatly exercised the courts in England. That the same is true in respect of the Province of Quebec appears from the fact that the above-mentioned judgment was affirmed by the Supreme Court of Canada only because the six presiding judges were equally divided on the subject. See also *Corporation of Drummondville v. Simoneau*[3], *Lalonde v. Fickles*[4]. In *Whiting v. Blondin*[5], the Supreme Court held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been fulfilled by the contractor who had no right of action under the contract. To the same effect is the case of *Bertrand v. Pépin*[6].

[1] [1959] B.R. 473, 476.
[2] (1911) 21 B.R. 61.
[3] (1912) 23 B.R. 392.
[4] (1915) 47 C.S. 257.
[5] (1904) 34 Can. S.C.R. 453, 457.
[6] (1917) 51 C.S. 496.

It will be seen that a number of the cases referred to deal with a situation wherein the contractor had not completely fulfilled his obligations, but this situation does not arise in the present case, and the applicability of the above-mentioned jurisprudence is accordingly limited.

I will consider first the Quebec case which I think offers the least difficulty, i.e., that concerning the Bouchard contract. This contract leaves no doubt as to the existence of a condition precedent with respect to the taxpayer's entitlement to payment of holdbacks. Section 1(*a*)(ii) of the contract (Ex. B) provides that Form C.C.C. 34A shall form an integral part of the contract, and section 10 of the said form reads in part as follows:

> . . . no work under this contract shall be deemed to have been performed, nor materials or things provided, *so as to entitle the Contractor to payment therefor* unless and until the Engineer is satisfied therewith, as evidenced by his certificate in writing, which certificate *shall be a condition precedent to the right of the Contractor to be paid therefor. . . .* (Emphasis supplied)

It has been proved that the engineer's final certificate (Ex. H) was duly signed and issued on January 26, 1954. It follows, in my opinion, that, insofar as that portion of the sum added to the taxpayer's income amounting to approximately $3,000, in connection with the holdbacks on the original contract, or by reason of additional work, the Minister's appeal should be dismissed.

The Héroux & Robert Limited Oratory contract (Ex. D) provides that the final payment is to be made thirty days after the completion of the work and acceptance by either the architect or the owner. I note in passing that nowhere in this contract is there an article protecting the owner in the event that defects should develop in a building after final payment has been made, such as article 4 in the Statistics building contract. This seeming omission may be due to the fact that the C.C. article cited hereunder affords protection against such eventuality.

> Art. 1688. If a building perish in whole or in part within five years, from a defect in construction, or even from the unfavorable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss.

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Although the contract does not specifically state that such acceptance shall constitute a condition precedent to payment, I think, by reason of the foregoing jurisprudence, it should be given the same interpretation as if such words appeared in the text. It is in evidence that the owner accepted the work only when final payment was made in 1957, amounting to some $5,000 which falls under the heading of holdbacks.

In view of the foregoing jurisprudence and attributing what I consider to be the ordinary meaning to the word "receivable," I think that those portions of the amount added by the Minister to the taxpayer's income in connection with the holdbacks on the Bouchard and Oratory contracts are unjustified.

For the above-mentioned reasons I consider that the cross-appeal of the taxpayer should be dismissed with costs. Insofar as the appeal of the Minister is concerned, I think it should be maintained in respect of that portion of the amount added to the taxable income of the taxpayer in connection with the holdbacks in the Dominion Bureau of Statistics contract but without costs. I would accordingly vary the decision appealed from and refer the matter back to the Minister for reassessment.

In the event that the parties fail to agree on the amount of holdback which is to be attributed to each of the three contracts in issue, this matter may be spoken to.

Judgment accordingly.

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BETWEEN:

IRON ORE TRANSPORT COMPANY LIMITED .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Crown Liability Act 1-2 Elizabeth II, c. 30, s. 3(1)(a), s. 4(2) and s. 3(1)(b)—"Tort"—Articles 1053 and 1054 C.C.—Damage to ship striking an obstruction in channel in St. Lawrence River—Ship heavily laden and improperly navigated—No liability on Crown.

Suppliant's ship the *Ruth Lake* while proceeding heavily laden on a voyage from Sept Iles, Quebec, to Contrecoeur, Quebec, struck a submerged object when rounding Nicolet Curve on entering Lake St. Peter and suffered considerable damage, to recover which, suppliant brings this action against the respondent. In its petition of right suppliant alleges that the *Ruth Lake* was drawing less than the limiting depth of 35 feet when she left Sept Iles laden with ore and that the respondent's officers and servants are guilty of tort in not maintaining the channel in the condition described in official publications and charts and that suppliant was misled concerning the depth of water in the channel and further that the St. Lawrence Ship Channel constitutes a public work and the respondent committed a breach of duty under s. 3(1)(*b*) of the *Crown Liability Act* 1-2 Eliz. II, c. 30 since it failed to ascertain the presence of any obstruction in the channel or if it had knowledge of any obstruction it failed to give warning of its presence to the crew of the *Ruth Lake*. The Court found that the damage to the *Ruth Lake* was due to faulty navigation on the part of her officers in that she was proceeding off course with too much speed when so heavily laden.

Held: That "tort" as defined in the *Crown Liability Act* must be read in the light of articles 1053 and 1054 of the Civil Code of the Province of Quebec.

2. That the Crown's liability, if any, was light and vicarious.

3. That the *Ruth Lake* was drawing more than the limiting channel depth of 35 feet at the time of the accident and was therefore proceeding at her own risk.

PETITION OF RIGHT to recover from the Crown damages sustained by suppliant's ship striking a submerged object in St. Lawrence River.

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

F. O. Gerity and *A. S. Hyndman* for suppliant.

R. Lafontaine, Q.C. and *P. M. Troop* for respondent.

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

KEARNEY J. now (August 19, 1960) delivered the following judgment:

The suppliant is a company duly incorporated under the laws of Canada and is the owner of the diesel ship *Ruth Lake*, a bulk carrier being of the following dimensions: weight, 21,156 gross registered tons, 661′ in length and 87′ of beam.

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On October 14, 1956, the *Ruth Lake*, heavily laden with iron ore, ship and cargo weighing 42,000 tons, proceeded up the St. Lawrence River from the port of Sept Iles in the Gulf of St. Lawrence, bound for Contrecoeur, near Montreal. At about 6:30 p.m., upon entering lake St. Peter and while rounding what has been called the Nicolet Curve, she struck very violently some submerged object in the vicinity of buoy 12L. As a result the ship suffered damages allegedly amounting to $146,511.15 for which the suppliant seeks to hold the respondent responsible.

This is an action in tort and the law applicable to it is contained in ss. 3(1)(*a*), as qualified by s. 4(2), and 3(1)(*b*) of the *Crown Liability Act,* 1-2 Eliz. II, c. 30. The word "tort" as contained in s. 3(1)(*a*) is defined in s. 2(*d*) as follows:

In this Act

"tort" in respect of any matter arising in the Province of Quebec, means delict or quasi-delict.

Since the cause of action arose in Quebec and Arts. 1053 and 1054 C.C. deal with delicts and quasi-delicts, I think the above-mentioned sections must be read in the light of these two articles. The texts of the foregoing provisions read as follows:

3(1) The Crown is liable in tort for the damage for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

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.

Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Art. 1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care; . . .

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

The suppliant alleges that, within the meaning of s. 3(1)(*a*), the officers and servants of Her Majesty acting within the scope of their employment are guilty of tort in that they failed to inspect the said channel and to maintain it in the condition described in official publications and charts; in that they allowed a less depth of water to exist than that advertised by permitting an obstruction to remain in the channel and did not notify the mariners accordingly; and in that these omissions by the said officers and servants misled ship owners in general, and the suppliant in particular, into navigating the said channel in vessels drawing less than 35 feet of water. It alleges that the Crown in any case, with respect to its ownership, occupation, possession or control of the St. Lawrence Ship Channel, which constitutes a public work, committed a breach of duty under s. 3(1)(*b*) because it failed to ascertain the presence of any obstruction in the channel; or because, if it had knowledge of any obstruction, it failed to give warning of its presence to the crew of the *Ruth Lake,* and issued misleading information concerning the depth of the channel.

The respondent denies responsibility both in fact and in law and claims that the damages suffered were attributable to the negligence of the servants of the suppliant acting in the course of their employment in that at the time in question they permitted the draught of the *Ruth Lake* to be excessive, did not steer a usual and safe course and failed to keep within the limits of the channel.

In endeavouring to determine the true cause of the grounding, counsel for the suppliant attributed the accident to any one of several possible causes which, I think, are for the most part mutually exclusive. There were no witnesses apart from the officers and crew of the *Ruth Lake* who were in a position to establish the ship's location, and at the trial they placed the point of impact at dead center of the channel and about midway between buoys 12L and 11L which mark its north and south limits. The evidence shows the existence of two obstructions, neither of which was located at the point of impact as above described. One of them was an anchor some 10′ in length and of the same width, weighing over 3,000 pounds; and the other, a boulder 7′ long, 6′ high and 6′ wide.

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Before dealing in more detail with the potential causes of the grounding, I think it appropriate to indicate a few of the surrounding circumstances and add a few explanatory notes concerning certain exhibits.

The *Ruth Lake* was a brand new ship. She had been built in Great Britain and was registered in London and had arrived in Canada on her maiden voyage in June 1956. When the ship left Sept Iles on October 13, according to the suppliant she was drawing 34′01″ fore and aft, but this draught had been gauged while she was moored in salt water. Roger Laliberté, a fully qualified pilot, during the summer had piloted the *Ruth Lake* on her previous trips from Sept Iles to Contrecoeur. On the trip in question the same pilot was navigating the ship and giving steering directions to able seaman Thomas Sutherland who was at the helm. With them on the bridge were Captain J. Smith, master of the ship, and P. James, first mate, whose task it was to take the ship's bearings by landmarks at the time of the accident. This important witness was not heard at the trial because he had left the employ of the company and was said to be in Australia.

The master had in his possession a small scale map of lake St. Peter region numbered 1337 (Ex. 1) which had been filed on discovery as exhibit S-1, but the scene of the accident is more clearly shown on a blown-up map of the area which was filed as exhibit 3, on which have been superimposed in red markings most of which, being descriptive of various objects pertinent to the issue, speak for themselves. In navigating around what is called the Nicolet Curve, the *Ruth Lake* was following the line of what appears as the Port St. Francis Range which joins up with the Nicolet Traverse Range which she later followed. The pilot testified that the *Ruth Lake* left the Port St. Francis Range opposite buoy 8L. He apparently kept somewhat to the north of buoy 9L, so as to avoid coming close to a sunken dredge located outside the southern limit of the channel and which, to the knowledge of the ship's officers, crews were attempting to raise.

Beginning at buoy 10L and continuing past buoy 14L the north side of the channel was in process of being widened but, although the dredges had been removed, the widened

portion of the channel had not yet been cleared of boulders and had not been declared open for traffic. Prior to the accident red gas buoy 12L had been moved 600′ farther east to a position which it occupied on October 14, 1956. Between buoys 12L and 11L appear three positions of the *Ruth Lake* as drawn in court by the master of the vessel. The first sketched in blue and marked J.S.I. is where the master thought the *Ruth Lake* was when she hit. The second position sketched in red and marked 2 is where the master thought the ship was a moment or two following the initial shock and after he had swung her somewhat to starboard. The master on discovery had stated that at the time of contact the flashing green buoy had cleared the port quarter of the *Ruth Lake,* and the flashing red buoy 12L was just forward of the starboard beam, and counsel for the Crown asked him to sketch the ship's position giving effect to these bearings. The result is seen in the blue outline marked III.

Pilot Laliberté indicated on exhibit 7 the location of the *Ruth Lake* at the instant of striking and shortly thereafter, and these positions are marked with his initials and numbered 1 and 2. He places the ship slightly north of midchannel and Captain Smith puts her slightly south of it. Both place her in midchannel, much nearer to the boulder than to the anchor.

The extent of the damage suffered which is not contested was so heavy that a forward air tank on the port side was bilged and over 800 tons of water rushed into it, the ship began to list and her head rested on the bed of the channel until the master adroitly opened an air tank near the starboard quarter and took in water which brought the ship on an even keel and allowed her to proceed on her journey. Although she touched bottom en route she arrived safely at her destination which was Contrecoeur.

I will first consider to what extent, if any, the anchor may be regarded as the obstacle which caused the damage. Following is an account of the circumstances surrounding its discovery:

On the night of October 16 Paul H. Kuhring, who was then chief engineer of the St. Lawrence Ship Channel and in the employ of the Department of Transport, learned from the signalling service of the Department of Transport that

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the *Ruth Lake* had touched near the central channel line, opposite the sunken dredge *De Rome*; and on October 18 he caused a sweep about 700′ in length and about 300′ wide to be made in the locality indicated, but no obstruction was found.

On October 22 pilot Laliberté filed with the Department of Transport a pilot's casualty report (Ex. D), wherein he purported to describe the exact spot where the accident took place as opposite the wreck *Délorme* (should read *De Rome*), about 500′ east of buoy 12L. On receipt of this information Mr. Kuhring on October 24 caused a more extensive sweep to be made in the area as indicated by the pilot's report, with the result that the anchor already described was located at about 1,800′ downstream from the point of contact, as later described by the master and the pilot on exhibits 3 and 7, and about 800′ north of the sunken dredge. See exhibit R entitled "Sketch Showing Proving Done in View of Finding an Obstruction to Navigation at Nicolet Traverse."

Before the location of the anchor had been established it was thought by two of the ship's chief officers that it, or something like it, had become detached from the wrecked dredge and had caused the damage. The master in reporting to the ship's owners under date of October 19, 1956, stated:

> . . . our pilot is of the opinion that some part of the wreckage has become detached and fallen into the channel. This would appear to be quite a sound hypothesis for we have a sharp heavy indent about 3 feet above the keel plate which could not have been caused by contact with the bottom.

The later discovery of the anchor belonging to the sunken dredge for a long time appeared to have settled the identity of the obstruction, but in April 1959 when Mr. Hector L. Land of the Department of Transport, and chief engineer of the St. Lawrence Ship Channel, was examined on discovery, counsel for the suppliant for the first time learned that in July 1956 what later turned out to be a large boulder with a red smudge on it had been found by Mr. T. M. Tardif, also of the Department of Transport and district engineer in charge of sweeping, 130′ upstream from the charted position and 750′ from the actual position as of

October 14, 1956 of the red gas buoy 12L, and approximately 15′ south from the northern extremity of the channel. I will have occasion to refer to the boulder after I have concluded dealing with the anchor and other potential causes.

According to the expert testimony of Mr. Buchanan, a naval architect, ship surveyor and senior steamship inspector of the Department of Transport, who examined both the ship and the anchor which was unbent and bore no traces of contact. He stated that the ship likely struck a shelf, hard rock or hard shell, or a series of rocks and rammed them into the bottom as she went over them; or struck a risen object and rolled it under the port bow. This evidence was in keeping with a description given by the master and the pilot who testified that the sensation on contact indicated that the object struck rolled along the bottom of the ship. Counsel for the suppliant conceded that there was little likelihood that the anchor constituted the cause of the accident, and I think there is considerable evidence to justify such conclusion.

Counsel for the suppliant also submitted that the *Ruth Lake,* while in midstream, might have come in contact with some unidentified object and the force and weight of the ship in rolling over it caused it to disappear in a cavity in the bed of the river. This submission has the merit of being consistent with the testimony given by the witness called by the suppliant as to the whereabouts of the ship, but I consider there is little, if any other, evidence to justify it. Every spring lines are run to ascertain the state of the channel, as frequently winter debris finds its way into it. According to the evidence, Mr. Tardif had made more than one sweep in 1956 in the vicinity of buoy 12L, and the *Ruth Lake* and her sister ship had previously steered the same course which was followed on October 14, 1956; and, although the St. Lawrence is a busy highway, at no time prior to the hearing is there any suggestion of the existence of a large boulder or similar obstruction being found where it is claimed the *Ruth Lake* struck.

Another alternative equally consistent with such testimony was suggested, namely, that the boulder with the red smudge became dislodged by ice and was in midchannel at

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the time of the accident. There was some evidence that ice had caused the sunken dredge to move from where it sank. Several witnesses stated that it was possible, though highly improbable, that an ice flow could dislodge such a boulder, but such possibility can be disregarded since, as appears later, the boulder was discovered in July and removed in November of the same year and evidence was led to prove that no ice had formed on lake St. Peter in the interval.

An additional aspect of cause arises if the *Ruth Lake* can be brought to the position of the boulder. The likelihood and consequences of such occurrence require consideration. The pilot testified emphatically that the ship could not possibly have been where the boulder was said to have been found; and counsel for the suppliant stated in argument that this could occur only if the *Ruth Lake* practically grazed buoy 12L in rounding the Nicolet Curve, which was also an impossibility. Nevertheless, assuming that a boulder was in the position stated by the respondent, it was less than 300′ from the supposed point of impact, and counsel for the suppliant intimated that the confusion of the moment might account for inaccuracies in the evidence of the ship's officers as to her situs. In pursuing such a suggestion it is important to examine the evidence establishing the position of the boulder. In 1956 dredge widening operations on both sides of the channel at the Nicolet Curve were being carried out, but we are here not concerned with what occurred on the south side. As to the position of the boulder, Mr. Tardif testified that, when dredging had ceased on the north side, on instructions received he carried out a sweep in July 1956 in the dredged sector and along the edge of the channel in search of obstructions. The cross bar of his sweeper was set 2′ below chart datum point, and when it strikes something or makes what is called a touch, the obstacle touched causes the bar to rise and a measuring device registers the height of such rise and this determines the extent to which the obstacle is above or below the datum point. Mr. Tardif stated that, according to the angle and the force with which the bar strikes the obstacle, it may tilt or bounce in such a way that the height of the obstruction may be less than appears on the gauge. Once an obstacle is found, its exact location is accurately recorded by taking a three-point

fix with two sextant angles on triangled points ashore. Exhibit Q dated July 26, 1956, and signed by Mr. Tardif, shows the height and location of the obstacles remaining after dredging and which, as might be expected, consisted of stones or boulders of varying sizes, some of which protruded above datum point. The 2½′ touch, sometimes referred to as the 34 foot touch (meaning that there were 34′ of water covering the object), located 15′ inside the channel, is the boulder which according to later evidence bore a red smudge on it. Mr. Tardif, speaking of this boulder, said: "We disregarded that (the boulder) on account of it was so close to the edge of the channel, and when there is a dredging operation and steep bank, there is always some stuff falling into the channel. That is why when we do sweeping of the area, we run a line on the edge." It was lifted in the autumn general clean-up when other boulders in the newly dredged area were removed.

Mr. Houde, a foreman employed by the Department of Transport overseeing soundings and rock removal, stated that on November 8, 1956, he was furnished with exhibit Q or a duplicate thereof and on that day he found the boulder on the edge of the channel strip within 20′ of where he expected to find it. He was careful, he stated, not to allow it to turn while being lifted. Apart from giving the measurements of the boulder, 7′ x 6′ x 6′, Mr. Houde added that on its southern side it had a red smudge 2′ long by 1½′ wide. It will be recalled that the *Ruth Lake* was moving upstream and suffered damage only on her port side and, at first sight, since the red smudge was on the left-hand or southern side of the boulder, one might be led to infer it could not have been this boulder which came in contact with the ship. Such a presumption would clearly prevail if it could be said that the boulder, when found on November 8, had not budged from the position it occupied prior to the accident. I think, taking into account the evidence of both the master and the pilot and the weight and momentum of the *Ruth Lake* at the time of the accident, if she struck the boulder she likely caused it to roll over.

In cross-examination Mr. Houde declared that he was not familiar with the use of sextants and maps and that some superior officer on board his lifter, with the aid of exhibit Q,

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directed him to the anticipated location of the boulder. The superior officer referred to was not called as a witness and Mr. Houde's evidence in respect of the exact location of the stone leaves a lot to be desired. Nevertheless, in the absence of any evidence to the contrary, I think the boulder when first found was 15′ inside the northern limit of the channel and that if the *Ruth Lake* struck it she was off course. Whether the dredge salvage operations had diverted the attention of the ship's officers, as suggested by Mr. Kuhring, or for some other unknown cause the *Ruth Lake* with her 87 foot beam struck the boulder on her port side, I think, as Mr. Kuhring speaking from long experience said, the *Ruth Lake* must have been outside the channel when she struck and may well then have grounded on other boulders. This would explain the multiple scorings 100′ long and 8′ wide on the ship's bottom. I do not think such markings should be ascribed only to the boulder, because if it rolled for 100′ under the ship, one would expect to find more than a single relatively small red smudge on it. Mr. Kuhring expressed the opinion that paint from tugs or other vessels in the course of dredging could have caused the smudge on the stone.

The only remaining theory as to the cause which would be consistent with the *Ruth Lake* striking the boulder while remaining in the channel is to assume that neither she nor the boulder was located at the places indicated by the evidence but were both somewhere in between. I think that to make such an assumption in the face of all the evidence to the contrary, one would have to resort to conjecture. In the case of *Montreal Tramways Co. v. Léveillé*[1] Lamont J., in speaking about the facts upon which the court may draw conclusions from the known facts to the fact proved, said:

> These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man, in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.

[1] [1933] S.C.R. 456, 466.

Lord MacMillan in *Jones v. Great Western Railway Co.*[1] observed:

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference *from the facts actually observed and proved.* (Emphasis mine)

Also in the case of *The King v. Moreau*[2], Rinfret C.J., speaking of the quality required of presumptions, said:

La doctrine et la jurisprudence sont bien arrêtées sur ce point et ne souffrent plus de discussion. Elles exigent que les présomptions sur lesquelles peut valablement se fonder une conclusion de ce genre soient graves, précises et concordantes. Il m'est impossible de trouver ici une situation qui rencontre ces exigences.

It was said on behalf of the suppliant that the respondent did not make a sufficiently thorough sweep of the channel following the grounding. In accident cases involving an obstruction on a city street or on the runway of an airport, unquestionably the burden of proving the existence of any object alleged to have caused the damages in issue rests on the complainant. We are here concerned with a river channel which constitutes a public highway and, although it is more difficult to do so and might necessitate the employment of sweeping apparatus and divers, I think the burden of locating the obstruction complained of rested on the suppliant, as did the onus of showing that its presence was imputable to a breach of duty for which the respondent was in law responsible.

Speaking of the burden of proof Taschereau J. in *Palmer et al. v. Miron & Frère*[3] stated:

The action is based on section 1053 of the *Civil Code* of the Province of Quebec, and the plaintiffs have therefore to show that a delict or a quasi-delict was committed, that it was imputable to the defendants and that as a result of their wrongful act, the appellants suffered damages.

[1] 47 T.L.R. 39, 45. [2] [1950] S.C.R. 18, 23.
[3] [1959] S.C.R. 397, 399.

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I think that the above clear statement of the law is applicable in the circumstances of the present case, particularly in view of the draught of the ship at the moment of impact.

As mentioned previously it was stated by the master that the *Ruth Lake* while moored in salt water was drawing 34′01″ fore and aft. The loading and dead weight form (Ex. 11) shows that the ship was carrying 184 tons in excess of dead weight which, according to Mr. Buchanan, added a further small amount of 1½″, making her draught 34′01½″ when she left Sept Iles. It is conceded that, standing still, she would draw 9¾″ more in fresh water than in salt water and her draught would increase proportionately to the increase in her speed. Mr. Buchanan, assuming as stated by Pilot Laliberté that the *Ruth Lake* was travelling at 10 knots, declared that in his opinion, when she grounded in the restricted fresh water channel of lake St. Peter, she was drawing 38′03″. In the opinion of Alexander Doag, a naval architect called on behalf of the suppliant, the lake St. Peter channel was not so restricted as Mr. Buchanan supposed and the *Ruth Lake* on arriving in lake St. Peter was drawing 34′11½″ and that at the estimated speed of 8 knots she would be drawing 35′07½″; and if she were travelling at 10 knots her draught would be 2″ greater. An entry in the log book (Ex. 6) made by the second mate who was on watch indicates that the *Ruth Lake* apparently touched bottom while passing Deschaillons, about 35 miles from lake St. Peter, some three hours before the grounding with which we are concerned occurred.

Although opinions may vary somewhat as to the amount of water the *Ruth Lake* was drawing at the time of impact, it is indisputably clear that her draught exceeded the limiting depth of 35′ mentioned on exhibit 1.

The master and the pilot declared that on the information obtained from the Marine Signal Service they expected to find 37′ of water in lake St. Peter. It was proved that the depth gauges indicated 37′06″. I do not think that in the circumstances such information has much bearing on the Crown's liability. There are local variations in the water level, but it might have been quite different if, as sometimes occurs, the general level had been one or two feet below

the 35′ limitation depth and, knowing this, the respondent had failed to inform shipping interests of such lack of depth. Undoubtedly the heavier the ship is laden, the more profitable will the voyage be, and in the absence of instructions to the contrary the master may have felt justified in taking the calculated risk of loading his ship so heavily, since according to the evidence the *Ruth Lake* and her sister ship had previously carried without incident heavier cargoes than on the voyage in question. Nevertheless I think the ship thus laden was proceeding at her own risk.

A person's responsibility will be heavier or lighter in proportion to the duty which rests upon him. In the *Canadian National Railways Co. v. Lepage*[1] Rinfret J., as he then was observed:

> It is a familiar principle that negligence may, in law, be considered a fault only if it corresponds with a duty to act.

In my opinion it would be difficult to visualize a relationship such as prevails between the suppliant and the Crown in the present case, existing between two private citizens, or to find a situation wherein a lighter duty or a more vicarious responsibility might be said to rest on the respondent. The dredging and maintenance of the St. Lawrence Ship Channel, a tremendous undertaking, is carried out by the respondent with public funds and the improvement inures particularly to the benefit of those engaged in shipping which of course includes the suppliant. Nevertheless it is true, as observed by Trudel in *Traité de Droit Civil du Québec,* vol. 8, p. 45, No. 64, that the slightest derogation from average or normal prudence may constitute a quasi-delict entailing legal responsibility in the Province of Quebec. Speaking of the test of negligence, Rinfret C.J. in *Eaton v. Moore*[2] referred with approval to the dissenting opinion of McDougall J. in the court below that—

> Reduced to its simplest form and in its present connotation, the test of negligence is not whether greater precautions might have been taken and the loss avoided, but whether ordinary precautions, those usual in the circumstances, were taken.

Because of the conclusion I have reached upon the facts, I think it is unnecessary to deal with the question of degree of fault, or to decide whether under the circumstances

[1] (1927) S.C.R. 575, 578. [2] [1951] S.C.R. 470, 474.

described by Mr. Tardif, he or his senior officer, Mr. Kuhring, owed it as a duty to the suppliant not to wait until the general clean-up to remove the boulder but to do it immediately or give warning of its presence; or whether their failure to do so made them personally liable and so engaged the responsibility of the Crown under s. 3(1)(*a*).

On the evidence I have little hesitancy in concluding that the damage was not caused by the anchor, I am convinced that the boulder was on the edge of the channel and I am not satisfied that the damage suffered is attributable to its presence there. Furthermore I think, if the *Ruth Lake* struck it, she went outside the channel; and because of the presence of numerous boulders beyond the northern limit of the channel, likely as not she would have suffered damages in any case and the fault would lie not on the presence of the stone but in the position and speed of the ship when navigating so heavily laden.

Among further submissions counsel for the suppliant stated that s. 3(1)(*b*) of the *Crown Liability Act* applied if for no other reason than because the St. Lawrence Ship Channel constituted a public work under the control of the Crown. As he also observed, this is the first occasion on which s. 3(1)(*b*) has been invoked. In the *Cleveland-Cliffs SS. Co. et al. v. The Queen*[1] the question of its applicability did not arise because its date of promulgation was subsequent to the date on which the cause of action arose.

It was held in *The Hamburg American Packet Company v. The King*[2] that—

> . . . it cannot be doubted that the ship channel between Montreal and Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada.

Being of the opinion that on the facts the suppliant has failed to discharge the burden of proving that a quasi-delict was committed which was imputable to the respondent and that the damages claimed resulted therefrom, I do not see

[1] [1957] S.C.R. 810.

[2] (1901) 7 Can. Ex. C.R. 150, 177.

the necessity of determining whether or not the dredging of the channel in the present case constituted a public work. It follows that I would dismiss the suppliant's claim with costs.

Judgment accordingly.

BETWEEN:

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Jan. 14
Mar. 10

REMINGTON RAND LIMITED ....PLAINTIFF;

AND

TRANSWORLD METAL COMPANY LIMITED, carrying on trade and business as Transworld Trading Company and the said TRANSWORLD TRADING COMPANY ....DEFENDANTS.

Trade mark—Infringement—Motion to quash interim injunction restraining importation into, and sale in Canada of shavers alleged to bear trade marks similar to plaintiff—Balance of convenience.

The plaintiff, owner of the Canadian registered trade marks "Remington", "Rollectric" and "Princess" in respect *inter alia* of electric shavers, sells shavers bearing these marks, and also one bearing the unregistered trade mark "Roll-a-matic", in Canada. All are made by the plaintiff's United States parent company, Remington Rand Electric Shaver Division, Sperry Corporation. The defendants sold electric shavers in Canada bearing the same marks. Some of the latter were made in Germany by Remington Rand C.M.B.T. Elektro-Rasierer and others by the plaintiff's parent company in the United States. The plaintiff obtained an interim injunction restraining such sales by the defendants with leave to the defendants to move to dissolve the injunction. On a motion brought by the defendants to do so

Held: That evidence of the sale by the defendants in Canada of shavers bearing the registered trade marks showed a strong *prima facie* case of infringement and the balance of convenience favoured restraining the defendants from selling shavers bearing such marks until trial. *Dunlop Rubber Co. Ld. v. A. A. Booth & Co. Ld.* and *Gillette Safety Razor Co. et al. v. Diamond Edge Ld.* (1926) 43 R.P.C. at 139 and 310 respectively, referred to.

MOTION under s. 51(4) of the *Trade Marks Act* to prohibit the importation or other dispositions of electric shavers and parts thereof bearing the trade marks "Remington", "Princess" or "Roll-a-Matic" and not being wares of the plaintiff.

D. F. Sim for the motion.

H. E. Manning, Q.C. contra.

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REMINGTON RAND LTD. v. TRANSWORLD METAL CO. LTD. *et al.*

THURLOW J. now (March 10, 1960) delivered the following judgment:

This is an application to dissolve an interim injunction granted by Cameron J. on January 14, 1960. In the order, leave to move to dissolve the injunction was reserved to the defendants.

The plaintiff is the owner in Canada of the registered trade marks "Remington", "Rollectric", and "Princess" in respect of, *inter alia,* electric shavers and sells in this country several types of electric shavers bearing the mark "Remington" and either the mark "Rollectric" or the mark "Princess" or the unregistered mark "Roll-a-matic". The shavers sold by the plaintiff are made in the United States by Remington Rand Electric Shaver Division, Sperry Rand Corporation, of which the plaintiff is a wholly-owned subsidiary company. The validity of the plaintiff's registered trade marks is not attacked in these proceedings.

The evidence shows that the defendants have sold in Canada electric shavers bearing these marks, some of which were made in Germany, and some of which were made in the United States by the plaintiff's parent company and were outwardly, at least, identical with those sold by the plaintiff. The shavers which came from Germany bore the marks "Remington" and "Rollectric" and were manufactured by Remington Rand, C. M. B. H. A. B. T. Elektro-Rasierer, Frankfurt. No relationship or connection between this company and the plaintiff has been shown.

Notwithstanding the relationship between the plaintiff and its United States parent corporation, the evidence of use of the marks by the defendants in Canada, in my opinion, shows a strong *prima facie* case of infringement of the marks. *Vide Dunlop Rubber Company Ld. v. A. A. Booth & Co. Ld.*[1], where Tomlin J. said at p. 144:

> The "Dunlop" tyre business is conducted under a system whereby in different countries there are different Companies, so that the English Company owns in this country a number of Trade Marks and the French "Dunlop" Company in France holds Trade Marks in France which are identical with the English Trade Marks, and I gather that a similar condition of affairs obtains in Italy and possibly in other countries. It follows from that that a French "Dunlop" tyre having upon it the Trade Marks which are identical with the English Trade Marks cannot be imported for sale into this country without infringing the English Trade Marks.

[1] (1926) 43 R.P.C. 139.

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I also think that, notwithstanding the difficulty that may be experienced in ascertaining the defendants' damages from being restrained if they succeed in the action, the balance of convenience in this case favours restraining them until the trial. The case bears little similarity to *Parke, Davis & Co. et al. v. Gilbert Surgical Supply Co. Ltd.*[1], which was cited on behalf of the defendants. Here, while a purchaser of one of the defendants' shavers gets a shaver which, in the case of those imported from the United States, is made by the same manufacturer as those sold by the plaintiff, it is not unlikely he will think that the shaver is one sold and warranted by the plaintiff, since it bears one or more of the plaintiff's marks. If so, he will be deceived, and when he examines the warranty card and discovers the true situation the plaintiff's good will is, I think, likely to suffer. The extent of the injury that is likely to occur to the plaintiff's good will if the defendants are not restrained will, I think, be substantial, and it too will be difficult to estimate accurately in damages. And there is the additional feature that, in the meantime, if not restrained, the defendants will be permitted to go on committing what amounts, *prima facie* at least, to deception of the public. *Vide Gillette Safety Razor Company et al. v. Diamond Edge Ld.*[2]

On the other hand, the evidence does not satisfy me that the unregistered mark "Roll-a-matic" indicates in Canada shavers sold only by the plaintiff. It seems to me that it indicates, if anything, no more than that the shaver is one of a type of shaver made by the particular manufacturer, and it represents nothing as to the identity of the seller of it in Canada. However, the mark "Remington" on the same shavers appears to me to be sufficient to entitle the plaintiff to the same protection with respect to them.

The injunction will, accordingly, be continued, restraining the defendants until the trial from infringing the trade marks "Remington", "Rollectric", and "Princess" by importing or distributing shavers bearing any of these trade marks.

Costs of the motion will be costs in the cause.

[1] (1959) 18 Fox P.C. 175. [2] 43 R.P.C. 310.

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BETWEEN:

GORDON JOHNSON COMPANY AND GRAHAM METAL PRODUCTS LIMITED .... APPELLANTS;

AND

HAROLD CALLWOOD .... RESPONDENT.

Patent—Appeal from Commissioner of Patents—Abuse of patent rights—Patent capable of being worked in Canada—Not worked on commercial scale—No satisfactory reason given—Patent Act, R.S.C. 1952, c. 203, ss. 2(j), 67(2)(a)(b)(d), 68, 73.

The appellants appealed from a decision of the Commissioner of Patents ordering the grant to the respondent of a license under Patent No. 421,164 pursuant to s. 68 of the *Patent Act,* R.S.C. 1952, c. 203. The Commissioner found that the invention, a device for removing feathers from fowls, was one capable of being worked in Canada but was not being worked within the country on a commercial scale by the patentee or the owner of the equitable rights to the patent. That the working in this country was hindered by importation from abroad of the patented machine and fingers, and that the trade of certain persons was being prejudiced contrary to the public interest. He also found that the applicant possessed the necessary knowledge to work the patent in Canada.

Held: That although the Commissioner granted the application on the grounds that there had been an abuse within the meaning of paragraphs (a), (b) and (c) of s. 67(2) of the *Patent Act,* it was unnecessary to go beyond the provisions of paragraph (a) of s. 67(2), for on the evidence an abuse within the meaning of that paragraph clearly appeared and was by itself sufficient to warrant the exercise by the Commissioner of the powers conferred upon him by s. 68 of the Act.

2. That an abuse under s. 67(2) of the exclusive rights under the patent having been established, the Commissioner's decision to grant the license should be affirmed.

Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd. [1939] Ex. C.R. 128; *Brownie Wireless Co. Ld. Application* (1929) 46 R.P.C. 457; *In re McKechnie Bros. Ld. Application* (1934) 51 R.P.C. 461, referred to.

APPEAL from the decision of the Commissioner of Patents granting to respondent a license to manufacture and sell in Canada the invention covered by the Letters Patent in issue.

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

M. B. K. Gordon, Q.C. and *J. Kokonis* for appellants.

R. W. MacQuarrie for respondent.

THURLOW J. now (July 7, 1960) delivered the following judgment:

In these proceedings, the Gordon Johnson Company of Kansas City, Missouri, and Graham Metal Products Limited of Preston, Ontario, have appealed, first, from a decision of the Commissioner of Patents ordering the grant to the respondent, Harold Callwood, of a licence under Patent Number 421,064 pursuant to s. 68 of the *Patent Act,* R.S.C. 1952, c. 203, and, secondly, from the order by which the Commissioner settled the terms of the licence. The appeals were launched separately but were later consolidated by order of this Court and were heard together.

The patent in question relates to apparatus for removing feathers from fowls. The device described in the specification consists of a revolving drum from the outer surface of which protrude at an angle a number of flexible fingers by which, on being brought into contact with them, the feathers are removed without damaging the skin. The claims include the rotating device with the fingers secured thereto and the fingers, as well, with their particular design and characteristics and also the method of removing feathers from fowls by the application of the successive forces obtainable in using apparatus of the kind described. The use of the invention has greatly reduced the time required to remove feathers from fowls in commercial poultry processing. The machines and the fingers are sold as an item of poultry processing equipment generally by dealers carrying a line of such equipment.

The patent was granted on June 27, 1944, to George R. Hunt, and since 1955 has been registered in the names of several members of his family. It is not disputed, however, that since November, 1952 all equitable rights under the patent have belonged to the Gordon Johnson Company, one of the appellants, pursuant to assignments from the members of the Hunt family and from the Greenbriar Company, an Ohio corporation, the holder of an exclusive licence under the patent.

In July, 1950, the Greenbriar Company had granted to the Barker Poultry Equipment Company of Ottumna, Ohio, a non-exclusive sublicence under the patent, and by a document dated February 1, 1956 and consented to by the Gordon Johnson Company, the Barker Poultry Equipment

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Company extended to the Barker Poultry Equipment Company Limited of St. Boniface, Manitoba, its rights under the sublicence. In September, 1951 the Greenbriar Company had also granted to the Callwood Can Company Limited of St. Boniface, Manitoba, a limited, non-exclusive, non-transferable sublicence under the patent. The latter licence was cancelled by the Gordon Johnson Company early in 1955 for failure to make royalty payments as provided in the agreement therefor, and shortly afterwards, in March, 1955, the Gordon Johnson Company granted another similar licence to the other appellant, Graham Metal Products Limited.

