1944

CANADA
LAW REPORTS

Exchequer Court of Canada

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

Published under authority by Arnold W. Duclos, K.C.
Registrar of the Court

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1944

22144—1a

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports.

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON

(Appointed, October 6, 1942)

PUISNE JUDGE:

THE HONOURABLE EUGENE REAL ANGERS

(Appointed, February 1, 1932)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

His Honour DONALD MCKINNON, Prince Edward Island Admiralty District—appointed, July 20, 1935.

do LEONARD PERCIVAL DEWOLFE TILLEY, New Brunswick Admiralty District—appointed, August 14, 1935.

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

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

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

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

DEPUTY DISTRICT JUDGES:

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

do J. B. M. BAXTER—New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable LOUIS S. ST. LAURENT, K.C.

TABLE OF CONTENTS

Memoranda *re* Appeals VII

Table of the Names of Cases Reported in this Volume..... IX

Table of the Names of Cases Cited in this Volume..... XI

Report of the cases adjudged..... I

Index 255

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE EXCHEQUER COURT OF CANADA

A. To the Judicial Committee of the Privy Council:

1. *Fiberglas Canada Ltd.* v. *Spun Rock Wools Ltd. et al.* (1942) Ex. C.R. 73. Appeal to the Supreme Court of Canada allowed. (1943) S.C.R. 547. Leave to appeal to the Privy Council granted. Appeal pending.
2. *Lafayette et al* v. *Maple Leaf Milling Co. et al.* (1939) Ex C.R. 368. Appeal to the Supreme Court of Canada allowed. (1941) S.C.R. 66. Appeal to the Privy Council abandoned.
3. *Lafayette et al* v. *Port Colborne & St. Lawrence Navigation Co. Ltd.* (1939) Ex. C.R. 355. Appeal to the Supreme Court of Canada allowed. (1941) S.C.R. 66. Appeal to the Privy Council abandoned.
4. *Montreal Coke & Mfg. Co.* v. *Minister of National Revenue.* (1941) Ex. C.R. 30. Appeal to the Supreme Court of Canada dismissed. (1942) S.C.R. 89. Appeal to the Privy Council dismissed.
5. *Montreal Light, Heat & Power Consolidated* v. *Minister of National Revenue.* (1941) Ex. C.R. 21. Appeal to the Supreme Court of Canada dismissed. (1942) S.C.R. 89. Appeal to the Privy Council dismissed.

B. To the Supreme Court of Canada:

1. *Bitter, Edward* v. *Secretary of State of Canada.* (1944) Ex. C.R. 61. Appeal pending.
2. *Braun, Mary* v. *The Custodian.* (1944) Ex. C.R. 30. Appeal dismissed.
3. *British Drug Houses Ltd* v. *Battle Pharmaceuticals.* (1944) Ex. C.R. 239. Appeal pending.
4. *Gauthier & Co. Ltd.* v. *The King.* (1944) Ex. C.R. 17. Appeal allowed.
5. *Highwood-Sarcee Oils Ltd.* v. *Minister of National Revenue.* (1942) Ex. C.R. 56. Appeal dismissed.
6. *King, The* v. *Dominion Engineering Co. Ltd.* (1943) Ex. C.R. 49. Appeal dismissed.
7. *King, The* v. *Williams, Lloyd Cameron.* (1943) Ex. C.R. 193. Appeal allowed.
8. *Lumbers, Walter G.* v. *Minister of National Revenue.* (1943) Ex. C.R. 202. Appeal dismissed.
9. *Northumberland Ferries Ltd.* v. *The King.* (1944) Ex. C.R. 123. Appeal pending.
10. *St. John Dry Dock & Shipbuilding Co. Ltd.* v. *Minister of National Revenue.* (1944) Ex. C.R. 186. Appeal pending.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

B

Name of Case	Page
Battle Pharmaceuticals, British Drug Houses Ltd. v.	239
Bitter, Edward v. Secretary of State of Canada	61
Braun, Mary v. Custodian, The	30
British Drug Houses Ltd. v. Battle Pharmaceuticals	239

C

Custodian, The, Braun, Mary v.	30

D

Douville, Raymond et al, Zamacois, Miguel v.	208

F

Fraser, C. M. et al, King, The v.	97
Fraser, M. B. et al, King, The v.	97

G

Gauthier & Co. Ltd. v. The King.	17

K

King, The v. Fraser, C. M. et al	97
King, The v. Fraser, M. B. et al	97
King, The, Gauthier & Co. Ltd. v.	17
King, The v. McKelvey, F. B. et al	97
King, The, Northumberland Ferries Ltd. v.	123
King, The, Tremblay, Achille v.	1
King, The, Yarmolinsky, Sam v.	85
King, The, Zakrzewski, Peter v.	163

Mc

McKelvey, F. B. et al, King, The v.	97

M

Name of Case	Page
Minister of National Revenue, Robertson Ltd., Kenneth B. S. v.	170
Minister of National Revenue, St. John Dry Dock & Shipbuilding Co. Ltd. v.	186

N

Northumberland Ferries Ltd. v. The King	123

R

Robertson Ltd., Kenneth B. S. v. Minister of National Revenue	170

S

Secretary of State of Canada, Bitter, Edward v.	61

St

St. John Dry Dock & Shipbuilding Co. Ltd. v. Minister of National Revenue	186

T

Tremblay, Achille v. The King.	1

Y

Yarmolinsky, Sam v. The King.	85

Z

Zakrzewski, Peter v. The King.	163
Zamacois, Miguel v. Douville, Raymond et al	208

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

Name of Case	Where Reported	Page
A & B Taxis Ltd. v. Secretary of State for Air	[1922] 2 K.B.D. 328	139
African Steam Ship Co. v. Swanzy & Kennedy	[1856] 2 Kay & Johns. 660	150
Ager v. Collingridge	[1886] 2 T.L.R. 291	232
Aldridge v. Westbrook	[1841] 4 Beav. 212	116
Ancell v. Rolfe	[1896] W.N. 9	107
Anderson v. Guardian Ins. Co. of Canada	[1933] 54 B.R. 407	5
Attorney-General v. Bouvens	[1838] 4 M. & W. 171	71
Attorney-General v. Higgins	[1857] 2 H. & N. 399	40

B

Baelz v. Public Trustee	[1926] Ch. D. 863	46
Bagshaw v. Pimm	[1900] P. 148	118
Ballard v. North British Ry. Co.	[1923] S.C. 43	25
Barclays Bank v. Paton et al	[1933] 38 Q.P.R. 72	121
Baumfelder v. Secretary of State of Canada	[1927] Ex. C.R. 86	68
Becker v. Goodman	[1931] 51 B.R. 159	7
Belcher v. Williams	[1890] 45 Ch. 510	107, 117
Bellew v. Bellew	[1868] W.N. 253	106
Besnier v. The King	[1924] Ex. C.R. 26	166
Bidder et al and North Staffordshire Ry. Co.	[1878-9] 4 Q.B.D. 412	142
Bijeau v. Gammon	[1940] 15 M.P.R. 198	22
Blake v. Imperial Brazilian Ry.	[1884] 2 T.C. 58	193
Blake Co., C. G. v. United States	[1921] 275 Fed. 861 [1922] 279 Fed. 71.	154
Blakey v. Latham	[1888] W.N. 126	118
Bolchow v. Fisher	[1882] 10 Q.B.D. 161	96
Boots Pure Drug Co. Ld's Trade Mark "Livron", *In re*	[1937] 54 R.P.C. 327	248
Boswell v. Coaks	[1887] 36 Ch. 444	117
Bradbury v. English Sewing Cotton Co.	[1923] A.C. 744	43
Bramwell v. Halcomb	[1836] 3 Myl. & Cr. 737	231
Brassard v. Smith	[1925] A.C. 371	41, 75
Braun, Mary v. Custodian	[1944] Ex. C.R. 30	69
Brossoit v. Turcotte	[1875] 20 L.C.J. 141	239
Brown v. Helvering	[1934] 291 U.S. 193	179
Brown et vir v. Winterbottom et al	[1917] 19 Q.P.R. 162	121
Bull v. West London School Board	[1876] 34 L.T. 674	105
Byrne v. Statist Co.	[1914] 1 K.B. 622	236