In February and again in March of 1955, the respondent, Harold Callwood, who had been president of Callwood Can Company Limited from the time of its formation in 1947 until 1953 and had left it and commenced doing business in poultry processing equipment in Toronto, Ontario, under the name of The Callwood Company, asked the Gordon Johnson Company to consider giving him a licence under the patent, but this was refused. He thereupon applied for a compulsory licence pursuant to s. 68 of the *Patent Act* but was refused and, on an appeal to this Court from such refusal being dismissed, he launched a second application which, after a hearing at which the Gordon Johnson Company, the Barker Poultry Equipment Company Limited, and Graham Metal Products Limited were represented and heard in opposition thereto, resulted in the orders now under appeal.

Before turning to the reasons given by the Commissioner for ordering the grant of a licence, it will be convenient to refer to the substantive provisions of the statute under which the application was made to him. These are contained in a group of sections under the heading "Conditions". One of the sections is s. 67, s-s. (3) of which is as follows:

> (3) It is declared with relation to every paragraph of subsection (2) that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

By s-s. (1) of the same section, it is provided that the Attorney-General of Canada or any person interested may at any time after three years from the grant of a patent

apply to the Commissioner, alleging that there has been an abuse of the exclusive rights thereunder and asking for relief.

Subsection (2) of the same section contains, *inter alia*, the following:

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

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

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

* * *

(*d*) if, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted.

The expression "work on a commercial scale" is declared by s. 2(j) to mean

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

By s. 68, the Commissioner, on being satisfied that a case of abuse of the exclusive rights under the patent has been established, is given a number of powers, including a power to order the grant to the applicant of a licence on such terms as the Commissioner may think expedient. The power of the Commissioner to order the grant of such a licence is thus in the first instance dependent on his having been satisfied that a case of abuse has been established. By s. 73, however, all such orders and decisions of the Commissioner are made subject to appeal to this Court and, there being

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no limitation on such appeal expressed in the statute, it devolves on the Court to review the matter both on the facts and the law. *Vide Brownie Wireless Company Limited* case[1], where Luxmoore J. said at p. 478:

> In the course of the argument a great deal was said with regard to the position of the *Comptroller*. It was said that the legislature had on three separate occasions altered the Tribunal to which the decision of the question of the grant of compulsory licences should be committed, and that in finally selecting the *Comptroller*, special reliance was placed on his admittedly wide experience and knowledge. For this reason it was suggested that the Court should be very careful before deciding to alter any decision come to by the *Comptroller*, and ought only to consider whether the decision involved any mistake of law. I am well aware of the *Comptroller's* great experience, and I recognise the care and anxiety he has brought to bear in the decision of this case, but the legislature has provided that the decision of the *Comptroller* in such cases as the present is subject to an appeal to the Court. The appeal is not limited to questions of law, and it is plainly the duty of the Court to consider the decision not only with regard to the questions of law which arise, but also on the facts.

The legislative background of the provisions mentioned above was commented on as follows by MacLean P. in *Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd.*[2] at p. 129:

> Before referring to the provisions of the *Patent Act* relevant to the issues here, which are sections 65 to 70 inclusive, I might observe that prior to the enactment of such sections, the *Patent Act* provided that any person might apply to the Commissioner, at any time after three years from the date of a patent, for the revocation of such patent on the ground that the patented articles or process was manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent. The Commissioner, in the absence of satisfactory reasons as to why the article or process was not manufactured or carried on in Canada, was empowered to make an order revoking the patent forthwith, or after a reasonable interval. This provision was enacted with a view to establishing new industries in this country, but it was evidently found at times impractical, or oppressive, and it was superseded by the provisions of the *Patent Act* to which I am about to turn, which are almost identical with section 27 of the English *Patent Act*.

The development of the corresponding provisions of the English Patent Act is traced by Luxmoore J. in the *Brownie Wireless* case (*supra*) at pp. 469 to 472, a case which turned on the English provision corresponding to s. 67(2)(*d*) of the *Patent Act*. The earlier English cases must, in my opinion, be read with caution in view of the differences between the statutes applicable when they arose and the present provisions of the *Patent Act*.

[1] (1929) 46 R.P.C. 457. [2] [1939] Ex. C.R. 128.

In his reasons for granting the respondent's application, the Commissioner, after reviewing the facts, found as follows:

> In resume, I find that the invention is one capable of being worked in Canada, that it is not worked within the Country on a commercial scale by the patentee or by the party which we have agreed to call the owner of the equitable rights to the patent, that the working in this Country is still hindered by a considerable importation from abroad of the patented machine and fingers and that the trade of certain persons is being prejudiced contrary to public interest. I also find that the applicant possesses the necessary knowledge and competence to work the patent in Canada.

It will be observed that the Commissioner in effect found that there had been abuse within the meaning of all three of the above-quoted paragraphs of s. 67. For the purposes of this appeal, however, it is, in my opinion, unnecessary to go beyond the provisions of paragraph (*a*) for, in my view, an abuse within the meaning of that paragraph clearly appears and is by itself sufficient to warrant the exercise of the powers conferred by s. 68.

Under paragraph (*a*) of s. 67(2) (omitting what is not material to the present discussion), the exclusive rights under the patent are to be deemed to have been abused if (*a*) the patented invention is one capable of being worked within Canada, (*b*) it is not being worked within Canada on a commercial scale, and (*c*) no satisfactory reason can be given for such non-working. That the invention in question is one capable of being worked in Canada is, in my view, clear, for it appears from the evidence that some, if not all, sizes of the machines have been made in Canada, and that the fingers can also be made in Canada.

Turning to the second of the elements mentioned, the expression "work on a commercial scale" and the English equivalent of the statutory definition were discussed as follows by Luxmoore J. in *McKechnie Bros. Ltd.* application[1] at p. 468:

> The question therefore arises, What is the meaning of the phrase "working on a commercial scale"? In ordinary parlance the phrase is used in contradistinction to research work, or work in the laboratory, but in the Section under consideration the words "worked on a commercial scale" must be read in the light of the statutory definition contained in Section 93 of the Consolidated Acts. The definition is in these words: "'Working on a commercial scale' means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent in

[1] (1934) 51 R.P.C. 461.

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or by means of a definite and substantial establishment or organization, and on a scale which is adequate and reasonable in all the circumstances". I am not going to attempt any delimitation of the necessary scale beyond pointing out that it must have a definite relation to all the circumstances of the particular case. It must be adequate with reference to some particular circumstances. "Adequate" is a word imputing equality or sufficiency in a proportionate sense. In ordinary circumstances, where there is no difficulty in the way of working an invention in this country and there are no other circumstances to be considered, "adequate" would, I think, suggest a reasonably close relationship to the demand for the particular article in this country.

In *Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd.* (*supra*), MacLean P. said at p. 136:

> It is essential to the working of the patents in Canada, in my opinion, that the formation of perforations, apertures, or surface openings, in the acoustical board should be carried out in Canada, because such is the essence of the inventions;

At p. 138 he also said:

> Sec. 65, ss. (3) of the Act declares that in an application of this nature it shall be taken that patents for new inventions are granted not only to encourage inventions but to secure that new inventions shall, as far as possible, be worked on a commercial scale in Canada, without undue delay; that is, and always has been, the spirit of the several Patent Acts in force in this country, at least for a long time. The present *Patent Act* is more liberal to patentees than former Acts. If a patentee has claimed a wholly new invention, a machine, an acoustical board, he must manufacture it in this country or run the risk of coming within the provisions of s. 65 of the Act. Each case must, of course, be determined on its merits, and in each case it will have to be determined on a proper construction of the patentee's specification, what the invention really is, and what are its essential features. In this case the essential feature of the inventions of Trader and Mazer, as I have already stated, is the manufacture of a suitable acoustical board or material according to the manner described in such patents. That is a new manufacture. The patentee must, in such cases make an effort to create a demand for the monopoly, and the establishment of an industry will in itself frequently help to create a demand for the article or process in question. And regard must be had to the possible export trade with countries in which the importer would not be liable to actions for infringement, as well as the demand for domestic consumption. It may be that the demand in Canada for the acoustical board produced by Celotex is limited, and that Celotex has adequately met Canadian demands for that board by importations of such board, but that is not a working of the patents as contemplated by the *Patent Act*.

In interpreting the provisions of the section 67 it is, I think, not without importance to observe that, while in effect conceding that patents are granted to "encourage" inventions, s-s. (3) declares that they are granted to "secure" that new inventions shall so far as possible be

worked on a commercial scale in Canada without undue delay. Patent rights are thus granted not merely to encourage working on a commercial scale but to secure this, and the tribunal is required to bear this in mind in determining whether there has been abuse within the meaning of the several paragraphs of s-s. (2). It is the responsibility of one holding rights under the patent law of this country to see that commercial working of the patent in Canada within the limits indicated is secured, and if he fails to secure it and finds as a result that the powers of s. 68 are exercised with respect to his patent he has none but himself to blame for he holds the patent not alone for his own enrichment but for the purposes as well of the policy declared by the statute. It is also to be noted that, under paragraph (*a*) of s-s. (2) and the definition in s. 2(*j*), the working of an invention on a commercial scale in Canada requires both a definite and substantial organization in or by means of which the manufacture of the patented article or the carrying on of the patented process is carried out in this country and that the working be on a scale that is adequate and reasonable under the circumstances.

In the present case, the salient facts with respect to the working of the patent in Canada are broadly that there was no working of it at all for the first seven years from June 27, 1944, when the patent was granted, until the Callwood Can Company Limited began working it under the licence from the Greenbriar Company dated September 9, 1951. From that time until its licence was cancelled at the end of 1954, the Callwood Can Company Limited paid royalty on 20 machines which it manufactured and sold at a total selling price of $24,562.20. In the period between the cancellation of that licence and the end of 1956, the Graham Metal Products Limited under its licence manufactured and sold 55 machines at a total selling price of $12,444.60. Thus, in the five years 1952 to 1956 inclusive there were 75 machines manufactured and sold in Canada at a total selling price of $37,006.80. In 1953 and 1954, two of the years in which the Callwood Can Company Limited held its licence, the Gordon Johnson Foreign Company, which handles the sales made by the Gordon Johnson Company in countries other than the United States, exported to Canada 69 machines having a total selling price of $61,023.92. In the years 1955

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and 1956, during which the Graham Metal Products Limited held its licence, the same company exported to Canada 48 machines having a total selling price of $43,453.57. In 1956 alone, the year in which the smallest number of machines were exported to Canada, there were 12 machines exported with a selling value of $13,929.52, this being more than the total selling price of machines manufactured and sold in 1955 and 1956 by the Graham Metal Products Limited. In fact, what the Graham Metal Products Limited appears to be manufacturing is merely three or four models of the smaller machines which, while accounting for a considerable number of individual sales, by no means represent the bulk of the business in both small and large machines available in the Canadian market in value or in economic importance, and particularly so in view of a trend in the poultry processing industry to the use of larger machines.

In totals for the five years mentioned, the machines manufactured and sold in Canada by the Callwood Can Company Limited and the Graham Metal Products Limited compare with the Gordon Johnson Company exportations to Canada as follows:

	No. of Machines	*Total Selling Price*
Canadian-made	75	$ 37,006.80
U.S.-made	107	$104,477.49

In addition, the supply to the Canadian market of rubber fingers for the machines has been entirely by importation from the United States. For these there is a steady demand in Canada both for new machines and for replacements. Graham Metal Products Limited alone in 1955 and 1956 imported and sold in Canada about 96,000 fingers at a selling price in excess of $44,000, and the Barker Poultry Equipment Company Limited imported about 15,000 in the year preceding the hearing.

Turning to the other licencees, the Barker Poultry Equipment Company manufactured neither machines nor fingers in Canada in the years from 1950 to the time of the hearing before the Commissioner in February, 1957, and no figures were given in evidence as to the extent of its exports of the patented articles to Canada. Its namesake, the Barker Poultry Equipment Company Limited of St. Boniface, Manitoba, however, following the extension to it of the

rights under the licence, in a shop where two workmen were employed, commenced working on three machines none of which had by the time of the hearing been completed, and it also arranged for the construction by another company of a fourth machine, which had been sold. Up to the time of the hearing, it had imported and sold five Barker machines and had imported two others. In November, 1956 it obtained from the Dominion Rubber Company Limited a quotation for the manufacture of four types of rubber fingers and in December of that year placed an order for 5,000 of one of the four types. An acknowledgment of the order by the Dominion Rubber Company Limited was put in evidence, as well as a sample finger said to have been made by that company. Whether in fact the order was ever filled does not appear and, bearing in mind the time when it occurred in relation to the proceedings before the Commissioner, I would give the transaction no weight whatever as evidence of manufacture of the fingers in Canada or of any *bona fide* intention to secure their manufacture in Canada on a commercial scale within the meaning of the statute.

Applying the test suggested by Luxmoore J. in the passage above quoted from *In Re McKechnie Bros.' Application,* in my opinion it is clear on the evidence that there is no reasonably close relationship between the manufacture of the patented articles in Canada and the demand which is shown to have been supplied in Canada, nor is there anything to indicate that there ever was any real difficulty in the way of working this invention in Canada or any special or other circumstances to be considered. Up to the time of the hearing, nearly 13 years after the grant of the patent the Canadian market had been supplied with fingers entirely by imports from the United States and less than half of the Canadian market had been supplied with Canadian-made machines while, so far as appears, no Canadian-made machines had moved into the United States market or the market of any other country. I am accordingly of the opinion that the scale of working in Canada was not at any time up to the time of the hearing before the Commissioner "adequate" within the meaning of s. 2(*j*) or sufficient to constitute working on a commercial scale within the meaning of that definition.

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This brings me to the third of the questions arising on s. 67(2)(*a*), that of whether any *satisfactory* reason for non-working in Canada on a commercial scale within the meaning of the definition has been given.

On this question, it may first be noted that no explanation of any kind has been given by the members of the Hunt family, in whose name the patent is registered. Nor has any explanation been given as to why the patent was not worked in Canada in the first seven years after it was granted. Mr. Gordon Johnson, whose company acquired the equitable interest in the patent in 1952, in the course of his evidence referred to the many technical aspects of the business and the knowledge necessary to make satisfactory equipment, to the desirability of one engaged in the supply of such equipment furnishing an educational and service program to those engaged in the industry, and to the fact that it is difficult to manufacture a line of such equipment in the quantities required and at satisfactory costs, having regard to the rapidity of changes in the equipment and the demands for it. He did not suggest, however, that his company was not at all times qualified in all necessary respects, and I would conclude from his evidence that the reason his company did not commence and carry on the working of the patent in Canada was that, with the United States market to supply, it was more practical and desirable to supply the much smaller Canadian market or at least a considerable part of it by export from the United States. This view of his evidence is, I think, borne out by some of the reasons he gave for refusing the respondent's request for a licence. He said:

> Yes. I just recited this morning some of the requirements we felt necessary for our licensee, that is to grant a licence. One is whether it was needed. We had an arrangement with the Graham Metal Company that we knew would develop into a licence, which it did, and felt they were sufficiently experienced. We were selling in this country, some of our other licensees, including Barker, were selling in this country and we realized the volume of business was not great enough to make it practical from a business standpoint to have too many people supplying the equipment. That was one of the reasons.

Whether or not, from the point of view of the business of his company and of realizing profit from the patent, the policy thus indicated is the most practical and reasonable one to follow is a question which I do not have to pass upon.

Here the question is whether this affords a satisfactory explanation within the meaning of s. 67(2)(*a*) for not working the patent on a commercial scale in Canada, and in my opinion it does not.

An abuse under s. 67(2)(*a*) of the exclusive rights under the patent having been thus established, the Commissioner was empowered under s. 68 to grant a licence to the respondent if he saw fit so to do. At the hearing before him, as well as in the course of the argument on the appeal to this Court, much was said about the respondent's financial ability and technical qualifications or his lack of them, and it was urged that he was not a proper person to have a licence. On this point it should be noted that the statute prescribes no necessary financial or other qualifications for an applicant for the grant of a compulsory licence. The right to apply is given to "any person interested", and when an abuse has been established the Commissioner is authorized in his discretion to grant a licence to that person. The legislature, in conferring that discretion, has not seen fit to fetter or limit its exercise, and it would, I think, be quite wrong to read into it limitations which Parliament has not prescribed. On the other hand, in exercising the discretion the Commissioner can, no doubt, properly take into account the lack of financial and other qualifications of the particular applicant, and if, on that account, in a close case he should exercise his discretion in favour of refusing the licence the Court on an appeal would not be likely to interfere with his decision. What the Commissioner should, I think, in all cases take into account in exercising the discretion is the whole of the circumstances, including the nature and extent of the abuse shown to have occurred, as well as the financial and other qualifications of the applicant to work the patent, and where that has been done even the lack of financial ability or technical qualifications in the applicant would not necessarily or in all situations lead to a reversal of his decision to grant a licence.

In the present case, the respondent, being engaged in the business of poultry processing equipment, is undoubtedly a person interested within the meaning of s. 67(1) and, while he may not know as much about all the technical aspects of that business as some others, on the evidence I agree with the Commissioner's finding that he possesses the

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necessary knowledge and competence to work the patent in Canada. Moreover, despite the history of his financial troubles prior to 1953, I am not satisfied either that such history would in the circumstances afford a sufficient reason for refusing his application or that he is not presently in possession of sufficient financial resources to enable him to work the patent.

The Commissioner's decision to grant the licence to the respondent will, accordingly, be affirmed.

The several objections of the appellant to the terms of the licence were dealt with at the hearing of the appeal, except that relating to the royalty. By s. 68(*a*) of the Act, it is provided that

> . . . in settling the terms of a licence under this paragraph the Commissioner shall be guided as far as may be by the following considerations:
>
> (i) he shall, on the one hand, endeavour to secure the widest possible user of the invention in Canada consistent with the patentee deriving a reasonable advantage from his patent rights,
>
> (ii) he shall, on the other hand, endeavour to secure to the patentee the maximum advantage consistent with the invention being worked by the licensee at a reasonable profit in Canada, and
>
> (iii) he shall also endeavour to secure equality of advantage among the several licensees, and for this purpose may, on due cause being shown, reduce the royalties or other payments accruing to the patentee under any licence previously granted, and in considering the question of equality of advantage, the Commissioner shall take into account any work done or outlay incurred by any previous licensee with a view to testing the commercial value of the invention or to securing the working thereof on a commercial scale in Canada.

In the present case, the Commissioner set the royalty at 10 per cent of the net sales price of each machine sold by the respondent but provided that the royalty on fingers sold as replacements should be two cents per finger. No reasons were given for arriving at these figures. The evidence indicates that, for most if not all varieties of fingers, two cents would be less than ten per cent on the selling price. In the case of the Callwood Can Company Limited licence, the royalty provided was 10 per cent of the net sales price of each machine and of all replacements including fingers, provided that the royalty should not be less than $10 for each machine nor less than six per cent of the advertised list price of such machine, nor less than two cents per finger on replacement fingers. The agreement also provided for payment of minimum royalty of $3,600 per year.

The licence given by the Greenbriar Company to the Barker Poultry Equipment Company provided for a royalty of five per cent on the retail price of automatic machines and six per cent on replacement fingers and for ten per cent on the retail price of manual machines and replacement parts therefor, including fingers, with a minimum of $10 per machine and not less than two cents per finger on replacement fingers and with a further provision that the royalty on each machine should not be less than six per cent of the advertised list price of the machine. There was, however, no provision for a minimum annual royalty.

The royalty provided for in the agreement between the Gordon Johnson Company and Graham Metal Products Limited is similar to that in the Callwood Can Company Limited licence, and there is a provision for minimum annual royalties of $3,600 commencing January 1, 1956. The agreement may be terminated on 90 days' notice by either party. When asking for a licence prior to making the first of his applications for a compulsory licence, the respondent stated that he would be willing to pay a royalty of 10 per cent even though he understood licensees in the United States pay at a lower percentage.

The appellants' objections to the royalty provided in the licence as settled by the Commissioner were that the royalty on replacement fingers should be 10 per cent, with a minimum of two cents per finger, and that there should be a provision requiring the respondent to pay minimum annual royalties. It will be noted that the royalty provisions in the Barker licensing agreement differ quite materially from those in the Callwood Can and Graham Metals agreements, the provisions in the Barker agreement, of which the Barker Poultry Equipment Company Limited has the benefit, being much less onerous than those in the other agreements. They are also less onerous than what Callwood himself offered. Having regard to the duty of the Commissioner under s. 68(*a*)(iii) to endeavour to secure equality of advantage among the several licensees, and to the provisions of the Barker licence, I do not think that he can be said to have been wrong in not providing for a minimum annual royalty and, having regard to the non-exclusive nature of the licence and to the ability of the Graham Metal Products Limited to cancel its agreement on a short-term notice, I

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would not alter the Commissioner's order in this respect. With respect to the royalty on replacement fingers, while it may turn out that the cost of Canadian-made fingers will be higher than those made in the United States and thus make it somewhat unfair to the respondent to be required to pay a similar percentage based on such higher price, two cents per finger is, I think, materially lower than the 10 per cent offered by the respondent and the royalty provided for in the Graham licence and, on the whole, I think the royalty on fingers should be set on the terms contained in the Barker licence; that is to say, six per cent on replacement fingers for automatic machines and 10 per cent on replacement fingers for manual machines, with, in the latter case, a two-cent per finger minimum. The royalty will be modified accordingly, and the other terms of the licence will be amended as indicated at the hearing.

The appeal from the grant of the licence will be dismissed and that from the terms of the licence will be allowed to the extent indicated. The respondent will have the general costs of the appeal, against which the appellants may tax and set off any costs which are related exclusively to the appeal against the terms of the licence.

Judgment accordingly.

1959
May 25, 26, 27

1960
June 15

BETWEEN:

GEORGES LAURIN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Purchase of farms resold in lots—Whether profit therefrom capital gain or taxable income—Validity of re-assessment notices—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 136(12) and 139(1)(e).

The appellant, a notary, in 1947 purchased a farm on the outskirts of Ville St. Laurent for $27,000 which he financed by a bank loan of $7,000 and a further loan of $20,000 advanced by an oil company and secured by a mortgage on the property. He built a service station thereon allegedly to set his son up in business but in 1948 sold the service station which comprised a fraction of the farm at a profit of $40,000.

In 1949 he sold a further parcel at a profit and then purchased an adjacent farm with the intention of becoming a gentleman farmer but in 1949, 1950, 1951 and 1952 sold most of the land comprised by the two farms in a series of 14 transactions. The Minister assessed the profits on the sales made in each of the four years as income. The appellant appealed from the assessments on the ground that the profits were non-taxable capital gains.

Held: That there was nothing in the sales of the land in question to distinguish them from the usual business practice in such matters so that each of them must be taken to constitute an adventure in the nature of trade within the meaning of s. 127(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148, and to have been properly assessed as income.

2. That the appellant's preliminary objections that the notices of re-assessment did not bear the handwritten signature of the Minister nor set out the basic elements of the revised assessments, should be dismissed, since nothing in the wording of s. 136(12) of the Act forbade the reproduction of the Deputy Minister's signature by mechanical means, and no provision in the Act required the Minister to set out in detail the revision of the tax in the notice itself.

APPEAL from a decision of the Tax Appeal Board.

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

A. J. Rosenstein for appellant.

Paul Boivin, Q.C. and *Paul Ollivier* for respondent.

DUMOULIN J. now (June 15, 1960) delivered the following judgment:

Le ministre intimé ayant ajouté une somme de $13,192.32 au revenu déclaré par le notaire Georges Laurin pour l'année d'imposition 1949, celui-ci, excipant de cette surcharge, en contesta le bien-fondé devant la Commission d'Appel de l'Impôt.

Par décision en date du 29 mai 1958[1], la Commission rejeta les objections de l'appelant, d'où pourvoi devant cette Cour.

Trois appels connexes, fondés sur des moyens de faits et de droit en tous points semblables et relatifs aux années 1950 (n° 147585), 1951 (n° 147586), 1952 (n° 147587), devront avoir le même sort que la présente cause, la preuve soumise étant commune aux quatre instances.

Avant de résumer les incidents du litige, je disposerai de certaines objections préliminaires soulevées *in limine litis* par l'avocat de l'appelant.

[1] (1958) 20 Tax A.B.C. 111; 58 D.T.C. 497.

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Ces objections, à la forme même des avis de nouvelle cotisation, portent sur deux points:

(a) Les formules, pièces 16, 17, 18 et 19, aux millésimes respectifs de 1949 à 1952 inclusivement, ne seraient pas revêtues de la signature manuscrite du ministre ni de celle d'un fonctionnaire dûment autorisé.

(b) Ces avis ne révélaient pas les éléments basiques des cotisations revisées ou supplémentaires, privant ainsi le contribuable de précisions indispensables à toute contestation de sa part; il n'aurait obtenu l'information requise qu'au mois de novembre 1957.

Quant au premier grief (a), les pièces 16 à 19, soit les avis de «nouvelle cotisation», portent au recto un fac-similé photostatique de la signature de M. «J. Gear McEntyre, sous-ministre du revenu national pour l'impôt» et, par ailleurs, le paragraphe (12) de l'article 136 de la loi, chapitre 148 des statuts revisés de 1952, édicte que:

(12) Tout document donné comme constituant un ordre, une directive, une demande formelle, un avis . . . une décision, une cotisation . . . ou autre document donné comme ayant été établi aux termes de la présente loi . . . sous le nom par écrit du Ministre, du sous-ministre du Revenu national pour l'impôt ou d'un fonctionnaire autorisé par règlement à exercer les pouvoirs ou à remplir les devoirs du Ministre en exécution de la présente loi, est censé être un document signé, fait et émis par le Ministre, le sous-ministre ou le fonctionnaire à moins qu'il n'ait été mis en doute par le Ministre ou par quelque personne agissant pour lui ou pour Sa Majesté.

Et l'article 124(12) du statut de 1948 (S.R.C. c. 52) est au même effet.

Je ne lis rien dans ce texte qui interdise la reproduction en photogravure ou mécanique de l'original «écrit» du seing d'un sous-ministre. Exiger la signature personnelle du principal administrateur d'un ministère sur possiblement quatre à cinq millions de notifications serait une absurdité dont nulle loi n'assumerait le ridicule.

Le second reproche (b), celui de n'avoir pas indiqué, au verso de l'avis, les facteurs à l'origine de la cotisation supplémentaire, me semble résulter d'une interprétation trop formaliste de la rubrique «Détail des Changements» inscrite au dos de cette feuille. Sans doute, serait-il souhaitable que de tels renseignements fussent alors fournis au payeur de taxes obligé de délier à nouveau les cordons de sa bourse mais, ce que je dois examiner est d'un autre ordre. La loi

applicable invalide-t-elle l'imposition fiscale ou même l'avis statutaire en conséquence de pareille omission ou imprécision?

Que disent les lois de 1948 et 1952 aux articles 42 et 46? Ceci que:

42, 46. (1) Le Ministre doit, avec toute la diligence possible, examiner chaque déclaration de revenu et répartir l'impôt pour l'année d'imposition et l'intérêt et les pénalités payables, s'il en est.

(2) Après examen d'une déclaration, le Ministre envoie un avis de cotisation à la personne qui a produit la déclaration.

(3) Le fait qu'une cotisation est inexacte ou incomplète ou qu'aucune cotisation n'a été faite n'atteint pas l'assujétissement à l'impôt établi par la présente Partie.

Puis encore, le paragraphe (7) et dernier du statut de 1952:

(7) Sous réserve de modifications qui peuvent y être apportées, ou d'annulation qui peut être prononcée lors d'une opposition ou d'un appel sous le régime de la présente Partie et sous réserve d'une nouvelle cotisation, une cotisation est censée être valide et exécutoire nonobstant toute erreur, vice de forme ou omission dans ladite cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

Pareil langage atteste assez clairement l'intention du législateur de déconseiller l'interprétation rigoriste de la procédure et des formalités d'application de sa loi.

La manifestation tangible d'une cotisation, l'avis, demeure l'accessoire, indispensable à n'en pas douter, mais purement matériel d'un acte immatériel et légal: l'impôt établi par le ministre.

Le Président de cette Cour, M. le juge Thorson, décidant la cause *Pure Spring Company Limited v. Minister of National Revenue*[1], écrivait ce qui suit:

The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper . . .

Sur ces quatre «morceaux de papier» (pièces 16 à 19), se voit au verso, tracé au crayon de plomb, le nom de J. P. Larue, et, imprimée au-dessous, la qualité de «Fonctionnaire autorisé». Monsieur J. P. Larue, reviseur à l'impôt sur le revenu, a témoigné que l'inscription de son nom n'était pas de son fait, mais qu'il était bien le calculateur des chiffres apposés par un copiste sur ces feuilles, sous l'en-tête «Détail des Changements».

[1] [1946] Ex. C.R. 471, 500.

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La nature très sommaire de l'information transmise par de tels documents ressort aussi de l'indication mise au verso et dont je reproduis la teneur:

> Pour obtenir des renseignements sur ces changements, on doit s'adresser au Bureau de District de l'Impôt d'où provient la nouvelle cotisation.

Même s'il est convenable, je le répète, de résumer dans l'avis de surtaxe, les motifs essentiels de cette majoration, je ne trouve, par contre, aucune disposition de la loi de l'impôt sur le revenu qui astreindrait le ministre à expliciter la revision de la taxe dans la notification individuelle, sous peine de nullité de la nouvelle cotisation. Par ces motifs, il m'est impossible d'accueillir les objections préliminaires soumises par l'appelant.

Revenons aux incidents topiques du litige, ceux qui lui impriment, à mon sens, l'aspect sous lequel il se présente à l'investigation juridique.

Le 9 juillet 1947, le notaire Georges Laurin, alors âgé de 55 ans, qui exerçait sa profession à Montréal et aussi à Ville St-Laurent, acquit une première propriété foncière, la ferme Tait, le lot 473 du cadastre de St-Laurent. La superficie de l'immeuble atteignait 442,854 pieds carrés. Le prix d'achat: $27,000, fut payé comptant, grâce à des avances bancaires de $7,000 et à un emprunt du reliquat, $20,000, obtenu, contre garantie hypothécaire, de la compagnie British American Oil.

A quelle fin l'acquéreur prétendait-il affecter cette acquisition? A l'installation d'un poste de gazoline et d'huiles motrices, dont il entendait faire bénéficier son jeune fils, Pierre Laurin, alors étudiant au cours commercial du Mont St-Louis, un collège réputé de la métropole.

Toutefois, l'appelant ne limite pas la partie initiale de son témoignage à cette seule explication. Il ajoute que, dès 1946, son associé professionnel, Me Hector Beaudin, décédé depuis, l'avait mis en relation avec un agent de la puissante compagnie ci-haut nommée, afin de conclure l'achat d'un emplacement propice aux affaires de la «B.A.», selon l'abréviation populaire. Dans cette vue, le notaire Laurin avait alors obtenu consécutivement de la succession Tait trois options de trente jours. Deux lettres, cotées ensemble comme pièce 22, émanant de feu J. Alfred Perreault, en ce temps, novembre 1946, directeur des affaires immobilières

de la British American Oil, rendent compte de l'échec des négociations avec les héritiers Tait. Je citerai trois paragraphes de la première, sans corriger l'orthographe:

J'ai obtenu par votre entremise, écrivait M. Perreault, une option pour un certain temps (deux fois renouvelé) pour la somme de $30,000. J'ai recommandé à ma compagnie de faire l'achat du terrain. La B.A. Oil a refusé l'offre, disant qu'elle achèterait seulement 200 pieds et qu'elle n'avait que faire du résidu.

La succession Tait ne voulu pas morcelé sa ferme, et mon option devint caduque. Maître Laurin, je vous ai alors recommandé d'acheter vous-même tout le terrain, d'y ériger une station de gazoline, d'y installer votre fils et que je verrais à ce qu'un prêt vous soit consenti pour cette fin par B.A. Oil.

L'autre lettre, manuscrite celle-là, datée le 3 janvier 1957, est de même teneur, sauf que les suggestions de M. Perreault se font plus pressantes. Nous lisons que:

Sur mes conseils vous achetiez vous-même la propriété pour y installer votre fils . . .

Monsieur Laurin construisit un poste d'essence au coût de $38,000, sur le lot 473, et le revendit, le 17 août 1948, avec superficie de 30,000 pieds carrés seulement, à un nommé Leslie Brandt pour un prix de $105,000, réalisant ainsi un profit de $40,000, (cf. pièce 5).

Cette transaction, la première d'une série de quinze (15), ne fut pas taxée (cf. l'article 9 de "Notice of Appeal"). Je l'aurais passée sous silence, n'eût été la mention détaillée qu'en fait la pièce introductive d'appel, étayée d'une preuve minutieuse, et le caractère de semi-commercialité qui, s'il eût été aperçu en temps utile, aurait possiblement contrebalancé auprès du fisc l'allégation de sollicitude paternelle. Il va sans dire, enfin, que le bénéficiaire supposé, le jeune fils, ne fut ni pressenti ni même informé préalablement de cette revente.

Mais il existe, en outre, un motif pertinent de ne pas taire cette mutation de propriété et qui influera, dans une certaine mesure, sur l'appréciation juridique des ventes subséquentes. C'est que la spéculation sur immeubles, dans le secteur concerné, avoisinant le Chemin de la Côte-de-Liesse, s'amorçait dès le mois d'août 1948, comme paraît bien le démontrer un profit de $40,000, provenu de la revente d'un quatorzième de la superficie de 442,854 pieds, achetée treize mois auparavant, compte tenu d'un poste de service valant $38,000. Sur ce point, il y a lieu à divergence d'opinion avec

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celle du courtier en immeubles, Jack Cummings, qui reporte à 1950 le début du formidable enchérissement des biens fonciers à Ville St-Laurent.

Le 14 janvier 1949, autre vente de partie du lot 473-5 à «l'Œuvre et Fabrique of St. Malachy», pour l'érection d'une église, de 30,000 pieds carrés, au prix de $15,000, (pièce 3), somme qui accroissait d'autant le profit antérieur de $40,000.

«Après cette dernière vente, dit M. Laurin, je dressai l'inventaire de mes biens qui révéla un montant de $300,000 en actif immobilier et en numéraire».

L'appelant se crut assez riche, à ce qu'il avance, pour réaliser l'ambition de son jeune âge, de devenir un «gentleman farmer».

C'est dans la poursuite de ce dessein, longtemps ajourné, que, le 26 février 1949, il acquérait la terre d'Armand St-Aubin, la partie nord-est du lot nº 475 du cadastre de la Paroisse St-Laurent, d'une superficie d'un million deux cent soixante-neuf mille cent quarante pieds (1,269,140′), ou plus de 34 arpents carrés, pour le prix de $126,914, (cf. pièce 4).

Le notaire Laurin, dans son témoignage, insista sur son intention d'obtenir «un domaine rectangulaire», qui se serait réalisée par l'achat de partie de la terre St-Aubin, le lot 475.

Par contre, certains faits significatifs me semblent assez difficilement conciliables avec ce désir d'une oasis agricole dans un secteur qui devait, à très brève échéance, devenir l'objet d'une intense spéculation, si même elle n'était pas déjà commencée.

C'est ainsi, par exemple, que le 14 février 1949, l'appelant écrivait à un courtier en immeubles de Montréal, H. A. Martin, la lettre ci-dessous reproduite (pièce 25).

Dear Sir:

With respect to the development of the land which you are at present purchasing, namely the Westerly part of Lot 475, adjoining that portion owned by me, and in accordance with your request, I hereby wish it to be understood that when so required by you and agreed to by the Municipality of St. Laurent, permission without reservation of any kind is hereby given for the extension through my land of the East-West streets, the North-South streets, the land for which will be owned jointly, and the installation of water lines, sewers, sidewalks, paving and other services, in accordance

with the Master Plot Plan prepared by Mr. Marcel Huot, Engineer of the Municipality of St. Laurent, completed January 6th, 1949, and incorrectly dated January 6, 1948.

It is understood also that such conditions will form part of any sale of land to any other party which in any way might affect the above.

Yours faithfully,
Geo. P. Laurin

Il ressort de ce document que, douze jours avant de se porter acquéreur de partie du lot 475, M. le notaire Laurin connaissait l'existence d'un plan municipal d'ensemble portant sur cette localité, et acquiesçait volontiers, sans restriction aucune, «without reservation of any kind», à ce que des rues pavées, bordées de trottoirs, vinssent éventuellement sillonner en plusieurs sens un bien destiné à des fins agricoles, avec l'aggravation de servitudes sous-jacentes, telles la pose d'un système d'aqueduc et d'égout, acquiescement dont il entendait favoriser un courtier en immeubles.

Le nouveau propriétaire ne se hâta point, du reste, de réaliser l'installation de la ferme projetée, laissant son vendeur, Armand St-Aubin, en paisible possession des lieux, et louant le lot 473 (ancienne ferme Tait) pour un loyer annuel de $50 à un cultivateur, Emile Robitaille, qui ne cessa d'exploiter qu'après la démolition de la grange rendue inévitable par l'érection de l'église de Fatima.

Assigné par l'appelant, M. Rodrigue St-Onge, chef du service du crédit de la banque Canadienne-Nationale, à Montréal, en 1949, témoigna que, cette année-là, Laurin sollicita de lui l'ouverture d'un crédit bancaire de $50,000 afin de faciliter «un placement qu'il voulait faire», mais sans allusion à son dessein de s'établir gentleman farmer. Cette demande n'eut pas de suite. Pareillement, M. Armand St-Aubin, qui continue de cultiver gratis jusqu'en 1950 l'importante superficie vendue à Georges Laurin, nous dit que ce dernier ne le mit jamais au courant de l'utilisation personnelle à laquelle il aurait prétendu affecter cette terre.

Si l'on ne peut légalement reprocher à M. Laurin de ne s'être pas ouvert de son projet de prédilection non pas même à son banquier dont il espérait un prêt, il convient de se montrer plus circonspect au chapitre de la substitution d'un mode tout autre de liquidation de cet acquis immobilier.

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A ce point, je rappellerai une dernière fois que cette cause, de l'assentiment exprès des parties, doit aussi servir à disposer de trois autres appels, toute preuve pertinente devant être entendue ou, selon le cas, versée au dossier dans l'instance dont il s'agit.

Il serait superflu et, partant, fastidieux de commenter chacune des quinze (15) ventes qui, échelonnées sur une période comprise entre le 17 août 1948 (pièce 5) et, je crois, le 11 décembre 1952 (pièce 15), ont fait passer en mains tierces les lots 473 et 475 sauf, sur le 473, une étendue de 22,000 pieds carrés, et, à même le 475, une superficie résiduaire de 206,000 pieds, encore possédées par l'appelant à titre de propriétaire.

«Le ou vers le 26 août 1950, rapporte le notaire Laurin, j'avais cédé gratuitement à la Ville de St-Laurent cent quatre-vingt-treize mille (193,000′) pieds carrés afin de permettre l'ouverture de quatre rues, celles dites: du Collège, Beaudet, Decelles et de l'Eglise, ce qui mettait fin définitivement à mon espoir d'un domaine agricole.»

Même dans l'hypothèse la plus favorable, où nul facteur ne militerait contre sa force probante, pareille allégation ne saurait avoir en droit fiscal qu'une bien médiocre portée eu égard aux circonstances du cas. Mais, au surplus, elle est inconciliable avec telle autre partie de la preuve de l'appelant.

La lettre de Geo. P. Laurin, du 14 février 1949, à l'agent d'immeubles, H. A. Martin (pièce 25) contient une mention explicite d'un plan d'ensemble (Master Plot Plan), dressé par l'ingénieur municipal Marcel Huot et concernant, entre autres, des terrains que Laurin devait acheter douze jours après, le 26 février (pièce 4). Ce plan (pièce 39), le notaire Laurin l'a examiné au point d'en pouvoir rectifier la date, et je cite le passage concordant da la pièce 25, «in accordance with the Master Plot Plan prepared by Mr. Marcel Huot, Engineer of the Municipality of St. Laurent, completed January 6th, 1949, *and incorrectly dated January 6, 1948*» (les mots en italique sont de moi). Si, maintenant, l'on consulte ce plan, pièce 39, le tenant à angle droit par rapport à son intitulé: Ville de St-Laurent, les quatre rues ci-haut apparaissent clairement tracées et désignées en toutes lettres dans l'ordre suivant (de bas en haut): Rue du Collège, Rue Beaudet, Rue de l'Eglise, Rue Decelles.

Laurin était donc informé de l'ouverture imminente de ces voies dès avant d'acquérir le lot 475; il avait pris des dispositions en conséquence comme l'indique sa lettre du 14 février 1949 (pièce 25), et ce ne fut certes pas la mise en œuvre prévue de ce plan qui, à la fin d'août 1950, put le déterminer à renoncer au projet de se tailler dans cette zone déjà industrialisée une ferme de dimensions considérables.

La revente des lots 473 et 475, entre le 17 août 1948 et décembre 1952, se poursuivit dans les conditions et selon des modalités qui ne permettent pas de la différencier d'avec les pratiques du négoce en pareille matière ou, plus techniquement peut-être, qui l'intègrent en tous points dans cette catégorie de transactions imposables visées par l'article 127(1)(*e*) de la loi de l'Impôt sur le Revenu (S.R.C. 1948, c. 52), comme étant «une initiative ou affaire d'un caractère commercial».

A l'appui de cet avis, je récapitulerai quelques ventes relatives aux lots 473 et 475.

Pièce 8: Le 5 juin 1951; vente de Georges P. Laurin à l'Œuvre et Fabrique of St. Malachy, Diocèse de Montréal, de partie du lot 473-9, pour un prix de $37,299.75, payé comptant.

Pièce 9: 11 janvier 1951; vente par Georges P. Laurin à Hector Beaudin, notaire, de partie du lot 475-13, au prix de $32,320.40.

Pièce 11: 3 janvier 1952; vente par Georges Laurin à Robert L. Adelstein, ingénieur-contracteur, de partie du lot 475, au prix de $100,929.90.

Pièce 12: 4 avril 1952; vente par Georges Laurin à Mlle Louise Laurin, des parties 15-4 du lot originaire 475, au prix de $42,420; un acompte de $1,000 étant versé.

Pièce 14: 29 novembre 1952; vente par Georges Laurin à la Ville St-Laurent, de partie du lot 473, au prix de $50,000, payé comptant.

Pièce 15: 11 décembre 1952; autre vente par le même à la Ville St-Laurent, de parties des lots 473 et 475, au prix de $14,826, payé comptant.

Convenons qu'un destin compatissant atténuait par un lénitif efficace et d'application continue, la déception de l'appelant frustré de son rêve de jeunesse.

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Passant sous silence neuf (9) autres transactions de même nature, je ferai une brève allusion à la pièce 34, du 4 avril 1952, relatant les conditions d'une sorte d'association entre Laurin et un nommé Jack Cummings qui se décrit comme étant un «real estate developer and investor», aux fins de construire six (6) maisons de rapport ou conciergeries par l'intermédiaire de la firme Janper Construction Ltd., sur des terrains de l'appelant. Ce projet, toutefois, fut abandonné parce que, nous explique le notaire Laurin, «je réalisai que j'étais trop âgé pour m'engager dans cette entreprise».

Enfin, les procédures d'appel dans les quatre causes conjointes semblent attacher la valeur d'un jugement officiel à une simple lettre qu'écrivait, le 30 septembre 1955 (pièce 38), le sous-ministre à l'Impôt, M. Gear McEntyre, à Me René Beaudoin, alors procureur de Laurin.

Absolument rien, ni en droit, il va sans dire, ni davantage en fait, n'autorise cette fantaisiste interprétation d'une lettre dans laquelle un haut fonctionnaire déclare ne pouvoir accueillir les prétentions du notaire Laurin, et lui indique avec précision où, quand et comment, il pourra se pourvoir légalement contre les réclamations du service de l'impôt fédéral.

Le Président de cette Cour, conformément à une jurisprudence invariable, rappelait, dans l'instance *Cragg v. Le Ministère du Revenu National*[1], le rôle fort aléatoire d'une simple déclaration d'intention formulée par le contribuable quand, par ailleurs, les faits du cas particulier ne l'accréditent point d'une suffisante plausibilité.

Sans révoquer en doute l'assertion de M. Laurin d'avoir souhaité, un certain temps durant, se ménager la retraite dont il parle, il est cependant indéniable qu'il dut très tôt y renoncer et s'engager dans la voie de spéculations immobilières parfaitement licites mais non moins imposables au désir de la loi.

Quelques mots encore concernant deux décisions britanniques où fut traité, bien que sommairement, ce point de «l'initiative ou affaire d'un caractère commercial».

[1] [1952] Ex. C.R. 40, 45, 46.

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Le Lord Président Clyde écrivait à ce sujet dans *The Commissioners of Inland Revenue v. Livingston*[1], que:

I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade" merely because it was a single venture which took only three months to complete.

Cet éminent magistrat, reprenant cette analyse dans la cause de *Rutledge v. The Commissioners of Inland Revenue*[2], ajoutait:

It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no purpose except that of a re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade", though it may be wholly insufficient to constitute by itself a trade.

C'est l'opinion exprimée aussi par le savant Président de cette Cour dans deux autres instances, celles de *Cragg v. Minister of National Revenue* (*supra*) et de *Minister of National Revenue v. James A. Taylor*[3] où, faisant suite à plusieurs citations de Lord Clyde, M. le juge Thorson ajoute:

It is, I think, plain from the wording of the Canadian Act, quite apart from any judicial decisions, that the terms "trade" and "adventure or concern in the nature of trade" are not synonymous expressions, and it follows that the profit from a transaction may be income from a business within the meaning of section 3 of the Act, by reason of the definition of business in section 127(1)(*e*), even although the transaction did not constitute a trade, provided that it was an adventure or concern in the nature of trade.

Ceci revient à tenir que l'expression «affaire d'un caractère commercial», définie à l'article 127(1)(*e*) du statut de 1948, comporte une extension plus grande que le strict terme de «commerce» (trade). Conséquemment, et c'est le cas ici, telle transaction conditionnée par ses circonstances propres, revêtira un caractère de commercialités, sans pour autant se ranger dans la pratique d'un commerce régulier.

Je n'éprouve aucune hésitation à déclarer que l'ajouté par l'intimé d'un montant de $13,192.32 aux revenus imposables de l'appelant, pour l'année d'imposition 1949,

1 (1926) 11 Tax Cases, 538, 542. 2 (1929) 14 Tax Cases, 490, 497.
3 (1956) 10 D.T.C. 1125, 1131.

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est conforme à la loi, cette somme provenant d'une initiative ou affaire d'un caractère commercial, et non pas de la plus-value inhérente à une mutation de capitaux (enhancement of capital).

Par les motifs qui précèdent la Cour rejette l'appel. L'intimé aura droit de recouvrer ses frais taxables.

Jugement en conséquence.

1959
Nov. 3
1960
May 2

BETWEEN:

THE STEAMSHIP *GIOVANNI AMENDOLA* .... APPELLANT;

AND

MARJORIE MANZ LEVAE, Executrix of the Estate of Gray Buxton LeVae, LILIAN ANNIE ILOTT, Executrix of the Estate of George William Ilott, and MARION ADELAIDE CROOKS, Executrix of the Estate of George Goodwin Crooks ....RESPONDENTS.

Shipping—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 726 and 727—Workmen's Compensation Act, British Columbia, s. 11 as enacted by Statutes of British Columbia 1954, c. 54, s. 9—Pensions paid under Workmen's Compensation Act not to be taken into account in determining damages to which respondents entitled in action brought by virtue of the Canada Shipping Act—Appeal from District Judge in Admiralty dismissed.

Held: That in assessing damages awarded in an action brought by respondents under Part XVII of the *Canada Shipping Act* R.S.C. 1952, c. 29 pension payments made under British Columbia *Workmen's Compensation Act* are not to be considered.

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

The appeal was heard by the Honourable Mr. Justice Thurlow at Ottawa.

J. R. Cunningham for appellant.

R. M. Hayman for respondent.

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

THURLOW J. now (May 2, 1960) delivered the following judgment:

This is an appeal from a direction forming part of an order for judgment granted by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District[1], upon the trial of this action. The action was brought to recover damages resulting from the deaths in a collision at sea of the husbands of the respondents, and by the order in question, after pronouncing in their favour on the question of liability, the matter of the damages to which they are entitled was referred to the Deputy Registrar of the Court to take accounts of such damages and to report the amounts due, and it was directed that, in determining such damages, the Deputy Registrar should not take into account the British Columbia Workmen's Compensation Board pension payments which the respondents were receiving. The appeal is from the direction so given to the Deputy Registrar not to take these pension payments into account.

The right of the plaintiffs to bring the action arises under Part XVII of the *Canada Shipping Act,* R.S.C. 1952, c. 29, ss. 726 and 727 of which are as follows:

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

727. (1) Every action under this Part shall be for the benefit of the dependants of the deceased, and except as provided in this Part shall be brought by and in the name of the executor or administrator of the deceased, and in every such action such damages may be awarded, as are proportioned to the injury resulting from the death to the dependants respectively for whom and for whose benefit such action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the dependants in such shares as may be determined at the trial.

(2) In assessing the damages in any action there shall not be taken into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of assurance or insurance.

[1] [1959] Ex. C.R. 324.

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Thurlow J.

The general rule as to the measure of damages recoverable under such legislation is stated in *Davies v. Powell Duffryn Associated Collieries, Ltd.*[1] by Lord Russell of Killowen as follows:

> The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well-settled, viz., that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts, the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately. It is conceded, and rightly conceded, that the general rule must apply, unless some statutory exception to the rule prevents its application.

It is, I think, also established that, when a defendant seeks to have taken into account in reduction of damages anything in the nature of a benefit accruing by reason of the death, such alleged benefit must be taken into consideration along with the terms upon which it accrues. Thus, in *Grand Trunk Railway Company of Canada v. Jennings*[2] Lord Watson said at p. 804:

> Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; *but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision* and the position and means of the deceased.

In *Baker v. Dalgleish Steam Shipping Company*[3] the question was whether it was necessary to take into account in reduction of damages a naval pension received by the widow which, under regulation 24(*b*) of the applicable regulations, was liable to be cancelled or reduced on account of the recovery of such damages. Younger L.J. said at p. 375:

> It follows that if for any purpose of this case the receipt of 3*l*. 2*s*. 10*d*. is relied on by the appellants, as that sum is being paid under the regulations of 1920, and under them only, the appellants are at once relegated to these regulations to ascertain the terms on which the payment is being made, and for that purpose they must have regard to all the provisions of those regulations, including, of course, r. 24(*b*), to which reference has already been made.

[1] [1942] 1 All E.R. 657.

[2] (1888) 13 A.C. 800.

[3] [1922] 1 K.B. 361.

Again, in *Johnson v. Hill*[1] du Parcq L.J., speaking for the Court of Appeal, said at p. 273:

> Where dependants have a reasonable prospect of receiving a pension from the Crown by reason of the death on which their claim for damages is founded, that prospect like any other reasonable expectation of benefit must be taken into consideration in assessing the damages. In *Baker v. Dalgleish Shipping Co.*, where the principle which we have just stated was affirmed, the pension in question was granted on the terms that it might be reduced or cancelled if compensation was paid by a tortfeasor. This is true of the present case also. It is common ground that the Minister of Pensions must act in accordance with the Royal Warrant dated Dec. 4, 1943, of which art. 56(1) is as follows:
>
> > Where the Minister is satisfied that compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be paid or that any compensation which has been or will be paid will benefit such a person, the Minister may take the compensation into account against the pension or gratuity in such manner and to such extent as he may think fit and may withhold or reduce the pension or gratuity accordingly.
>
> As was pointed out in *Baker's* case it is reasonable to assume that if full compensation is recovered from the wrongdoer, the Minister will withhold, or at least drastically reduce, the pension. (See especially the judgment of *Scrutton*, L.J., at pp. 372, 373). *Prima facie*, therefore, little or no deduction should be made in respect of so shadowy an expectation of benefit, and in *Baker's* case this court affirmed the decision of a judge who had made no deduction in respect of the pension payable.

I turn now to consider the nature of the alleged benefits which the respondents are receiving from the British Columbia Workmen's Compensation Board and which the appellant contends should be taken into account in assessing their damages. It may be noted at this point that it was not contended that such pension payments were insurance payments and were thus exempted from the computation of damages by s. 727(2), of the *Canada Shipping Act*.

The payments are made pursuant to the *Workmen's Compensation Act* of British Columbia, which provides for their payment where a workman has been killed by accident arising out of and in the course of his employment. This provision was in effect prior to and at the time of the accident which took the lives of the respondents' husbands, and the right of the respondents to such payments undoubtedly arose by reason of their husbands' deaths. If there were nothing more to be said about them, they would thus appear to be payments of the kind which, under the general rule, must be taken into account in determining the

[1] [1945] 2 All E.R. 272.

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respondents' damages. But that is not the situation for, while the *Workmen's Compensation Act* does not provide as did the regulations governing the pension payments considered in *Baker v. Dalgleish* and *Johnson v. Hill* that the pension payments may be withheld or reduced in the event of the dependent obtaining compensation from the wrongdoer, it contains a different provision which, in my opinion, goes further. By s. 11, as enacted by Statutes of British Columbia 1954, c. 54, s. 9, the *Workmen's Compensation Act* provides as follows:

> (1) Where an accident arising out of and in the course of his employment happens to a workman in such circumstances as entitle him or his dependent to an action against some person other than his employer and other than an employer in an industry within the scope of this Part or against the Crown, the workman or his dependent, if entitled to compensation under this Part, may claim such compensation or may bring such action; but if the workman or dependent elects to claim compensation, he shall do so within three months after the happening of the accident or, in case it results in death, within three months after the death.
>
> (2) If the workman or his dependent brings such action and, if after trial, or after settlement out of court with the written approval of the Board, less is recovered and collected than the amount of the compensation to which the workman or dependent would be entitled under this Part, the workman or dependent shall be entitled to compensation under this Part to the extent of the amount of the difference.
>
> (3) If any such workman or his dependent makes application to the Board claiming compensation under this Part, neither the making of such application nor the payment of compensation thereunder shall restrict or impair any such right of action against the party or parties liable, but as to every such claim the Board shall be subrogated to the rights of the workman or his dependent and may maintain an action in his name or in the name of the Board, and if more is recovered and collected than the amount of the compensation to which the workman or his dependent would be entitled under this Part, the amount of the excess, less costs and administration charges, may be paid to the workman or his dependent. The Board shall have exclusive jurisdiction to determine whether it shall maintain an action or compromise the right of action, and the decision of the Board shall be final and conclusive.

The effect of the former s. 11 (s-ss. (1), (2), and (3) of which for the present purpose were not materially different from those above set out) upon the damages recoverable under the *Families' Compensation Act* of British Columbia was considered by the Supreme Court of Canada in *The King v. Snell*[1], and the Court there held that the pension paid to Mrs. Snell by the Workmen's Compensation Board was not deductible from the damages otherwise recoverable.

[1] [1947] S.C.R. 219.

Counsel for the appellant sought to distinguish the Snell case on several grounds, but, while there are a number of differences between it and the present case, the judgment, in my opinion, settles the effect of s. 11 of the *Workmen's Compensation Act* and is authority for the proposition that the relevant sections of that Act are to be construed as affecting *inter se* the rights of the dependents and the Board only and that they have no effect by way of reducing the liability of a wrongdoer to the dependents of a workman who has been killed. It was submitted that the provisions of the *Workmen's Compensation Act* could not affect the right of the appellant to have the payments under that Act taken into account since the appellant's right arose under the *Canada Shipping Act* and the provincial statute could not take away such right, but even if it be assumed for the purposes of this case that the *Workmen's Compensation Act* can have no effect *ex propio vigore* on an assessment of damages under Part XVII of the *Canada Shipping Act,* the fact is that the payments which the appellant seeks to have taken into account were applied for by the respondents and are being received by them only by virtue of the *Workmen's Compensation Act* and upon its terms, including the provision for subrogation, by all of which the respondents are bound. So far as the appellant is concerned, the effect is, accordingly, the same whether the *Workmen's Compensation Act* can, of its own force, affect an assessment of damages under the *Canada Shipping Act* or not, for the appellant, seeking to have these payments taken into account in reduction of the respondents' damages, cannot, in my opinion, have this done without at the same time accepting the fact that the payments are made and received upon the terms set out in the *Workmen's Compensation Act.*

It was also argued that the effect of the authorities is that the pensions must be brought into account in any case, even if at the same time there are terms attaching to them which reduce what otherwise might be their effect on the damages, but I see no reason why this should be so where the terms on which an alleged benefit is received are such as to completely eliminate any effect it might otherwise have in reducing the amount at which damages should be assessed. In this respect, the applicable provision of the

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Workmen's Compensation Act differs from the regulations which were applicable in *Baker v. Dalgleish Steam Shipping Company* and *Johnson v. Hill.*

Finally, it was submitted that cases are conceivable where the value of a Workmen's Compensation Board pension alone would exceed the pecuniary benefits which the particular dependent could reasonably have expected from the deceased and that, since such pension would be available to the dependent at the time of the death, the dependent would suffer no pecuniary loss from the death. At first sight, this appeared to me to be a strong argument in favour of the appellant's contention, but on reflection I think it too is fallacious. It disregards the fundamental fact that the dependent can obtain no money at all under the *Workmen's Compensation Act* without claiming the benefits available under that Act and that, in so claiming them, the dependent can do so only upon the terms which confer upon the Workmen's Compensation Board the benefit of the dependent's right to damages from the wrongdoer. The dependent's right to benefits under the *Workmen's Compensation Act* is thus of no interest to the wrongdoer, for the measure of the damages he must pay is the same whether he must pay them to the dependent personally or as a trustee for the Board which, as between the Board and the dependent, has become entitled to them, and the measure is also the same whether the capitalized value of the benefits, which the Board can provide on the terms that the Board shall be subrogated to the dependent's right to damages, exceeds such damages or not.

In the course of the argument, counsel contended that there was nothing in the record before the Court to indicate what the terms were upon which the payments were made, since they are referred to in the agreed statement of facts only as "pensions from the British Columbia Workmen's Compensation Board". I think it is entirely unlikely that the Board could be paying such pensions otherwise than pursuant to the statute, but any possibility of prejudice to the appellant on this account can, I think, be eliminated by varying the direction so as to make it clear that it refers only to pension payments made by the Board pursuant to the *Workmen's Compensation Act.*

The direction will, therefore, be varied accordingly and, subject to this variation, it will be affirmed. The appeal will be dismissed with costs.

Judgment accordingly.

1959 Dec. 1
1960 July 7

BETWEEN:

IWAI & CO. LTD. AND THE GOSHO CO. LTD. .... PLAINTIFFS;

AND

THE SHIP *PANAGHIA*, COMPANIA DE NAVEGACION SAPPHO S. A. AND ANGLO CANADIAN SHIPPING CO. LTD. .... DEFENDANTS.

Shipping—Admiralty Act, R.S.C. 1952, c. 1, ss. 18 and 20—Jurisdiction to issue writ of summons—Appeal from order of District Judge dismissed.

Held: That s. 20 of the Admiralty Act R.S.C. 1952, c. 1 is not exhaustive on the question of when actions within the jurisdiction outlined in s. 18 of the Act may be instituted in a registry and does not restrict the exercise of the jurisdiction to the situations therein set out but merely states certain instances where a statutory right is given to commence proceedings in such district, leaving unprescribed the registry in which actions over which the Court has jurisdiction but not falling within any of its clauses may be instituted.

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

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

C. C. I. Merritt for appellant (defendant) Compania de Navegacion Sappho S.A.

J. R. Cunningham for respondents (plaintiffs).

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

THURLOW J. now (July 7, 1960) delivered the following judgment:

This is an appeal by Compania de Navegacion Sappho S. A. from an order made by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia

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Admiralty District, dismissing a motion made on behalf of that defendant for an order that the writ of summons herein be set aside on the ground that the Court had no jurisdiction to issue it.

In the endorsement on the writ, the plaintiffs claim as the owners or endorsees of the bills of lading of a quantity of pulp shipped from British Columbia to Japan in the Panamanian ship *Panaghia,* against the defendant Compania de Navegacion Sappho S. A. as owner of the ship and against the defendant Anglo Canadian Shipping Company Limited as charterer of the ship and as carrier, damages for breach of contract constituted by the bills of lading for the carriage of the goods and in tort for damages for negligence of both defendants in and about the carriage of said goods by sea. The defendant Anglo Canadian Shipping Company Limited is a Canadian corporation, carrying on business in British Columbia, and the defendant Compania de Navegacion Sappho S. A. is a Panamanian corporation with no office in British Columbia and not carrying on business there. At the time of the issue of the writ, the *Panaghia* was not in British Columbia, and she has not been arrested in these proceedings.

The question for determination is whether or not the Exchequer Court as a court of admiralty has jurisdiction to entertain and determine the action so commenced.

Under s. 3 of the *Admiralty Act,* R.S.C. 1952, c. 1, first enacted by S. of C. 1934, c. 31, it is provided that the Exchequer Court of Canada shall continue to be a court of admiralty and to have and exercise on its admiralty side general jurisdiction in admiralty. By s. 12, each of several named provinces, including British Columbia, is declared to constitute an admiralty district for the purposes of the *Admiralty Act,* and provision is made for one or more registries in each district. Provision is also made in ss. 4 and 6 for the appointment by the Governor in Council of judges to be designated as District Judges in Admiralty, who are to have and exercise the admiralty jurisdiction of the Court within the districts for which they are appointed. The admiralty jurisdiction of the Court is then outlined in s. 18 in several subsections, which to a considerable extent overlap one another. By s-ss. (1) and (2) of that section, the

Court is given jurisdiction which is generally co-extensive with the admiralty jurisdiction of the High Court of Justice in England, including that described in s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*. This included jurisdiction over claims relating to the carriage of goods in a ship and claims in tort in respect of goods carried in a ship but not when it appeared that any owner or part owner of the ship was domiciled in England. By s. 18(3) and (4) it is then provided:

(3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

(*a*) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(ii) relating to the carriage of goods in a ship, or

(iii) in tort in respect of goods carried in a ship,

(*b*) any claim for necessaries supplied to a ship, or

(*c*) any claim for general average contribution.

(4) No action *in rem* in respect of any claim mentioned in paragraph (*a*) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

It is, I think, apparent that the effect of s-ss. (3) and (4) of s. 18 is to eliminate the limitation on the jurisdiction of the Court which is implicit in s-ss. (1) and (2) in cases relating to the carriage of goods in a ship and in tort in respect of goods carried in a ship, where any owner or part owner of the ship is domiciled in Canada, but, at the same time, to prohibit the invoking of jurisdiction under s-s. 3(*a*) by proceedings *in rem* when an owner or part owner of the ship is domiciled in Canada. Jurisdiction in such cases in proceedings *in personam* is, however, unrestricted.

The claims endorsed on the writ in this action appear to fall within clauses (*a*)(ii) and (*a*) (iii) of the subsection, and if the statute went no further it would seem plain that the Court would have jurisdiction under s-s. (3) to hear and determine them in an action *in personam*, if the defendants or some of them are to be found in the territorial area or district in which the Court's jurisdiction is exercised. The principle on which the exercise of a court's

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jurisdiction is founded is stated as follows by Viscount Haldane in *John Russell and Co. Ltd. v. Cayzef, Irvine and Co. Ltd.*[1] at p. 302:

> The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction. In other countries that is different; in Scotland jurisdiction is to a considerable extent made dependent upon the presence within the jurisdiction of property of the defender who may be outside the jurisdiction. But we are concerned with the rule based upon the English jurisprudence, and that jurisprudence is prima facie as I have stated. It has been extended by the rules which have been made as to service out of the jurisdiction. These rules have been made with scrupulous care because there arose some time ago a conflict between the Scotch Courts and the English Courts about jurisdiction, and the rules were framed with a view of preventing such conflicts from arising again.

Whether the jurisdiction of the Court *in personam* can also be exercised in an admiralty district when no defendant can be served therein is, of course, another matter and depends on the scope of the cases in which, under the rules of the Court, service out of the jurisdiction may be allowed. In the present case, however, this problem does not arise since one of the defendants is resident in British Columbia and was served there. Accordingly, having regard to s. 18(3) and on the assumption that the statute goes no further in limiting the district or the manner in which the jurisdiction conferred by that subsection is to be exercised, it would seem that the action is within the jurisdiction of the Court and was properly launched in the British Columbia registry, regardless of the fact that the other defendant is not resident in the province of British Columbia.

On further examining the statute, one finds that, under the heading "Practice and Procedure", it is provided in s. 19(2) that, subject to s-ss. (3) and (4) of s. 18 and s-s. (1) of s. 20, the jurisdiction of the Court may be exercised either in proceedings *in rem* or in proceedings *in personam*. Whatever the scope and effect of this subsection may be, it is expressly made subject to s-s. (3) of s. 18, which itself begins with the words, "notwithstanding anything in this Act" and proceeds to say that the Court has jurisdiction over "any claim" of the kinds therein described. The jurisdiction so

[1] [1916] 2 A.C. 298.

given is thus not subject to elimination by anything contained in the Act. The manner in which it may be exercised may, of course, be prescribed, and for some cases procedure by action *in rem* is prohibited by s. 18(4) but, subject only to this, given a claim of the kind described in s. 18(3), jurisdiction to be exercised in one kind of proceeding or the other must be held to exist and, in my opinion, the authority of the Court to hear and determine such a claim is not subject to being ousted by s. 20 or by any other provision of the Act.

On behalf of the appellant, it was submitted that the jurisdiction conferred on the Court by s. 18 is exercisable only when one or more of the clauses of s. 20(1) applies and that, since the case as stated in the endorsement does not fall within any of such clauses, the Court is without jurisdiction to entertain the action. Section 20 provides:

20. (1) An action may be instituted in any registry when,

(*a*) the ship or property, the subject of the action, is at the time of the institution of the action within the district or division of such registry;

(*b*) the owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner, or the ship's husband, reside at the time of the institution of the action within the district or division of such registry;

(*c*) the port of registry of the ship is within the district or division of such registry;

(*d*) the parties so agree by a memorandum signed by them or their attorneys or agents;

(*e*) the action is *in personam* and is founded on any breach or alleged breach within the district or division of such registry, of any contract, wherever made, that is one within the jurisdiction of the Court and, according to the terms thereof, ought to be performed within such district or division; or

(*f*) the action is *in personam* and is in tort in respect of goods carried on a ship into a port within the district or division of such registry.

(2) When an action has been instituted in any registry, no further action shall be instituted in respect of the same matter in any other registry of the Court without the leave of the Judge of the District or division of such other registry, which leave may be granted subject to such terms as to costs and otherwise as he directs.

It will be observed that in this section no distinction is made between the central registry of the Court at Ottawa (which is, however, referred to in s. 27) and the district registries and that, if the appellant's contention is correct, not only is the jurisdiction appearing to be conferred by s. 18 very considerably narrowed, but the overriding provision contained in s. 18(3) cannot be given its full effect.

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It follows, in my opinion, that the appellant's contention cannot be correct and that, despite the argument that statutory authority for commencing this action in the British Columbia Registry of the Court must be found in s. 20(1) if the action is to be properly commenced there, s. 20(1) must be interpreted as a permissive provision relating to procedure, which, in any case, is what in form it appears to be.

There are, however, some additional considerations which I think point to the same conclusion. From s. 18(7) it appears that the group of provisions dealing with practice and procedure in the Court, of which s. 20 is one, are not to be considered exhaustive on that subject. Section 18(7) provides:

> (7) The jurisdiction of the Court on its Admiralty side shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by general rules and orders, and where no special provision is contained in this Act or in general rules and orders with reference thereto any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it may now be exercised by the Court.

This subsection refers to the "manner in which jurisdiction may now be exercised in the Court". Prior to March 1, 1935, when the *Admiralty Act 1934* came into effect, the *Admiralty Act*, R.S.C. 1927, c. 33, had contained in s. 18 a provision first enacted in 1900 in terms almost identical with those in the present s. 20, save that there were no clauses corresponding to (*e*) and (*f*) in s-s. (1). A similar provision had also been in *The Admiralty Act*, 1891, S. of C. 1891, c. 29, as s. 13. In *The Dunbar and Sullivan Dredging Company v. The Milwaukee*[1], where a foreign ship had been arrested in an action which had been instituted in the Ontario registry of the Court when the ship was not in that district, Hodgins L.J.A. distinguished the judgment of the Supreme Court of Canada in *The D. C. Whitney*[2] and upheld the jurisdiction on a number of grounds, including waiver implied from the owners of the ship having given a bond to obtain the release of the ship from arrest, and this despite the precise wording of clause (*a*) of s. 18 of the Act

[1] (1905) 11 Ex. C.R. 179. [2] (1906) 38 S.C.R. 303.

then in force. And in *The Dunbar and Sullivan Dredging Co. v. The Ships Amazonas and Montezuma and the Davison Steamship Co.*[1], Garrow L.J.A., speaking of s. 18 of that Act, said at p. 500:

> Then comes sec. 18 which under the title "Procedure" begins "Any suit may be instituted *in any Registry* when" etc., the whole very clearly intended not to limit the general jurisdiction of the court, but to supply a guide in the case of a possible conflict between two or more Registry districts. The confusion seems to arise from confounding Admiralty Districts with Registry Districts, the two not being by any means identical, or at least necessarily so.

In that case the jurisdiction of the Court to entertain an action arising from a collision in Canadian waters between foreign vessels was maintained despite the fact that the defendant ship was not in the district when the action was commenced, though she was later arrested there while passing through the district on a voyage between United States ports.

These were cases where jurisdiction was considered to have arisen by reason of the collision giving rise to the right of action having occurred in the admiralty district and which were not covered in s. 18. In *The D. C. Whitney* (*supra*) the parties and ships were also foreign, and the defendant ship was arrested in Canadian waters in a suit instituted when the ship was not in Canada, but the cause of action was based on a collision which had also occurred in the United States. The Supreme Court of Canada set the proceedings aside on the ground that the Court did not have jurisdiction, but it is noteworthy that the judgment was not based on s. 13 of the *Admiralty Act, 1891,* nor is that section referred to anywhere in the report of the case. In *Donald H. Bain Ltd. v. The Ship Martin Bakke*[2], Sidney Smith D.J.A. at p. 243 suggested a view contrary to that expressed in the *Dunbar and Sullivan Dredging* case, but that case apparently had not been drawn to his attention and, in any case, from what he said, it appears that he was not expressing a concluded opinion on the matter. Moreover, the upholding by him of the jurisdiction in the present case, in which he did not give reasons, appears to be opposed to the view suggested in the *Bain* case.

[1] (1911) 13 Ex. C.R. 472. [2] [1955] Ex. C.R. 241.

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It may also be observed that *Howell's Admiralty Law and Practice,* published in 1893, at p. 14 indicates that the admiralty court then also had jurisdiction *in personam* against the master of a ship in certain instances, and it is not difficult to conceive of such cases arising where none of the clauses of the present s. 20(1) would be applicable or where none of the clauses of the former s. 18 would have been applicable. In such cases, if the appellant's contention is correct, an action could not have been brought in the district in which the master resided and where the court's process and authority would run and there would have been no registry in which it could have been brought, and yet the court undoubtedly had, under s. 3 of the *Admiralty Act, 1891,* "all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890".

I am accordingly of the opinion that s. 20 of the present Act is not exhaustive on the question of when actions within the jurisdiction outlined in s. 18 may be instituted in a registry and that, even if it be regarded as compulsory so far as it goes, it does not restrict the exercise of the jurisdiction to the situations therein set out but merely states certain instances wherein a statutory right is specially given to commence the proceedings in such district, leaving unprescribed the registry in which actions over which the Court has jurisdiction but not falling within any of its clauses may be instituted. It seems curious that, in stating situations in which proceedings to invoke the extended jurisdiction conferred by the statute in 1934 might be instituted in particular registries, the draftsmen of clauses (*e*) and (*f*) of s. 20 did not go further, but it is not inconceivable that it may have been regarded as obvious in view of the interpretation which had been put upon the former s. 18 and in view of what Viscount Haldane in the passage cited referred to as "the root principle of the English law about jurisdiction" that s. 20 would not be treated as exhaustive and that there was no need of a clause dealing with the situation where the defendant or one of the defendants was resident in a district and could be served there. It is, of course, apparent that s. 20(1) and particularly clauses (*e*) and (*f*) of that subsection will apply

to authorize the institution of proceedings in a district in some cases whether any of the defendants is resident there or not and this, I think, is in addition to the right of a plaintiff to take proceedings in any district where the defendant can be found and served.

It follows that the order appealed from is right and should be affirmed. The appeal will be dismissed with costs.

Judgment accordingly.

BETWEEN:

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HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

LLOYD S. LARKIN ....DEFENDANT.

Crown—Financial Administration Act, R.S.C. 1952, c. 116, s. 89—Action for money received as agent of Crown and not accounted for—Plea of res judicata based on acquittal on criminal charges involving same money rejected.

The Crown seeks to recover from the defendant a sum of money received by the defendant when one of the Crown's postmasters as agent for the Crown and which he has failed to pay to Her Majesty though duly requested to do so, in accordance with the provisions of the *Financial Administration Act*, R.S.C. 1952, c. 116, s. 89.

The defendant pleads that the monies now claimed by the Crown were the same monies as were involved in two offences with which the defendant was charged and upon which he was acquitted by an Assize Court of the province where he resided, and pleads the defence of *res judicata.*

Held: That the plea of acquittal in the Criminal Courts cannot be invoked by the defendant in this case.

ACTION by the Crown to recover money received as agent of the Crown and not accounted for.

The action was tried before the Honourable Mr. Justice Cameron at Winnipeg.

Max Isaacs for plaintiff.

G. O. Jewers for defendant.

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

CAMERON J. now (September 12, 1960) delivered the following judgment:

By this Information, the Crown seeks to recover from the defendant the sum of $3,948.66 and interest. At the trial this morning, no oral evidence was adduced, the parties, however, having agreed upon a Statement of Facts filed as Exhibit 1. From these facts it appears that at all material times the defendant was the Postmaster at Teulon, Manitoba; that between March 1, 1956, and March 31, 1957, the defendant as such Postmaster in the employment of and as agent for Her Majesty, received the sum of $3,948.66 on behalf of and for the use of Her Majesty, which sums he has failed to pay to Her Majesty although duly requested to do so. It is that amount, with interest, which the Crown now seeks to recover.

Pursuant to s-s. (1) of s. 89 of the *Financial Administration Act*, R.S.C. 1952, c. 116, the Minister of Finance on February 23, 1959, caused a notice (Exhibit 2) to be served on the defendant requiring him to account for the said sum to the Deputy Postmaster General within thirty days from the day on which he was so served. That section reads as follows:

89. (1) Whenever the Minister has reason to believe that any person

(*a*) has received money for Her Majesty and has not duly paid it over,

(*b*) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or

(*c*) has in his hands any public money applicable to any purpose and has not duly applied it,

the Minister may cause a notice to be served on such person, or on his representative in case of his death, requiring him within such time from the service of the notice as may be named therein, duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Minister proper vouchers that he has done so.

(2) Where a person has failed to comply with a notice served on him under subsection (1) within the time stated therein, the Minister shall state an account between such person and Her Majesty, showing the amount of the money not duly paid over, accounted for or applied, as the case may be, and, in the discretion of the Minister, charging interest on the whole or any part thereof at the rate of five per cent per annum from such date as the Minister may determine, and in any proceedings for the recovery of such money a copy of the account stated by the Minister, certified by him, shall be *prima facie* evidence that the amount stated therein, together with interest, is due and payable to Her Majesty, without proof of the signature

of the Minister or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

Under s-s. (2) thereof, the Minister of Finance on April 20, 1960, stated an account between the defendant and Her Majesty (Exhibit 3) showing the amount of $3,948.66 said not to be duly accounted for and charging interest thereon at the rate of 5 per cent. per annum from that date.