C

Capital Trust Corpn. Ltd. et al v. Minister of National Revenue	[1936] Ex. C.R. 163. [1937] S.C.R. 192	181
Carroll v. Harrison	[1910] W.N. 104	107
Casselman v. Ottawa, Arnprior & Parry Sound Ry. Co.	[1898] 18 P.R. 261	89

C—*Concluded*

Name of Case		Where Reported	Page
Catling's Estate, *In re*	[1890]	W.N. 75	108
Catton v. Banks	[1893]	2 Ch. 221	106
Cedars Rapids Mfg. & Power Co. v. Lacoste	[1914]	A.C. 569	134
Chalin v. Gagnon	[1898]	5 R. de J. 320	239
Charles Brown & Co. v. Commissioners of Inland Revenue	[1930]	12 T.C. 1256	198
Christiansen's Trade Mark, *In re*	[1886]	3 R.P.C. 54	250
Cimon et al v. Fortin et al	[1930]	34 Q.P.R. 127	121
Claude v. Belisle et al	[1938]	41 Q.P.R. 274	121
Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.	[1942]	2 D.L.R. 657	245
Colonial Bank v. Cady	[1890]	15 A.C. 267	38, 84
Columbia Brewing Co. v. Miller	[1922]	281 Fed. 289	46
Commissioner of Stamps v. Hope	[1891]	A.C. 476	73
Crawford v. Lundy	[1876]	23 Gr. 244	114

D

Dawson v. London Street Ry. Co.	[1898]	18 P.R. 223	89
Day v. Batty	[1882]	21 C.D. 830	106
Dion v. Gagnon et al	[1924]	27 Q.P.R. 93	121
Direction der Disconto-Gesellschaft v. United States Steel Corpn.	[1924]	300 Fed. 741	59
Disconto-Gesellschaft v. U. S. Steel Co.	[1925]	267 U.S. 22	51
Dixon v. The Winnipeg Electric Street Ry. Co.	[1895]	10 M.R. 660	90
Dodge v. The King	[1906]	38 S.C.R. 155	160
Drapeau v. Boivin	[1933]	54 B.R. 133	5
	[1935]	S.C.R. 628	6

E

Edward Collins & Sons Ltd. v. Commissioners of Inland Revenue	[1924]	12 T.C. 773	179
Edwards v. Cuba Railroad Co.	[1925]	268 U.S. 628	200
English Scottish & Australian Bank Ltd. v. Commissioners of Inland Revenue	[1932]	A.C. 238	73
Eno v. Dunn	[1890]	15 A.C. 252	248

F

Farr v. Sheriffe	[1845]	4 Hare's Rep. 512	105
Federal District Commission v. Dagenais	[1935]	Ex. C.R. 25	134, 135, 139
Fradette v. The King	[1918]	17 Ex. C.R. 137	166
Fraser et al v. City of Fraserville	[1917]	A.C. 187	134
Frothingham & Workman Ltd. v. Shean et al	[17]	Q.P.R. 159	121

G

Gagnon v. Robitaille	[1909]	16 R.L. (N.S.) 235	7
Garey v. Whittingham	[1842]	5 Beavan 268	109
Garvan v. Marconi Wireless Telegraph Co.	[1921]	275 Fed. 486	46
Gaunt v. Taylor	[1840]	2 Beavan 346	108
Gauthier v. The King	[1918]	56 Can. S.C.R. 176	8, 167
Girard v. Tremblay	[1934]	40 R. de J. 467	239
Goodbun v. Mitchell et al	[1928]	37 M.R. 451	96
Gordanier v. Canadian Northern Ry Co.	[1904]	15 M.R. 1	90
Gorham v. Gorham	[1870]	17 Gr. 386	114
Goring v. The London Mutual Fire Ins. Co.	[1885]	10 P.R. 642	87
Grainger v. Martin	[1862]	4 B. & S. 9	152
Greedy v. Lavender	[1848]	11 Beavan 417	105
Gribble v. Manitoba Free Press Co. Ltd.	[1931]	3 W.W.R. 570	236

H

Name of Case	Where Reported	Page
H.R.H. The Nizam State Ry. Co. v. Wyatt	[1890] 24 Q.B.D. 548	193
Hanley v. Hayes	[1924] 55 O.L.R. 361	5
Harbin v. Masterman	[1896] 1 Ch. 351	109
Hartnett v. Canada Mutual Aid Association	[1888] 12 P.R. 401	88
Hawkes & Son Ltd. v. Paramount Film Service Ltd.	[1934] Ch. 593	231
Helvering v. Claiborne-Annapolis Ferry Co.	[1938] 93 Fed. (2nd) 875	200
Henderson's Patent, *In re*	[1901] A.C. 616	111
Hodson v. Cash	[1855] Jur. 864	112
Hopkinson's Patent, *In re*	[1896] 14 R.P.C. 5	110
Howe v. Smith	[1884] 27 Ch. D. 89	184
Howgrave v. Cartier	[1814] 3 Ves. & B. 79; 35 E.R. 409	103
Hubbard v. Latham	[1866] 35 L.J. Ch. 402	111

I

Inglis v. Guelph Lumber Co. et al	[1885] 10 P.R. 600	118
Isaac, *In re*	[1897] 1 Ch. 251	114

J

Jellenik v. Huron Copper Mining Co.	[1899] 177 U.S. 1	45
John Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd.	[1936] All E.R. 379	236

K

King, The v. Armstrong	[1908] 40 Can. S.C.R. 229	8, 167
King, The v. Beech	[1930] Ex. C.R. 133	136
King, The v. Dubois	[1935] S.C.R. 378	10
King, The v. Estate of John Manuel	[1915] 15 Ex. C.R. 381	134
King, The v. Halifax Graving Dock Co. Ltd.	[1920] 20 Ex. C.R. 44	134
King, The v. Lovitt	[1912] A.C. 212	73
King, The v. Macpherson et al	[1914] 15 Ex. C.R. 215	157
King, The v. W. D. Morris Realty Ltd.	[1943] Ex. C.R. 140	136
King, The v. Moscovitz	[1935] S.C.R. 404	11
King, The v. National Trust Co.	[1933] S.C.R. 670	42, 75
King, The v. Quebec Skating Club	[1931] Ex. C.R. 103	134
King, The v. Schrobounst	[1925] S.C.R. 458	10
King, The v. Spencer	[1939] Ex. C.R. 340	136, 157
King, The v. Wilson	[1914] 15 Ex. C.R. 283	134
King Lumber Mills Ltd. v. C.P. Ry. Co.	[1912] 2 D.L.R. 345	92

L

Lake Erie & Northern Ry Co. v. Brantford Golf & Country Club	[1916] 32 D.L.R. 219	157
Lamport v. Thompson et al	[1942] 2 D.L.R. 65	98
Langham v. Governors of Wellingborough School	[1932] 101 L.J. K.B. 513	25
Laurie v. Raglan Bldg. Co. Ltd.	[1942] 1 K.B. 152	23
Lavergne dit Renaud v. Lariviere et al	[1910] 12 Q.P.R. 149	121
Leitch v. Grand Trunk Ry. Co.	[1888] 12 P.R. 541; [1890] 13 P.R. 369	88
Lennox & Toronto Board of Education, *Re*	[1926] 58 O.L.R. 427	141
Lincolnshire Sugar Co. Ltd. v. Smart	[1937] A.C. 697	199
Lovitt v. The King	[1910] 43 Can. S.C.R. 106	74, 76
Lucas & Chesterfield Gas & Water Board, *In re*	[1909] 1 K.B. 16	134

Mc

Name of Case	Where Reported	Page
McArthur v. The King	[1943] Ex. C.R. 77	10, 86
McDonald v. United Air Transport Ltd.	[1939] 3 D.L.R. 27	92
McDowell's Application, *In re*	[1927] 44 R.P.C. 335	247
McQueen v. The Queen	[1887] 16 Can. S.C.R. 1	165

Mac

MacRae v. B. C. Electric Ry. Co. Ltd.	[1942] 1 W.W.R. 532	92

M

Maeder's Application, *In re*	[1916] 33 R.P.C. 77	247
Melbourne v. City of Toronto	[1890] 13 P.R. 346	119
Merchant Prince, The	[1892] P. 179	24
Mersey Docks & Harbour Board v. Lucas.	[1883] 2 T.C. 25	197
Miller v. Kaliwerke	[1922] 283 Fed. 746	46
Miller v. The King	[1927] Ex. C.R. 52	166
Mitchell v. Martin & Rose	[1925] 1 D.L.R. 260	120
Montgomery v. The King	[1915] 15 Ex. C.R. 372	86
Morrison v. Grand Trunk R.W. Co.	[1903] 5 O.L.R. 38; [1902] 4 O.L.R. 43	89
Morrison v. The King	[1940] S.C.R. 325	86
Murphy & Lindsay, Bobcaygeon & Pontypool Ry. Co., *Re*	[1905] 6 O.W.R. 361	115

N

National City Bank of New York v. United States	[1921] 275 Fed. 855; [1922] 281 Fed. 754	154
Naval Colliery Co. Ltd. v. Commissioners of Inland Revenue	[1928] 12 T.C. 1017	179
Newcastle Breweries Ltd. v. The King	[1920] 1 K.B.D. 854	157
New York Life Ins. Co. v. Public Trustee.	[1924] 2 Ch. 101	73
Nichols & Shephard Co. v. Skedanuk	[1912] 2 W.W.R. 1002	91
Nish Yashan v. Burton	[1931] 37 R.L. (N.S.) 115	7
North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.	[1899] A.C. 83	243
Noyes v. La Cie d'Imprimerie et de Publication	[1890] M.L.R. 6 C.S. 370	239

O

Odell v. City of Ottawa	[1888] 12 P.R. 446	88
Oliver v. The King	[1921] 21 Ex. C.R. 49	166
Osmont v. Petit Journal Inc.	[1935] R.J.Q. 73 C.S. 465	227

P

Pastoral Finance Assn., Ltd. v. The Minister	[1914] A.C. 1083	134
Paul v. The King	[1906] 38 Can. S.C.R. 126	10
Penny v. The Queen	[1895] 4 Ex. C.R. 428	166
Petrie v. Guelph Lumber Co. et al.	[1885] 10 P.R. 600	118
Pianotist Co, Ltd's Application, *In re*	[1906] 23 R.P.C. 774	245
Prince Line Ltd. v. United States	[1922] 283 Fed. 535	154
Protestant Board of School Commissioners of Outremont v. Cooke et al.	[1899] 2 Q.P.R. 251	121

R

Name of Case	Where Reported	Page
Ramsay v. Midland Ry.	[1883] 10 P.R. 48	87
Reade v. Sparkes	[1827] 1 Moll. 8	111
Remnant v. Hood	[1859] 27 Beavan 613	98, 105
Renaud et vir v. Chartier et al.	[1923] 25 Q.P.R. 242	121
Rex v. Commissioners of Taxes for St. Giles & St. George, Bloomsbury	[1915] 7 Rep. T.C. 59	116
Rex v. Williams	[1942] A.C. 541	40
Rogers v. Davis et al.	[1932] S.C.R. 546; [1932] 4 D.L.R. 207	98
Rose & Laflamme Ltd. v. Campbell, Wilson & Strathdee Ltd. et al.	[1923] 4 D.L.R. 92	119
Russell v. London & South-Western Ry. Co.	[1908] 24 T.L.R. 548	25
Rustomjee v. The Queen	[1876] 1 Q.B.D. 487	165

S

Sandow Ld's Application, *In re*	[1914] 31 R.P.C. 196	249
Saunders v. Smith	[1838] 3 Myl. & Cr. 711	231
School Board for London v. Southeastern Ry. Co.	[1886-7] 3 T.L.R. 710	142
Scott v. London & St. Catharine Docks Co.	[1865] 3 H. & C. 596	25
Seaham Harbour Dock Co. v. Crook	[1931] 16 T.C. 333	195
Secretary of State of Canada and Custodian v. Alien Property Custodian for the United States	[1931] S.C.R. 170	40, 53, 76, 81
Shackell v. Drapeau et al.	[1889] 17 R.L. 558	239
Shaw v. City of Winnipeg	[1910] 13 W.L.R. 706	91
Shields, Shields v. London & Western Trust Co., *Re*	[1920] 52 D.L.R. 615	115
Sidney v. North Eastern Ry. Co.	[1914] 3 K.B. 629	134
Sisters of St. Joseph of the Diocese of London v. Fleming	[1938] S.C.R. 172	26
Smith v. Dale	[1880] 18 Ch. 516	113
Smith v. Levesque	[1923] S.C.R. 578	41, 72
Southwark Water Co. v. Quick	[1878] 3 Q.B.D. 315	96
Spitz, Arpad v. Secretary of State of Canada	[1939] Ex. C.R. 162	34
Stebbing v. Metropolitan Board of Works.	[1870] L.R. 6 Q.B. 37	134
Stewart v. Guelph Lumber Co. et al.	[1885] 10 P.R. 600	118
Stoeck v. Public Trustee	[1921] 2 Ch. 67	77
Streatham & General Estates Co. Ltd. v. Commissioners of Works & Public Buildings	[1888] 52 J.P. 615	139
Swedish Central Ry. Co. v. Thompson	[1925] A.C. 495	44

T

Tasse et vir v. Tasse et al.	[1917] 18 Q.P.R. 340	121
Texas & Pacific Ry. Co. v. United States.	[1932] 286 U.S. 285	200
Thomas v. The Queen	[1874] L.R. 10 Q.B. 31	9
Thomson v. The King	[1921] 20 Ex. C.R. 467	166
Todasko v. Bourgie	[1933] 71 C.S. 442	5
Toronto City Corpn. and Toronto Ry. Corpn.	[1925] A.C. 177	139
Tremblay v. The King	[1944] Ex. C.R. 1	167
Twist et al.	[1902] P. 92	112
Tylee v. The Queen	[1876] 7 Can. S.C.R. 651	165

U

United Cigarette Machine Co. v. Canadian Pacific Ry. Co.	[1926] 12 Fed. (2nd) 634	58
United Motor Service Inc. v. Hutson et al.	[1937] S.C.R. 294	24

V

Vase, *Re* ..... [1901] 84 L.T. 761 107

W

Walker v. Baird ..... [1892] A.C. 491 77
Wallace v. Languedoc et al ..... [1902] Q.R. 21 S.C. 298 121
Warner Quinlan Asphalt Co. v. The King. [1923] Ex. C.R. 195 147
Webb v. Webb ..... [1847] 16 Sim. 55 113
Western Vinegar Ltd. v. Minister of National Revenue ..... [1938] Ex. C.R. 39 178
Whimster & Co. v. Commissioners of Inland Revenue ..... [1925] 12 T.C. 813 179
Wing v. London General Omnibus Co.... [1909] 2 K.B. 652 22
Worthington & Co's Trade Mark, *In re*.. [1880] 14 Ch. D. 8 246

Y

Yamashita v. Hudson Bay Ins. Co..... [1918] 3 W.W.R. 671 92

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

ACHILLE TREMBLAY .....SUPPLIANT,

AND

HIS MAJESTY THE KING.....RESPONDENT.

1943

May 18.
Dec. 23.