By s-s. (2) of s. 89 of the *Financial Administration Act* (*supra*), it is provided that

> In any proceedings for the recovery of such money a copy of the account stated by the Minister, certified by him, shall be *prima facie* evidence that the amount stated therein, together with interest, is due and payable to her Majesty, without proof of the signature of the Minister, or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

In his Statement of Defence, it is alleged that the defendant, following service on him of the Notice (Exhibit 2), did account for the said sum. It is admitted that on February 25, 1959, the defendant by his solicitor wrote the letter referred to in para. 4 of the Statement of Defence, which reads as follows:

> Mr. Larkin has sent us the "notice to account" under Section 89(1) of the Financial Administration Act, chapter 116 of the Revised Statutes of Canada, 1952, which you caused to be served on him on February 23rd, 1959. Our client has instructed us to advise you that the sum of $3,948.66 mentioned in the "notice to account" was apparently stolen from the safe in the post office at Teulon, Manitoba on or about April 1st, 1957. The missing monies formed the subject matter of criminal charges against Mr. Larkin namely, public mischief and conversion. Mr. Larkin was acquitted by an Assize Court Jury of both of these offences, although he was convicted of certain offences regarding falsification of his accounts. The law officers of the Crown are quite familiar with the circumstances of this loss for which Mr. Larkin accounted, apparently satisfactorily, to a criminal Assize Court Jury.

No evidence was given as to the alleged theft of the monies on or about April 1, 1957, and accordingly I need say nothing further about that matter.

The remaining defence is that disclosed in the same letter, namely, that by reason of the acquittal of the defendant by an Assize Court of the province of Manitoba on October 20, 1958, the matter is now *res judicata* and the Crown is

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thereby estopped from taking these proceedings. The two charges on which he was acquitted are stated in para. 6 of the Defence as follows:

> (a) That being a person employed in the business of the Canada Post Office as a Postmaster at Teulon Post Office in the said Province and an employee of the Government of Canada did between the 1st day of March, 1956 and the 31st day of March, 1957 at Teulon aforesaid, unlawfully convert to his own use monies in the amount of $4,315.56, entrusted to him in his capacity of Postmaster as aforesaid and did thereby commit an indictable offence, contrary to Section 62(1) of the Post Office Act.
>
> (b) On the 31st day of March, A.D. 1957, at the Village of Teulon in the Province of Manitoba, did unlawfully, with attempt to mislead, cause V. H. Marchbank, a peace officer, to enter upon an investigation by reporting that an offence had been committed when it had not been committed, contrary to the provisions of Section 120(*a*)(*c*) of the Criminal Code.

By the agreed facts it is admitted that the monies involved in those offences are those now claimed by the Crown and that the defendant was acquitted on those two charges.

In order that a defence of *res judicata* may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff had an opportunity of recovering, and, but for his own fault might have recovered in the first action that which he seeks to recover in the second (see *Halsbury's Laws of England*, Third Edition, Vol. 15, Art. 358, p. 185). That is not the situation here as the Assize Court in which the defendant was tried had no power to direct payment to the Crown of the amounts now claimed.

The matter is concluded, I think, by the judgment of the Supreme Court of Canada in *The King v. Bureau*[1]. There the suppliant sought to set aside an Order forfeiting to the Crown certain cigarettes illegally imported into Canada and the automobile used in connection therewith. It was shown that the claimant had been acquitted in the Criminal Courts of having in his possession without lawful excuse goods illegally carried into Canada—namely, the cigarettes. In the Supreme Court, Rinfret J. (as he then was), speaking for the majority of the Court, said at p. 374:

> It was correctly decided in the Exchequer Court [1948] Ex. C.R. 257, that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Fonciere Compagnie d'Assurance de France v. Perras et al. and Daoust* [1943] S.C.R. 165.

[1] [1949] S.C.R. 367.

It was, therefore, necessary for the case to be tried *de novo* absolutely as if no criminal charge had been brought against the respondent.

A case very similar to the present one was before the Australian Courts in *The King v. Seery*[1] a decision of the High Court of Australia. That was an action against a postmistress to recover £137 as being public monies collected and received by her and not paid to the plaintiff. It appeared that she had been tried and acquitted at a Court of Quarter Sessions on a charge that she fraudulently converted to her own use certain monies which included the sum claimed in the civil proceedings. A plea of *res judicata* failed. Griffith C.J. stated at p. 17:

This is an action for money received by the defendant to the use of the Crown. The verdict relied upon is a verdict on a charge of fraudulently misappropriating that money. In order to determine the latter question the jury had to apply their minds not only to the question whether the respondent received the money but also to the other question whether she fraudulently misappropriated it. It does not appear from the verdict whether they were satisfied that she had received the money. They may not have applied their minds to that question at all, but may only have come to the conclusion that, whether she had or not, they were not satisfied that she had misappropriated it with fraudulent intent.

The element of fraud was necessarily involved in the charge. That was decided by this Court in *Hardgrave v. The King,* 4 C.L.R. 232; and it would be very strange if it were not so. It may be that under the Statute an accounting party who has received money for the Crown and does not account for it labours under the disadvantage that there is a presumption of fraud against him. But the fraudulent intent is an essential element of the charge, and must be found by the jury. If authority is needed for that proposition it is to be found in *R. v. Farnborough* (1895) 2 Q.B., 484. There the Judge at the trial upon a charge of larceny asked the jury whether they believed the evidence for the prosecution, and, on their answering the question in the affirmative, directed a verdict of "guilty", and it was held that the direction was wrong because the fraudulent intent was a fact that must be found by the jury. In this case it does not appear whether the jury found anything more than that the respondent had no fraudulent intent, which had nothing to do with the question whether she had received the money.

For these reasons I am of opinion that the appeal should be allowed.

Isaacs J. agreed, stating at p. 18:

I quite agree. The verdict of acquittal may, for all that appears, have proceeded on the finding of absence of *mens rea.* There are no materials before the Court now to enable it to say whether or not anything was found by the jury as to the receipt of the money or the ownership of the money. Under those circumstances the principle applies which I think is most concisely stated by Mellish L.J. *In re Bank of Hindustan, China*

[1] 19 Commonwealth Law Reports, 15.

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and Japan: Alison's Case, L.R. 9 Ch., 1, at p. 25. One other case I should mention is *Stephenson v. Garnett* (1898) 1 Q.B., 677, at p. 682, where Collins L.J. lays down the same principle.

In my opinion, the plea of acquittal in the Criminal Courts cannot be invoked by the defendant in this case. There being no dispute that the defendant received the amount claimed as agent for the Crown and has not paid it, there will be judgment for the Crown for $3,948.66, with interest at 5 per cent. thereon from April 20, 1960. The plaintiff is also entitled to costs after taxation.

In the agreed Statement of Facts it is admitted that "there is payable to the defendant approximately the sum of $1,900 superannuation credits which sum has been withheld from him pending the outcome of this action". In his defence, the defendant claimed that these credits amounted to $3,000, but the amount is now agreed upon as approximately $1,900. By agreement of the parties, I was not asked to deal specifically with this matter. I have no doubt whatever that the Crown in view of the agreement of its counsel that this amount is owing to the defendant, will in due course give credit for the full amount on hand.

Judgment accordingly.

1960 — May 30, 31, June 1 — Sept. 14

BETWEEN:

M. GELLER INCORPORATED AND NU-WAY LAMBSKIN PROCESSORS LIMITED .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Excise Tax Act R.S.C. 1927, c. 179, s. 80A and 105(6)—Recovery of money paid as excise taxes under mistake of law and fact—"Person who by mistake of law or fact actually paid"—Status of eventual claimant when no taxes due—Limitation in Act not applicable when no taxes due.

Section 80A of the *Excise Tax Act* R.S.C. 1927, c. 179, and amendments reads:

"80A. 1. There shall be imposed, levied and collected, an excise tax equal to twenty-five per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.

3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made.

. . ."

Section 105(6) of the Act reads:

"105(6). If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid."

Suppliant M. Geller Inc. seeks to recover from respondent money paid by it for excise taxes on processed sheepskins, erroneously classed as furs by respondent's agents, this money having been paid to the Customs and Excise Branch of the Department of National Revenue at Montreal, Quebec, by advancing the same to its regular dyers and dressers Nu-Way Lambskin Processors Ltd. the second suppliant herein which company paid it to respondent's agents. M. Geller Inc. also seeks recovery of other payments made direct to the Customs and Excise Branch.

Respondent contends that the alleged excise impost objected to was claimable from the dresser or dyer, and was in fact paid by it to the customs officials.

Held: That suppliant M. Geller Inc. is entitled to recover the money paid as excise taxes since that money was disbursed in the mistaken assumption of paying an excise tax when no tax existed.

2. That M. Geller Inc. is the "Person who by mistake of law or fact" actually "paid to Her Majesty any moneys which have been taken to account as taxes imposed by this Act . . .", s. 105(6) of the Excise Tax Act.

3. That the status of an eventual claimant, in contingencies where no taxes were due, is unrestricted and fully available to "any person" who pays and subsequently claims a refund in the circumstances and limitations laid out in subs. (6) of s. 105 of the *Excise Tax Act*.

4. That Nu-Way Lambskin Processors Ltd. not having complied strictly with the provisions of s. 105(6) of the Act is barred from any redress.

PETITION OF RIGHT to recover money allegedly paid as excise taxes under mistake of law and fact.

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

J. J. Spector, Q.C. and *S. Leon Mendelsohn, Q.C.* for suppliants.

B. A. Lewandoski, Q.C. and *Edouard Martel* for respondent.

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

DUMOULIN J. now (September 14, 1960) delivered the following judgment:

The firm of M. Geller Inc., prime suppliant in this case, is a dealer in sheepskins with its head office in the City of Montreal. During a period extending from June 15, 1951 to November 9, 1953, this concern paid to the Customs and Excise Branch of the Department of National Revenue at Montreal, through the instrumentality of its regular dyers and dressers, Nu-Way Lambskin Processors Limited, sums of money aggregating $20,011.72 for alleged excise taxes on processed sheepskins, erroneously classified as furs by the respondent's agents. Between November 15, 1952 and November 9, 1953, Geller Inc. also made direct payments, for similar reasons, of $945.02. The total amount sought and claimed as a proper refund from the respondent adds up to $20,956.74.

Sections 3 and 4 of the Petition set out quite accurately the gist of this action. They read as follows:

> 3. Due to error of fact and law, the officers of the Department of National Revenue, a department of Her Majesty's Government of Canada, wrongfully and illegally insisted upon exacting, and exacted, an excise tax; under Section 80A of the Excise Tax Act, R.S.C. 1927, Chapter 179, as amended, on sheepskins worked on as aforesaid or imported into Canada by your Suppliant M. Geller Inc., and which sheepskins were not subject to such excise tax;
>
> 4. As a consequence of the said wrongful and illegal position assumed by the officers of the said Department of National Revenue, your said Suppliant, M. Geller Inc., was compelled to pay a sum totalling the amount of $20,956.74, levied as excise tax as aforesaid.

To this, respondent objects that no "lien de droit" (cf. Defence, s. 19) exists between the parties, i.e. respondent and suppliants, since M. Geller Inc. owed and paid no tax as "owner" of sheepskins and "is not entitled to refund for money it did not pay" (Defence, s. 20).

This statement and the entire defence are based upon the consequential explanation suggested by s. 21 hereunder:

21. Pursuant to Section 80A of the Excise Tax Act (Chapter 179 R.S. 1927) the excise tax was payable by the dyer or dresser at the time of delivery, namely the other Suppliant from and for whom it was paid.

These dyers and dressers, Nu-Way Lambskin Ltd., having made no application in writing within two years for a refund, "as prescribed by s. 105(6) of the Excise Tax Act", (s. 22 of the Defence), would then have lost any right they might have had to an eventual reimbursement.

Now, reverting anew to the Petition of Right, section 8 alleges that:

8. On June 4th, 1953, your said Suppliant M. Geller Inc. made demand for refund with respect to the amount of $17,818.57, paid within a period of the preceding two years, and it was agreed and understood between your said Suppliant M. Geller Inc. and the authorized agents of Her Majesty that the said notice would avail for all future payments exacted from your said Suppliant M. Geller Inc., and that the payment of refund would be deferred, and would abide the result in the last instance of a test case submitted to this Honourable Court in the matter of Her Majesty the Queen and The Universal Fur Dressers & Dyers Ltd. . . .

In the latter case, the Supreme Court of Canada[1] reversing a decision of the trial Court, unanimously ruled that sheepskin was not fur within the meaning of the Excise Act and insofar tax free.

This written demand for a refund emanated from the M. Geller company because, as will be more fully shown, "all such excise taxes were paid with your said suppliant M. Geller Inc.'s own money" (Petition, s. 11).

Exhibit 2 constitutes the formal notice in writing sent to respondent by registered mail, and should be reproduced *in extenso*, I quote:

Montreal 1 Que. June 4, 1953

David Sims Esq.,
Deputy Minister of Customs and Excise,
Department of National Revenue,
Connaught Bldg.,
Ottawa, Ont.
Dear Sir:

Over the past two years this Company has made payments of $17,818.57 by way of Excise Tax under Section 80A of Excise Tax Act, which we are now claiming refund of under Section 105 of Excise Tax Act.

[1] [1956] S.C.R. 632.

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We assert that these moneys have been paid to you by mistake on our part by reason of the fact that the sheepskin, in our opinion is not a fur within the meaning of Section 80(A) of the Act, and in any event this Section does not provide for the various processes used in connection with sheepskins, and which are not used in the processing of furs.

We therefore wish to advise, that any further payments of such moneys is to be made with protest from this date.

Yours truly,
(signed) M. Geller Inc.
(per) M. Geller
Pres.

Exhibit 3, dated June 9, 1953, signed: J. Mitchell for Deputy Minister, acknowledges receipt of Mr. Geller's communication and expresses complete disagreement with the opinion and request formulated in suppliant's letter of June 4 (ex. 2).

According to the evidence given by Mr. Vernon Nauman, now retired, but Assistant Deputy Minister of National Revenue, Excise Branch, until approximately 1953, refunding demands such as that made by M. Geller Inc. were at that time held in abeyance pending the decision of the Court of last resort in the *Universal Fur Dressers and Dyers'* case, already mentioned, a judgment eventually rendered on June 11, 1956. An exchange of correspondence (cf. exhibits 6, 7 and 8) between Mr. J. J. Spector, Q.C. and National Revenue, would bear out Mr. Nauman's opinion, albeit not dealing nominally with the issue at bar.

Mr. Nauman added that he "really does not recall any refunds being allowed, save, of course, to Universal Fur Dressers & Dyers in compliance with the Supreme Court's decision."

The moot question before this Court raises a clear-cut controversy. Suppliant, on the one hand, contends, subject to confirmatory proof, that it advanced to the processors, Nu-Way Lambskin Ltd., every dollar of the $20,011.72, supposedly owing as excise taxes in connection with the dyeing and dressing of raw sheepskins, so punctually and accurately that any neglect to do so would have entailed the dresser's refusal to deliver the "glamorized" goods.

On the other hand, respondent resorting to a literal, but under the circumstances somewhat dubious interpretation, attempts to overlook any shadow of right in suppliant's petition, since the alleged excise impost objected to was claimable from the dresser or dyer, and, in fact, was handed out by the latter to the regular customs officials. And we have seen that Nu-Way Lambskin Ltd., through the lapse of the legal delay, is precluded from its otherwise permissible recourse.

Regarding the moneys involved, it was admitted by respondent's counsel that Nu-Way Lambskin Processors Limited, from June 15, 1951 to November 30, 1954, paid \$20,049.57 (less credits in the sum of \$37.85, leaving a balance of \$20,011.72) to Canadian Customs and Excise Branch on the score of excise dues. Also admitted was a direct payment of \$945.02 by M. Geller Inc. to the same party for skins processed in the United States. In the event of a finding conformable to the suppliant's conclusion the refund would then amount to \$20,956.74.

The first statutory enactment to be considered is section 80A of chapter 179 (R.S.C. 1927 and amendments) providing that:

> 80A. 1. There shall be imposed, levied and collected, an excise tax equal to twenty-five per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—
>
> (i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.
>
> 2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.
>
> 3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made. . . .

Before reporting briefly the practice obtaining in the fur trade as between the three parties concerned: owner, dyer or dresser and the excise tax collectors, mention should be made (notwithstanding respondent's admission) that

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Messrs. Moses Geller and Saul Tenenbaum, respectively President of M. Geller Inc. and of Nu-Way Lambskin Processors Ltd. swore, the former, to having reimbursed the processors, at all material times, a supposed excise tax of $20,049.57, the latter, to due receipt from M. Geller Inc. of such sums handed over to the local Customs Branch. Numerous cheques in favour of Nu-Way Lambskin Processors Ltd. attached to the corresponding vouchers, filed as exhibit 10, substantiate these assertions. Mr. Paul Harkin, representing the Montreal firm of "Commercial Customs Brokers Ltd.", next testified to a total outlay of $945.02, incurred for similar reasons by his company on behalf of suppliant Geller, who made good this payment. Exhibit 10 consists of a whole sheaf of departmental forms or tax bills in the above totals, countersigned by some officers of Customs and Excise, Messrs. Crevier and Ranger.

The similarity of the sheepskins, imported by the first suppliant and processed by the second, with those specifically exempted from the fiscal reach of section 80A by the Supreme Court's judgment *"supra"*, was attested by both Moses Geller and Saul Tenenbaum. All the lambskins in question belonged to the commonest class, the Garden and Barnyard varieties. Moreover, the respondent raised no issue on this point.

The Excise Tax Supervisor and Appraiser at the Port of Montreal from 1951 to 1954, Mr. Henri Crevier, and also Messrs. Geller and Tenenbaum related in detail the regular process resorted to in appraising and acquitting the 25% tax that the law levies on "furs". It is a very simple matter so far as this case is concerned, consisting initially in filling two forms: E-162 (ex. 4) and E-163 (ex. A), on which appear under separate headings the required particulars and information. Mr. Crevier explained that form E-162 (ex. 4) was issued by his department in triplicate, one copy to the processors (dyers and dressers), a second to the owner of those goods, the third copy remaining in the possession of port entry authorities. When all incidental details had been inserted on these forms, regarding the price of raw skins, the cost of processing labour, etc., twenty-five per cent of the total was added for tax requirements and presented by the dresser or dyer to the client, owner of the furs, in this instance M. Geller Inc., for payment antecedent to the

delivery of the merchandise. On this point, an appropriate paraphrase of Geller's and Tenenbaum's corroboratory statements would be: "No payment of tax by the owner, no delivery of the processed goods to him". Within the next 24 hours, as said above, the dyer and dresser, here Nu-Way Lambskin Ltd., were obligated by law to settle with National Revenue for every dollar of the relevant dues.

Moses Geller, cross-examined, agreed that on two or three occasions, out of approximately ninety (90) deliveries of dressed skins, Nu-Way Ltd., might have advanced the amount of the supposed impost for a matter of a few days at the longest. It should also be noted, Tenenbaum's evidence is to this effect, that the only immediate payment insisted on by him related to the tax, a thirty days' respite being granted for the price of technical or chemical work.

Once a week, Crevier or some other appraiser, visited the processing plants and minutely checked the accuracy of all reports made on forms E-162, comparing the latter with form E-163 (ex. A), which applied to incoming material and was the first to be completed by processors.

The evidence adduced on suppliants' part, supplemented by a joint admission of amounts paid, did not induce the respondent to vary or in the least modify the legal stand initially taken. It persisted to deny any "lien de droit" between parties, because the immediate payer, "pursuant to Section 80A of the Excise Tax Act (Chapter 179 R.S. 1927)" had been the other suppliant, Nu-Way Lambskin Processors Ltd., who laid no claim to a refund within the rigidly prescribed period of two years.

The view I take of the case, consonantly, I trust, with proved facts and pertinent statutory law, leads me to believe that such a contention can flow only from a misconstruction of the former (i.e. the facts) and a misreading of the latter (i.e. the law).

Section 21 of the Defence (reproduced verbatim at the start of these notes) would carry some legal weight only if, in the given set of facts, it so happened that an excise tax were exigible "from the dyer or dresser at the time of delivery" pursuant to s. 80A.1(ii).

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The obligation of refunding, which might then accrue, would be that foreseen by s. 105(6) of our Act, wherein some error partially or *pro tanto* vitiates payment of an otherwise validly extant impost.

A totally different situation presently occurs, however, in which no excise duty attaches to commodities such as those (raw sheepskins) imported by M. Geller Inc. and processed for it by Nu-Way Lambskin Ltd.

In other words, considerable sums of money were disbursed in the mistaken assumption of paying an excise tax when no tax existed, a complication solved by s-s. (6) of s. 105 hereunder:

105(6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The status of an eventual claimant, in contingencies where no taxes were due, appears to be unrestricted and fully available to "any person" who pays and subsequently claims a refund in the circumstances and limitations laid out in s-s. (6) of s. 105.

The above analysis of the legal provisions constitutes, I believe, a literal construction of this fiscal statute.

There now remains to determine a question of fact, namely, identifying the "person who by mistake of law or fact" actually "paid . . . to Her Majesty any moneys which have been taken to account as taxes imposed by this Act. . ."

On this score, in addition to Geller's and Tenenbaum's uncontroverted averments, previously mentioned, the Petition of Right, *inter alia*, urges in s. 14 a would-be subrogation produced as exhibit 11, purporting to invest M. Geller Inc. with ". . . any and all claims to any refunds for excise taxes paid to Her Majesty the Queen, in connection with sheepskin processed mouton by us for the said M. Geller Inc. prior to March 18, 1954, and subsequent to the said date, and we hereby acknowledge that all excise tax in connection with all such sheepskin processed mouton has been paid by us with funds received from the said M. Geller Inc. for said purpose . . . (signed) Nu-Way Lambskin Processors Ltd., per S. Tenenbaum."

Dated October 5, 1956, some two years after the last payment to Customs and Excise, this instrument, in the light of art. 1155(1) of the Civil Code, could not operate as a valid conventional subrogation on account of its tardiness, but should, nevertheless, constitute an explicit reassertion in written form that M. Geller Inc. defrayed out of its own funds each and every instalment of those alleged excise duties.

Respondent's counsel, at trial, hesitatingly alluded to the passing on of this tax to Geller's clients. Albeit, commercially viewed, this suggestion is tantamount to a certainty, I fail to see how the respondent's title to these moneys could be enhanced by a random recourse to unspecified third party rights.

Evidence, written and oral, conclusively singles out M. Geller Inc. as "payer", through the customary channel of its processors, of $20,011.72, and, by direct payment to Customs and Excise, of $945.02, in all an undue outlay of $20,956.74. This suppliant's written request for a refund and protest regarding future tax instalments (ex. 2) duly safeguarded its recourse.

As for the second or alternate suppliant, Nu-Way Lambskin Processors Ltd., although the literal wording of the statute doubtless afforded it, at the very least, a *prima facie* action in the matter, its non-compliance with the stringent conditions imposed by s. 105(6), those of (a) a written application, (b) within two years, peremptorily bars the way to any redress, quite apart from the facts revealed by the evidence.

Save for the governing precedents of *Universal Fur Dressers and Dyers Ltd. v. Her Majesty the Queen, supra,* and of *Beaver Lamb & Shearling Co. v. Her Majesty the Queen*[1], the several other decisions quoted mostly dealt with the distinguishing traits of direct and indirect taxation or the precluding effect of prescription, topics of slight assistance actually.

For the reasons preceding, this Court doth order and adjudge:

[1] [1960] S.C.R. 505.

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(a) that suppliant M. Geller Inc. is entitled to recover from Her Majesty the Queen, respondent, a total sum of $20,956.74, being the relief sought in its Petition of Right herein, and costs to be taxed;

(b) and doth further order and adjudge that the other suppliant, Nu-Way Lambskin Processors Ltd., is not entitled to relief sought by this Petition, and that Her Majesty the Queen recover from the said Nu-Way Lambskin Processors Ltd. her costs to be taxed, if any.

Judgment accordingly.

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BETWEEN:

J. MASTAI RAVARY ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Net worth assessment—Notice of objection—Presumption of validity of assessment—Income War Tax Act, R.S.C. 1927, c. 97, ss. 47, 55, 69A (1)(4), 70(1), (2), (3) and 4th Schedule s. 3(2) as amended—Civil Code, art. 1234.

The appellant, the president and majority shareholder of J. M. Ravary Co. Ltd., declared an annual salary of $780 received from the company in 1946 and 1947 as his taxable income for each of those years. The Minister finding it impossible to obtain the necessary information to justify the taxable income declared, proceeded under the authority of s. 47 of the *Income War Tax Act* to calculate the appellant's income on a net worth basis and increased the 1946 income to $11,113.37 and the 1947 income to $5,173.41. In each case $3,123.20 was included as the estimated living costs of the appellant and his wife. On an appeal to the Income Tax Appeal Board a deduction of $600 was allowed from the appellant's estimated net worth for 1947 and the 1946 assessment was affirmed. In an appeal to this Court the appellant contended that the $10,000 amount included in his personal balance sheet as prepared by respondent belonged to his wife. That his annual living expenses did not exceed $1,393.20, and that by service of a notice of objection under s. 69A of the *Income War Tax Act* the onus of establishing the validity of the assessment shifted to the Minister.

Held: That the serving of a notice of objection under s. 69A of the *Income War Tax Act* does not have the effect of displacing the presumption of validity of an assessment made according to law. This presumption subsists until the taxpayer succeeds in satisfying the Court or tribunal hearing the appeal that the assessment is erroneous in law and in fact.

2. That in determining the amount payable by the taxpayer the Minister acted within the powers conferred upon him by s. 47 of the Act.
3. That the $10,000 loan was established by the filing of a valid legal document and art. 1274 of the *Civil Code* prohibited the introduction of oral evidence to contradict or vary its terms.
4. That the Court could not accept the appellant's evidence as to his living expenses and in any event the appellant did not establish the figure submitted by the Minister to be erroneous.
5. That the decision of the Income Tax Appeal Board be affirmed.

APPEAL from a decision of the Income Tax Appeal Board.

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

Henri P. Lemay for appellant.

Pierre A. Badeaux, Q.C. and *Paul Boivin, Q.C.* for respondent.

FOURNIER J. now (July 15, 1960) delivered the following judgment.

Dans cette cause il s'agit d'un appel de la décision rendue le 27 septembre 1957 par la Commission d'Appel de l'Impôt sur le Revenu[1] au sujet des cotisations du revenu de l'appelant pour les années d'imposition 1946 et 1947. Le Ministre du Revenu national en cotisant le revenu de l'appelant avait ajusté et augmenté les montants mentionnés par ce dernier dans ses déclarations de revenu imposable pour les années en question.

La Commission d'Appel de l'Impôt sur le Revenu avait maintenu l'appel en partie et avait référé la cotisation pour l'année 1947 au Ministre pour qu'il déduise du revenu de l'appelant pour cette année la somme de $600 et émette une nouvelle cotisation en conséquence. Quant à la cotisation pour l'année d'imposition 1946, elle fut confirmée. C'est de cette décision que l'appelant a logé le présent appel devant la Cour de l'Échiquier.

Il base son appel sur le fait que l'intimé a cotisé son revenu imposable pour les années 1946 et 1947 en prenant comme base de ses calculs l'avoir net de l'appelant à une époque antérieure et postérieure aux années d'imposition et ne tenant pas compte des frais réels personnels et de subsistance, auxquels il a substitué des chiffres arbitraires, ignorant les conditions de vie de l'appelant et de son épouse.

[1] 57 D.T.C. 522; 18 Tax A.B.C. 129.

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L'intimé soumet qu'il ne lui a pas été possible d'obtenir de l'appelant les renseignements nécessaires pour justifier son revenu imposable et qu'il a dû déterminer le montant de l'impôt à payer par la méthode dite d'augmentation ou de diminution de capital, laquelle dans ses résultats réflète correctement le revenu de l'appelant. L'intimé avait l'autorité de procéder ainsi en vertu des dispositions de l'article 47 de la Loi de l'impôt de guerre sur le revenu (S.R.C. 1927, c. 97 et ses amendements).

47. Le ministre n'est lié par aucune déclaration ou aucun renseignement fourni par un contribuable ou en son nom, et nonobstant ces déclaration ou renseignement, ou si aucune déclaration n'a été faite, le ministre peut déterminer le montant de l'impôt qu'une personne doit payer.

Dans sa déclaration de revenu pour les années d'imposition dont il s'agit, l'appelant déclare qu'il n'avait qu'un revenu de $780 pour chacune de ces années, lequel provenait de son salaire comme officier et employé de la Compagnie J. M. Ravary, Incorporé. Après l'examen de la déclaration du contribuable, vu l'absence de renseignements nécessaires à la vérification de l'estimé de son revenu, l'intimé fit préparer une cédule d'augmentation ou de diminution du capital de l'appelant pour les années d'imposition de 1944 à 1951. D'après cette cédule, l'intimé en est arrivé à conclure que le revenu imposable de l'appelant pour l'année 1946 était de $11,893.17, moins le revenu déclaré de $780, soit $11,113.17, et que le revenu pour 1947 était de $5,953.41, moins le revenu déclaré de $780, soit $5,173.41.

Pour en arriver à ce résultat, le calcul est simple. Au 1er janvier 1946, le capital de l'appelant était de $27,445.57; au 31 décembre de la même année, son capital était de $36,215.14, soit un surplus de $8,769.97. A ce montant a été ajouté $3,123.20, estimé du coût de la vie de l'appelant et de son épouse. Pour l'année 1947, au 1er janvier le capital de l'appelant était de $36,215.14; au 31 décembre de la même année, il était de $33,200.35, soit une diminution de $3,014.79. Mais un retrait non expliqué de $5,845 donne un surplus pour l'année de $2,830.21; à ce montant a été ajouté $3,123.20, coût de la vie des époux. L'impôt à être payé par l'intimé découle de ces calculs. D'ailleurs, le bilan personnel de l'appelant et la cédule d'augmentation et de diminution de capital ont été déposés au dossier et forment partie de la preuve.

L'appelant conteste d'abord le montant de $10,000 compris dans son bilan personnel préparé par l'intimé. Ce montant est entré dans son actif sous le titre «Placement—Grill G. Rivet, Oka». Il prétend que ce montant fait partie de l'actif de son épouse. Ensuite, il conteste l'exactitude du montant fixé pour ses frais personnels ou de subsistance. Il prétend que ces frais ne dépassent pas la somme de $1,393.20.

Les parties ont soumis le présent appel à cette Cour sur la preuve documentaire et verbale offerte devant la Commission d'Appel de l'Impôt sur le Revenu. J'ai considéré attentivement cette preuve et crois devoir relater les faits importants et matériels au litige.

L'appelant est un homme d'affaire avisé qui dirige le commerce de ferronnerie de la Compagnie J. M. Ravary, Inc. Il est actionnaire majoritaire et président de cette compagnie, dont le personnel se compose de quatre employés. Son rapport de revenu personnel pour fins d'impôt est sommaire: il déclare que le salaire qu'il a retiré de la compagnie, savoir $780 pour chacune des années d'imposition, est son revenu. Dans son témoignage il répète qu'il a déclaré son revenu net, mais en transquestion il admet avoir retiré des loyers de ses propriétés. Il n'en a pas fait mention dans la déclaration parce qu'il avait droit à certaines déductions. Je n'ai trouvé aucune preuve de ce dernier fait au dossier.

Il est propriétaire de l'édifice dans lequel le commerce de ferronnerie est situé; il habite un appartement au deuxième étage et loue le troisième étage. Il a une maison d'été à Oka, maison habitée l'hiver par ses beaux-parents. Il possède une voiture-automobile Buick et pendant une certaine période en 1947 il avait deux automobiles. Il n'a pas d'enfant et il est fort économe. Il fume rarement, ne consomme pas de liqueurs alcooliques, ne va au cinéma que quelques fois par année; ne se promène en automobile que pendant les fins de semaine. Toutefois, il dit qu'il vit bien, mais qu'il ne mange pas beaucoup. Lui et son épouse sont bien vêtus; cependant, ils dépensent peu pour leurs vêtements. Ils ont une bonne santé et n'ont pas à recourir aux services de médecins; ils n'ont donc pas de frais médicaux à rencontrer. Ce sont là les déclarations faites pour justifier l'état de leurs frais personnels et de subsistance annuels au montant de

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$1,393.20. Ce document fait partie du dossier. Par contre, l'intimé dans ses calculs estime que ces frais s'élèvent à la somme de $3,123.20.

Quant au montant de $10,000 formant partie de l'actif de l'appelant d'après le bilan préparé par l'officier cotiseur, l'intimé en a tenu compte vu un acte authentique passé devant Me Arthur Bélanger, notaire de Montréal, entre Gilles Rivet et l'appelant le 3 novembre 1946. Ce document, dont une copie a été produite au dossier, relate que les parties ont comparu devant le susdit notaire et ont déclaré, entre autres, ce qui suit:

> Monsieur Gilles Rivet, hôtelier, demeurant en la cité de Montréal;
>
> Lequel, par ces présentes, reconnaît devoir à Monsieur J. Mastai Ravary, marchand, demeurant en la dite cité de Montréal, à ce présent et acceptant créancier, la somme de $10,000 pour prêt d'autant que le créancier fait au débiteur qui le reconnaît et s'en déclare satisfait;
>
> Le débiteur s'oblige de rembourser la dite somme de $10,000 au créancier, dans deux ans, c'est-à-dire le 1er décembre 1948.

L'acte a été signé par l'appelant et Gilles Rivet devant le notaire ci-dessus mentionné et enregistré au bureau d'enregistrement du comté des Deux-Montagnes le 6 décembre 1946. C'est ce document, où l'appelant se déclare prêteur et créancier de la somme de $10,000, laquelle Gilles Rivet reconnaît lui avoir été prêtée par J. Mastai Ravary, que l'appelant veut expliquer et contester par une preuve verbale.

L'appelant fait reposer ses prétentions sur l'interprétation de l'article 69A de la Loi de l'impôt de guerre sur le revenu et la distinction entre une présomption de validité et le fardeau de la preuve. L'article 69A(1)(4) se lit comme suit:

> 69A (1) Un contribuable qui s'oppose à une cotisation prévue par la présente loi peut, dans les deux mois après la date du dépôt à la poste de l'avis de cotisation, signifier au Ministre, sous la forme prescrite par ce dernier, un avis d'opposition en double exemplaire, énonçant les motifs de l'opposition et tous les faits pertinents . . .
>
> (4) Si un avis d'opposition, prévu au présent article, n'est pas signifié dans le délai prescrit, la cotisation est réputée valable, nonobstant toute erreur, tout vice de forme ou toute omission y contenue ou constatée dans toute procédure intentée, sous le régime de la présente loi, à cet égard.

L'effet de l'article 69A(1) est de permettre au contribuable, s'il n'est pas satisfait de la cotisation, de soumettre au Ministre les motifs de sa dissatisfaction, ainsi que tous les faits pertinents, afin qu'il puisse examiner de nouveau la cotisation, l'annuler ou la ratifier ou procéder à

une nouvelle cotisation et donner avis au contribuable de sa décision finale. C'est ce qui a été fait dans le présent cas. Va sans dire que de cette décision il y a appel à la Commission d'Appel de l'Impôt sur le Revenu et à la Cour de l'Échiquier du Canada. Comme il y a eu un avis d'opposition dans cette cause, les dispositions du paragraphe (4) de l'article 69A ne s'appliquent pas au présent litige. Le but de ce paragraphe est de permettre l'application des dispositions de l'article 71(1)(2)(3) de la Loi de l'impôt de guerre sur le revenu. Je cite les parties pertinentes de l'article.

71. Tous impôts, intérêts et amendes payables en vertu de la présente loi et restés impayés en totalité ou en partie après deux mois à compter de la date de la mise à la poste de l'avis de cotisation, peuvent être certifiés par le Sous-Ministre (Impôt).

(2) Sur production à la Cour de l'Échiquier du Canada, le certificat est enregistré dans ladite cour et, à compter de la date de cet enregistrement, il a la même force et le même effet que s'il était un jugement obtenu de la cour pour le recouvrement d'une dette au montant spécifié dans le certificat, y compris l'intérêt à la date du paiement ainsi qu'il est prescrit dans la présente loi, et inscrit à la date de cet enregistrement, et toutes les procédures peuvent être instituées sur ce certificat.

Le fait par le contribuable d'avoir signifié un avis d'opposition à la cotisation lui donne le droit d'interjeter appel de la décision du Ministre à la Commission d'Appel de l'Impôt sur le Revenu ou à la Cour de l'Échiquier et crée un empêchement pour la Couronne de procéder au recouvrement de l'impôt cotisé en vertu des dispositions des articles 70 et 71(1)(2)(3) en partie cités *supra*. Je suis d'opinion que la signification d'un avis d'opposition et des motifs de dissatisfaction au Ministre n'a pas pour effet de faire disparaître la présomption de légalité de la cotisation faite conformément à la loi. Cette présomption de légalité subsiste jusqu'au moment où le contribuable a réussi à démontrer, à la satisfaction de la Cour ou du tribunal qui entendra l'appel, que la cotisation est mal fondée en fait et en droit.

Il a été à maintes reprises décidé qu'il incombait au contribuable, pour réussir dans son appel, de démontrer au tribunal que la cotisation est erronée en fait et en droit.

Il n'y a pas de doute qu'en vertu de l'article 47 le Ministre avait le pouvoir de procéder à déterminer le montant de l'impôt que l'appelant devait payer. Les documents et renseignements fournis avec la déclaration de revenu du contribuable ne donnaient pas suffisamment de détails pour permettre d'établir son revenu imposable. Dans le présent cas,

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il était en droit d'enquêter et de déterminer la cotisation conformément à la loi et d'après les renseignements et documents obtenus. Ce pouvoir ne peut être considéré comme exorbitant en regard du pouvoir général conféré au Ministre en vertu de l'article 55 de la loi. Si ce pouvoir n'existait pas, il faudrait en conclure que la cotisation serait limitée au montant déclaré par le contribuable dans son rapport de revenu.