Crown—Petition of Right—Exchequer Court Act R.S.C. 1927, c. 34, s. 19 (c)—Collision at street intersection—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53, ss. 2 and s. 36, ss. 7—Onus of proof of negligence in claims against the Crown under s. 19 (c) of Exchequer Court Act not displaced by provincial enactment—Applicability of provincial rule of the road governing conduct of driver of motor vehicle at intersections in claim against the Crown under s. 19 (c) of Exchequer Court Act—Liability of the Crown for negligence of servant in driving motor vehicle to be determined by law of negligence of the province, in which alleged negligence occurred, in force on June 24, 1938.

Suppliant seeks to recover damages from the Crown for injuries suffered by his minor son and expenses incurred by himself as the result of a collision at an intersection between a bicycle on which his son was riding and a truck owned by the Crown and driven, within the scope of his duties, by an enlisted soldier of the Royal Canadian Army Service Corps. The Court found that the proximate cause of the collision was the negligence of the driver of the truck and held the Crown responsible for such negligence.

Held: That under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended, the onus of proof rests upon the suppliant in a Petition of Right, to show that there was negligence on the part of an officer or servant of the Crown and that Suppliant's loss or injury resulted from such negligence, notwithstanding any provincial enactment to the effect that the onus of proof shall be otherwise and that s. 53, ss. 2, of the Motor Vehicles Act, Revised Statutes of Quebec 1941, c. 142 has no application in such a claim.

2. That the driver of a vehicle on coming to an intersection must give right of way to a driver coming from his right, not only when the two vehicles are coming into the intersection at the same time, but also when the driver sees a vehicle coming towards the intersection from his right, even although he has himself reached the intersection first, where the vehicles are approaching the intersection so nearly at the same time and at such a rate of speed that if both proceed each without regard to the other, a collision is reasonably to be

1943

TREMBLAY v. THE KING.

apprehended. *Drapeau* v. *Boivin* (1933) 54 B.R. 133; *Anderson* v. *Guardian Insurance Company of Canada* (1933) 54 B.R. 407 at 410, approved.

3. That where a claim is made against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on June 24, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. *The King* v. *Armstrong* (1908) 40 Can. S.C.R. 229 and *Gauthier* v. *The King* (1918) 56 Can. S.C.R. 176 at 180, followed and applied.

4. That the necessity of complying with the Quebec rule of the road governing the conduct of the driver of a vehicle at an intersection gives rise to duties of care on the part of such driver that he shall keep a proper lookout to his right on coming into and passing through the intersection and keep his vehicle under adequate control as to its speed so that he will be able to stop in time to allow a driver coming from his right to pass if his failure to do so would be likely to result in a collision and that these principles are as applicable in a claim against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action.

PETITION OF RIGHT by the Suppliant seeking damages against the Crown for injuries suffered by his son and expenses incurred by himself due to the alleged negligent operation of a motor vehicle owned by the Crown and driven by an enlisted soldier of the Royal Canadian Army Service Corps.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Quebec.

Joseph Bilodeau, K.C. for suppliant.

Fernand Choquette, K.C. for respondent.

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

THE PRESIDENT now (December 23, 1943) delivered the following judgment:

In this Petition of Right the suppliant claims damages from the respondent in respect of injuries suffered by his minor son, Gerard Tremblay, and expenses incurred by himself as the result of a collision between a bicycle on which his son was riding and a truck owned by

the Crown and driven, within the scope of his duties, by Lance Corporal Alfred Lagacé, an enlisted soldier of the Royal Canadian Army Service Corps. The collision occurred shortly after 1 p.m. on Sunday, August 31, 1941, in the intersection of Second avenue and Eleventh street, at Limoilou, in the city of Quebec. Immediately before the collision the young boy, who was then not quite 10 years of age, was riding on his bicycle on Second avenue proceeding from north to south and the truck was travelling on Eleventh street from east to west. The collision occurred in the northwest corner of the intersection of the two streets. The truck had almost crossed the intersection when the bicycle collided with the rear right wheel of the truck. The young boy was thrown to the ground and suffered in addition to bruises a fracture of the skull.

It is contended on behalf of the suppliant that the accident was the result of negligence on the part of the driver of the truck in driving through the intersection at an excessive speed and failing "to protect his right". The respondent alleges that the driver did not enter the intersection until he had ascertained that the road was clear and sounded his horn, that he entered the intersection slowly and had crossed three-quarters of it when the young boy by faulty operation of his bicycle ran into the right rear wheel of the truck, and that the accident was due to the negligence of the young boy in that he was riding his bicycle at an excessive speed without having control of it by reason of defective brakes and that when he ran into the truck it had almost cleared the intersection. It was denied that the accident was in any way attributable to servants of the Crown or that they had been guilty of any fault.

Counsel for the suppliant contended as a matter of law that once it had been established that there had been a collision between the young boy on his bicycle and the truck driven by Lagacé, while acting within the scope of his duties, and proof had been given of the loss or injury sustained by the suppliant and his minor son as the result of the collision, there was a presumption of negligence on the part of the driver and the onus of proof of lack of negligence then lay on the respondent. In support of this contention he relied upon the provisions of section 53, subsection 2, of the Motor Vehicles Act, Revised Statutes of Quebec, 1941, chap. 142, which reads as follows:

1943

TREMBLAY v. THE KING.

Thorson J.

53. (2) Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

This statutory provision is an important exception to the general rule that in an action based upon negligence the burden of proof of negligence lies upon the plaintiff.

The suppliant in order to succeed against the respondent must bring his claim within the ambit of paragraph (*c*) of section 19 of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, reading as follows:

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

While it is established that the liability of the Crown under this statutory provision is to be determined by the law of negligence in force in the province in which the alleged negligence occurred, this rule is subject to the qualification that such provincial law shall apply only in so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. The liability of the Crown for the negligence of its officers and servants is entirely a statutory one and does not exist in law apart from the express terms of the statute by which it was imposed.

In petitions of right under section 19 (*c*) of the Exchequer Court Act, as amended, the onus of proof rests upon the suppliant not only to show that there was negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment but also that his loss or injury resulted from such negligence; this onus of proof cannot be displaced by any provincial enactment that the onus of proof shall be otherwise; consequently, such a provincial enactment as section 53, subsection 2, of the Motor Vehicles Act, Revised Statutes of Quebec, 1941, chap. 142, which provides that under certain circumstances the onus of proof of lack of negligence shall be upon the owner or driver of the motor vehicle has no application in a claim made under section 19 (*c*) of the Exchequer Court Act, as amended. The onus of proof of negligence in such a claim rests upon the suppliant notwithstanding any such provincial enactment.

The main contention of counsel for the suppliant was that the driver of the truck had been negligent in that he had failed "to protect his right". He relied upon subsection 7 of section 36 of the Motor Vehicles Act, Revised Statutes of Quebec 1941, chap. 142, and the interpretation placed upon it by the Court of King's Bench of Quebec in *Drapeau* v. *Boivin* (1).

Subsection 7 of section 36 of the Motor Vehicles Act, so far as relevant here, reads as follows:

36. (7) At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give the right of way to the driver of a vehicle coming to his right on the other road.

The subsection was carefully considered by the Court of King's Bench of Quebec in *Drapeau* v. *Boivin* (*supra*), where the judgment of the Superior Court of that province was confirmed. Galipeault J. in the course of his opinion held that if effect was to be given to the law the driver of a vehicle could not enter an intersection with his vehicle,

Avant de s'être assuré qu'il ne venait pas sur la rue Caron, à sa droite, de voiture, à proximité de la sienne, et avant de s'être rendu compte qu'une collision n'était ni probable, ni possible.

And went on to say:

Pour se rendre ainsi compte de la situation, le conducteur doit regarder à sa droite avant de s'engager dans le croisement des chemins: si la vue lui est cachée, il doit user d'une précaution plus grande et arreter son véhicule, si nécessaire.

The effect of this decision is that the driver of a vehicle on coming to an intersection must give right of way to a driver coming from his right not only when the two vehicles are coming into the intersection at the same time but also when the driver sees a vehicle coming towards the intersection from his right, even although he has himself reached the intersection first. Indeed as was held in *Todasko* v. *Bourgie* (1) the fact that at the moment of impact the vehicle coming from the left had cleared the greater part of the intersection does not by itself absolve the driver of it from blame. The rule thus laid down must be qualified by the dictates of common sense, as was pointed out by Hall J. in *Anderson* v. *Guardian Insurance Co. of Canada* (2), where he adopted the statement made by Masten J.A. in *Hanley* v. *Hayes* (3) where the Ontario Appellate Division was dealing with a similar statute:

(1) (1933) 54 B.R. 133.
(1) (1933) 71 C.S. 442 at 443. (2) (1933) 54 B.R. 407 at 410.
(3) (1924) 55 O.L.R. 361 at 366.

1943

TREMBLAY v. THE KING.

Thorson J.

Our statute is intended to apply only where the travellers or vehicles upon the intersecting streets approach the crossing so nearly at the same time and at such rate of speed that if both proceed, each without regard to the other, a collision is reasonably to be apprehended.

If the traveller holding the servient position comes to a crossing and finds no one approaching the crossing on the cross-street within such a distance as to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right.

This statement of the law must, I think, be regarded as the law of the province of Quebec governing the conduct of drivers of vehicles at street intersections. It definitely and, in my opinion, properly rejects the view that the right of way at an intersection belongs to the driver of a vehicle who enters it first.

The purpose of the subsection is plain and clear, namely, to prescribe a rule of the road at intersections, the observance of which will lessen the number of collisions at intersections if not eliminate them altogether. As Duff C.J. said in *Swartz* v. *Wills* (1), where the Supreme Court of Canada had before it for consideration a statute similar to the one now under review:

I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible.

The adoption of the contrary view that the driver of the vehicle who first enters an intersection has the right of way even as against a driver approaching the intersection from his right would, in my opinion, not only be a distortion of the language of the subsection but would defeat the purpose of the rule of the road in that it would tend to lead to an increase, rather than a decrease, in the number of collisions at intersections by inviting an increase of speed on the part of drivers of vehicles approaching an intersection and a competition between them in order to enter the intersection first and thus acquire the right of way as against the driver of the other vehicle.

This Court should, in my judgment, apply the rule of the road, as interpreted in *Drapeau* v. *Boivin* (*supra*) to the situation in this case, so far as it is permissible to do so.

Counsel for the respondent pointed out that subsection 7 of section 36 of the Motor Vehicles Act refers only to

(1) (1935) S.C.R 628 at 629.

the right of way as between vehicles at intersections, that the definition of "motor vehicle" in subsection 1 of section 2 of the Act makes it clear that a bicycle is not included in such term and that there is no definition in the Act of the term "vehicle". I understood him to contend that since the subsection does not refer to bicycles it does not apply to the facts of this case. I cannot agree with this view. The fact that the term "motor vehicle" is defined and it is clear from such definition that a bicycle is excluded from its meaning and that the term "vehicle" is not defined at all leads to the conclusion that the latter term is of general application to all vehicles, whether motor or otherwise, and consequently does include a bicycle. But even if this were not so, it is clear that the minor son of the applicant had a perfect right to ride his bicycle on Second avenue. Pedestrians have as much right to the use of the streets as have the drivers of vehicles, motor or otherwise: it is entirely erroneous to assume that motor vehicles have any superior rights. The use of the streets belongs equally to pedestrians and the drivers of vehicles. This statement of equal rights of user of streets and highways as between pedestrians and others is laid down in a number of Quebec cases such as *Nish Yashan* v. *Burton* (1); *Gagnon* v. *Robitaille* (2) and *Becker* v. *Goodman* (3). It follows that a person riding a bicycle on the street has a right of user of the street equal to that of a pedestrian or the driver of any other vehicle.

The necessity of complying with the Quebec rule of the road that governs the conduct of the driver of a vehicle at an intersection, namely, that he shall give the right of way to the driver of a vehicle coming from his right, gives rise to certain duties of care on the part of the driver of the servient vehicle, the one coming from the left, namely, that he shall keep a proper lookout to his right on coming into and passing through the intersection and also that he shall keep his vehicle under adequate control as to its speed, so that he will be able to stop in time to allow the driver of the dominant vehicle, the one coming from the right, to pass if his failure to do so would be likely to result in a collision. It cannot seriously be argued that such a driver would owe lesser or different duties of care to a young boy

(1) (1931) 37 R.L. (N.S.) 115. (2) (1909) 16 R.L. (N.S.) 235.
(3) (1931) 51 B.R. 159.

1943

TREMBLAY v. THE KING.

Thorson J.

approaching an intersection on his right on a bicycle than he would owe to the driver of a motor vehicle coming in the same direction. While the statutory rule of the road may specifically refer only to vehicles at intersections and be silent on the subject of bicycles the duties of care arising from the necessity of complying with such rule of the road enure to the benefit of pedestrians and persons on bicycles as well as to the drivers of motor vehicles.

The principles thus stated would, I think, clearly apply in an ordinary action between subject and subject, but whether they are as fully applicable in a claim against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended, requires consideration. While it is the rule that the liability of the Crown for the negligence of its officers or servants under this section is to be determined by the law of negligence in force in the province where the alleged negligence occurred, this rule is, as already stated, subject to qualification. One qualification has already been mentioned, namely, that the provincial law is inapplicable in so far as it is repugnant to the terms of the statute by which the liability of the Crown was imposed or seeks to impose a liability different from that imposed by Parliament. There is still a further qualification, namely, that the provincial law of negligence that is to be applied is the law that was in force at the time the liability of the Crown was first imposed. This qualification of the rule was enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (1). In that case Davies J. disposed of two questions that had been controversial; at page 248 he said:

> I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the "Exchequer Court Act", and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist;

and went on to say:

> And also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

This statement was approved by Fitzpatrick C.J. in *Gauthier* v. *The King* (2) where he said:

> Although this was a case under section 16 (*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in

(1) (1908) 40 Can. S.C.R. 229. (2) (1918) 56 Can. S.C.R. 176 at 180.

respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

The principle underlying the qualification thus laid down is that when liability was imposed upon the Crown by Parliament there was no law by which such liability could be determined except that which was in force in the several provinces and it was liability in accordance with such provincial law that was imposed. The liability of the Crown having been imposed by Parliament in the light of the existing provincial law, it follows that such liability cannot be altered by a subsequent provincial enactment. Only Parliament itself can alter the nature or extent of the liability which it has imposed.

In view of this qualification of the general rule an important question of law arises. To what extent, if at all, do the provisions of The Motor Vehicles Act, to which reference has been made, apply in the present case? It does not follow from the decisions of the Supreme Court of Canada that have just been cited that the provincial law that should be applied in this case is the law of negligence that was in force in the province of Quebec in 1887, when the Crown was first made liable for the negligence of its officers and servants by section 16 (*c*) of the Exchequer Court Act of 1887. Indeed, Fitzpatrick C.J. in *Gauthier* v. *The King* (*Supra*) at p. 179 makes it clear that it is not always the laws in force at the time of the passing of the Exchequer Court Act to which regard must be had. He said:

> It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the "Exchequer Court Act" to which regard must be had. The error has probably arisen from judicial decisions upon clause (*c*) of section 16 (now sec. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the "Exchequer Court Act". *Thomas* v. *The Queen* (1). The principle is the same however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

It is, therefore, necessary to ascertain when the Crown first became liable for negligence of the kind alleged by the suppliant in this case. The history of section 19 (*c*) of the Exchequer Court Act was reviewed by the Supreme

(1) (1874) L.R. 10 Q.B. 31.

1943

TREMBLAY v. THE KING.

Thorson J.