Dans la cause de *Dezura* et *Le Ministre du Revenu national*[1], le président de cette Cour, l'honorable J.-T. Thorson, a énoncé succinctement les règles applicables aux cotisations faites en vertu de l'article 47. Je cite:

Held: That the Minister's power under section 47 is not of the same kind as the various discretionary powers vested in the Minister by the Act in respect of particular items but is general in nature and relates to the amount of the assessment as a whole.

2. That the Minister's power under section 47 must be exercised within the Act and subject to it.

3. That, when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, he has made a finding of fact as to the amount of the assessment which is subject to review by the Court under its appellate jurisdiction.

4. That the onus of proof of error in the amount of the determination rests on the appellant.

Aux termes de l'article 3(2) de la Quatrième Annexe—Appels à la Cour de l'Échiquier du Canada—Loi de l'impôt de guerre sur le revenu, S.R.C. 1927, c. 97 et amendements, ces appels sont assimilés à des actions ordinaires. Je cite:

3(2) Sur production des pièces mentionnées au premier paragraphe du présent article, l'affaire est réputée une action devant la Cour et, à moins que cette dernière n'ordonne aux parties de produire leurs conclusions, prête pour audition.

C'est donc dire que, nonobstant le fait que la loi intitule la procédure un appel, c'est un procès *de novo*. La Cour peut procéder avec le dossier tel que transmis ou ordonner une nouvelle enquête. La position est la même que lorsque les parties se sont présentées devant la Commission d'Appel de l'Impôt. Que le contribuable soit appelant ou intimé, il lui incombe de démontrer que le Ministre a erronément déterminé le montant de l'impôt qu'il doit payer.

[1] [1948] Ex. C.R. 10; 3 D.T.C. 1101; [1947] C.T.C. 375.

Dans la cause de *Johnston* et *Ministre du Revenu national*[1] la Cour suprême du Canada a décidé:

Held: That the action was really an appeal from the assessment even though section 63(2) of the Act refers to it as an action ready for trial or hearing and that the onus was on the taxpayer to demolish the basic fact on which the taxation rested.

Cette décision confirmait en quelque sorte la règle posée dans la cause de *Dezura,* citée *supra,* décrétant:

That the onus of proof of error in the amount of the determination rests with the appellant (taxpayer).

Dans la cause de *Minister of National Revenue v. Simpson's Limited*[2] l'honorable J.-T. Thorson, Président de cette Cour, décrit ainsi la position des parties dans les causes en appel des décisions de la Commission d'Appel de l'Impôt sur le Revenu (p. 97, *in fine*):

. . . On the contrary, the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law. Thus, the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Income Tax Appeal Board may have allowed an appeal from it. It follows, under the circumstances, that while the Minister, being the appellant, may be called upon to begin he may rest on the assessment so far as the facts are concerned without adducing any evidence. The onus of proving the assessment to be erroneous in fact is on the taxpayer.

Malgré la doctrine ci-haut énoncée et les décisions de la Cour suprême du Canada et de la Cour de l'Échiquier, l'appelant dans la présente cause prétend que la présomption de validité stipulée à l'article 69A de la Loi de l'impôt de guerre sur le revenu ne s'attache qu'au montant d'impôt cotisé et cesse d'exister lorsque le contribuable produit un avis d'opposition, étape préliminaire et essentielle avant l'appel devant la Commission ou devant la Cour.

Si cette proposition était admise comme établissant la position juridique des parties devant la Commission ou la Cour, l'appelant serait, à toute fin pratique, déchargé du fardeau de la preuve, puisque cette obligation découle de la présomption de validité de la détermination par le Ministre du montant de l'impôt que le contribuable doit payer. Il s'ensuivrait que l'appelant, qui réclame la modification ou l'annulation de la cotisation, n'aurait qu'à signifier un avis

[1] [1948] S.C.R. 486; [1948] C.T.C. 195; 3 D.T.C. 1182.
[2] [1953] D.T.C. 1127; [1953] Ex. C.R. 93; [1953] C.T.C. 203.

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d'opposition, accompagné des motifs de dissatisfaction, pour obtenir que la Commission ou la Cour déclare que la cotisation est erronée, à moins que le Ministre défendeur n'établisse que l'avis d'opposition et les motifs sont mal fondés en fait et en droit. Ce serait là une situation inconcevable puisque la loi oblige le contribuable à faire une déclaration de son revenu; à estimer l'impôt à payer sur ce revenu; à fournir les documents et renseignements nécessaires pour permettre au Ministre de constater si la déclaration du revenu et l'estimation de l'impôt à payer par le contribuable sont basées sur des faits et dispositions légales prévus par le Statut.

Je suis d'opinion que les prétentions de l'appelant quant à la présomption de validité de la cotisation et du fardeau de la preuve qui incombe au contribuable viennent à l'encontre de la lettre et de l'économie de la Loi de l'impôt de guerre sur le revenu et de la Loi de l'impôt sur le revenu.

Je crois bien interpréter les dispositions de ces lois, pertinentes au litige, en déclarant qu'elles attachent à chaque détermination par le Ministre du montant d'impôt à être payé par le contribuable une présomption de validité qui subsiste jusqu'au moment où le contribuable ait réussi à démontrer au tribunal que la cotisation est erronée et que celui-ci ait statué sur l'appel.

Il appartenait donc à l'appelant de présenter à la Cour une preuve suffisante pour démolir la cotisation du Ministre. Le débat est en réalité limité à deux item. Le premier—«Placement Grill G. Rivet, Oka, $10,000», compris dans le bilan de l'appelant pour l'année d'imposition. Au soutien de cette entrée, l'intimé a produit au dossier un acte de prêt, sous forme authentique, dans lequel l'appelant se déclare prêteur de la dite somme, que l'emprunteur déclare avoir reçue de l'appelant et reconnaît lui devoir. C'est un écrit valablement fait et dont la validité n'est pas contestée. L'appelant voulait, par preuve testimoniale, contredire ou changer les termes de ce document. Je ne crois pas que cette preuve puisse être acceptée.

L'article 1234 du Code civil, qui s'applique dans les circonstances, dit:

> Art. 1234. Dans aucun cas la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait.

Le second item sous discussion était le montant de $3,123.20 que l'intimé a fixé pour les frais personnels ou de subsistance de l'appelant pour chacune des années d'imposition. L'appelant fixe le montant de ces frais à $1,393.20 par année. J'ai résumé la preuve en ce qui a trait à ce poste. J'en suis arrivé à la conclusion que les faits relatés par l'appelant n'étaient pas raisonnables ou vraisemblables. A tout événement, je suis d'opinion que la preuve offerte par l'appelant n'est pas suffisante pour démontrer que les calculs de l'intimé relatifs à cet item sont erronés.

Quant à la somme de $600, la preuve me semble justifier la conclusion de la Commission d'Appel de l'Impôt sur le revenu que la cotisation pour l'année 1947 doit être déférée au Ministre pour qu'il y déduise cette somme et émette une nouvelle cotisation et que la cotisation pour l'année 1946 ne doit pas être modifiée.

Jugement en conséquence.

BETWEEN:

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BEULAH GORKIN and JACK ADILMAN as Administrators with will annexed of the Estate of NATHAN ADILMAN, deceased ....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Succession duty—Transfer of shares to corporation owned by transferor's children for an annuity—Value of shares much greater than annuity—Whether transaction a gift or for partial consideration—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(d) and (k).

T died on June 20, 1956 at the age of 67 years leaving a son and daughter to whom by his will dated January 3, 1956, he left the bulk of his estate. Shortly before his death T had intended to remarry and in contemplation of this event, some 20 days before he died transferred to Edison Wholesale Ltd. 72 shares of Adilman's Ltd. and the land and building on which the latter carried on a department store business in consideration of a monthly sum of $1,666.66 to be paid to him for his life or until the total of such payments reached $200,000. At the time of the transfer the son and daughter owned the balance of the issued common shares of Adilman's Ltd. and were the only beneficial shareholders of Edison Wholesale Ltd. At the time of T's death

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the fair market value of the property transferred was $344,400 and the present value of the annuity payable to T at the time of the transfer was $148,000. In assessing T's estate for succession duty the Minister included the $344,400 in the aggregate net value of the property of the deceased and assessed duty accordingly. On an appeal from the assessment the Administrators of T's estate contended that the property in question was "transferred for partial consideration" within the meaning of s. 3(1)(k) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, and accordingly the only amount which could be properly included in assessing duty was $196,400, the difference between the $344,400 and $148,000 the value of the annuity which Edison Wholesale Ltd. had agreed to pay. The Minister submitted that the transaction in question was a "gift" with a reservation of benefit to the donor by contract within the meaning of s. 3(1)(d) of the Act and that the $344,400 was accordingly properly included in making the assessment.

Held: That both clauses (d) and (k) of s. 3(1) of the *Dominion Succession Duty Act* are clauses which catch and require to be brought in on their terms transactions of the kind therein described, and, if a transaction fairly falls within one of them it makes no difference to the application of that clause that the transaction may also fall within another clause, the application of which might be either more or less burdensome to the taxpayer.

2. That in interpreting clause (d) of s. 3(1) the principle that the substance of the transaction must be ascertained, applied, and having regard to all the circumstances under which the transaction was entered into it was clear that it was not dictated by commercial considerations and the inference was that the object of the deceased was not to acquire the annuity in place of the property but to do something for the benefit of his son and daughter.

3. That the transaction was a "gift" with a benefit to the donor provided "by contract" within the meaning of s. 3(1)(d).

Semble—That the property was not "transferred for partial consideration" within the meaning of s. 3(1)(k), since the obtaining of the consideration was not the real object of the transaction.

Attorney-General for Ontario v. Perry [1934] A.C. 477; *Attorney-General v. Worrall* [1895] 1 Q.B. 99; *Attorney-General v. Johnson* [1903] 1 K.B. 617; *Re Baroness Bateman* [1925] 2 K.B. 429, referred to.

APPEAL under the provisions of the *Dominion Succession Duty Act.*

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

H. H. Stikeman, Q.C., J. M. Goldenberg, Q.C. and *P. N. Thorsteinsson* for appellants.

D. S. Maxwell, T. E. Jackson and *G. W. Ainslie* for respondent.

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THURLOW J. now (July 27, 1960) delivered the following judgment:

This is an appeal by the administrators with will annexed of the estate of Nathan Adilman, deceased, from an assessment of duties in respect of successions arising upon his death. In making the assessment, the Minister included in the aggregate net value of the property of the deceased and in the dutiable value of a succession to Edison Wholesale Limited, a corporation, a sum of $344,400, representing the value of certain property which had been the subject matter of an agreement made between the deceased and the corporation some twenty days before his death and assessed duty accordingly, and the issue in the appeal is whether the Minister was right in including the whole of this sum. As to $196,400 of it, there is no dispute. The matter comes before the Court on an agreed statement of facts which, together with the documents transmitted by the Minister pursuant to s. 42 of the Act and certain admissions contained in the pleadings, constitute the whole of the material upon which the issue is to be decided.

The deceased died on June 20, 1956 at the age of 67 years, leaving a son and daughter who are the administrators with will annexed of his estate. By his will made on January 3, 1956 he made specific bequests to a number of charitable organizations, to a brother and to several grandchildren, as well as to his son and daughter and also gave to his son and daughter the residue which comprised the great bulk of his estate. On June 1, 1956, by the agreement above mentioned, the deceased transferred to Edison Wholesale Limited 72 shares of a corporation known as Adilman's Limited and a parcel of land with the building thereon, in which Adilman's Limited carried on a department store business, in consideration of a monthly sum of $1,666.66 for as long as he should live, payable on the first day of each month, beginning on the first day of July, 1956, provided that the payments should in any event cease when their total reached $200,000. At the time of the making of this agreement, the appellant's son and daughter were already the owners of 88 of the 160 issued common shares of Adilman's Limited, and they were also the only beneficial shareholders of Edison Wholesale Limited.

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In paragraph 8 of the agreed statement of facts, it is stated that:

> 8. The said agreement was entered into by the deceased and Edison Wholesale Ltd. in good faith, for legitimate family reasons and in view of the intended re-marriage of the deceased, and not in attempt to avoid the payment of any Succession Duty.

Paragraph 2 of the agreed statement of facts also refers to the deceased's death as sudden, which I take it means unexpected.

The fair market value of the property so transferred to Edison Wholesale Limited at the time of the death of the deceased was $344,400, and the annual value or profit from it as in June, 1956 was $28,000. The present value on June 1, 1956 of the annuity payable to Nathan Adilman was $148,000. The succession duty return filed by the appellants indicates that, apart from the properties in question, the deceased had assets with an aggregate net value of $353,311.75.

The Minister's case for including the $344,400, representing the value of the property in question, is that the transaction in question, though couched in the form of a contract, was in substance a "gift" within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89. The appellants, on the other hand, take the position that the property was "transferred for partial consideration" within the meaning of s. 3(1)(*k*) and that, accordingly, the only amount which could properly be included was $196,400, that is to say, the difference between the $344,400 and $148,000, the value of the annuity which Edison Wholesale Limited had agreed to pay.

These provisions of the statute are as follows:

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—
>
> * * *
>
> (*d*) property taken under a gift whenever made of which actual and *bona fide* possession and enjoyment has not been assumed by the donee or by a trustee for the donee at least three years before the death of the deceased and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;
>
> * * *

> (*k*) property transferred within three years prior to the death of the deceased for partial consideration in money or money's worth paid or agreed to be paid to the deceased, to the extent to which the value of the property when transferred exceeds the value of the consideration so paid or agreed to be paid.

By the other clauses of the same subsection, there are included in what are deemed to be successions several other types of dispositions of property, including in clause (*b*) donations *mortis causa* and in clause (*c*) dispositions operating or purporting to operate as immediate gifts *inter vivos*.

It will be observed that, if clause (*d*) is applicable, the property to be included is greater than under clause (*k*) and that, if these clauses are mutually exclusive, as the appellants maintained and counsel for the Minister did not dispute, some line of demarcation must differentiate a transaction by which property is "transferred . . . for partial consideration" from a gift transaction in which a benefit is obtained by the donor "by contract". Yet, where the benefit obtained by the donor is less than the value of the property given, the latter type of transaction, on first impression, seems to be readily describable as or likely to fall within the meaning of the expression "transferred . . . for partial consideration". Nor is the difference between the two rendered any less difficult to define by reason of the absence of a statutory definition of gift. For the purposes of this case, however, it is unnecessary to attempt to define the line of demarcation if, indeed, any definition is possible for it is not difficult to conceive of cases which fall within clause (*k*) and which clearly are not gifts and cases can also be conceived which are more readily classified as gifts, even though accompanied by a contractual benefit to the donor, than as transfers for partial consideration. Each case must be considered on its own facts to determine under which clause the transaction falls and, while there undoubtedly may be cases which may present considerable difficulty, the present is, in my opinion, not such a case, the circumstances affording a fairly clear indication of the side on which the transaction falls.

The wording of these clauses bears considerable similarity to that of provisions in the *Customs and Inland Revenue Act*, 1881 (44 and 45 Vict., c. 12, Imp.) as amended by the

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Customs and Inland Revenue Act, 1889 (52 and 53 Vict., c. 7, Imp.) and incorporated by reference, with certain amendments, by the *Finance Act,* 1894 (57-58 Vict., c. 30, Imp.).

By the *Customs and Inland Revenue Act,* 1881, as amended in 1889, it was provided that account duty should be paid in respect of property which included "any property taken as a *donatio mortis causa* made by a person dying after June 1, 1881, or taken under a *voluntary* disposition, made by a person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide,* made three months before the death of the deceased, and property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise".

By the *Finance Act,* 1894, it was enacted that property passing on the death of a deceased should be deemed to include "property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, as if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom". By s. 3 of the same Act, it was provided:

3. (1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

(2) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purposes of Estate duty.

The evolution of these provisions and its effect on their interpretation is discussed in *Attorney-General for Ontario v. Perry*[1], where the lack of the same historical background in similarly worded Ontario legislation was considered by the Privy Council to be an important difference between the two statutes. Lord Blanesburgh said at p. 483:

> To pass by, for the moment, one other to which reference must later be made, it may be taken that for present purposes the great difference between the two sub-sections consists in this—that the sub-section appears in the Ontario statute as an original enactment with no trace of its origin or history to be found either in its terms or in any other Ontario legislation, whereas the British sub-section is, on its face an amendment of an existing Act of Parliament, which, as so amended, remains the substantive operative enactment.

And at p. 487 he also said:

> First, then, is the Ontario sub-section, unlike the corresponding British enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be so construed. It contains on its face no reference to any origin. It comes into Ontario legislation full grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.

Save for certain immaterial amendments which have since been made, clauses (*b*), (*c*), (*d*) and (*k*) of s. 3(1) of the *Dominion Succession Duty Act* also came into the law as original enactments, full grown and without ancestry, when that statute was enacted in 1941, and, though they have some similarity to the English provisions, the principle so stated must, I think, be applied and, in considering and applying decisions on the English statutes, care must first be taken to see how far they are based on the historical evolution of such statutes.

It was submitted that there is a further distinction between the English statutes and the *Dominion Succession Duty Act* in that s. 3 of the *Finance Act,* 1894, deals only with *bona fide purchases* for full or partial consideration, while clause (*k*) of s. 3(1) of the Canadian statute applies to all *transfers* for partial consideration. It was urged that the meaning of transfer is broader than purchase or sale and includes gifts as well. I do not think, however, that the word "transferred" in its context in clause (*k*) necessarily bears so wide a connotation for it is limited by the words

[1] [1934] A.C. 477.

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"for partial consideration in money or money's worth", and I am inclined to think that the words "for partial consideration in money or money's worth" connote not alone what the transferor is to receive in money or money's worth but, as well, his object in making the transfer. And if, as I think, this is the correct interpretation of clause (*k*), there is not much difference between what is there contemplated and what is contemplated in the expression "bona fide purchase" in the *Finance Act,* 1894.

It should be observed, however, that, unlike s. 3(2) of the *Finance Act,* 1894, which is an excepting provision, clause (*k*) of s. 3(1) of the *Dominion Succession Duty Act* defines a type of transaction which gives rise to a succession and does not operate as an exception to clauses (*c*) or (*d*). Both (*d*) and (*k*) are thus clauses which catch and require to be brought in on their terms transactions of the kinds therein described, and, to my mind, if a transaction fairly falls within one of them it makes no difference to the application of that clause that the transaction may also fall within another clause, the application of which might be either more or less burdensome to the taxpayer. *Vide Speyer Brothers v. C. I. R.*[1]

Accordingly, as I view it, the problem which I have to consider is whether or not the transaction in question falls within the wording of clause (*d*) of s. 3(1) for, if it does, the appeal cannot succeed and, if it does not fall within that clause, there is no dispute as to the application of clause (*k*).

Turning now more particularly to the interpretation of clause (*d*), under the corresponding enactments it has been consistently held in England that it is the substance of the transaction that must be ascertained and I see no reason to think that this principle is not applicable in interpreting s. 3. Secondly, the words "by contract or otherwise", which on first impression seem repugnant to the notion of gift, appear to require a wider interpretation of "gift" in clause (*d*) than what has been referred to as "a pure and simple" gift. In clause (*d*), this is made even more manifest than in the corresponding English clause for the Canadian clause uses the expression "whether voluntary or by contract or otherwise", while the English clause has never had

[1] [1908] A.C. 92.

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the word "voluntary" included in this position in its text. The English decisions on the meaning of "gift" in the provision corresponding to clause (*d*), insofar as they are not based on the historical development of the provision can, accordingly, in my opinion, be of some assistance so far as they go. This, I think, is also the effect of what Lord Blanesburgh said at p. 486 in *Attorney-General for Ontario v. Perry (supra)*, a case which arose under a provision of the *Ontario Succession Duty Act*, corresponding with s. 3(1)(*c*) of the *Dominion Succession Duty Act*:

> Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of s. 38, sub-s. 1(9.), of the Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of the subsection supra, shows that the gift therein being dealt with need not be preceded by a "disposition", but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not "a pure and simple gift." *Attorney-General v. Worrall,* [1895] 1 Q.B. 99, and *Attorney-General v. Johnson,* [1903] 1 K.B. 617, may be cited as typical; and see *Attorney-General v. Holden,* [1903] 1 K.B. 832, 837. These authorities would have had greater significance on the present occasion if upon construction it were held that the final words of s. 7(*b*) of the Succession Duty Act applied to the second limb of the sub-section as well as to the third. But, as will presently be seen, this, in the opinion of their Lordships, is not the case.

Earlier, at p. 485, he had said:

> It was always held in Great Britain, under s. 38, sub-s. 1(9.), of the Inland Revenue Act, 1881, amended as above but with the word "voluntary" remaining before the word "disposition", that an ante-nuptial settlement of the second class above alluded to, not being in law a voluntary settlement, did not fall within the second limb of the section. It is interesting here to note, as will be seen later, that something which was not a "pure and simple" gift might however have come under the third limb. In other words "gift" in the two limbs had not the same meaning.

In *Attorney-General v. Worrall*[1], a case which arose before the enactment of the *Finance Act,* 1894, Lopes L.J. said at p. 105:

> One question is whether there was a "gift" of property at all. It is suggested that there was not, because there was a collateral covenant by the son to pay to the father an annuity. It appears to me that there was not the less a gift within the meaning of the Act on that account.

[1] [1895] 1 Q.B. 99.

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A. L. Smith L.J. said at p. 107-8:

> The next point is this: It is said that the transaction is not a gift within the meaning of the statute because a consideration was given. On reading sec. 11, sub-s. 1, it seems clear that the legislature in using the word "gift" in that section contemplated cases where the donee enters into a covenant such as this.

In *Attorney-General v. Johnson*[1], Vaughan Williams L.J. said at p. 624:

> Having regard to the terms of s. 11 of the Customs and Inland Revenue Act, 1889, which speaks of a benefit to the donor by contract, and to the language of the Finance Act, 1894, s. 2, sub-s. 1(*c*), which incorporates the provisions of s. 11 of the Customs and Inland Revenue Act, 1889, as if the words "voluntary" and "voluntarily" and "volunteer" were omitted, and to the decisions in *Crossman v. Reg.*, 18 Q.B.D. 256, and *Attorney-General v. Worrall*, [1895] 1 Q.B. 99, we come to the conclusion that the Legislature intends that property shall be treated as taken under a "gift", although such gift may have been made under a contract by which the donor takes a benefit.

On the question whether the transaction was in substance one of gift, Vaughan Williams L.J. discussed the facts as follows at p. 624:

> If, then, the substance of the transaction between Mr. Burton and the Missionary Society be looked at, it seems to us that it was intended not to be a matter of pure business, but one of bounty on the part of Mr. Burton. The facts that the payment was made "in lieu of a legacy", and that the amount paid largely exceeded the market value of the annuities agreed to be paid to Mr. and Mrs. Burton are sufficient to establish this. Consequently, the transaction must, in our opinion, be held to be a gift within the meaning of s. 2, sub-s. 1(*c*), of the Finance Act, 1894.

Later, at p. 627, when dealing with the question whether the transaction could be regarded as a purchase, he also said:

> Phillimore J. has held that the whole 500*l.* is, in the first instance, taxable—a conclusion in which we agree—but has further held that in this case 210*l.*, the value of an annuity of 25*l.* a year for two lives, ought to be deducted from the 500*l.*, and that therefore only 290*l.* remains to be taxed. This is a conclusion in which we cannot agree, because, in our judgment, this is not a case of a bona fide purchase of an annuity at all. It is a case of a testamentary gift effected by the machinery of a present donation, subject to a reservation of something intended to be the equivalent of a life interest in the subject-matter of the donation.

[1] [1903] 1 K.B. 617.

In *Re Baroness Bateman*[1] the deceased had purported to sell to her son certain furniture at a price below its value and the question before the court was whether the transaction was in substance a purchase for partial consideration within the meaning of s. 3(2) of the *Finance Act*, 1894. Rowlatt J. said at p. 435:

> The transaction here was induced of course by family considerations, but that does not conclude the matter. My attention has been drawn to observations in *Lethbridge v. Attorney-General*, [1907] A.C. 24, in the House of Lords, where it is pointed out that there might be a family arrangement co-existent with a purchase. The question is whether the object of the transaction was really on the one side to get money for goods by disposing of the goods in the future, and on the other side to pay money and obtain goods. In *Brown v. Attorney-General*, 79 L.T. 572, a father entered into a partnership deed with his son, one of the provisions being that on his death the son should take over the father's share in consideration of a payment of 10,000*l*. to the estate. There the motive and intention were clearly not to turn something into money either in the present or in the future, but to provide for the disposal of the business after death, and to prevent the business going to the eldest son without his making some corresponding contribution to the estate. It was held that that could not fairly be described as a sale and purchase. In the present case the mother was in want of money, and she obtained it by a simple sale of her furniture subject to her life interest. The sum paid, whether it was the full amount which would have been obtained for it or not, was certainly not so inadequate as to be an unreality. I think therefore that this was a bona fide sale and purchase by the son, and that no succession duty is payable.

Now what, in the present case, is the substance of the transaction in question? In form, the transaction is a contract for substantial consideration and not a gift at all, but that is merely one of a number of facts that must be taken into account and it can be outweighed by the other circumstances. The deceased was a man 67 years of age with a son and a daughter. He had property worth somewhere in the vicinity of $700,000. His will, made some months earlier, shows his disposition to benefit his son and daughter in the event of his death, but he was contemplating re-marriage, an event which would revoke his will and, at the same time, bring into his family another person who might be expected to be an object of his bounty. A substantial portion of his property—amounting to nearly half of it—was made up of the land and building in which Adilman's Limited carried on its business and in common shares of that company. His son and daughter owned the remaining issued common

[1] [1925] 2 K.B. 429.

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shares of that company. The real estate and shares which he held were producing a substantial income. In this setting, "for legitimate family reasons", which I would infer included the safeguarding to the son and daughter of complete ultimate control of this particular portion of his property, the deceased made an agreement to transfer that portion of his property to Edison Wholesale Limited, a company whereof his son and daughter were the only beneficial shareholders, in consideration of an annuity which, in itself, was substantially less than the income which the property in question was producing, the present value of the annuity being much less than half the value of the property transferred. It seems a fair assumption that the transferee would not expect to be obliged to dip into its own resources to pay any portion of the annuity or to use for that purpose the capital of the property transferred but that, on the contrary, the transferee would enjoy a considerable benefit immediately from the income of the property, even after paying the annuity therefrom. That this transaction was not dictated by commercial considerations is perfectly clear, and I would also infer that the object of the deceased in entering into it was not really to acquire the annuity in place of or for this property but to do something for the benefit of his son and daughter. The circumstance that the transaction was entered into with a corporation, rather than with the son and daughter, militates to some extent in favour of the transaction being in substance what its form suggests, but there is no reason to doubt that, in law, a gift may be made to a corporation and, as the only beneficial shareholders of Edison Wholesale Limited were the son and daughter of the deceased, for the purposes of the present problem I see in the fact that the transaction was made with the corporation little reason to differentiate it in substance from a similar transaction made with the son and daughter. On the whole, therefore, I am of the opinion that the transaction in question was a "gift" with a benefit to the donor provided "by contract", within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act*. It is perhaps unnecessary that I should go any further, but I also

think that the property was not "transferred for partial consideration" within the meaning of s. 3(1)(*k*), since the obtaining of the consideration was not, in my view, the real object of the transaction.

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The appeal, accordingly, fails, and it will be dismissed with costs.

Judgment accordingly.

BETWEEN:

1960 — May 30, 31 — Aug. 16

MONTREAL TRUST COMPANY, MARJORIE HELEN SMITH and GERALD MEREDITH SMITH, Executors under the Will of MARY ANDERSON SCOTT, Deceased, and MARJORIE HELEN SMITH, Personally .... APPELLANTS;

AND

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

Revenue—Succession Duty—General power to dispose of capital—Power never exercised—Whether a succession—Meaning of "power" "general power" "competent to dispose"—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(1)(i), 3(4) and 4(1).

S., who died domiciled in the Province of Quebec on December 14, 1940, prior to the coming into force of the *Dominion Succession Duty Act,* by his will left the residue of his estate to his wife to freely dispose of the revenue and capital and upon her death the residue not disposed of to go to his daughter upon similar terms for her life and upon her death the residue not disposed of to vest in certain others. The wife made no disposition of the capital during her lifetime. Following her death on October 9, 1955, the Minister in assessing her estate for succession duty added to the declared value thereof the value of the residuary estate of her husband as well as the interest accrued to the date of her death on some bearer bonds in her husband's estate. In an appeal from the assessment it was contended that under the *Civil Code* the will of S created a substitution of his property whereby his widow became the institute and his daughter the first substitute and upon the death of the widow the right of the daughter in the assets forming the residue of the estate of S arose under the terms of his will and not by any disposition made by the widow. The Minister submitted that the property in question had been properly included in making the assessment as the wife at the time of her death had a general power

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to dispose of the property within the meaning of s. 3(4) of the *Dominion Succession Duty Act* as enacted by R.S.C. 1952, c. 317, s. 2(3) and that accordingly a succession to the property was deemed to have arisen.

Held: That the definition of "general power" in s. 4(1) of the *Dominion Succession Duty Act* must be taken to apply to s. 3(4) of the Act, and the word "power" in the expression "general power to appoint or dispose of property" in s. 3(4) must be interpreted as referring to the capacity of the holder to alienate the property, rather than as having the narrower meaning of strict legal usage.

2. That at the time of her death the widow of S had a general power to dispose of the residue of his estate within the meaning of s. 3(4) of the Act and that the value thereof had been properly included in the successions.

3. That the value of the accrued interest on bonds of the testator's estate was properly included in computing the value of the property included in the successions since the widow of S had a general power to dispose of the assets of his estate which included the bonds with any accretions to their value.

APPEAL under the *Dominion Succession Duty Act.*

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

J. de M. Marler, Q.C. for appellants.

Maurice Paquin, Q.C. and *Roger Tassé* for respondent.

THURLOW J. now (August 16, 1960) delivered the following judgment:

This is an appeal by the executors of the will of Mary Anderson Scott, deceased, and by Marjorie Helen Smith, personally, from an assessment under the *Dominion Succession Duty Act* of duties in respect of successions arising on the death of the said deceased. There are two issues raised in the appellants' statement of claim, the first being whether in computing the value of the property included in the successions the value of property in the hands of the executors of the estate of the late Honourable Gordon W. Scott, deceased, and forming the residue of that estate, was properly added and included by the Minister, and the other whether certain minor sums of interest which had accrued but which were not yet payable on bonds held in that estate and forming part of its assets were also properly included.

The late Honourable Gordon W. Scott died domiciled in the province of Quebec on December 14, 1940, prior to the coming into force of the *Dominion Succession Duty Act,*

S. of C. 1940-41, c. 14, leaving a will by which, after making several specific bequests and directions, he provided in clauses Seventh and Eighth as follows:

SEVENTH:

All the rest, residue and remainder of my property, movable and immovable, real and personal, of whatsoever the same may consist and wheresoever the same may be situate, and any property or properties acquired in replacement thereof or of any part thereof and representing the same at any time, I give, devise and bequeath all such property to my wife, Mary Edith Anderson, who may freely use and dispose of the revenue and capital thereof as she may determine, subject always to the seizin, rights and powers hereby conferred upon my Executors in respect of such of the property from time to time not used or disposed of by my wife; and, upon the death of my said wife, or in case my wife predeceases me, I give, devise and bequeath the rest, residue and remainder of such property as has not been so used or disposed of by my wife during her lifetime, to my daughter Marjorie Helen Smith (nee Scott) who may freely use and dispose of the revenue and capital thereof during her lifetime as she may determine, subject always to the seizin, rights and powers hereby conferred upon my executors in respect of such of the property from time to time not used or disposed of by my daughter; and, upon the death of my said daughter, she having survived my wife, or in case she predeceases me and/or my wife, the rest and residue of said property then remaining, if any, in the hands of my Executors shall at such time be and become vested in the then surviving descendants *par souche* of my said daughter, and, if my daughter should die without descendants her surviving, then such property, if any, as may then remain shall devolve to my said two sisters in equal shares or to their descendants *par souche* subject, however, in all cases to the rights of my wife during her lifetime.

EIGHTH:

All property bequeathed by this Will is given as alimony and upon the condition that the same, both in capital and income, shall be at all times exempt from seizure, provided that nothing herein contained shall prohibit any heir or legatee under this Will from voluntarily alienating or hypothecating such property, and also that this provision shall be without effect as regards my Executors and any of their acts, rights and powers under this my Will.

In subsequent clauses, he appointed executors, extended their powers and the duration of their authorities as such beyond the year and day limited by law and until all the capital of his estate should be paid over by them to the persons entitled thereto, and gave them various powers to borrow, lease, sell, alienate, dispose of, and invest for the purposes of the administration of the estate.

Following the death of the Honourable Gordon W. Scott and until her death on October 9, 1955, his widow, Mary Anderson Scott, received such income as was received by the executors of her late husband's estate and had the use of his residence in Westmount, but at all times after her

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husband's death the entire capital of his estate remained in the hands of the executors of his will, and she never made any disposition of any such capital.

It is common ground that the seventh clause of the will created with respect to the residue of the estate of the Honourable Gordon W. Scott, deceased, a fiduciary substitution *de residuo,* the deceased Mary Anderson Scott during her lifetime being the institute, and the appellant Marjorie Helen Smith, the first substitute, and that, upon the death of the deceased Mary Anderson Scott, the right or rights of Marjorie Helen Smith in the assets forming the residue of the estate of the Honourable Gordon W. Scott, deceased, arose under the terms of his will and not by virtue of any disposition to that end made by the deceased Mary Anderson Scott.

The Minister's case for including the property in question in making the assessment is that the deceased Mary Anderson Scott "at the time of her death had a general power to appoint or dispose of" the property in question, within the meaning of s. 3(4) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, as that subsection is enacted by R.S.C. 1952, c. 317, s. 2(3). The subsection is as follows:

(4) When a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

By s. 4(1), it is also provided as follows:

4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris,* enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

The expression "competent to dispose" is found in s. 3(1)(i), and both that clause and s. 4(1) have been in the statute unchanged since it was enacted in 1941 by S. of C. 1940-41, c. 14. At that time, there was no s. 3(4), such a subsection having first been enacted by S. of C. 1944-45, c. 37, s. 2. Sections 3(1)(i) and 4(1) have wording comparable to provisions of the *Finance Act,* 1894 (Imp.), which

have been interpreted in a number of cases. So far as I am aware, there is no Imperial provision corresponding to s. 3(4).

The appellants' first submission was that the definition of "general power" in s. 4(1) relates only to that expression as used in the earlier part of the same subsection, which defines "competent to dispose", and not to the expression "general power" in s. 3(4), which was not in existence when s. 4(1) was enacted, that, as used in s. 3(4), the word "power" is a term of art not to be confused with the dominion which a person has over property which he owns, and that the subsection does not apply where the deceased was at the time of death the owner of the property. From this position it was argued that at the time of her deah Mrs. Scott was the owner of the property comprising the residue of her late husband's estate and that she had no mere power over it.

The case submitted on behalf of the Minister was that the word "power" in s. 3(4) is not a term of art and that, while a power to dispose may be distinct from ownership, it does not follow that ownership does not involve and include a power to dispose, within the meaning of s. 3(4). While not conceding that Mrs. Scott during her lifetime had full ownership of the property in question—since she lacked the right to dispose of it by her will—it was submitted that, under the terms of her deceased husband's will, she had power to dispose of the property by act *inter vivos* and that such power was a power to dispose of the property within the meaning of s. 3(4).

That there is a distinction between a power over property and ownership of property is, no doubt, well established (*vide Freme v. Clement*[1], *Ex parte Gilchrist, In re Armstrong*[2], *Commissioner of Stamp Duties v. Stephen*[3]), the term "power" in general being associated in legal usage with the description of an authority in respect to property or an interest in property which does not itself belong to the person holding the power. Even when a power to dispose of property is wide enough to enable the holder of the power to exercise it in favour of himself the power itself, in the

[1] (1880) 18 Ch. D. 499. [2] (1886) 17 Q.B.D. 521.
[3] [1904] A.C. 137.

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absence of any exercise of it, is not regarded as equivalent to ownership of the property. Conversely, one scarcely refers to an owner either in ordinary or technical usage as "a person having a general power to appoint or dispose of" his property. But an owner undoubtedly has the right and, in that sense, the "power" to dispose of his property.

In which sense, then, is the word "power" used in s. 3(4)? In *The Montreal Trust Company (Bathgate Estate) v. The Minister of National Revenue*[1], Kerwin C.J., with whom Taschereau and Fauteux JJ. concurred, said at p. 705:

> Notwithstanding the matters mentioned in the preceding paragraph which were relied on by the appellants, Mrs. Bathgate was "competent to dispose" of the residue of her husband's estate (subs. 1(i) of s. 3), because she had a general power to dispose of it since "general power" includes "every power or authority enabling the donee . . . to appoint or dispose of property as he thinks fit" (subs. 1 of s. 4). By subs. 4 of s. 3 there was deemed to be a succession in respect of property where the deceased person had at the time of death not merely the general power or authority to "appoint", but also to "dispose of" property. Although this subs. 4 of s. 3 was added only in 1952, the provisions of subs. 1 of s. 4, stating who is to be deemed "competent to dispose" apply to it. By the terms of the trust the executors and trustees of the husband were to pay Mrs. Bathgate "the whole or such part of the corpus thereof as she may from time to time and at any time during her lifetime request or desire". This power or authority to "request or desire" is sufficient to bring her within the terms of the statute.

In *In re Penrose,* [1933] Ch. 793, a wife gave a power of appointment to her husband in favour of a limited class which, on construction, was held to include the husband. He purported to exercise the power in favour of himself with respect only to part of the property and died without any general exercise of the power. Luxmoore J. held that there was nothing to prevent the husband as donee of the power from also being an object and appointing the whole property to himself. It is unnecessary to consider all the implications of that decision, but, so far as the point under consideration is concerned, I agree so unreservedly with the reasoning of Luxmoore J. where he is dealing with comparable provisions of the Imperial Finance Act, 1894, that I transcribe the relevant paragraph which appears at pp. 807-8 of the report:

> It is argued that the power in the present case is a limited power and does not authorize the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent

[1] [1956] S.C.R. 702.

gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit", is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint", because otherwise the words "or dispose of" would be mere surplusage.