Court of Canada in *The King* v. *Dubois* (1) and by this Court in *McArthur* v. *The King* (2) and need not be dealt with in detail here.

By section 16, paragraph (*c*), of the Exchequer Court Act as enacted in 1887, this Court was given exclusive and original jurisdiction to hear and determine:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

The liability for negligence imposed upon the Crown under this section was a very narrow one. In order to bring his claim within the statute a suppliant had to prove that the injury of which he complained had occurred actually "on" a public work. If it happened "off" the public work itself, he had no remedy even if the negligence which caused his injury had arisen "on" a public work. This was definitely settled by the Supreme Court of Canada in *Paul* v. *The King* (3) which was followed in a long line of cases. Under the section as thus first enacted it is clear that no liability was imposed upon the Crown for negligence of the kind alleged in the present petition.

In 1917 paragraph (*c*) of section 16, which had now become section 20, was repealed and the following substituted therefor:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work;

Under the section as thus amended it was no longer necessary for a suppliant to prove either that his injury had happened actually "on" a public work or that the negligence which caused it had arisen "on" a public work. It did not matter where the injury happened or where the negligence arose so long as the suppliant could prove that his injury resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, if such duties or employment were "upon any public work". In *The King* v. *Schrobounst* (4), the words "upon any public work" were held to be descriptive of the kind of duties or employment rather than their physical locality. It was not necessary for a suppliant to

(1) (1935) S.C.R. 378.
(2) (1943) Ex. C.R. 77.
(3) (1906) 38 Can. S.C.R. 126.
(4) (1925) S.C.R. 458.

prove that the duties or employment were actually "on" a public work so long as he could show that they were related to or connected with a public work. While the liability of the Crown was substantially enlarged by the amendment of 1917 it did not extend to the negligence of an officer or servant of the Crown while driving a motor vehicle even although he was doing so while acting within the scope of his duties or employment. In *The King* v. *Dubois* (1) it was held by the Supreme Court of Canada, reversing the judgment of the Exchequer Court, that a radio interference motor car was not a "public work" within the meaning of the section and that consequently the Crown was not liable for the negligence of the driver of it even if he was acting within the scope of his employment, since such employment was not employment "upon any public work". The judgment of the Supreme Court of Canada in *The King* v. *Moscovitz* (2), where the Exchequer Court was also reversed, was to a similar effect. "Public work" in the amendment of 1917 had the same meaning as it had in the section as it was first enacted in 1887; a motor vehicle was not a "public work" within such meaning; and the driving of a motor vehicle in itself was not employment "upon a public work". Consequently, where the driving of the motor vehicle was not related to or connected with a "public work", the Crown was not liable for the negligence of the driver, even although he was an officer or servant of the Crown and acting within the scope of his duties or employment.

After these decisions showing the narrow limits of the liability of the Crown for negligence and, no doubt, in consequence of them, the section was further amended in 1938 by deleting from it altogether the words "upon any public work". Thereby liability was imposed upon the Crown for the negligence of its officers or servants regardless of whether their duties or employment had anything to do with "any public work" or not. Not only was the field of liability greatly enlarged but liability was imposed upon the Crown for the first time for negligence in many kinds of duties or employment where there had, previous to the 1938 amendment, been no liability at all.

It was, I think, clearly established by the Supreme Court of Canada in *The King* v. *Dubois* (*supra*) and *The King* v.

(1) (1935) S.C.R. 378. (2) (1935) S.C.R. 404.

1943

TREMBLAY v. THE KING.

Thorson J.

Moscovitz (*supra*) that the section, even as amended in 1917, had imposed no liability upon the Crown for the negligence of its officer or servant while driving a motor vehicle even although he was acting within the scope of his duties or employment in so doing, where the driving of such vehicle was not in any way related to or connected with a public work. It is equally clear, in my opinion, that liability for such negligence was first imposed upon the Crown by the amendment of section 19 (*c*) of the Exchequer Court Act that was made in 1938; it follows from the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (*supra*) and *Gauthier* v. *The King* (*supra*) that in claims against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, when the amendment by which liability for such negligence was first imposed upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. In *Gauthier* v. *The King* (*supra*) Fitzpatrick C.J. pointed out, at page 182:

> Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

It follows that the provisions of The Motor Vehicles Act to which reference has been made, since they were in force prior to 1938, are as applicable in a claim against the Crown made under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action between subject and subject.

It also follows that the principles already stated as to the duties of care that arise from the necessity of complying with subsection 7 of section 36 of the Motor Vehicles Act are fully applicable in the present case.

The only questions that remain for consideration in determining liability are questions of fact, the first being whether Lance Corporal Lagacé, the driver of the truck, kept a proper lookout to his right as he entered and crossed Second avenue, and the second whether he had his car under adequate control in the matter of speed as he was crossing the intersection.

On the first question the evidence of Sergeant Paul Henri Mercier is striking. He was sitting in the cab of the truck to the right of Lagacé. His evidence was that the bicycle could not be seen before the truck entered the intersection but that he did see it coming when the truck was in the centre of the intersection. When he first saw the bicycle it was at least from 40 to 50 feet away from the truck and travelling very fast; the young boy was crying out; the bicycle appeared to be out of control; the boy's feet were not on the pedals; the handle-bars were wobbling, and the bicycle was zig-zagging as it was coming along. He did not make any remark until they had almost crossed the street when he heard a noise behind and called to the driver to stop. The bicycle had run into the truck somewhere about its right rear wheel, the truck having by this time almost crossed the intersection. Sergeant Mercier admitted that it would have been possible to see the boy sooner than he did if he had looked in that direction.

Lance Corporal Lagacé, the driver of the truck, did not see the young boy on the bicycle at all until just before the collision when Sergeant Mercier spoke to him. He looked in the direction that Mercier had turned and just saw the accident like a passing shadow. He said that the accident was unavoidable and sought to justify this contention by explaining that being almost three-quarters of the way across Second avenue he had then gone too far and that even if he had seen the boy and stopped the accident would have happened anyway.

Lagacé said that he had looked to his right before crossing Second avenue, that he saw nothing there except some children a distance away playing under the trees and on the street and sidewalk and that there were no cars or bicycles on the avenue. There is no doubt in my mind that Lagacé did not look to his right at all as he was crossing Second avenue until Mercier called out to him when he was three-quarters of the way across. He did not see the young boy on the bicycle at all until then, but he

1943

TREMBLAY v. THE KING.

Thorson J.

could have seen him as soon as Mercier did if he had looked to his right as he should have done. Had he done so he could not have failed to see him coming fast on his bicycle to the intersection. If Sergeant Mercier could have seen him before the truck was half way across Second avenue if he had looked in that direction so could Lagacé if he had looked. The evidence is conclusive, in my opinion, that Lance Corporal Lagacé did not keep a proper lookout towards his right as he should have done as he was entering and crossing Second avenue, and I so find. If he had kept such a lookout for vehicles coming from the north he would have seen the young boy coming fast on his bicycle into the intersection and would have known that a collision was imminent unless he either cleared the intersection so that the young boy could pass behind his truck or stopped so that he could pass in front of it. There was clearly a breach of the duty to keep a proper lookout on the part of Lagacé.