Rand J. also said at p. 707:

Mr. Johnston's argument is that in the ordinary definition of the expression "general power of appointment" there must be an unlimited discretion as to appointees, including the donee of the power, either by instrument *inter vivos* or by will or both and that as the donee here could appropriate only to herself, that is, that on her request the money would be paid to her, the definition is not satisfied. What the clause does, the contention goes, is to give a power to appropriate the corpus as distinguished from the power to appoint.

I will assume that the definition so stated is right but I think the question is disposed of by s. 4(1). By that language the expression used in s. 3(4) includes "every power or authority enabling the donee or other holder to appoint or dispose of the property as he thinks fit". If the language were "to appoint as he thinks fit" that would, no doubt, express the general understanding of such a power but the "authority to dispose of property as he thinks fit" must obviously be given independent meaning and if it is then it necessarily effects an enlargement of the ordinary scope of the expression. "Authority to dispose of" contemplates ultimate alienation. The technical conception of an appointment is that the property is deemed to pass from the donor of the power to the appointee, but with authority to dispose there is added the case such as is before us where the donee can admittedly require the whole of the residue to be paid to her and thereupon dispose of it as she sees fit. That was the view of similar language taken by Luxmoore J. in *In re Penrose*, [1933] Ch. 793, and I think it is the right view.

From the foregoing, I think it is apparent, first, that the definition of "general power" in s. 4(1) must be taken to apply to s. 3(4) and, second, that the word "power" in the expression "general power to appoint or dispose of property" in s. 3(4) must be interpreted as referring to the capacity of the holder to alienate the property, rather than as having the narrower meaning of strict legal usage. In the *Bathgate* case (*supra*), the deceased, a widow, had under the terms of her husband's will a right to income for life and an unrestricted right to call upon the trustee to pay to her the corpus of her husband's estate, and the Court held that the right of the widow to call for the corpus was sufficient to

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bring the case within the terms of the statute. In that case, what Mrs. Bathgate had at the time of her death was a power in the strict sense and a power alone, for she had not called for any of the corpus of her deceased husband's estate, and counsel for the appellants distinguished the case on the ground that here what Mrs. Scott had during her life was not such a power but ownership of the property. However, even assuming that there is a distinction between the two situations in that, in Mrs. Bathgate's case, disposal by her of the corpus of her husband's estate would have involved initially an exercise of a power to make the property her own and a subsequent disposal as owner, while only the latter step would have been involved in any disposal by Mrs. Scott, since she was already the owner of the property, the matter appears to me to be concluded at least for this Court by the judgment of the Supreme Court of Canada in *Minister of National Revenue v. Montreal Trust Company (Smith Estate)*[1]. In that case, a similar argument had been advanced on behalf of the taxpayer, but the case differed from the present one in that the institute, Mrs. Smith, had before her death executed a document purporting to operate as a renunciation of her rights in the capital of her husband's estate. The majority of the Court held that this renunciation was valid and that s. 3(4) did not apply. Taschereau J., with whom the Chief Justice concurred, said at p. 487:

> La seule conclusion logique qui, à mon sens, s'impose, est qu'à son décès, l'épouse n'avait pas *un pouvoir general de désignation ou de disposition de biens,* parce qu'elle y a renoncé irrévocablement en 1951.

Abbott J. expressed his agreement with the reasons of Taschereau J. and, at p. 503, said:

> The institute, some three years prior to her death, having effectively renounced any right to dispose of the substituted property, section 3(4) of the *Dominion Succession Duty Act* could have no application.

Fauteux J. (with whom Judson J. concurred) dissented as to the effect of the renunciation and, in the course of his reasons, said at p. 491:

> A la clause 10, le testateur a prévu l'éventualité du pré-décès de son épouse et la caducité de la clause 9 en résultant. Il a aussi prévu l'éventualité où, dans le cas de la survie de cette dernière, elle n'aurait pas, de son vivant, disposé suivant son pouvoir général et absolu de ce faire, du

[1] [1960] S.C.R. 477.

résidu à elle légué par la clause 9. Il a alors pourvu à la distribution et répartition de tout ce résidu, dans le cas de pré-décès, ou, au cas de survie, de ce qui pourrait en rester lors du décès de son épouse.

Il résulte des clauses 9 et 10 que, de son vivant, Madame Smith avait droit de jouir et de disposer en tout ou en partie du résidu, comme propriétaire absolue. Elle ne pouvait, cependant, en disposer par voie de testament. De son vivant, et comme tout propriétaire, elle pouvait à son gré aliéner ces biens à titre onéreux ou à titre gratuit. Elle avait donc, au sens de l'article 3(4) de la loi précitée, d'après les clauses 9 et 10 du testament de son époux, un pouvoir général de disposition des biens mentionnés . . .

Later, at p. 494, the learned judge dealt with the argument as follows:

L'article 3(4) de la loi. Comme dernier moyen (iii), quant à l'interprétation, les intimés se sont contentés d'affirmer que le pouvoir d'aliénation de Madame Smith découle de son droit de propriété et n'equivaut pas à un pouvoir général de disposition au sens de l'article 3(4) de la *Loi fédérale sur les droits successoraux.* Ce pouvoir général de disposition est accordé à Madame Smith aux termes mêmes du testament de son époux où il est prévu qu'à défaut de l'exercer de son vivant, les personnes mentionnées en la clause 10 recueilleront ce qui pourra en rester à son décès. C'est là une des situations prévues au paragraphe 3(4) de la loi.

At p. 497, he also said:

Aussi bien et en tout respect pour les tenants de l'opinion contraire, je suis d'avis que si on écarte de la considération l'existence du DEED OF DECLARATION AND ACCEPTANCE,—comme l'ont fait les intimés pour les fins de cet argument,—il ne fait aucun doute qu'au sens de ces articles de la Loi fédérale, il y a eu, au décès de Madame Smith, une succession venant d'elle en ce qui concerne les biens qui lui furent légués par son époux.

And at p. 498, after discussing the result which would, in his opinion, follow on the assumption that the renunciation was effective, he said:

Si, au contraire, il n'y a pas eu de transfert ou de délivrance résultant du DEED OF DECLARATION AND ACCEPTANCE, il s'ensuit que Madame Smith n'ayant pas autrement disposé de ces biens, de son vivant, les intimés les ont recueillis à son décès et non le 24 août 1951; et, dans cette alternative, c'est l'article 3(4) qui reçoit son application et il y a succession.

On the question whether what Mrs. Smith had had prior to the renunciation was a "power" within the meaning of s. 3(4), I see no conflict between the opinion of Fauteux and Judson JJ. and the opinions of the other members of the Court but even if, as suggested in argument, the majority should not be taken as having determined the question since, having found that the renunciation was effective, it was no longer necessary to the result to determine the

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nature of what had been renounced, I would regard the opinion of Fauteux and Judson JJ. as one that should be followed in this Court on the particular point. The subsection 3(4) considered in the *Smith* case was the earlier subsection 3(4), as consolidated in R.S.C. 1952, c. 89, but that, in my opinion, makes no difference for this purpose since that subsection, as well, referred to "a general power to appoint or dispose of property". The appellants' submission on this point, accordingly, fails.

The next submission put forward on behalf of the appellants was that, if Mrs. Scott did hold a power to dispose of the property in question, it was not a general power within the meaning of s. 3(4) and that, accordingly, that subsection does not apply. In support of this position, counsel pointed first to the extensive provisions contained in the will dealing with the disposal of the property after Mrs. Scott's death; secondly, to the fact that the testator gave Mrs. Scott no power to dispose of the property by her will; thirdly, to the fact that the words "if any" do not appear in the description of the property which the first substitute, Marjorie Helen Smith, is to take upon Mrs. Scott's death, though they do appear in the description of property which subsequent substitutes might take, and finally, to the provisions of clause 8, by which the testator declares that all the property bequeathed by his will is given as alimony. From these, it was submitted that it appeared that it was not the intention of the testator that Mrs. Scott was to have unrestricted power to alienate the whole of the capital of the residue of his estate. Whilst the considerations mentioned may go so far as to suggest that the testator thought it unlikely that his widow would, by the time of her death, have disposed of the whole of the residue of his estate, I do not think they indicate that he intended that she should not have power to do so, and even if they tend to suggest that conclusion, in my opinion, they cannot prevail over the express wording of the seventh clause of the will. This clause refers to the residue of the testator's estate in the widest of terms and gives such residue to his wife "who may freely use and dispose of the revenue and capital thereof as she may determine". The clause also makes clear that what is given to the first substitute, Marjorie Helen Smith, is not the whole residue but "the rest, residue, and

remainder of such property as has not been so used or disposed of by my wife during her lifetime". And finally, after expressing the provisions in favour of the substitutes, the clause ends with the words "subject, however, in all cases to the rights of my wife during her lifetime". The rights given to the wife during her lifetime were to "freely use and dispose of the residue and capital thereof as she may determine" and, save that it is restricted to disposal to others by act *inter vivos,* this, in my opinion, is as broad and general as it is possible to conceive. The only doubt I have had as to the generality of the power arises from the inability of Mrs. Scott to so exercise it in her own favour as to complete her own title and thus free herself from the limitation upon her ability to dispose of it by her will or to have it pass to her heirs or representatives upon her dying intestate, but in this respect the case is not distinguishable from the *Smith* case, where, even if the determination of the generality of the power held by Mrs. Smith prior to the renunciation was not involved in the judgment of the majority, Fauteux and Judson JJ. considered that the power which Mrs. Smith had had was a general power within the meaning of s. 3(4). Nor, in my opinion, were the rights of Mrs. Scott restricted by the provision of clause 8 of the will. *Vide* the discussion on this point by Fauteux J. in *Minister of National Revenue v. Smith* (*supra*) at p. 491. The appellants' submission on this point as well, accordingly, fails.

The next submission was that, if Mrs. Scott had a general power, she did not have it at the time of her death, which is what s. 3(4) requires. In making this submission, counsel conceded that, if s. 4(1) applies to s. 3(4), his argument must fail, and I am of the opinion that this point is resolved against the appellants by the judgment of the Supreme Court in the *Bathgate* case, as indicated in the passages quoted above from the judgment of Kerwin C.J. and Rand J.

Finally, it was argued that, as Mrs. Scott never received and could never receive the accrued interest which had not yet fallen due on bonds held by the executors of the testator's will, the amount of such interest was improperly included in computing the value of the property included in the succession. If, as I have found, the value of the

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capital of the testator's estate was properly included because the deceased had a general power to dispose of it, she (the deceased) obviously had the same power to dispose of the assets, including bonds, with whatever accretions pertained to them at the moment of their disposal and, the problem being one of the value of the property to be included in making the assessment, the value of such accretions at the time of death is thus, in my opinion, properly taken into account.

The appeal will be dismissed with costs.

Judgment accordingly.

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14. Excise Tax Act, R.S.C. 1927, c.179, s.80A and 105(6). No. 8.
15. Expropriation. No. 5.
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17. Financial Administration Act, R.S.C. 1952, c.116, s.89. No. 7.
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21. Material supplied contractor used in public work. No. 3.
22. National Defence Act, R.S.C. 1952, c.184, s.217(a). No. 4.
23. No liability on Crown. No. 6.
24. Order-in-Council P.C. 1954-1017, dated July 6, 1954, Regulation 34(1). No. 2.
25. "Person who by mistake of law or fact actually paid". No. 8.
26. Petition of Right. Nos. 1, 2, 3, 5, 6, & 8.
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29. Public Service Superannuation Act, S. of C. 1952-53, c.47, as amended by S. of C. 1953-54, c.64. No. 2.
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31. Recovery of money paid as excise taxes under mistake of law and fact. No. 8.
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33. Soldier injured in Quebec by alleged negligence of defendant. No. 4.
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35. Superannuation. No. 2.
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37. "Tort". No. 6.
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CROWN — *Petition of Right — Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3 and 4—Conversion of package of diamonds by employee of the Crown in the course of his employment—Crown held liable.* Suppliants bring their petition of right to recover from the Crown the value of a parcel of diamonds imported by suppliant Levy Brothers Company Limited from Belgium, which was lost in the premises of the Customs Postal Branch at Hamilton, Ontario. It was admitted that the parcel of diamonds arrived by prepaid registered air mail at the Hamilton Post Office on or before Saturday, October 15, 1955, and was transferred to the Customs Postal Branch premises. Notice of the arrival of the package of diamonds was sent to Levy Brothers Company Limited, and was received by it in due course. On October 18 it attended at the Customs Postal Branch to make due entry but the parcel could not be found. It is agreed between the parties hereto that the parcel "had presumably been stolen by a person or persons unknown". The suppliants' claim to recover the loss from the Crown is based on negligence. The Court found that the package was stolen by a Customs employee during working hours, and in the course of his employment. *Held:* That the Crown was not a bailee. 2. That the conversion was one in the course of the servant or servants' employment and the Crown is liable to make good the loss. 3. That neither s. 23(1) of the *Customs Act* R.S.C. 1952, c. 58 nor s. 40 of the *Post Office Act*, R.S.C. 1952, c. 212 apply to relieve the Crown of liability. LEVY BROS. CO. LTD. *et al* v. HER MAJESTY THE QUEEN.......................... 61

2.—*Petition of Right—Superannuation—Supplementary death benefits—Premiums deducted from civil servant's pay despite his irrevocable election not to participate in benefits—Crown not bound by estoppel by acts of its servants—Public Service Superannuation Act, S. of C. 1952-53, c. 47, as amended by S. of C. 1953-54, c. 64—Order in Council P.C. 1954-1017, dated July 6, 1954, Regulation 34(1).* On June 26, 1954, supplementary death benefits were made available under Part II of the *Public Service Superannuation Act* to civil servants and beginning on January 1, 1955, monthly premiums to cover the benefits were deducted from their pay cheques. Section 50 of the Act empowered the Governor in Council to make regulations prescribing forms for the purposes of Part II, and s. 52 provided that a person entitled to the benefits would not be included if by November 1, 1954, such

CROWN—Continued

person, in the manner and form prescribed by the regulations, elected not to come under the provisions of Part II. P.C. 1954-1017 passed on July 1, 1954, provided: "34(1)—An election under s. 52 of the Act not to come under the provisions of Part II of the Act shall be made by completing and signing (*a*) an election in Form P in the case of a person mentioned in paragraph (*a*) of subsection (1) of s. 52 of the Act . . . and subject to subsection (2) of this section, sending it to the Minister within the time prescribed by the Act for making the election." The suppliant's husband, G, a Post Office Department employee, on September 3, 1954, signed a Form "P" and sent it to the Minister who received it four days later. Notwithstanding the notice, deductions for premiums for death benefits were made monthly from G's pay cheques. It was not until G's death in 1957 that competent authorities ascertained G had made an irrevocable election not to participate in the death benefit plan. In an action to recover the benefits covered by the premiums paid, it was admitted that G was aware of the deductions and did not draw them to the attention of the respondent; but it was contended for the suppliant that the so-called election was made in a form which had never been prescribed and was therefore invalid; and that the Crown, having accepted the premiums and led G to believe he was entitled to the benefits, was estopped and could not refuse to pay them. *Held:* That in enacting Regulation 34(1) it was not necessary to employ the word "prescribe" so long as the language used expressed its meaning. The word "shall" followed by the words "be made by completing and signing an election in Form P" imposes a peremptory order and lays down that Form "P" and no other must be used. 2. That in determining whether the suppliant is entitled to be paid the sum claimed, acts of omission or commission by servants of the Crown can have no bearing on the issue, the suppliant's rights or lack of rights is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant. *Nixon v. Attorney General* [1931] A.C. 184, 193. 3. That the theory of estoppel cannot be invoked against the Crown. Where a particular formality is required by statute, no estoppel will cure the defect. Here G, in order to be entitled to supplementary death benefits had to refrain from making an irrevocable option not to participate, and this he failed to do. *The King v. The Royal Bank of Canada* (1919) 50 D.L.R. 293, 304; *Millet v. The Queen* [1954] Ex. C.R. 562, 570 followed. FLORENCE J. GAMBLE v. HER MAJESTY THE QUEEN............... 138

3.—*Petition of right—Material supplied contractor used in public work—Written assurance of payment by Chief Engineer, Public Works Department—Liability of Crown—Public Works Act, R.S.C. 1952, c. 228, s. 18.*

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Section 18 of the *Public Works Act*, R.S.C. 1952, c. 228, provides that no deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding upon Her Majesty or be deemed to be the act of the Minister, unless the same is signed by him or by the Deputy Minister, and countersigned by the Secretary of the Department, or the person authorized to act for him. The suppliant on January 24, 1952 wrote the Chief Engineer, Department of Public Works, that it had supplied a contractor with material used in the construction of a public work and the latter had ignored its demand for payment and asked an assurance that the Department would protect it by withholding the amount due out of any future payments to be made the contractor. The Chief Engineer by letter dated January 31, 1952, replied that the amount owing had been noted and would be retained out of any amounts to be paid the contractor. Despite this undertaking, when the contractor was declared bankrupt on August 9, 1952, it was found the Department had paid the latter amounts considerably in excess of the debt owing the suppliant and that the assets were insufficient to meet the claims of the unsecured creditors of whom the suppliant was one. In an action to recover the amount of the debt from the Crown. *Held:* That since the suppliant in support of its claim relied solely on the letter dated January 31, 1952, the issue was to be decided by the provisions of s. 18 of the *Public Works Act* and it was for the suppliant to establish the requirements of the section had been strictly complied with, and this it failed to do. LORD & CIE LIMITEE v. HER MAJESTY THE QUEEN....................... 185

4.—*Soldier injured in Quebec by alleged negligence of defendant—Action by Crown to recover damages for loss of soldier's services and medical and hospital expenses—Liability to be determined under provisions of Civil Code—Common Law action per quod servitium amisit not applicable—National Defence Act, R.S.C. 1952, c. 184, s. 217(a)—Civil Code, arts. 1053, 1075, 1154.* A soldier, a member of Her Majesty's Forces, while on leave and working for the defendant in a civilian capacity in the Province of Quebec, was injured. He was treated in a civilian hospital until his leave expired when he returned to his unit. In view of his condition the military authorities placed him in hospital where he received prolonged medical care interspersed by several periods of sick leave. The Crown seeks to recover from the defendant damages suffered by way of pay and allowances paid to, and hospital and medical expenses paid for the soldier resulting from the injury caused by the alleged negligence of the defendant. *Held:* That as the action had to do with the civil rights of the parties, it must be decided according to the law of the Province of Quebec. 2. That the liability of the Crown

CROWN—Continued

to provide care and treatment to an injured soldier arises solely under s. 217(*a*) of the *National Defence Act*, R.S.C. 1952, c. 184, a federal act which lies wholly outside the civil law of the Province. 3. That the Crown bases its claim on an action *per quod servitium amisit*, a proceeding peculiar to the English law, and acceptable in the sister provinces adhering to the common law but having no counterpart under the Quebec *Civil Code*. 4. That the Crown failed, as required by art. 1053 of the *Code*, to establish by a preponderance of evidence, negligence on the part of the defendant. HER MAJESTY THE QUEEN v. POUDRIER & BOULET LTD. 261

5. — *Petition of Right — Expropriation — Abandonment of part of expropriation—Compensation—Expropriation Act R.S.C. 1952, c. 106, ss. 9, 23, 24(1)(4).* Respondent expropriated suppliant's property consisting of a hotel and a house in Hull, Quebec, and nearly two years later abandoned the expropriation of the major portion. Prior to the date of the expropriation the buildings on the property had been severely damaged by fire. By its petition of right suppliant seeks recovery from the respondent for loss suffered by reason of the abandonment and the alleged value of the land which remained expropriated. Suppliant also claims damages for the deprivation of a registered servitude consisting of a right of passage over neighboring land acquired by respondent who erected a building thereon which blocked suppliant's right of way. During the period title to the property was held by respondent the suppliant, while remaining in undisturbed possession of it, was restricted in effecting substantial repairs to the property and in the operation of it. Claims for loss of goodwill and patronage, for loss of potential profits and additional profits, for recovery of expenditures on temporary repairs, for architect's bill for preparation of plans for a new structure which were never used, for additional costs of works executed and for expert valuator's and legal fees are also put forth by suppliant. *Held:* That there was insufficient evidence to justify any allowance for loss of good will. 2. That there is no assurance that had suppliant been permitted to make earlier the expenditure it laid out in restoring the pre-fire earning capacity of the suppliant profits similar to those of the pre-fire era would have been realized. 3. That there is no evidence to justify an award for loss of additional profits since it was not established that but for the expropriation proceedings suppliant would have proceeded with the erection of a larger structure. 4. That the cost of temporary repairs was too remote a claim and in any event the suppliant had the benefit of them. 5. That the matter of expert valuator's and legal fees are to be considered as parts of the taxable costs and not for the Court to award. 6. That the claim for damages due to deprivation of the use of the right of way should be based on injurious affection provided for in s. 23 of the *Expropriation Act*. 7. That the respondent cannot be held responsible in tort for deprivation and subsequent abandonment because it was acting within its statutory powers. Compensation should consist of the value of the property to the suppliant at the time of the expropriation compared with such value on revesting, bearing in mind the reduced earning capacity due to the fire. STANDISH HALL HOTEL INC. v. HER MAJESTY THE QUEEN 373

6.—*Petition of Right—Crown Liability Act 1-2 Elizabeth II, c. 30, s. 3(1)(a), s. 4(2) and s. 3(1)(b)—"Tort"—Articles 1053 and 1054 C.C.—Damage to ship striking an obstruction in channel in St. Lawrence River—Ship heavily laden and improperly navigated—No liability on Crown.* Suppliant's ship the *Ruth Lake* while proceeding heavily laden on a voyage from Sept Iles, Quebec, to Contrecoeur, Quebec, struck a submerged object when rounding Nicolet Curve on entering Lake St. Peter and suffered considerable damage, to recover which, suppliant brings this action against the respondent. In its petition of right suppliant alleges that the *Ruth Lake* was drawing less than the limiting depth of 35 feet when she left Sept Iles laden with ore and that the respondent's officers and servants are guilty of tort in not maintaining the channel in the condition described in official publications and charts and that suppliant was misled concerning the depth of water in the channel and further that the St. Lawrence Ship Channel constitutes a public work and the respondent committed a breach of duty under s. 3(1)(*b*) of the *Crown Liability Act* 1-2 Eliz. II, c. 30 since it failed to ascertain the presence of any obstruction in the channel or if it had knowledge of any obstruction it failed to give warning of its presence to the crew of the *Ruth Lake*. The Court found that the damage to the *Ruth Lake* was due to faulty navigation on the part of her officers in that she was proceeding off course with too much speed when so heavily laden. *Held:* That "tort" as defined in the *Crown Liability Act* must be read in the light of articles 1053 and 1054 of the Civil Code of the Province of Quebec. 2. That the Crown's liability, if any, was light and vicarious. 3. That the *Ruth Lake* was drawing more than the limiting channel depth of 35 feet at the time of the accident and was therefore proceeding at her own risk. IRON ORE TRANSPORT CO. LTD. v. HER MAJESTY THE QUEEN 448

7.—*Financial Administration Act, R.S.C. 1952, c. 116, s. 89—Action for money received as agent of Crown and not accounted for—Plea of res judicata based on acquittal on criminal charges involving same money rejected.* The Crown seeks to recover from the defendant a sum of money received by

CROWN—Continued

the defendant when one of the Crown's postmasters as agent for the Crown and which he has failed to pay to Her Majesty though duly requested to do so, in accordance with the provisions of the *Financial Administration Act*, R.S.C. 1952, c. 116, s. 89. The defendant pleads that the monies now claimed by the Crown were the same monies as were involved in two offences with which the defendant was charged and upon which he was acquitted by an Assize Court of the province where he resided, and pleads the defence of *res judicata*.

Held: That the plea of acquittal in the Criminal Courts cannot be invoked by the defendant in this case.

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8.—*Petition of Right—Excise Tax Act R.S.C. 1927, c. 179, s. 80A and 105(6)—Recovery of money paid as excise taxes under mistake of law and fact—"Person who by mistake of law or fact actually paid"—Status of eventual claimant when no taxes due—Limitation in Act not applicable when no taxes due.* Section 80A of the *Excise Tax Act* R.S.C. 1927, c. 179, and amendments reads: "80A. 1. There shall be imposed, levied and collected, an excise tax equal to twenty-five per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him. 2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister. 3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made. . . ." Section 105(6) of the Act reads: "105(6). If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid." Suppliant M. Geller Inc. seeks to recover from respondent money paid by it for excise taxes on processed sheepskins, erroneously classed as furs by respondent's agents, this money having been paid to the Customs and Excise Branch of the Department of National Revenue at Montreal, Quebec, by advancing the same to its regular dyers and dressers Nu-Way Lambskin Processors Ltd. the second suppliant

CROWN—Concluded

herein which company paid it to respondent's agents. M. Geller Inc. also seeks recovery of other payments made direct to the Customs and Excise Branch. Respondent contends that the alleged excise impost objected to was claimable from the dresser or dyer, and was in fact paid by it to the customs officials. *Held:* That suppliant M. Geller Inc. is entitled to recover the money paid as excise taxes since that money was disbursed in the mistaken assumption of paying an excise tax when no tax existed. 2. That M. Geller Inc. is the "Person who by mistake of law or fact" actually "paid to Her Majesty any moneys which have been taken to account as taxes imposed by this Act . . .", s. 105(6) of the *Excise Tax Act*. 3. That the status of an eventual claimant, in contingencies where no taxes were due, is unrestricted and fully available to "any person" who pays and subsequently claims a refund in the circumstances and limitations laid out in subs. (6) of s. 105 of the *Excise Tax Act*. 4. That Nu-Way Lambskin Processors Ltd. not having complied strictly with the provisions of s. 105(6) of the Act is barred from any redress.

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CROWN HELD LIABLE.
See CROWN, No. 1.

CROWN LIABILITY ACT, 1-2 ELIZABETH II, c.30, s.3(1)(a), s.4(2) AND s.3(1)(b).
See CROWN, No. 6.

CROWN LIABILITY ACT, S. OF C. 1952-53, c.30, ss.3 AND 4.
See CROWN, No. 1.

CROWN LIABILITY ACT, S. OF C. 1952-53, c.30, s.3(4) AND 25(3).
See SHIPPING, No. 7.

CROWN NOT BOUND BY ESTOPPEL BY ACTS OF ITS SERVANTS.
See CROWN, No. 2.

CUSTOMS DUTY.
See REVENUE, No. 8.

CUSTOMS TARIFF, R.S.C. 1952, c.60, SCHEDULE A AS AMENDED BY S. OF C. 1955, c.51, s. 2 AND S. OF C. 1956, c.36, s.1.
See REVENUE, No. 8.

DAMAGE CAUSED TO SHIP "AT HOME".
See SHIPPING, No. 8.

DAMAGE TO CARGO.
See SHIPPING, Nos. 2. & 4.

DAMAGE TO SHIP BROUGHT ABOUT BY PERIL, DANGER OR ACCIDENT OF THE SEA.
See SHIPPING, No. 2.

DAMAGE TO SHIP STRIKING AN OBSTRUCTION IN CHANNEL IN ST. LAWRENCE RIVER.
See CROWN, No. 6.

DAMAGES.
See SHIPPING, No. 5.

DEALING NOT AT ARM'S LENGTH.
See REVENUE, No. 12.

DECLARED DIVIDEND NOT PAYMENT OF DEBT WHEN RECEIVED.
See REVENUE, No. 12.

DEDUCTION.
See REVENUE, No. 9.

DEFENCE OF ACT OF GOD DISALLOWED.
See SHIPPING, No. 5.

DESIGN NOT REGISTRABLE.
See INDUSTRIAL DESIGN, No. 1.

DESIGN ONE OF A BUILDING BLOCK LACKING ORNAMENTAL FEATURE.
See INDUSTRIAL DESIGN, No. 1.

DETERMINATION BY MINISTER.
See REVENUE, No. 2.

DIVIDEND IS INCOME WHEN RECEIVED NOT WHEN DECLARED.
See REVENUE, No. 12.

DOMINION SUCCESSION DUTY ACT, R.S.C. 1952, c.89.
See REVENUE, No. 4.

DOMINION SUCCESSION DUTY ACT, R.S.C. 1952, c.89 AS AMENDED, ss.3(1)(i), 3(4) AND 4(1).
See REVENUE, No. 27.

DOMINION SUCCESSION DUTY ACT, R.S.C. 1952, c.89, s.3(1)(d) AND (k).
See REVENUE, No. 26.

EXCISE TAX ACT, R.S.C. 1927, c.179, s.80A AND 105(6).
See CROWN, No. 8.

EXPROPRIATION.
See CROWN, No. 5.

EXPROPRIATION ACT, R.S.C. 1952, c.106, ss.9, 23, 24(1)(4).
See CROWN, No. 5.

FAILURE OF BOTH SHIPS TO COMPLY WITH INTERNATIONAL RULES OF THE ROAD.
See SHIPPING, No. 5.

FAILURE TO KEEP TO RIGHT HAND SIDE OF CHANNEL.
See SHIPPING, No. 6.

FAILURE TO OBTAIN PERMISSION OF HARBOUR MASTER TO ENTER CHANNEL.
See SHIPPING, No. 6.

FAILURE TO SOUND WARNING BLAST.
See SHIPPING, No. 6.

FINAL PAYMENT UNDER CONTRACT MADE ON ISSUANCE OF CERTIFICATE OF ARCHITECT OR ENGINEER.
See REVENUE, No. 23.

FINANCIAL ADMINISTRATION ACT, R.S.C. 1952, c.116.
See SHIPPING, No. 5.

FINANCIAL ADMINISTRATION ACT, R.S.C. 1952, c.116, s.89.
See CROWN, No. 7.

FOREIGN EXCHANGE PROFITS.
See REVENUE, No. 3.

GENERAL POWER TO DISPOSE OF CAPITAL.
See REVENUE, No. 27.

GIFT INTER VIVOS.
See REVENUE, No. 4.

"HAS TRANSFERRED".
See REVENUE, No. 5.

"HAS TRANSFERRED PROPERTY".
See REVENUE, No. 5.

HOLDBACKS.
See REVENUE, No. 23.

HUSBAND AND WIFE.
See REVENUE, No. 4.

INCOME.
See REVENUE, Nos. 1, 2, 3, 7, 9, 10, 12, 13, 19, 21, 22 & 23.

INCOME FROM COMMUNITY OF PROPERTY (QUE.)
See REVENUE, No. 6.

INCOME OR CAPITAL.
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INCOME OR CAPITAL GAIN.
See REVENUE, No. 20.

INCOME TAX.
See REVENUE, Nos. 1, 2, 3, 5, 6, 9, 11, 12, 15, 16, 21, 22, 24 & 25.

INCOME TAX ACT.
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INCOME TAX ACT, 1948, S. OF C. 1948, c.52 AS AMENDED, ss.2, 3.
See Revenue, No. 6.

INCOME TAX ACT, 1948, S. OF C. 1948, c.52, ss. 3, 4, 6 AND 127(1)(e).
See Revenue, No. 14.

INCOME TAX ACT, 1948, S. OF C. 1948, c.52; R.S.C. 1952, c.148, ss. 3, 4, AND 14(1).
See Revenue, No. 3.

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See Revenue, No. 10.

INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3, 4, 6(j), 139(1)(e).
See Revenue, No. 19.

INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3, 4, 12(1)(a), 85B(1)(b) AND 139(1)(w).
See Revenue, No. 11.

INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3 AND 27(1)(e).
See Revenue, No. 7.

INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3, 4, AND 85B(1)(b).
See Revenue, No. 23.

INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3, 4, 136(12) AND 139(1)(e).
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INCOME TAX ACT, R.S.C. 1952, c.148, ss. 3, 4 AND 139(1)(e).
See Revenue, No. 20.

INCOME TAX ACT, R.S.C. 1952, c.148, s.4.
See Revenue, No. 18.

INCOME TAX ACT, R.S.C. 1952, c.148, ss.6(a)(b)(c), 28(1)(2)(3)(4), 139(5a).
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INCOME TAX ACT, R.S.C. 1952, c.148, s.12(1)(a).
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INCOME TAX ACT, R.S.C. 1952, c.148, s.12(1)(a) AND (b).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss.13, 42 AND 46.
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INCOME TAX ACT, R.S.C. 1952, c.148, ss.22(1), 139(1)(ag).
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INCOME TAX ACT, R.S.C. 1952, c.148, ss. 32(1), (3), (4), 5(b).
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INCOME WAR TAX ACT, R.S.C. 1927, c.97, ss. 47, 55, 69A(1)(4), 70(1), (2), (3) AND 4TH SCHEDULE, s.3(2) AS AMENDED.
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INDUSTRIAL DESIGN—
1. Action for infringement and passing off. No. 1.
2. "Angelstone Limited". No. 1.
3. "Artistic Stone Limited". No. 1.
4. Design not registrable. No. 1.
5. Design one of a building block lacking ornamental feature. No. 1.
6. Industrial Design and Union Label Act, R.S.C. 1952, c.150. No. 1.
7. No evidence of passing off. No. 1.
8. Plaintiff's design expunged from register. No. 1.
9. Sand-O-Stone. No. 1.
10. "Shadow Stone". No. 1.

INDUSTRIAL DESIGN—*Industrial Design and Union Label Act, R.S.C. 1952, c. 150—Action for infringement and passing off—"Angelstone Limited"—"Shadow Stone"—"Artistic Stone Limited"—Sand-O-Stone—Design one of a building block lacking ornamental feature—Design not registrable—No evidence of passing off—Plaintiff's design expunged from register.* The action is one for infringement of plaintiff's duly registered Industrial Design of a building block. Defendant counterclaimed for expungement of the like. The Court found that the description of the design is that of an article of manufacture namely the building block in respect of which the certificate of registration of the design was issued, and that it also lacks novelty and was a reproduction with minor alterations of a design for building blocks that were in use before plaintiff's

INDUSTRIAL DESIGN—Concluded
engineer and sales manager conceived the idea, and consequently not original. The Court also found that the plaintiff had failed to establish that the defendant, for purposes of sales, had manufactured building blocks to which it had applied the plaintiff's design or a fraudulent imitation thereof and had offered for sale or sold such building blocks. *Held:* That the design in question was one for the article of manufacture itself and not for the ornamenting of such article; it is that of a building block itself and has no ornamental feature which could have resulted from the application or attachment or engraving of an ornamental design, and was not registrable and should be expunged from the register. ANGELSTONE LTD. v. ARTISTIC STONE LTD. 286

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MEANING OF "POWER" "GENERAL POWER" "COMPETENT TO DISPOSE".
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METHOD OF COMPUTING INCOME.
See REVENUE, No. 3.

METHOD OF COMPUTING INCOME FOR YEARS PRIOR AND SUBSEQUENT TO 1953.
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MONEY ADVANCED BY WAY OF LOAN TO PURCHASE PROPERTY IN NAME OF TRUSTEES.
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MONEY PAID TO LESSOR HELD TO BE INCOME FROM PROPERTY WITHIN THE PROVISIONS OF ss. 3 AND 4 OF THE INCOME TAX ACT, R.S.C. 1952, c.148.
See REVENUE, No. 17.

MONEY PAID TO LESSOR UNDER TERMS OF LEASE TO BE HELD BY IT UNDER CERTAIN CONDITIONS.
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MONEY RECEIVED FROM DISPOSAL OF CUTTING RIGHTS IS REALIZATION OF PART OF CAPITAL AND DOES NOT CONSTITUTE INCOME BUT IS A CAPITAL GAIN.
See REVENUE, No. 20.

MONEY RETAINED BY LESSOR IS RENT AND WAS NOT PAID FOR WAIVER OF A RIGHT.
See REVENUE, No. 17.

MONEY USED IN OPERATION OF BUSINESS.
See REVENUE, No. 18.

MOTION TO QUASH INTERIM INJUNCTION RESTRAINING IMPORTATION INTO, AND SALE IN CANADA OF SHAVERS ALLEGED TO BEAR TRADE MARKS SIMILAR TO PLAINTIFF.
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2. Appeal from Commissioner of Patents. No. 1.
3. No satisfactory reason given. No. 1.
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5. Patent Act, R.S.C. 1952, c.203, ss. 2(j), 67(2)(a)(b)(d), 68, 73. No. 1.
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PATENT—*Appeal from Commissioner of Patents—Abuse of patent rights—Patent capable of being worked in Canada—Not worked on commercial scale—No satisfactory reason given—Patent Act, R.S.C. 1952, c. 203, ss. 2(j), 67(2)(a)(b)(d), 68, 73.* The appellants appealed from a decision of the Commissioner of Patents ordering the grant to the respondent of a license under Patent No. 421,164 pursuant to s. 68 of the *Patent Act*, R.S.C. 1952, c. 203. The Commissioner found that the invention, a device for removing feathers from fowls, was one capable of being worked in Canada but was not being worked within the country on a commercial scale by the patentee or the owner of the equitable rights to the patent. That the working in this country was hindered by importation from abroad of the patented machine and fingers, and that the trade of certain persons was being prejudiced contrary to the public interest. He also found that the applicant possessed the necessary knowledge to work the patent in Canada. *Held:* That although the Commissioner granted the application on the grounds that there had been an abuse within the meaning of paragraphs (a), (b) and (c) of s. 67(2) of the *Patent Act*, it was unnecessary to go beyond the provisions of paragraph (a) of s. 67(2), for on the evidence an abuse within the meaning of that paragraph clearly appeared and was by itself sufficient to warrant the exercise by the Commissioner of the powers conferred upon him by s. 68 of the Act. 2. That an abuse under s. 67(2) of the exclusive rights under the patent having been established, the Commissioner's decision to grant the license should be affirmed. *Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ld.* [1939] Ex. C.R. 128; *Brownie Wireless Co. Ld. Application* (1929) 46 R.P.C. 457; *In re McKechnie Bros. Ltd. Application* (1934) 51 R.P.C. 461, referred to. GORDON JOHNSON CO. *et al* v. HAROLD CALLWOOD................. 466

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PROFIT ON FOREIGN EXCHANGE.
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PROFIT ON SALE OF EXCESS LAND HELD TO BE INCOME.
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PROFIT REALIZED ON SETTLEMENT OF INDEBTEDNESS IS TAXABLE AS INCOME.
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41. "Has transferred". No. 5.
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47. Income or capital. Nos. 10 & 18.
48. Income or capital gain. No. 20.
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50. Income Tax Act. No. 19.
51. Income Tax Act, 1948, S. of C. 1948, c.52 as amended, ss. 2, 3. No. 6.
52. Income Tax Act, 1948, S. of C. 1948, c.52, ss. 3, 4, 6 and 127(1)(e). No. 14.
53. Income Tax Act, 1948, S. of C. 1948, c.52; R.S.C. 1952, c.148, ss. 3, 4 and 14(1). No. 3.
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56. Income Tax Act, R.S.C. 1952, c.148, ss. 3 and 4, Nos. 13 & 14.
57. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4, 6, 81(1) and 138(1)(e). No. 10.
58. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4, 6(j), 139(1)(e). No. 19.
59. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4, 12(1)(a), 85B(1)(b) and 139(1)(w). No. 11.
60. Income Tax Act, R.S.C. 1952, c.148, ss. 3 and 27(1)(e). No. 7.
61. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4 and 85B(1)(b). No. 23.
62. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4, 136(12) and 139(1)(e). No. 24.
63. Income Tax Act, R.S.C. 1952, c.148, ss. 3, 4, and 139(1)(e). No. 20.
64. Income Tax Act, R.S.C. 1952, c.148, s.4. No. 18.
65. Income Tax Act, R.S.C. 1952, c.148, ss. 6(a)(b)(c), 28(1)(2)(3)(4), 139(5a). No. 12.
66. Income Tax Act, R.S.C. 1952, c.148, s. 12(1)(a). No. 16.
67. Income Tax Act, R.S.C. 1952, c.148, s. 12(1)(a) and (b). No. 9.
68. Income Tax Act, R.S.C. 1952, c.148, ss. 13, 42 and 46. No. 2.
69. Income Tax Act, R.S.C. 1952, c.148, ss.22(1), 139(1)(ag). No. 5.
70. Income Tax Act, R.S.C. 1952, c.148, ss.32(1), (3), (4), 5(b). No. 21.
71. Income War Tax Act, R.S.C. 1927, c.97, ss. 3 and 6(1)(a). No. 22.
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73. Income War Tax Act, R.S.C. 1927, c.97, ss. 47, 55, 69A(1)(4), 70(1), (2), (3) and 4th Schedule s.3(2) as amended. No. 25.
74. Legal expenses incurred in prosecuting appeal from a conviction under the Criminal Code for engaging in illegal trade practices are deductible in ascertaining income. No. 16.
75. Liability of husband therefor. No. 6.
76. Meaning of "power" "general power" "competent to dispose". No. 27.
77. Method of computing income. No. 3.
78. Method of computing income for years prior and subsequent to 1953. No. 11.
79. Money advanced by way of loan to purchase property in name of trustees. No. 5.
80. Money paid to lessor held to be income from property within the provisions of ss. 3 and 4 of the Income Tax Act, R.S.C. 1952, c.148.
81. Money paid to lessor under terms of lease to be held by it under certain conditions. No. 17.
82. Money received from disposal of cutting rights is realization of part of capital and does not constitute income but is a capital gain. No. 20.
83. Money retained by lessor is rent and was not paid for waiver of a right. No. 17.
84. Money used in operation of business. No. 18.
85. Must reflect real profit or loss. No. 3.
86. Net worth assessment. No. 25.
87. Notice of objection. No. 25.
88. "Or by any other means whatsoever". No. 5.
89. Partnerships Act, R.S.O. 1950, c.270, s.2 and 3(1)(3). No. 14.
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91. Power never exercised. No. 27.
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93. Presumption of validity of assessment. No. 25.
94. Proceeds of sale of partnership interest do not constitute taxable income. No. 14.
95. Profit on foreign exchange. No. 18.
96. Profit on sale of excess land held to be income. No. 13.
97. Profit realized on settlement of indebtedness is taxable as income. No. 18.
98. Profits from land purchased for development of a shopping centre and later sold. No. 10.
99. Progress payment. No. 23.
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102. Purchase of land in excess of requirement. No. 13.
103. Purchase of wood lots with paper mill. No. 20.
104. "Related persons". No. 12.
105. Right to deduct losses of one operation from profits of other. No. 7.
106. Sale of cutting rights on wood lots to recoup part of investment not a venture in the nature of trade. No 20.
107. Sale of topsoil from property liable to expropriation proceedings. No. 19.
108. Succession duty. Nos. 4, 26 & 27.
109. Tariff Board not bound by rules of evidence. No. 8.
110. Taxation year in which to include income. No. 23.
111. Terms of lease altered by later agreement. No. 17.
112. Transfer of shares to corporation owned by transferee's children for an annuity. No. 26.
113. Unclaimed expenses. No. 22.
114. Unprofitable taxicab business liquidated by sale of individual taxis. No. 1.
115. Unreported income. No. 22.
116. Validity of re-assessment notices. No. 24.
117. Valuation of inventory not here relevant. No. 11.
118. Value of shares much greater than annuity. No. 26.
119. When functus officio. No. 2.
120. Whether a succession. No. 27.
121. Whether "an outlay . . . made . . . for purpose of . . . producing income from property" or "an outlay . . . on account of capital". No. 9.
122. Whether more than one business. No. 7.
123. Whether net profits "investment income" or "earned income". No. 21.
124. Whether parts of Eimco filter classifiable under tariff item 410p or 410w. No. 8.
125. Whether payment of royalty to lessee by sub-lessee on ore shipped from leased mine "income derived from the operation of a mine" within the meaning of the Income Tax Act, R.S.C. 1952, c.148, s.83(5) as enacted by S. of C. 1955, c.54, s.21(1). No. 15.
126. Whether proceeds capital gain or taxable income. Nos. 1 & 19.
127. Whether profit therefrom capital gain or taxable income. No. 24.
128. Whether transaction a gift for partial consideration. No. 26.

REVENUE — *Income — Income tax — Unprofitable taxicab business liquidated by sale of individual taxis—Whether proceeds capital gain or taxable income—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, and 127(1)(e).* In 1946 the appellant, a garage operator, while continuing his main business branched out into the taxicab business, became a member of a taxicab association and by 1950 was operating 21 taxis. At the end of 1949 he realized the new venture was an unprofitable one and advertised it for sale for a lump sum. Not having received a satisfactory offer he decided to try and sell the taxis with their permits individually. To do this and to avoid heavy losses he continued to operate the taxi business. During this time he was obliged to replace worn out taxis with new ones, accept trade-ins on sales and re-possess cars for default in payment. It was not until July 1952 after completion of some 47 transactions in all that the last car was sold and the taxicab business liquidated. The profits realized from the sales in 1950, 1951 and 1952 were assessed by the Minister as income from a business and the assessment upheld on an appeal to the Income Tax Appeal Board. On an appeal to this Court: *Held:* That the taxpayer's garage business and taxicab business constituted two distinct and separate operations. The latter involving a capital investment in the form of rolling stock. 2. That the taxpayer's whole course of conduct indicated an intention to dispose of the taxicab operation as an unprofitable business. 3. That having decided to sell the taxicabs individually he was forced by the custom of the trade to accept trade-ins to escape the alternative of a bulk sale with the much smaller profit such a sale would bring. 4. That since the proceeds from the transactions constituted capital gains, they were not subject to assessment for income tax. EDOUARD LATREILLE v. MINISTER OF NATIONAL REVENUE.................................. 1

2.—*Income—Income tax—Chief source of income—Combination of farming and other source of income—Determination by Minister —When functus officio—Income Tax Act, R.S.C. 1952, c. 148, ss. 13, 42 and 46.* Section 13 of the Income Tax Act, R.S.C. 1952, c. 148 is as follows: "13. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming minus the lesser of (*a*) one-half his farming loss for the year, or (*b*) $5,000. (2) For the purpose of this section, the Minister may determine that a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income." In computing his income tax returns for the years 1953, 1954, a taxpayer whose sole occupation was farming, deducted his farming losses from his other income, the bulk of which he received

REVENUE—Continued

as life beneficiary of an estate. For 1953 he claimed to elect to average his income in accordance with the provisions of s. 42 of the *Income Tax Act.* The Minister assessed the taxes payable by the taxpayer accordingly but later determined pursuant to s. 13(2) that the taxpayer's chief source of income for 1953 and 1954 was neither farming nor a combination of farming and some other source of income and he thereupon re-assessed for those years and in so doing allowed as a deduction from other income only one-half of the farm losses claimed. The election to average income for 1953 was also rejected because the chief source of income during the averaging period did not appear to have been derived from farming as required by s. 42(1). The taxpayer's appeal to the Income Tax Appeal Board having been allowed, the Minister appealed from that decision to the Exchequer Court and, the taxpayer having died in the interval, the executors of his will were made parties respondent. On the appeal to this Court it was contended for the respondent that the determinations made by the Minister under s. 13(2) were subject to review by this Court and that the chief source of income for 1953, 1954 was a combination of farming and some other source of income, and alternatively that, in view of the original assessments, the Minister was *functus officio* and had no power thereafter to make the determination under s. 13(2) upon which the re-assessments were based. *Held:* That it does not follow from the mere fact of an assessment having been made that the Minister necessarily has made a determination under s. 13(2) and become *functus officio*, for until the applicability of s. 13(1) was questioned by some one, there would have been no issue to be determined. 2. That the original assessments being in conformity with the taxpayer's computations, there was no issue for determination by the Minister under s. 13(2) until such issue was opened in the subsequent correspondence. In this situation there was no foundation for an inference that the Minister had made determinations or had exhausted his power prior to or when making the first assessments and he therefore was not *functus officio* when making the determinations admitted in the taxpayer's reply. 3. That as it was conceded that the taxpayer's chief source of income for 1953 and 1954 was not farming, and as there was no evidence that his chief source of income was farming in any of the years 1949 to 1953, s. 42(1) was inapplicable and the claim to average properly rejected. 4. That the determination by the Minister under s. 13(1) is reviewable on appeal to this Court, but only within the limits indicated in *Minister of National Revenue v. Wright's Canadian Ropes* Ld. [1947] A.C. 109 at 122. MINISTER OF NATIONAL REVENUE v NORMAN LE FEVRE GRIEVE *et al*...... 11

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3.—*Income—Income tax—Foreign exchange profits—Method of computing income—Must reflect real profit or loss—The Income Tax Act, 1948, S. of C. 1948, c. 52; R.S.C. 1952, c. 148, ss. 3, 4 and 14(1).* The appellant company borrowed funds from its parent United States company to purchase goods from it and other suppliers in the United States indicating its indebtedness by promissory notes payable in U.S. funds. Due to the fact that during the currency of the notes the Canadian dollar rose from a discount to a premium over U.S. funds the appellant was able to pay off all the notes at a saving of some $512,847. Notes totalling $1,567,847 were paid off in 1951 at a saving of $81,744 and the balance totalling $9,225,326 in 1952 at a saving of $431,072. The respondent added the latter amount to the appellant's declared income for 1952 as "foreign exchange on notes payable". In an appeal from the assessment the appellant contended that the profit should be computed on an accrual basis by revaluing the amount of foreign exchange originally provided for, at the end of each fiscal year and including such amounts and the amounts actually realized by payment, in income. On this basis it submitted the profit should be apportioned as $64,675 for 1950; $259,820 for 1951 and $188,351 for 1952. It argued that the system was followed in 1952 and the preceding years in regard to outstanding obligations to other U.S. suppliers, the "profit" due to the lower rate of exchange being taken into account at the end of each year and treated as taxable income. To be consistent it urged that the same practice should be followed in regard to the notes. *Held:* That the issue before the Court was one of law and not of accounting. The profits in question were neither made nor ascertained by the mere revaluation downward on December 31, 1950 and 1951 on the books of the company, of the amount of the premium in Canadian dollars necessary to pay the outstanding notes, but that such were made only upon actual payment of the several notes. 2. That no taxable profit in respect of foreign exchange was made by the appellant until the time at which the several notes payable in U.S. currency were actually paid. 3. That the giving of a renewal note cannot be considered as payment of the debt any more than the giving of the original. 4. That the word "method" used in s. 14(1) of the *Income Tax Act* is not limited to those methods referred to as the "cash" and "accrual" methods. 5. That a taxpayer can invoke the provisions of s. 14(1) only when the method which he has adopted in an earlier year to compute his income (and which he proposes to follow in the taxation year in question) is one which is computed in accordance with the provisions of the Act and truly reflects his real profit or loss for the year. CANADIAN GENERAL ELECTRIC CO. LTD. v. MINISTER OF NATIONAL REVENUE.................. 24

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4.—*Succession duty—Gift inter vivos—Husband and wife—Presumption of advancement—Dominion Succession Duty Act, R.S.C. 1952, c. 89.* A testatrix who died on September 20, 1956 by her will dated August 14, 1947, gave the whole of her property to a trustee upon trust to convert the whole into money and pay the residue to her husband if he survived her. As required by the *Succession Duty Act*, R.S.C. 1952, c. 89, the executor filed form SD1 setting out all the assets of the deceased. In assessing the estate the Minister proceeded on the assumption that the assets declared were the wife's property and the husband her sole beneficiary. The executor appealed from the assessment on the ground that the assets were the absolute property of the husband which the deceased had held in trust for him. The husband died before the hearing of the appeal and the evidence in support thereof was mainly that of persons with whom the husband and wife had business and financial dealings in their lifetime in relation to investments. It was admitted at the trial that all the assets in question were registered in the name of the wife as sole owner at the time of her death and that there was nothing therein to indicate that they were held in trust for the husband or that he had any interest therein. It was further admitted that the wife had never executed any declaration of trust or other document which might indicate she held the assets in trust or on behalf of her husband or anyone else. A statutory declaration of the husband dated in May, 1947 filed in connection with claims for unpaid income tax was tendered in evidence by the appellant. It purported to set out his assets but added that the inventory "includes all the assets of my wife as well as myself" and "that no person holds any assets in trust for me". *Held:* That on the evidence adduced the Court could reasonably assume that all the assets held by the deceased at the time of her death had been either purchased by funds supplied by the husband, were replacements for assets so acquired, or represented income or profits from the assets so acquired, and there was a presumption in law that such assets were either gifts by the husband or profit, gains or accretions from such gifts. 2. That the husband's statutory declaration being subsequent to the date when the securities mentioned were placed in the wife's name, was admissible as evidence only against the declarant's interest and established that as of May, 1947 the wife had assets and did not hold them in trust for her husband. 3. That since the appellant had wholly failed to rebut the presumption that in placing assets in the name of his wife, the husband intended that they were gifts made to her by way of advancement, the appeal should be dismissed and the assessment affirmed. *Shephard v. Cartwright* [1954] 3 All E.R. 649, followed. ROYAL TRUST CO.

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et al (AMY KATHERINE MCDONALD ESTATE) v. MINISTER OF NATIONAL REVENUE.. 47

5.—*Income tax—The Income Tax Act R.S.C. 1952, c. 148, ss. 22(1), 139(1)(ag)—"Has transferred"—"Has transferred property"—"Or by any other means whatsoever"—Money advanced by way of loan to purchase property in name of trustees—Appeal allowed.* Appellant, in May 1945, arranged for the purchase of certain property by himself and the Toronto General Trusts Corporation from the Canadian Bank of Commerce as trustees for the purposes of a trust which they jointly declared in a document dated May 16, 1945. The money required to finance the purchase was provided by the appellant as a loan made by him to the trustees and secured by a mortgage of the property executed by the trustees in his favour, the loan to be repaid with interest. Both interest and principal were paid by the trustees from rentals of the property, the mortgage being retired in 1952. Since then income from the property has been accumulated in the hands of the trustees, no other assets being included in the property subject to the trust. The trust deed declared the trusts on which the property was held as being on behalf of the children of the appellant, subject to the happening of certain events. Two of the children were during the taxation years in question under the age of 19 years and the third *cestui que* trust apparently had not reached the age of 19 years by December 31, 1953. The Minister of National Revenue assessed appellant for income tax for the years 1952, 1953, 1954 and 1955 on the income from the property and in so doing relied on s. 22(1) of the *Income Tax Act* R.S.C. 1952, c. 148 which provides that "where a taxpayer has, since 1930, transferred property to a person who was under 19 years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from property or from property substituted therefor shall be deemed to be income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of 19 years." Appellant appealed to this Court from the assessments made by the Minister. *Held:* That the expression "has transferred" in s. 22(1) of the Act means that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age and the means adopted to transfer property are of no importance as the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer. 2. That the appellant never was the owner of the property purchased nor did he transfer it to any one since at the outset it belonged to the Canadian Bank of Commerce from which it was purchased by appellant and the trust company as trustees.

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3. That the making of the loan by appellant for the purpose of purchasing the property was not a transaction within the meaning of the expression "has transferred property" in s. 22(1) of the Act. 4. That the words "or by any other means whatsoever" used in s. 22(1) of the Act are directed to the means or procedure by which transfers may be accomplished rather than to the scope of the expression "has transferred property" and they do not expand that scope beyond the natural meaning of the expression. JOSEPH B. DUNKELMAN v. MINISTER OF NATIONAL REVENUE.................. 73

6.—*Income tax—Income from community of property (Que.)—Liability of husband therefor—Civil Code, arts. 1268, 1425—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, ss. 3, 9—The Income Tax Act, 1948, S. of C. 1948, c. 52 as amended, ss. 2, 3—The Income Tax Act, R.S.C. 1952, c. 148, as amended, ss. 2, 3.* The respondent and his wife, both of whom were domiciled in the Province of Quebec, were married there without having previously entered into a marriage contract. They thus accepted and became subject to the regime of legal community of property as provided by the Quebec *Civil Code.* The respondent claimed that under the provisions of the *Code* the income from the community, which consisted of his wages and income from rentals, was the income of himself and his wife in equal parts, and that for income tax purposes, each should be assessed for one half of the total income. The Minister ruled that during the existence of the community of property the income was that of the husband exclusively and he alone was liable for the tax. The husband's appeal from the ruling was allowed by the Income Tax Appeal Board. On an appeal by the Minister from the Board's decision. *Held:* That under the *Civil Code* of Quebec the relationship which exists between a husband and wife under the community of property is not a partnership in the ordinary sense of the law. 2. That the community is not a corporate body having the attributes of a legal entity. 3. That during the existence of the community the wife has none of the rights which characterize ownership. It is only after the dissolution and acceptance of the community that the law declares for the first time that the wife or her heirs have real and existing rights in the assets of the community. 4. That it is well settled law of the Province of Quebec that during the existence of the community, the husband is not only the administrator of the common property but that he is moreover the sole owner of the property. *Childs v. Libby* 1 C.S. 153 at 167; *Saultry v. Farrel* 31 C.S. 59; *Bonin v. La Banque d'Epargne de la Cité et du District de Montréal* 34 B.R. 322 at 331; *Dame Guérin v. Giroux* [1943] C.S. 323, 324. 5. That as during the existence of the community the husband is the sole owner of the property which makes up the

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assets of the community, he alone is liable for the debts which make up its liabilities. 6. That since the parties admit that the income in issue is, in the sense of art. 1272 of the *Code*, an asset of the community, the assessment should be affirmed and the appeal allowed. MINISTER OF NATIONAL REVENUE v. FRANK SURA........................ 83

7.—*Income—Corporation engaged in mining and construction—Whether more than one business—Right to deduct losses of one operation from profits of other—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 27(1)(e).* The appellant company's 1955 taxable income was $43,164 of which $2,005 was from its mining operations and $41,158 from construction operations. In 1956 it had a loss of $48,854 when construction operations showed a profit of $227,874 and mining operations a loss of $276,728. Because of the 1956 loss the Minister re-assessed the appellant for 1955 and allowed a deduction of $2,005 as "application of 1956 loss against mining profits". In an appeal from the re-assessment the appellant submitted that its business in 1955 and 1956 was the same and constituted but one business, consisting of a number of operations and that on a proper interpretation of s. 27(1)(*e*) of *The Income Tax Act*, the 1956 loss should have been applied against the whole of the 1955 profit, so that no tax would be payable for that year and the balance of the 1956 loss could be carried forward to subsequent years. *Held:* That s. 3 of *The Income Tax Act* clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business. 2. That there was ample evidence to establish that the appellant was in fact carrying on two separate businesses in 1955 and 1956, namely mining and construction. 3. That under s. 27(1)(*e*) of the Act the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained. 4. That as here the losses were sustained in one business of the appellant, namely mining, the 1956 losses could be carried back and deducted only to the extent of the appellant's 1955 profit from the same business. UTAH CO. OF THE AMERICAS v. MINISTER OF NATIONAL REVENUE.... 128

8.—*Customs duty—Appeal on question of law from Tariff Board declaration—Whether parts of Eimco filter classifiable under tariff item 410p or 410w—Customs Tariff, R.S.C. 1952, c. 60, Schedule A as amended by S. of C. 1955, c. 51, s. 2 and S. of C. 1956, c. 36, s. 1—Tariff Board not bound by rules of evidence.* The appellant by leave appealed to this Court from a declaration of the Tariff Board on the question: "Did the Tariff Board err as a matter of law in declaring that certain parts ... Eimco filters imported by Sherritt Gordon Mines Ltd. . . . were classifiable under Tariff Item 410*p* as enacted by S. of C. 1955, c. 51, rather than under Tariff Item 410*w* as enacted by S. of C. 1956, c. 36?" Tariff Item 410*p* provides for the entry free from duty of "Sundry articles of metal for use exclusively in metallurgical operations, namely... apparatus for chemical conversion, extraction, reduction or recovery, n.o.p." Tariff Item 410*w* provides for payment of duty on "Machinery, n.o.p. for use in the concentration or separation of ores, metals or minerals, namely; . . . filters . . . ." The respondent operates a mine at Lynn Lake, Man., where ore recovered therefrom is by a mechanical process reduced to concentrates and then shipped to the respondent's plant at Fort Saskatchewan, Alta. where after the concentrates are treated by a new process of chemical conversion, extraction, reduction or recovery, involving the use of natural gas, pure nickel, cobalt and copper are obtained. The imported articles in dispute were destined for use in the Fort Saskatchewan plant. The appellant conceded at the hearing of the appeal that the determining factor to be considered in determining the applicability of item 410*p* or 410*w* was the process in which the disputed articles of machinery were to be used, rather than the particular function they were to perform. *Held:* That since it was conceded that the words "chemical conversion, extraction, reduction or recovery" taken textually from item 410*p* accurately describes the process at Fort Saskatchewan, this item applies and the declaration of the Tariff Board should be affirmed. 2. That the two processes, the one at Lynn Lake admittedly mechanical, and that at Fort Saskatchewan chemical, are two distinct processes, the former falling into the field of mining and the latter into that of metallurgy. 3. That the expressions "concentration and separation" and "apparatus for chemical conversion, extraction or recovery" are words of art, each applicable to the machinery and operations envisaged in the tariff item in which it appears. 4. That the words "concentration and separation" are descriptive of mining but not of metallurgical operations as the legislature made abundantly clear when by S. of C. 1955, c. 51 of the *Customs Tariff* the words "for use exclusively in mining and metallurgical operations" as previously appeared in 410*p* were changed to read "for use exclusively in metallurgical operations". 5. That the Tariff Board is not bound by rules of evidence and can accept and act on information that in its judgment is authentic otherwise than under the sanction of an oath or affirmation. Thus the Board could accept the written statement or declaration of counsel quoting from his brief filed with the Board that "the goods which are the subject of this appeal are for use exclusively in metallurgical operations." DORR-OLIVER LONG LTD. v. SHERRITT GORDON MINES LTD.............................. 153

9.—*Income—Income tax—Deduction—Cost of new elevator and rebuilding of elevator shaft*

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to accommodate same—Whether "an outlay . . . made . . . for purpose of . . . producing income from property" or "an outlay . . . on account of capital"—The Income Tax Act, R.S.C. 1952 c. 148, s. 12(1)(a) and (b). The Income Tax Act provides: "S.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 respondent company owns and operates an office building equipped with an elevator and derives its income from leasing office space to tenants. The elevator had been in use for some forty years when the respondent was notified certain repairs would have to be made to it to meet the requirements of the law regulating elevators. In view of the cost of such repairs the respondent decided it was preferable to install a new elevator, and did so. In its 1955 income tax return it claimed as a deduction the installed cost of the new elevator as well as the cost of the rebuilding of the elevator shaft to accommodate it. Both deductions were disallowed by the Minister. The respondent appealed to the Income Tax Appeal Board which allowed the appeal in part and referred the assessment back to the Minister to allow as a deduction the amount expended for the new elevator and to treat the expenditure for the rebuilding of the elevator shaft as a capital expenditure. On an appeal and cross-appeal from the Board's decision: *Held:* That the outlays for the replacement of the old elevator by the new one and the rebuilding of the elevator shaft and other works connected therewith were not current expenses made in the ordinary course of the respondent's business operations to earn income within the meaning of s. 12(1)(*a*) of the *Income Tax Act.* 2. That the outlays were not recurrent but were made or incurred to create a new asset and bring into existence an advantage of enduring benefit and were properly attributable to capital and not revenue. *British Insulated & Helsby Cables Ltd. v. Atherton* [1926] A.C. 205 at 213, followed. *Samuel Jones Co. (Devondale) Ltd. v. C. I. R.* (1951) 32 T.C. 513, distinguished. 3. That the expenses were outlays or replacements of capital within the meaning of s. 12(1)(*b*) of the Act. MINISTER OF NATIONAL REVENUE v. LUMOR INTERESTS LTD. 161

10.—*Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6, 81(1) and 139(1)(e)—Profits from land purchased for development of a shopping centre and later sold—Income or capital—"An undertaking"—A "venture in the nature of trade"—A business—Appeal dismissed.* A group of persons formed a partnership for the purpose of developing a shopping centre in the City of Calgary, Province of Alberta. Appellant company was incorporated and certain lands were purchased for the purpose of proceeding with the development. Due to the occurrence of certain matters the shopping centre plan was dropped and the holdings of the appellant were disposed of at enhanced prices resulting in considerable gain to appellant. Appellant was assessed for income tax on this gain and an appeal by it to the Income Tax Appeal Board was dismissed. A further appeal was taken to this Court. Appellant contends that the amount of profit is a capital gain and not income. *Held:* That the profits in question are the regular outcome of "an undertaking", a "venture in the nature of trade" within the Income Tax Act and in short of a business and so properly assessed for income tax. 2. That from its inception the sole subject of the partnership consisted in profit-making through the operation of a shopping centre; the profit was attained by a quick turnover of three transactions and the mode instrumental in ensuring this result though at one remove from the company's initial and most favoured ambition does not detract from a basic profit-seeking venture. REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE 194

11.—*Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a), 85B(1)(b) and 139(1)(w)—The 1948 Income Tax Act ss. 3, 4, 12(1)(a) and 127(1)(v)—Contracting company—Completed contract basis of computing income not correct—Progress payments to be taken into account in year received—Method of computing income for years prior and subsequent to 1953—Valuation of inventory not here relevant—All expenses incurred deductible in year incurred —Appeal allowed.* Appellant's main business is that of contracting with government and municipal bodies for the excavation of ditches and installation of sewer and water systems. Appellant normally received throughout the life of the contracts and usually about the 15th of the month a payment "on account of the contract" of 85 or 90 per cent of the value of the work done and material furnished at the site in the previous month, following the issue of supervising engineers' certificate. Appellant used the completed contract method in computing its annual income tax return. According to that method the costs of the contract over the entire life of the contract are accumulated and nothing is taken into income. When the contract is completed the total cost over the years of that contract is deducted from the total receipts or billings on the contract and resulting item comes into profit and loss. In reassessing the appellant for income tax for the years 1952, 1953 and 1954 the respondent did so on the basis that the progress payments were taxable in the year of receipt and assessed appellant accordingly. An appeal to the

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Income Tax Appeal Board was dismissed and appellant appeals to this Court. Counsel for respondent admitted there were errors in the assessments, that further adjustments should be made for each year and requested that the matter be referred back to the respondent for re-assessment. *Held:* That the 85 or 90 per cent of the progress certificates as certified by the engineer and actually received by the appellant in a taxation year, constitute income for the year in which they were received. 2. That the "completed contract" method used by appellant in computing its income is contrary to the express provision of the 1948 *Income Tax Act* (applicable to the year 1952) and *The Income Tax Act* (applicable in subsequent years). 3. That in computing the income of appellant for the years commencing 1953 in accordance with the provisions 85B(1)(*b*) of the *Income Tax Act* the full amount to be received for property sold or services rendered up to December 31 must be included whether or not it has been certified by the engineer's progress certificates. 4. That for property sold and services rendered in 1952, (a) appellant must bring into income of 1952 only the amounts actually received by it in that year from each contract: (b) for services rendered and property sold in that year and for which the engineers' certificates were not issued until 1953, the 85 per cent or 90 per cent payable thereunder will be income of the 1953 taxation year: and (c) the holdbacks will be taken into income in the year in which the final engineers' certificate is approved and the holdbacks released. 5. That the question of valuation of inventory is in this case not relevant in computing appellant's income. 6. That all the expenses incurred by the appellant in connection with the contracts were deductible in full in the years in which they were incurred in accordance with s. 12(1)(*a*) of the *Income Tax Act.* WILSON AND WILSON LTD. v. MINISTER OF NATIONAL REVENUE..... 205

12.—*Income—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 6(a)(b)(c), 28(1)(2)(3)(4), 139(5a)—Controlled Corporation—Dealing not at arm's length—Dividend is income when received not when declared—Declared dividend not payment of debt when received — "Related persons" — Corporation controlled by three brothers and another corporation controlled by their father are related persons and cannot deal at arm's length—Appeal dismissed.* Appellant company, incorporated on December 14, 1953, is a private company and describes itself as an Investment Holding Company. All its shares are owned by three brothers. On December 18, 1953, appellant purchased from the father of the three brothers 191 shares of the 200 common shares of the capital stock of Parsons-Steiner Limited, a taxable Canadian resident corporation. On December 21, 1953, the directors of Parsons-

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Steiner Limited declared a dividend of $1,250 per share on all the issued common shares of its capital stock, payable to shareholders of record as of December 31, 1953. No payable date was specified. The dividend was paid and on January 22, 1954, a cheque in the amount of $238,750 was drawn by Parsons-Steiner Limited and received by appellant. In the taxation year 1954 the appellant controlled Parsons-Steiner Limited within the meaning of the *Income Tax Act.* The respondent in reassessing appellant for the 1954 taxation year assumed that the sum of $129,754.33 being part of the dividend received by it from Parsons-Steiner Limited was paid out of the designated surplus of that company and accordingly added that amount to appellant's declared income. An appeal from this reassessment was dismissed by the Income Tax Appeal Board and appellant now appeals to this Court. *Held:* That the dividend was received by appellant in the year 1954 and that Parsons-Steiner Limited was a company controlled by appellant at the time the dividend was received since the 1954 amendments to the provisions of the *Income Tax Act* s. 28 relating to arm's length dealings were applicable to the year 1954 and subsequent taxation years. 2. That the declared dividend did not cease to be a dividend on December 31, 1953 since s. 6(*a*) of the Act brings into income amounts received as dividends and not amounts receivable as dividends. 3. That all the appellant had on December 31, 1953 was a right to a dividend which it received in cash in the year 1954 and a right to a dividend is not income until the money is received, the cheque received by appellant on January 22, 1954 from Parsons-Steiner Limited was in payment of the dividend declared on December 31, 1953. 4. That Parsons-Steiner Limited was a company controlled by appellant within the provisions of s. 28(3) of the Act and as Parsons-Steiner Limited's financial year ran from July 1, 1953 to June 30, 1954 it was a company controlled by appellant when the dividend was declared in December 1953 as well as when it was paid and received in January, 1954. 5. That appellant corporation controlled by three brothers and Parsons-Steiner Limited another corporation controlled by their father are "related persons" within the meaning of s. 139(5*a*) of the Act and therefore cannot deal at arm's length. ROBWARAL LTD. v. MINISTER OF NATIONAL REVENUE........................ 221

13.—*Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Capital or income—Purchase of land in excess of requirement—Profit on sale of excess land held to be income—Appeal dismissed.* Appellant, a successful general building contractor, purchased a large tract of unoccupied land for the purpose of providing himself with a long term home for his business. The area purchased far exceeded his needs and after utilizing or

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retaining a portion of it at the rear of the property the remainder was disposed of by him at prices which netted him a profit. This profit was added to appellant's income for taxation purposes for the year 1954. An appeal from that assessment was dismissed by the Income Tax Appeal Board and a further appeal was taken to this Court. *Held:* That the appellant having entered into the business of a subdivider in exactly the same way as one engaged in that business would do and having retained a qualified surveyor to subdivide four lots the profit from the sale of the excess land constitutes income to the appellant for the taxation year in question, and was not the realization of a capital asset. LEON ADLER v. MINISTER OF NATIONAL REVENUE..... 236

14.—*The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 6 and 127(1)(e)—The Partnerships Act R.S.O. 1950, c. 270, s. 2 and 3(1)(3)—Capital or income—Partnership interest is a capital asset—Proceeds of sale of partnership interest do not constitute taxable income—Appeal dismissed.* Respondent, a practising barrister, owned an interest in a partnership which was engaged in developing and selling real estate. He disposed of part of his interest in the partnership for a sum of money over and above what it had cost him. The Minister of National Revenue assessed him for income tax on this amount and an appeal from such assessment was allowed by the Income Tax Appeal Board from whose decision the Minister appeals to this Court. *Held:* That whilst the income of a partnership is taxable to a member of the firm annually whether such share is withdrawn or not, the sale of his interest in the firm or a part of it at a profit constitutes a capital gain. MINISTER OF NATIONAL REVENUE v. NATHAN STRAUSS........ 315

15. — *Income tax — Whether payment of royalty to lessee by sublessee on ore shipped from leased mine "income derived from the operation of a mine" within the meaning of the Income Tax Act R.S.C. 1952, c. 148, s. 83(5) as enacted by S. of C. 1955, c. 54, s. 21(1).* Section 83(5) of the *Income Tax Act* provides: "Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the 36 months commencing with the day the mine came into production." The appellant corporation in 1953 secured an operating license in the form of a lease to mine iron ore from land in northern Quebec and thereafter subleased such right to another company. The consideration therefor included, *inter alia*, payment of an overriding royalty on all iron ore and specialties shipped by the sublessee from any mines on the leased land. Payment to the appellant under the agreement totalled $3,182,936, for the year 1956, the whole of which year was within the period of 36 months commencing with the day on which the mine

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operated on the property by the sublessee came into production. The Minister ruled that this sum was not income derived from the operation of a mine and thus exempted by section 83(5) and assessed the appellant accordingly. On an appeal from the assessment. *Held:* That the sum in question was not "received" from the operation of the mine but "arose and accrued" by reason of the operation and was thus "derived" therefrom. It was therefore "income derived from the operation of a mine" within the meaning of section 83(5) of the Act and was exempted by that provision. HOLLINGER NORTH SHORE EXPLORATION CO. LTD. v. MINISTER OF NATIONAL REVENUE.. 325

16.—*Income tax—Income Tax Act R.S.C. 1952, c. 148, s. 12(1)(a)—"An outlay or expense . . . made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer"—Legal expenses incurred in prosecuting appeal from a conviction under the Criminal Code for engaging in illegal trade practices are deductible in ascertaining income—Appeal allowed.* Appellant incurred expenses in prosecuting an appeal to the Ontario Court of Appeal from a judgment of the Ontario High Court finding it guilty of illegal trade practices. In its tax return for the fiscal year ended December 31, 1955, appellant claimed these legal expenses as deductions from income. The respondent disallowed these deductions and an appeal was taken to this Court. *Held:* That the appellant's trade practices in the operation of its business were used and followed for the purpose of earning income from its business, and legal fees and costs incurred or made in defending such practices till a final decision on their legality or illegality was reached, were made for the purposes of their trade and for the purposes of earning income and are deductible in ascertaining appellant's taxable income within the meaning of s. 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148. ROLLAND PAPER CO. LTD. v. MINISTER OF NATIONAL REVENUE................ 334

17.—*Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Money paid to lessor under terms of lease to be held by it under certain conditions—Terms of lease altered by later agreement—Money retained by lessor is rent and was not paid for waiver of a right—Money paid to lessor held to be income from property within the provisions of ss. 3 and 4 of the Income Tax Act, R.S.C. 1952, c. 148—Appeal dismissed.* Appellant leased a hotel property to another company, incorporated for the purpose of operating it, for a term of ten years from September 1, 1949, at a "minimum annual rental" of $75,000 payable in monthly instalments of $6,250. Provision was made for increasing the rent dependent on the lessee's total gross receipts. Upon the signing of the lease the sum of $75,000 was paid to appellant to be kept by it as lessor and to be forfeited on

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non-payment of rent or as damages in case of bankruptcy, otherwise to be applied as rent. By a later agreement between the parties this lease was altered in certain respects and on March 10, 1954 a new lease was entered into between the parties which was substantially the same as the original 1949 lease but contained the following clause: 30. In consideration of the Lessor entering into these presents and releasing the Lessee from its obligations under the said Indenture of Lease dated the 22nd day of August, 1949, as amended by the said Indenture dated the 30th day of April, 1950, the Lessee hereby waives and renounces any and every claim for the sum of Seventy-five Thousand Dollars paid to the Lessor as hereinbefore set out to be applied on account of future rent and to be retained by the lessor upon the happening of certain contingencies, and acknowledges that the Lessor is entitled to retain the said sum of Seventy-five Thousand Dollars free from any claim or demand by the Lessee. The Lessee further waives and renounces any and every claim for the payment of interest on the said sum of Seventy-five Thousand Dollars. It also provided for a reduction in rent and for renewal privileges. This sum of $75,000 was added by respondent to the appellant's declared income for the year 1955. Appellant asserts that it is a capital asset received for the surrender of the original lease and for the grant of a new lease and appeals from the re-assessment made by respondent. The parties agree that the money was received by appellant in its 1955 taxation year. *Held:* That it is the real character of a transaction and not the name given it which governs its taxability under the *Income Tax Act* and to discover the real purpose of the transaction all the surrounding circumstances may be examined; here the real purpose of the agreement was that the lessor should accept lower rent and that the agreement was for the payment of rent and not a waiver of a right, consequently the sum of $75,000 was income from property within sections 3 and 4 of the *Income Tax Act* R.S.C. 1952, c. 148. FRONT & SIMCOE LTD. v. MINISTER OF NATIONAL REVENUE................ 350