On the question of speed I find that the truck was travelling at a rate of speed greater than was reasonable under the circumstances, apart entirely from the statutory provision contained in the Motor Vehicles Act that the rate of speed in crossing intersections in cities should not exceed twenty miles per hour. Mercier says that the driver slowed up at each cross-street and that after slowing up at Second avenue and sounding his horn he crossed Second avenue at about 12 miles per hour and stopped about 8 to 10 feet after the impact. Lagacé says that he was going about 15 miles per hour when he got to the corner of Second avenue, that he slowed up and that when he was half way across Second avenue he was going about 8 to 10 miles per hour, that he put on his brakes as soon as he heard the bicycle strike the truck and came to a stop in 8 or 10 feet, which is considerably less than the length of the truck. I do not believe the evidence of Mercier and Lagacé as to the speed of the truck or the space in which it was stopped after the collision. I accept the evidence on these points given by the two Parent brothers, who were walking north on Second avenue just before the collision and saw the truck pass immediately before the accident and come to a stop afterwards. Neither of these boys knew the suppliant or his minor son until after the accident and I see no reason for not accepting their evidence,

although George Henri Parent was somewhat confused in marking on the plan, exhibit 1A, his position on the street at the time of the collision. He said that the truck was going at a speed of 20 to 25 miles per hour and came to a stop about 60 to 75 feet from the place of the accident. Fernand Parent said that the truck came to a stop about 70 feet from the scene of the accident and he placed its speed as it was crossing Second avenue at from 25 to 30 miles per hour. In my view this evidence is much more consistent with what happened than is the evidence of Lagacé and Mercier. Having regard to the distance which the truck travelled after the collision, which I find to be from 60 to 75 feet, I have no difficulty in finding that the truck was travelling across Second avenue at a rate of speed in excess of 25 miles per hour and that such rate, under the circumstances, was excessive. Lagacé not only failed to keep a proper lookout to his right but also failed in his duty to keep his truck under adequate control in that he was travelling at a rate of speed across Second avenue that would have made it difficult, if not impossible, for him to stop in time to avoid the collision even if he had seen the young boy on the bicycle coming from his right as soon as he should have done.

There is, I think, no doubt that the young boy was driving his bicycle on the right side of Second avenue. He says so in his evidence although he admits having told Major Coote sometime before the trial that he did not know on what side of the road he was. The evidence shows clearly that the collision occurred near the north-west corner of the intersection. The young boy must, therefore, have been riding on his right side of the road as he was coming from the north. He said that he had his hands on the handle-bars and his feet on the pedals but that he does not remember the collision at all. There is nothing strange in this. He did not see the truck coming. Evidence was given on behalf of the respondent of defective brakes on the bicycle, but these were checked after the bicycle had been repaired after the accident. Evidence was given by George Henri Parent that the young boy was travelling at 15 to 20 miles per hour as he was coming south, but it is a matter of common knowledge that estimates of the speed of approaching vehicles are not as reliable as those of the speed of passing ones. I reject the contention made on behalf of the respondent that the

1943

TREMBLAY v. THE KING.

Thorson J.

accident was due to negligence on the part of the young boy. If he was coming towards the intersection at the rate of speed stated by George Henri Parent it would have been evident to Lagacé if he had looked to his right that a collision was likely at the intersection if he did not bring his truck to a stop. If the bicycle was out of the young boy's control it was all the more incumbent upon the driver of the truck to avoid the collision since he was under a duty to give right of way to vehicles coming from his right and he did not owe a lesser duty to a young boy on a bicycle than he would have owed to the driver of a vehicle, particularly if the bicycle was out of control and the young boy was apparently in danger.

I find that the proximate cause of the collision was the negligence of Lance Corporal Lagacé, the driver of the truck, in failing to keep a proper lookout to his right as he entered and crossed Second avenue and in driving through the intersection at an excessive rate of speed. If he had looked to his right as he should have done he could not have failed to see the young boy coming to the intersection on his bicycle and if he had kept the truck under proper control in the matter of speed as he was crossing the intersection he could have stopped in time to allow the boy on the bicycle to pass. His failure to live up to the duties of care that lay upon him was the cause of the injury sustained by the suppliant and his minor son and was negligence on his part.

For this negligence the respondent is responsible, since it is clear that Lagacé while driving the truck was acting within the scope of his employment, and, being a member of the military forces of His Majesty in the right of Canada, is, by virtue of the amendment of the Exchequer Court Act, Statutes of Canada, 1943, chap. 25, deemed to be a servant of the Crown. Since this amendment the decision of this Court in *McArthur* v. *The King* (1) is no longer applicable in such a case as this.

There remains only the question of quantum of damages. The young boy suffered bruises and a fractured skull. He was only semi-conscious following the accident and suffered severely from shock. At the trial he appeared to be fully recovered. He is doing well in his classes at school and his only complaint was that if he played or ran hard he

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

1943

TREMBLAY v. THE KING.

Thorson J.

became dizzy. The medical evidence, however, was that while the fracture of the skull had knit in a normal way and although such a fracture is less dangerous in young people than in the case of others, nevertheless, there was a partial permanent incapacity which was placed at 5 per cent. I award damages of $600 in respect of the injury sustained by the minor son of the suppliant. The suppliant was duly appointed tutor for his minor son after a family council and the taking of the usual oath and authorized to claim damages for him. He is therefore entitled to receive the sum of $600 for his minor son, Gerard Tremblay, which he will hold for him in accordance with the law of the province of Quebec applicable to such matters. The suppliant has also proved special damages amounting to $105.95 for hospital and medical expenses and the cost of repairing the bicycle and is entitled to receive this amount in his own right. The suppliant is also entitled to costs.

Judgment accordingly.

1943
Nov. 17.

1944
Jan. 12.

BETWEEN:

GAUTHIER & COMPANY LIMITED.... SUPPLIANT,

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Claim for damages under s. 19 (c) of Exchequer Court Act due to collision between a vehicle owned by suppliant and one owned by respondent and operated in the course of duty by a member of the armed forces of Canada—Skidding of vehicle on icy road raises no presumption of negligence on the part of the driver of the vehicle, is not of itself evidence of negligence on his part and is not to be considered apart from the circumstances that caused it—Maxim res ipsa loquitur does not apply on mere proof of the skidding of a vehicle on an icy road—Onus of proof in claims made under s. 19 (c) of Exchequer Court Act rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment.

Suppliant claims damages for loss resulting from collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of duty by a member of the armed forces of Canada. The collision occurred on the Montreal Road and was due to the skidding of the carrier, as it was proceeding west, across the road and into the path of the motor ambulance as it was coming from the west. The Court found that the suppliant had not proved

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

that the skidding was the result of negligence on the part of the driver of the carrier and that the suppliant was not entitled to the relief claimed.

Held: That where there has been a collision between motor vehicles due to the fact that one of them skidded on a slippery or icy road the fact of skidding should not be considered apart from the circumstances that caused it. Proof of the mere fact of such skidding raises no presumption of negligence on the part of the driver of the vehicle and it is not in itself evidence of negligence on his part. The court should look to the surrounding circumstances and draw from them such inference as may be reasonable, but no inference as to presence or absence of negligence is to be drawn from the mere fact of skidding in itself, for that fact is a neutral one. The same view should be taken of the mere fact that a motor car at the time of a collision was on what is commonly called the wrong side of the road. It cannot properly be considered apart from the circumstances that caused it to be there.

2. That the maxim *res ipsa loquitur* does not apply on the mere proof of the skidding of the motor vehicle on a slippery or icy road and, no *prima facie* case of negligence on the part of the driver of the vehicle being established thereby, no onus of proof is cast upon the respondent either to show that the collision was due to inevitable accident or that it was not due to negligence on the part of the driver.

3. That in claims made under section 19 (*c*) of the Exchequer Court Act the onus of proof rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment. Where the collision was caused by the skidding of the motor vehicle owned by the Crown suppliant must prove negligence in the operation of the vehicle on the part of its driver, that is, some breach of the duty of care, skill and judgment that might reasonably be expected from him. If the Court cannot draw a fair and reasonable inference of negligence from the circumstances surrounding the skidding and consequent collision it should not give effect to the suppliant's claim for damages.

PETITION OF RIGHT by suppliant herein to recover from the Crown damages for loss resulting from a collision between suppliant's vehicle and one owned by the Crown due to the alleged negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

W. F. Schroeder, K.C. and *J. L. Kemp* for suppliant.

Robert Forsyth, K.C. for respondent.

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

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

THE PRESIDENT now (January 12, 1944) delivered the following judgment:

The suppliant claims damages from the respondent for loss resulting from a collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of his duties by Private Douglas Dunn, a member of the armed forces of Canada.