18.—*Income Tax Act R.S.C. 1952, c. 148, s. 4—Income or capital—Profit on foreign exchange—Money used in operation of business—Buying and selling of foreign exchange necessary for purpose of business transactions—Profit realized on settlement of indebtedness is taxable as income—Appeal dismissed.* Appellant, a Canadian company, carried on the business of selling aluminium and related products in foreign countries. It commenced trading operations in these commodities in Japan in 1934 and through this branch office promoted the market for its goods, served its customers and made its sales. The office was closed in April 1942. To finance the trading operations of its Japan branch it obtained through that branch loans and advances in Japanese currency from the National City Bank of New York through the branches of that bank maintained in Japan. The borrowings were for payment of import duties and for general purposes. A final settlement of indebtedness was effected in 1952 by the purchase by appellant of the necessary Japanese money. As a result the appellant made a profit of $172,927 which was shown in its income tax return for 1952 but which appellant claims to not be taxable income within the provisions of the *Income Tax Act* or the *Income War Tax Act.* The respondent assessed the appellant for income tax on this amount and an appeal to the Income Tax Appeal Board was dismissed from which decision the appellant now appeals to this Court. *Held:* That the profit realized from the use of the funds was income within the meaning of s. 4 of the *Income Tax Act* since the money borrowed from the bank was not borrowed for capital purposes but to pay the current expenses of carrying on the business, it was not borrowed for investment purposes but to meet the expenditures incurred in the operation of appellant's business activities and was circulating capital used in its trade. 2. That the amount of indebtedness of the appellant to the bank at the time of the settlement of the debt consisted of sums borrowed on demand loans and on advances by way of overdraft on its current account which sums had been used by appellant to finance its trading operations and was circulating capital used in the trade and the profit made on the exchange of dollars for Japanese yen when it settled its account with the bank in Japan was made on funds which had been borrowed and used to pay expenses of its trading operations. 3. That though the buying and selling or the exchanging of dollars for yen was not the primary business of the appellant that operation was necessary for the purpose of its transactions on revenue account and the settlement of its debt with the bank in Japan was a part of its trading operations. ALUMINIUM UNION LTD. v. MINISTER OF NATIONAL REVENUE 363

19.—*Income—Income Tax Act—Sale of topsoil from property liable to expropriation proceedings—Whether proceeds capital gain or taxable income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(j), 139(1)(e).* The respondent in 1944 purchased a run-down farm on the outskirts of Toronto. The purchase was made as a long term investment in the belief the land would increase in value and also that it might be used for a mushroom farm, if the mushroom company owned by her husband in which she was a shareholder and then operating within the city limits, should be obliged to relocate. Between the years 1945-1953 the farm itself was operated at a loss but from 1945 to 1948 and from 1950 to 1952,

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respondent sold topsoil from the farm to the mushroom company but refused to sell to other would-be purchasers. In 1953 the Ontario Department of Highways notified her that it would require the 37 acres of the north part of the farm for highway purposes and offered her $1,500 an acre with the alternative of expropriation proceedings in the event of refusal. Shortly after receiving the notice she sold the parcel in question to a paving company and as part of the consideration the purchaser agreed to remove the topsoil therefrom to the unsold portion of the farm. The respondent then sold the topsoil so removed, realizing $18,500 in 1953 and $1,500 in 1954. The Minister assessed the amounts so received as income within the meaning of the *Income Tax Act*. On an appeal from a judgment of the Income Tax Appeal Board allowing the respondent's appeal from the assessment. *Held:* That the whole course of the taxpayer's dealing with the topsoil indicated that she was disposing of it in a way capable of producing a profit and, with that object in view, the transactions were of the same kind and carried on in the same way as those of ordinary trading in the commodity and she therefore was engaged in an adventure or concern in the nature of a trade or scheme of profit making. 2. That the sums received from the sale of topsoil in the years 1953 and 1954 were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to taxation. MINISTER OF NATIONAL REVENUE v. MARY ORLANDO......... 391

20.—*Income or capital gain—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Purchase of wood lots with paper mill—Business not successful and assets disposed of—Sale of cutting rights on wood lots to recoup part of investment not a venture in the nature of trade—Money received from disposal of cutting rights is realization of part of capital and does not constitute income but is a capital gain—Appeal allowed.* Appellant purchased a paper making mill from Dominion Paper Company and in order to do so was compelled to purchase from the same vendor as a part of the transaction certain wood lots owned by the vendor and not required by the appellant and of no value to it. Later appellant sold the cutting rights on the wood lots in order to save some of the money paid for the entire estate, after it had vainly tried to dispose of all the assets purchased by it and had decided to cease operations. Respondent assessed appellant for income tax on the "net proceeds on the sale of standing timber on a stumpage basis" as calculated by respondent. From this assessment the appellant appealed to this Court. *Held:* That the appellant did not deal with the wood lots in the same way as a dealer in timber limits or cutting rights would have dealt and the transaction was not a venture in the nature of trade. The timber formed part of the entire assets purchased by

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appellant and the money it received from the sale of the cutting rights was the proceeds of the realization of part of its capital and did not constitute income but was a capital gain. STERLING PAPER MILLS INC. v. MINISTER OF NATIONAL REVENUE 401

21.—*Income—Income tax—Business carried on by testamentary trustee for beneficiaries under a will—Whether net profits "investment income" or "earned income"—Income Tax Act, R.S.C. 1952, c. 148, ss. 32(1), (3), (4), 5(b).* For the purpose of the investment income surtax imposed by s. 32(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, "investment income" is defined in s. 32(4) as "the income for the taxation year minus the aggregate of the earned income for the year . . ."; and, "earned income", for the purpose of s. 32, is defined by s. 32(5) as meaning "(*b*) income from the carrying on of a business either alone or as a partner actively engaged in the business". Under the provisions of a will a trustee carried on a business the net profits of which belong under the terms of the will to a son and daughter of the testatrix. The Minister treated the whole of the income from the business as investment income and assessed investment surtax accordingly. *Held:* (Allowing the appeals of the son and daughter) That the material words used in clause (*b*) of s. 32(5) are simply "Income from the carrying on of a business either alone or as a partner actively engaged in the business" without specifying that the carrying on must be by the taxpayer. Here, the income in question, was income which arose from the carrying on of a business by the trustee alone and fell within the meaning of clause (*b*) of s. 32(5) and therefore was deductible from income in computing "investment income" as defined in s. 32(4). AUDREY QUINN v. MINISTER OF NATIONAL REVENUE AND JAMES C. SHORTT v. MINISTER OF NATIONAL REVENUE................ 414

22.—*Income—Income tax—Unreported income — Unclaimed expenses — Alleged illegality in payment of wages no bar to their deductibility for the purpose of ascertaining net profit or gain—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 and 6(1)(a).* The appellant company failed to report the whole of its income for the years 1944 to 1953 inclusive and the Minister, following an investigation, added substantial amounts to its reported income and assessed accordingly. On an appeal from the assessments on the grounds that the amounts added were in excess of the unreported receipts, and that the amounts expended to earn income, for which no claim had been made, should have been deducted, the Minister submitted that no expenses in excess of those claimed had been made, and if they had, they were not deductible since they were made in carrying out illegal transactions. *Held:* That on the evidence the

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appellant had established that some of the amounts added were not income of the appellant and that since on the material before the Court it was impossible to estimate how much, the matter should be referred to the Minister for reconsideration and reassessment. 2. That the Court was satisfied that certain cheques put in evidence, as well as additional debits, were in fact incurred for overtime wages, salesmen's commissions and other items, and were not claimed in the appellant's income tax returns as deductions. 3. That the alleged illegality in connection with the payment of overtime wages did not affect their deductibility for the purpose of ascertaining net profit or gain within the meaning of the *Income War Tax Act*. ESPIE PRINTING CO. LTD. v. MINISTER OF NATIONAL REVENUE................ 422

23.—*Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 85B(1)(b)—Final payment under contract made on issuance of certificate of architect or engineer—Progress payments—Holdbacks—"Amount receivable"—Taxation year in which to include income—Appeal allowed in part—Cross-appeal dismissed.* Respondent, carrying on most of its business as a sub-contractor, is engaged in furnishing and installing plumbing, heating, air conditioning and ventilation equipment. It receives from the prime contractor monthly progress payments for 85% or 90% of the work done, the remaining 15% or 10% being withheld as a holdback. Final payment is made when the project is completed and the certificate of an architect or an engineer named in the contract is issued that the work is satisfactory. For the taxation year 1953 respondent did not report progress payments of $80,000 actually received or holdbacks of $67,000 not yet received, related to three incompleted contracts, a large one in Ontario and two smaller contracts in Quebec. The Minister of National Revenue added both amounts to respondent's 1953 income. The Income Tax Appeal Board held that the progress payments were taxable in 1953 but that the holdbacks were not so taxable. The Minister appealed to this Court and the respondent cross-appealed. The respondent contends that its profits, if any, cannot be determined until after the completion of each of the three projects to the satisfaction of the supervising architect or engineer. *Held:* That the cross-appeal must be dismissed and the progress payments were taxable in 1953 since the *Income Tax Act* does not provide that a taxpayer may reckon his income according to the duration of each individual contract especially when payments received thereon during any year exceed the aggregate of the taxpayer's direct costs applicable to them, and thus contain an element of profit. 2. That the holdbacks related to the larger Ontario contract were "amounts receivable" in 1953 since the certificate of the supervising architect or engineer was issued in the respondent's 1953 taxation year and not withstanding that by the terms of the contract such amounts only fell due in a subsequent taxation year they must be included in the company's income for the year in question, but the holdbacks related to the two Quebec contracts were not amounts receivable in 1953 as the certificates for them were not issued until later years. 3. That "amount receivable" means an amount which the intended recipient has a clearly legal, though not necessarily immediate right to receive, and the clause in each contract dealing with the architect's or engineer's certificate constituted a binding condition precedent which prevented respondent claiming the holdbacks until the certificate was issued. MINISTER OF NATIONAL REVENUE v. JOHN COLFORD CONTRACTING CO. LTD.............. 433

24.—*Income tax—Purchase of farms resold in lots—Whether profit therefrom capital gain or taxable income—Validity of re-assessment notices—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 136(12) and 139(1)(e).* The appellant, a notary, in 1947 purchased a farm on the outskirts of Ville St. Laurent for $27,000 which he financed by a bank loan of $7,000 and a further loan of $20,000 advanced by an oil company and secured by a mortgage on the property. He built a service station thereon allegedly to set his son up in business but in 1948 sold the service station which comprised a fraction of the farm at a profit of $40,000. In 1949 he sold a further parcel at a profit and then purchased an adjacent farm with the intention of becoming a gentleman farmer but in 1949, 1950, 1951 and 1952 sold most of the land comprised by the two farms in a series of 14 transactions. The Minister assessed the profits on the sales made in each of the four years as income. The appellant appealed from the assessments on the ground that the profits were non-taxable capital gains. *Held:* That there was nothing in the sales of the land in question to distinguish them from the usual business practice in such matters so that each of them must be taken to constitute an adventure in the nature of trade within the meaning of s. 127(1)(e) of the *Income Tax Act*, R.S.C. 1952, c. 148, and to have been properly assessed as income. 2. That the appellant's preliminary objections that the notices of re-assessment did not bear the handwritten signature of the Minister nor set out the basic elements of the revised assessments, should be dismissed, since nothing in the wording of s. 136(12) of the Act forbade the reproduction of the Deputy Minister's signature by mechanical means, and no provision in the Act required the Minister to set out in detail the revision of the tax in the notice itself. GEORGES LAURIN v. MINISTER OF NATIONAL REVENUE........................ 480

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25.—*Income tax—Net worth assessment—Notice of objection—Presumption of validity of assessment—Income War Tax Act, R.S.C. 1927, c. 97, ss. 47, 55, 69A (1)(4), 70(1), (2), (3) and 4th Schedule s. 3(2) as amended—Civil Code, art. 1234.* The appellant, the president and majority shareholder of J. M. Ravary Co. Ltd., declared an annual salary of $780 received from the company in 1946 and 1947 as his taxable income for each of those years. The Minister finding it impossible to obtain the necessary information to justify the taxable income declared, proceeded under the authority of s. 47 of the *Income War Tax Act* to calculate the appellant's income on a net worth basis and increased the 1946 income to $11,113.37 and the 1947 income to $5,173.41. In each case $3,123.20 was included as the estimated living costs of the appellant and his wife. On an appeal to the Income Tax Appeal Board a deduction of $600 was allowed from the appellant's estimated net worth for 1947 and the 1946 assessment was affirmed. In an appeal to this Court the appellant contended that the $10,000 amount included in his personal balance sheet as prepared by respondent belonged to his wife. That his annual living expenses did not exceed $1,393.20, and that by service of a notice of objection under s. 69A of the *Income War Tax Act* the onus of establishing the validity of the assessment shifted to the Minister. *Held:* That the serving of a notice of objection under s. 69A of the *Income War Tax Act* does not have the effect of displacing the presumption of validity of an assessment made according to law. This presumption subsists until the taxpayer succeeds in satisfying the Court or tribunal hearing the appeal that the assessment is erroneous in law and in fact. 2. That in determining the amount payable by the taxpayer the Minister acted within the powers conferred upon him by s. 47 of the Act. 3. That the $10,000 loan was established by the filing of a valid legal document and art. 1274 of the *Civil Code* prohibited the introduction of oral evidence to contradict or vary its terms. 4. That the Court could not accept the appellant's evidence as to his living expenses and in any event the appellant did not establish the figure submitted by the Minister to be erroneous. 5. That the decision of the Income Tax Appeal Board be affirmed. J. MASTAI RAVARY v. MINISTER OF NATIONAL REVENUE.......... 522

26.—*Succession duty—Transfer of shares to corporation owned by transferor's children for an annuity—Value of shares much greater than annuity—Whether transaction a gift or for partial consideration—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(d and (k).* T died on June 20, 1956 at the age of 67 years leaving a son and daughter to whom by his will dated January 3, 1956, he left the bulk of his estate. Shortly before his death T had intended to remarry and in contemplation of this event, some 20 days before he died transferred to Edison Wholesale Ltd. 72 shares of Adilman's Ltd. and the land and building on which the latter carried on a department store business in consideration of a monthly sum of $1,666.66 to be paid to him for his life or until the total of such payments reached $200,000. At the time of the transfer the son and daughter owned the balance of the issued common shares of Adilman's Ltd. and were the only beneficial shareholders of Edison Wholesale Ltd. At the time of T's death the fair market value of the property transferred was $344,400 and the present value of the annuity payable to T at the time of the transfer was $148,000. In assessing Ts' estate for succession duty the Minister included the $344,400 in the aggregate net value of the property of the deceased and assessed duty accordingly. On an appeal from the assessment the Administrators of T's estate contended that the property in question was "transferred for partial consideration" within the meaning of s. 3(1)(k) of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, and accordingly the only amount which could be properly included in assessing duty was $196,400, the difference between the $344,400 and $148,000 the value of the annuity which Edison Wholesale Ltd. had agreed to pay. The Minister submitted that the transaction in question was a "gift" with a reservation of benefit to the donor by contract within the meaning of s. 3(1)(d) of the Act and that the $344,400 was accordingly properly included in making the assessment. *Held:* That both clauses (d) and (k) of s. 3(1) of the *Dominion Succession Duty Act* are clauses which catch and require to be brought in on their terms transactions of the kind therein described, and, if a transaction fairly falls within one of them it makes no difference to the application of that clause that the transaction may also fall within another clause, the application of which might be either more or less burdensome to the taxpayer. 2. That in interpreting clause (d) of s. 3(1) the principle that the substance of the transaction must be ascertained, applied, and having regard to all the circumstances under which the transaction was entered into it was clear that it was not dictated by commercial considerations and the inference was that the object of the deceased was not to acquire the annuity in place of the property but to do something for the benefit of his son and daughter. 3. That the transaction was a "gift" with a benefit to the donor provided "by contract" within the meaning of s. 3(1)(d). *Semble*—That the property was not "transferred for partial consideration" within the meaning of s. 3(1)(k), since the obtaining of the consideration was not the real object of the transaction. *Attorney-General for Ontario v. Perry* [1934] A.C. 477; *Attorney-General v. Worrall* [1895] 1 Q.B. 99; *Attorney-General v. Johnson* [1903] 1 K.B. 617; *Re Baroness Bateman* [1925] 2 K.B. 429, referred to. BEULAH GORKIN *et al* v. MINISTER OF NATIONAL REVENUE..... 531

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27.—*Succession Duty—General power to dispose of capital—Power never exercised—Whether a succession—Meaning of "power" "general power" "competent to dispose"—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(1)(i), 3(4) and 4(1).* S., who died domiciled in the Province of Quebec on December 14, 1940, prior to the coming into force of the *Dominion Succession Duty Act*, by his will left the residue of his estate to his wife to freely dispose of the revenue and capital and upon her death the residue not disposed of to go to his daughter upon similar terms for her life and upon her death the residue not disposed of to vest in certain others. The wife made no disposition of the capital during her lifetime. Following her death on October 9, 1955, the Minister in assessing her estate for succession duty added to the declared value thereof the value of the residuary estate of her husband as well as the interest accrued to the date of her death on some bearer bonds in her husband's estate. In an appeal from the assessment it was contended that under the *Civil Code* the will of S created a substitution of his property whereby his widow became the institute and his daughter the first substitute and upon the death of the widow the right of the daughter in the assets forming the residue of the estate of S arose under the terms of his will and not by any disposition made by the widow. The Minister submitted that the property in question had been properly included in making the assessment as the wife at the time of her death had a general power to dispose of the property within the meaning of s. 3(4) of the *Dominion Succession Duty Act* as enacted by R.S.C. 1952, c. 317, s. 2(3) and that accordingly a succession to the property was deemed to have arisen. *Held:* That the definition of "general power" in s. 4(1) of the *Dominion Succession Duty Act* must be taken to apply to s. 3(4) of the Act, and the word "power" in the expression "general power to appoint or dispose of property" in s. 3(4) must be interpreted as referring to the capacity of the holder to alienate the property, rather than as having the narrower meaning of strict legal usage. 2. That at the time of her death the widow of S had a general power to dispose of the residue of his estate within the meaning of s. 3(4) of the Act and that the value thereof had been properly included in the successions. 3. That the value of the accrued interest on bonds of the testator's estate was properly included in computing the value of the property included in the successions since the widow of S had a general power to dispose of the assets of his estate which included the bonds with any accretions to their value. MONTREAL TRUST CO. *et al* (MARY ANDERSON SCOTT ESTATE) v. MINISTER OF NATIONAL REVENUE.... 543

RIGHT TO DEDUCT LOSSES OF ONE OPERATION FROM PROFITS OF OTHER.
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SALE OF CUTTING RIGHTS ON WOOD LOTS TO RECOUP PART OF INVESTMENT NOT A VENTURE IN THE NATURE OF TRADE.
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SALE OF TOPSOIL FROM PROPERTY LIABLE TO EXPROPRIATION PROCEEDINGS.
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SAND-O-STONE.
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"SHADOW STONE".
See INDUSTRIAL DESIGN, No. 1.

SHIP HEAVILY LADEN AND IMPROPERLY NAVIGATED.
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SHIPPING—

1. Action for damages for personal injuries to passenger. No. 3.
2. Action taken by defendant's assistant marine superintendent that of one of defendant's servants. No. 2.
3. Actual fault or privity. No. 7.
4. Admiralty Act, R.S.C. 1952, c. 1, ss. 18 and 20. No. 10.
5. Admiralty Act, R.S.C. 1952, c. 1, s. 18(2). No. 3.
6. Appeal allowed and judgment of trial court varied. No. 6.
7. Appeal from District Judge in Admiralty dismissed. No. 9.
8. Appeal from judgment of District Judge in Admiralty. No. 6.
9. Appeal from order of District Judge dismissed. No. 10.
10. Apportionment of blame. No. 5.
11. Canada Shipping Act, R.S.C. 1952, c.29, s.657. No. 7.
12. Canada Shipping Act, R.S.C. 1952, c.29, ss.657 and 659. No. 5.
13. Canada Shipping Act, R.S.C. 1952, c.29, ss. 657-659, 662. No. 1.
14. Canada Shipping Act, R.S.C. 1952, c.29, ss. 726 and 727. No. 9.
15. Claim by cargo-owners against shipowners. No. 4.
16. Collision. No. 1.
17. Collision between fishing vessel and vessel owned by Crown. No. 7.
18. Collision in Port of Montreal. No. 6.
19. Collision in St. Lawrence River. No. 5.
20. Control of ship not taken over by defendant. No. 2.

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21. Crown Liability Act, S. of C. 1952-53, c.30, s.3(4) and 25(3). No. 7.
22. Damage caused to ship "at home". No. 8.
23. Damage to cargo. Nos. 2 & 4.
24. Damage to ship brought about by peril, danger or accident of the sea. No. 2.
25. Damages. No. 5.
26. Defence of Act of God disallowed. No. 5.
27. Failure of both ships to comply with International Rules of the Road. No. 5.
28. Failure to keep to right hand side of channel. No. 6.
29. Failure to obtain permission of Harbour Master to enter channel. No. 6.
30. Failure to sound warning blast. No. 6.
31. Financial Administration Act, R.S.C. 1952, c.116. No. 5.
32. Judgment for plaintiff. No. 8.
33. Jurisdiction. Nos. 3 & 4.
34. Jurisdiction to issue writ of summons. No. 10.
35. Liability of defendants. No. 1.
36. Limitation of liability. Nos. 1, 5, & 7.
37. Links in chain of causation ending in collision. No. 6.
38. Loss of icebreaker Lady Grey. No. 5.
39. Negligence due to navigation only. No. 2.
40. Negligence of officers of both ships. No. 5.
41. Negligence of vessel in moving out of her berth. No. 8.
42. No "fault and privity" of company to neglect of employees. No. 1.
43. Pensions paid under Workmen's Compensation Act not to be taken into account in determining damages to which respondents entitled in action brought by virtue of the Canada Shipping Act. No. 9.
44. Practice. No. 4.
45. Provision in bill of lading that any suit be brought before Italian court. No. 4.
46. Recovery for loss of personal effects of officers and crew. No. 5.
47. Recovery for loss of use of ship and replacement. No. 5.
48. Regulation 19. No. 5.
49. Regulations for Preventing Collisions at Sea (1954) Rule 29. No. 5.
50. Stay of action. No. 4.
51. Water Carriage of Goods Act, R.S.C. 1952, c.291, Art. IV, Para. 2(a) and (c). No. 2.

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52. Workmen's Compensation Act, British Columbia, s. 11 as enacted by Statutes of British Columbia 1954, c.54, s.9. No. 9.

SHIPPING—*Collision—Liability of defendants—Limitation of liability—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657-659, 662—No "fault and privity" of company to neglect of employee.* In an action for damages resulting from the collision of defendants' tug and barge with a dredge owned by plaintiffs the Court found both defendants liable. Defendant shipowner seeks to limit its liability under sections 657-659 and 662 of the *Canada Shipping Act*, R.S.C. 1952. *Held:* That the defendant company cannot be held in "fault and privity" to the neglect of the senior despatcher of the company whose fault in not communicating to the Captain of defendants' tug the position of the dredge was the real cause of the accident, since the despatcher has no interest in defendant company as he is not a shareholder, being an employee, and defendant company is entitled to limit its liability. MARWELL EQUIPMENT LTD. *et al* v. VANCOUVER TUG BOAT CO. LTD. *et al*...... 120

2.—*Damage to cargo—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, Para. 2(a) and (c)—Damage to ship brought about by peril, danger or accident of the sea—Negligence due to navigation only—Control of ship not taken over by defendant—Action taken by defendant's assistant marine superintendent that of one of defendant's servants.* The plaintiff claims for damage to a cargo of flax seed transshipped at Port Colborne to defendant's barge the *David Barclay* for carriage to Montreal in a single uninterrupted voyage. Plaintiff alleges that defendant in breach of its undertaking and in dereliction of its duty failed to deliver the cargo in the same good order and condition in which it was received, but on the contrary on arrival in Montreal it was found to be wet, short and damaged. Defendant pleads the *Water Carriage of Goods Act*, 1936 and alleges that the damage resulted from the fact that the *David Barclay* rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal. *Held:* That the damage to the *David Barclay* resulting from the collision was occasioned or brought about by a peril, danger or accident of the sea within the meaning of Art. IV, Par. 2 (*c*) of the *Water Carriage of Goods Act* and since the *David Barclay* was seaworthy at the commencement of the voyage and at all times prior to her contact with the canal bank defendant was not liable in respect of such damage to the cargo as resulted directly from the collision. 2. That any negligence on the part of the Master of the *David Barclay* following the collision which resulted in damage to the cargo was negligence related primarily to the navigation or the management of the

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ship for which defendant cannot be held responsible in view of the exception afforded by Art. IV, Para. 2 (*a*) of the *Water Carriage of Goods Act*. 3. That action taken by the assistant marine superintendent of defendant subsequent to the collision and without reference to defendant's head office or any executive officer of defendant and solely on his own initiative and on the basis of the Master's telephone reports did not amount to a taking over of control of the vessel by the defendant in such a manner as to render it liable for any negligence there may have been thereafter on the part of the Master, crew or other servants of defendant in the navigation or management of the ship. 4. That anything done by the assistant marine superintendent of defendant was done by him on his own responsibility as one of defendant's servants within the meaning of Art. IV, Para. 2 (*a*) of the *Water Carriage of Goods Act*. 5. That defendant has brought itself within the exception provided by Art. IV of the *Water Carriage of Goods Act*. LEVAL & CO. INC. v. COLONIAL STEAMSHIPS LTD............................... 172

3.—*Action for damages for personal injuries to passenger—Jurisdiction—Admiralty Act, R.S.C. 1952, c. 1, s. 18(2).* The plaintiff sought to recover damages for injuries suffered by her while a passenger on board ship when an armchair in which she was seated in the ship's library overturned throwing her to the floor. On a motion to set aside the writ for want of jurisdiction. *Held:* That since the plaintiff's claim as alleged in her statement of claim must be that the damages claimed are damages done by the ship, that is damages of which the vessel was the active cause, and the Court could find no such allegation, the action must be dismissed. ANNIE WEISS STERNBERG v. HOME LINES INC............. 218

4.—*Practice—Stay of action—Damage to cargo—Claim by cargo-owners against shipowners—Provision in bill of lading that any suit be brought before Italian court—Jurisdiction.* The defendant moved for the dismissal of plaintiff's action or a stay of proceedings because of a clause in the bill of lading which provided that any action arising thereunder should be brought before the Italian Court of Genoa. *Held:* That as it was apparent that the trial of the case before the Italian court would involve very considerable inconvenience and greatly increase the costs the Court would not be justified in giving effect to the clause. Motion dismissed accordingly. R. J. POLITO v. GESTIONI ESERCIZIO NAVI SICILIA GENS............................ 233

5.—*Collision in St. Lawrence River—Loss of icebreaker Lady Grey—Negligence of officers of both ships—Failure of both ships to comply with International Rules of the Road—Apportionment of blame — Damages — Recovery for loss of use of ship and replacement—*

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Recovery for loss of personal effects of officers and crew—Defence of Act of God disallowed—Limitation of liability—Regulations for Preventing Collisions at Sea (1954) Rule 29—International Rules of the Road 15, 16, 27 and 30—Financial Administration Act R.S.C. 1952, c. 116—Regulation 19—Canada Shipping Act R.S.C. 1952, c. 29, ss. 657 and 659. The action is one to recover from the defendant, owner of the Ferry *Cité de Lévis*, damages for the loss of the icebreaker *Lady Grey*, owned by the plaintiff in the right of Canada, which sank in the St. Lawrence River following a collision between the two ships. The collision occurred in very severe winter weather during which the fog was so thick that at times there was practically no visibility. Plaintiff contends that the collision and damage resulting were caused by the fault and negligence of the *Cité de Lévis* and the servants of defendant on board and employed by defendant. Defendant counters that the collision was due to an Act of God or *vis major* or the negligence of the navigators of the *Lady Grey*. The Court found that the collision was not due to inevitable accident but was caused by the negligent operation of both vessels and assessed blame to the plaintiff as sixty per cent and to the defendant as forty per cent. *Held:* That it was bad seamanship on the part of defendant not to have had a proper look-out at all times during the operation of the *Cité de Lévis*, and such failure was a contributing cause of the accident. 2. That breaches of Rule 15(*c*)(1) of the International Rules of the Road by both vessels caused the collision and both vessels and those in charge of them were at fault in failing to send the mandatory signals prescribed by the Rule. 3. That the plaintiff is entitled to recover from defendant the amounts paid by the Crown to the officers and members of the crew of the *Lady Grey* for the loss of their personal effects resulting from the collision. 4. That plaintiff is entitled to recover compensation for the loss of the use of the *Lady Grey* and replacement, as well as for the loss of the *Lady Grey* itself. 5. That defendant is entitled to limitation of its liability as provided for in *The Canada Shipping Act* R.S.C. 1952, c. 29, ss. 657 and 659. HER MAJESTY THE QUEEN v. LEVIS FERRY LTD.......... 242

6.—*Appeal from judgment of District Judge in Admiralty—Collision in Port of Montreal—Failure to obtain permission of Harbour Master to enter channel—Failure to keep to right hand side of channel—Failure to sound warning blast—Links in chain of causation ending in collision—Appeal allowed and judgment of trial court varied. Held:* That failure to obtain permission from the Harbour Master at the Port of Montreal to enter what is a dangerous and busy channel, by steering a mid-channel course, particularly when two ocean-going vessels were tied up alongside sheds 18 and 19, and failure to sound a warning blast when

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opposite the Marine Tower were acts of negligence on the part of those in charge of the respondent ship *Britamlube* which contributed to the collision with appellant ship *Prins Frederik Willem*, thereby causing damage. THE SHIP *Prins Frederik Willem* AND HER OWNERS v. GAYPORT SHIPPING LTD., OWNERS OF THE TANKSHIP *Britamlube* 274

7.—*Limitation of liability—Collision between fishing vessel and vessel owned by Crown—Actual fault or privity—Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(4) and 25(3).* In an action in damages arising from a collision between the suppliant's fishing vessel, *Cape Russell* and the *Laurier*, a vessel owned by the Crown and under the control of the Department of Fisheries, the Crown disputed its liability for any of the damages sustained by the suppliant, and in the alternative, pleaded limitation of liability under s. 657 of the *Canada Shipping Act*, R.S.C. 1952, c. 29. It also counter-claimed for a declaration that the Crown was entitled to limit its liability in accordance with s. 657 of that Act as read with ss. 3(4) and 25(3) of the *Crown Liability Act*, S. of C. 1952-53, c. 30. *Held:* That the excessive speed at which the *Laurier* was proceeding under the circumstances and her failure to keep a proper and adequate lookout caused the collision. 2. That the master of the *Cape Russell* should have acted more promptly than he did in putting his ship in reverse, when had he done so, it was highly probable the collision might have been avoided. Accordingly the Court found contributory fault on the part of the *Cape Russell* and held her responsible to the extent of 25 per cent of the loss. 3. That in the circumstances the Crown was therefore entitled to a declaration of limitation of liability as claimed. *Blackfriars Lighterage & Cartage Co. Ltd. v. R. L. Hobbs*, [1955] 2 Lloyd's L.L.R. 554 referred to. CANADIAN FISHING CO. LTD. v. HER MAJESTY THE QUEEN 303

8.—*Negligence of vessel in moving out of her berth—Damage caused to ship "at home"—Judgment for plaintiff. Held:* That defendant vessel was negligent through improper manoeuvring on her part when moving out of her berth, thereby causing a wash which resulted in damage to plaintiff's vessel in the cost of replacement of mooring lines, dock repairs and other items, for which plaintiff is entitled to recover. THE STATES STEAMSHIP CO. v. THE SHIP *Elisabeth Bakke*.. 348

9.—*Canada Shipping Act, R.S.C. 1952, c. 29, ss. 726 and 727—Workmen's Compensation Act, British Columbia, s. 11 as enacted by Statutes of British Columbia 1954, c. 54, s. 9—Pensions paid under Workmen's Compensation Act not to be taken into account in determining damages to which respondents entitled in action brought by virtue of the*

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Canada Shipping Act—Appeal from District Judge in Admiralty dismissed. Held: That in assessing damages awarded in an action brought by respondents under Part XVII of the *Canada Shipping Act* R.S.C. 1952, c. 29 pension payments made under British Columbia *Workmen's Compensation Act* are not to be considered. THE STEAMSHIP *Giovanni Amendola* v. MARJORIE MANZ LEVAE *et al*....................... 492

10.—*Admiralty Act, R.S.C. 1952, c. 1, ss. 18 and 20—Jurisdiction to issue writ of summons—Appeal from order of District Judge dismissed. Held:* That s. 20 of the *Admiralty Act* R.S.C. 1952, c. 1 is not exhaustive on the question of when actions within the jurisdiction outlined in s. 18 of the Act may be instituted in a registry and does not restrict the exercise of the jurisdiction to the situations therein set out but merely states certain instances where a statutory right is given to commence proceedings in such district, leaving unprescribed the registry in which actions over which the Court has jurisdiction but not falling within any of its clauses may be instituted. IWAI & CO. LTD. *et al.* v. THE SHIP *Panaghia et al*............................ 499

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STATUS OF EVENTUAL CLAIMANT WHEN NO TAXES DUE.
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SUPPLEMENTARY DEATH BENEFITS.
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TARIFF BOARD NOT BOUND BY RULES OF EVIDENCE.
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TAXATION YEAR IN WHICH TO INCLUDE INCOME.
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TERMS OF LEASE ALTERED BY LATER AGREEMENT.
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TRADE MARKS—
1. Balance of convenience. No. 2.
2. Infringement. Nos. 1 & 2.
3. Motion to quash interim injunction restraining importation into, and sale in Canada of shavers alleged to bear trade marks similar to plaintiff. No. 2.
4. Recovery of damages precludes an accounting. No. 1.
5. Trade Marks Act, S. of C. 1952-53, c.49. No. 1.
6. Trade name. No. 1.

TRADE MARKS—*Trade name—Infringement—Recovery of damages precludes an accounting—Trade Marks Act, S. of C. 1952-53, c. 49.* The plaintiff brought an action against the defendant for infringement of its trade marks "New Majestic" and "Majestic" used in connection with domestic sewing machines and claimed an injunction, damages in the sum of $10,000, or an accounting, as the plaintiff might elect. The defendant contended that if any infringement took place, which it did not admit but denied, it occurred in August 1955 when the defendant entered into a promotion scheme with The Robert Simpson Montreal Ltd., whereby it supplied that firm with sewing machines bearing the trade mark "Majestic Rotary" which the latter sold as its agent. That the plaintiff brought an action against the Simpson company in the Quebec Superior Court alleging the same grounds of complaint and seeking the same remedies as in the present action and was awarded damages and an injunction, and that pursuant to the Quebec civil law rules of "solidarity", linking the Simpson company and the defendant in a joint defence, the damages now claimed had been liquidated by the Superior Court judgment. The defendant further submitted that the present action should be dismissed as vexatious as the plaintiff could have taken a single action against both parties or added the present defendant as a defendant in the Superior Court action. *Held:* That the Court was unable to perceive any connection between the case at bar and the civil laws of the Province of Quebec in relation to a trade mark offence. One statute only should be considered and applied, namely the *Trade Marks Act* S. of C. 1952-53, c. 49. 2. That the plaintiff having admitted it recouped all its actual damages in the Superior Court action was precluded on its own admission from now laying claim to an accounting. 3. That on the evidence and in view of defendant's admission of infringement, the injunction prayed for should be granted. Aaron Hershbain v. White Sewing Machine Products Ltd...... 147

2.—*Infringement—Motion to quash interim injunction restraining importation into, and sale in Canada of shavers alleged to bear trade marks similar to plaintiff—Balance of convenience.* The plaintiff, owner of the Canadian registered trade marks "Remington", "Rollectric" and "Princess" in respect *inter alia* of electric shavers, sells shavers bearing these marks, and also one bearing the unregistered trade mark "Roll-a-matic", in Canada. All are made by the plaintiff's United States parent company, Remington Rand Electric Shaver Division, Sperry Corporation. The defendants sold electric shavers in Canada bearing the same marks. Some of the latter were made in Germany by Remington Rand C.M.B.T. Elektro-Rasierer and others by the plaintiff's parent company in the United States. The plaintiff obtained an interim injunction restraining such sales by the defendants with leave to the defendants to move to dissolve the injunction. On a motion brought by the defendants to do so. *Held:* That evidence of the sale by the defendants in Canada of shavers bearing the registered trade marks showed a strong *prima facie* case of infringement and the balance of convenience favoured restraining the defendants from selling shavers bearing such marks until trial. *Dunlop Rubber Co. Ltd. v. A. A. Booth & Co. Ltd.* and *Gillette Safety Razor Co. et al. v. Diamond Edge Ltd.* (1926) 43 R.P.C. at 139 and 310 respectively, referred to. Remington Rand Ltd. v. Transworld Metal Co. Ltd. *et al*.... 463

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UNCLAIMED EXPENSES.
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UNPROFITABLE TAXICAB BUSINESS LIQUIDATED BY SALE OF INDIVIDUAL TAXIS.
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WHETHER PAYMENT OF ROYALTY TO LESSEE BY SUB-LESSEE ON ORE SHIPPED FROM LEASED MINE "INCOME DERIVED FROM THE OPERATION OF A MINE" WITHIN THE MEANING OF THE INCOME TAX ACT, R.S.C. 1952, c.148, s.83(5) AS ENACTED BY S. OF C. 1955, c.54, s.21(1).
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WHETHER PROFIT THEREFROM CAPITAL GAIN OR TAXABLE INCOME.
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WORKMEN'S COMPENSATION ACT, BRITISH COLUMBIA, s. 11 AS ENACTED BY STATUTES OF BRITISH COLUMBIA 1954, c.54, s.9.
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