The collision occurred at about 1.45 p.m. on January 11, 1942, on the Montreal Road, part of Ontario provincial highway No. 17, about a mile or so east of the village of Orleans.

The suppliant's motor ambulance was proceeding easterly on the south half of the road at about 25 miles per hour. The Bren gun carrier was travelling westerly on the north half of the road at from 10 to 12 miles per hour. As the carrier was on a slight curve, the rear end of it slid off to the driver's left and the carrier skidded across the road directly in the path of the suppliant's motor ambulance as it was coming from the west so that the driver of it was unable to stop in time to avoid running into the side of the carrier, as it came to a stop on the south half of the road.

The damage to the motor ambulance amounted to $409.94 for necessary repairs and in addition the suppliant was put to the expense of $100 for the use of another motor ambulance while the repairs were being made.

The roadway was well ploughed and was from 24 to 26 feet wide with a snow bank on each side of the ploughed portion. The surface was of hard-packed snow without ruts. Langlois, the driver of the suppliant's motor ambulance, said that the road was a little icy. Constable Harkness stated that a snow-packed surface was ordinarily slippery but that the road was in good winter condition and safe for driving. It had snowed a little and there had been some sleet, but this had not made the road dangerous. It would be fair to find that the road was slippery, but not dangerously so.

It was alleged in the petition of right that as the Bren gun carrier (described in the petition as a tank) was proceeding in a westerly direction along the highway it began to zig-zag on the highway for approximately one hundred feet when it regained its own or the north side of the highway, but that when it was a short distance from the ambu-

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

lance it again commenced to zig-zag and suddenly and without warning crossed the centre line of the highway to the southern side thereof and came into violent collision with the motor ambulance of the suppliant. The suppliant alleged that the collision was the result of negligence on the part of Private Dunn and gave particulars of the negligence alleged.

At the trial the suppliant sought to establish two specific particulars of negligence on the part of the driver, namely, that he did not have his vehicle under control and that he was driving at an excessive rate of speed. Findings of fact are required in respect of these two matters in view of the contradictory nature of the evidence.

[The learned President here considers the evidence and finds that the driver of the carrier had his vehicle under complete control and was driving it on a steady course until it suddenly skidded and that prior to the skidding the carrier was travelling at from 10 to 12 miles per hour.]

The suppliant has not succeeded in establishing either lack of control by the driver prior to the skidding or excessive speed on his part. Indeed, if the carrier had been behaving in the manner described by Langlois and travelling at the speed he ascribed to it, there might well be some question as to whether Langlois had not himself been negligent in continuing to drive as he did. The fact is that both vehicles were driving on their own respective sides of the road, when the carrier skidded across the road in the path of the oncoming motor ambulance so that it could not avoid crashing into the side of the carrier. After the impact the carrier was crossways on the south half of the road with its back end close to the snow bank on the south side of the road.

Counsel for the suppliant in his argument did not base the suppliant's claim on any specific ground of negligence on the part of the driver of the carrier, with the exception of certain statements made by him on his cross-examination, to which reference will be made later. His main contention was that there was a rule of the road that where the driver of a vehicle meets another vehicle he shall turn out to the right from the centre of the road and allow the vehicle so met one-half of the road free; that the driver of the carrier had broken this rule of the road in that immediately before the collision the carrier had skidded across the road so that

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

it was on the south half of it, on which the motor ambulance was properly travelling; that, consequently, a *prima facie* case of negligence on the part of the driver of the carrier had been established; that the onus lay on the respondent to explain the cause of the collision and show that it was the result of inevitable accident; and that since this onus had not been discharged the suppliant was entitled to succeed. He also relied upon the maxim *res ipsa loquitur*.

I cannot accept the view that the mere presence of the carrier on what is commonly termed the wrong side of the road is necessarily evidence of negligence on the part of its driver. That is not enough, in my opinion, to establish a *prima facie* case of negligence against him. It may frequently happen that driving on the wrong side of the road is a prudent and careful thing to do. Everything depends upon the surrounding circumstances. The mere presence of the carrier on the wrong side of the road, moreover, was not the direct cause of the accident, for if the driver of the motor ambulance had seen it there in sufficient time he could have turned to his left and his failure to do so would have been negligence on his part. It is much more important to consider what happened when both vehicles were in motion and approaching one another. Each was driving properly on its right side of the road when suddenly the carrier skidded across the road in the path of the oncoming motor ambulance. The skidding of the carrier is, therefore, more important than its mere presence on the wrong side of the road. Indeed, the two facts are inseparable. It was the skidding that brought the carrier to the wrong side of the road. If the carrier had not skidded, there would have been no collision. It was the sudden skidding of the carrier into the path of the oncoming motor ambulance that was the direct cause of the collision between the two vehicles. Of this there can, I think, be no doubt. It is important, therefore, to consider whether the skidding of the carrier was the result of negligence on the part of its driver. It is on this issue that the whole case depends.

The question of skidding of motor vehicles on slippery or icy roads has presented considerable difficulty to the courts and there has been some difference of opinion as to what inference, if any, should be drawn from the mere fact

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

of such skidding. The subject was considered by the Nova Scotia Supreme Court (*in banco*) in *Bijeau* v. *Gammon* (1). In that case, Hall J., at page 201, said:

> The fact that defendant's car skidded does not of itself raise a presumption of negligence.

This statement is in accord with general judicial opinion on the matter and presents no difficulty. But Hall J. later, at page 203, said:

> The fact that Gammon's car skidded (in the absence of a plea of inevitable accident), is some evidence that his rate of speed, though reasonable and proper under ordinary conditions, was too great under the condition that prevailed and *ipso facto* he was in some degree negligent.

I confess that I find it a little difficult to understand this statement. If it is, as I think, a finding of fact that the particular skidding was due to excessive speed under the conditions that prevailed and that under the circumstances of the case, it was due to negligence, no exception can be taken to it, but if it is a statement of law that the fact of skidding is itself some evidence of negligence I must, with respect, disagree. I cannot accept the view that the mere fact of a motor vehicle skidding on a slippery or icy road should in itself be regarded as evidence of negligence on the part of its driver. It is a matter of common knowledge that motor vehicles frequently do skid on slippery or icy roads even where there has been no negligence on the part of the driver. Moreover, the statement made by Hall J., if it is to be regarded as one of law, is, in my opinion, contrary to the weight of judicial authority. The question came before the English Court of Appeal in *Wing* v. *London General Omnibus Company* (2). In that case the only evidence adduced at the trial was that a motor omnibus belonging to the defendant, in which the plaintiff was a passenger, skidded upon a road, the surface of which was greasy from rain, and ran into an electric light standard and the plaintiff was in consequence injured. The defendant called no witnesses except as to quantum of damages. At the end of the plaintiff's case counsel for the defendant submitted that there was no evidence either of negligence or of nuisance to go to the jury and the trial judge gave partial effect to that contention by withdrawing from the jury the question of negligence in the driving or

(1) (1940) 15 M.P.R. 198. (2) (1909) 2 K.B. 652.

management of the car. The Court of Appeal held that he had been right in so doing. While this case has been the subject of some criticism it must be taken as deciding that the fact that a heavy vehicle has skidded on a greasy road will not alone suffice to establish negligence on the part of its driver. The fact that motor vehicles frequently skid on greasy roads without negligence on the part of the driver was clearly recognized in that case. In my opinion, the proper view to take of the fact of skidding by itself was stated with accuracy and precision by Lord Greene M.R. in *Laurie* v. *Raglan Building Company, Limited* (1), where he described such a fact as a neutral fact. He was dealing with an argument advanced before the Court that assuming a *prima facie* case of negligence had been established, the fact that a heavily loaded lorry had skidded was sufficient to displace the *prima facie* case. With this argument he disagreed. At page 154, he said:

> In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence.

It may be noted that on the facts of the case he held not only that a *prima facie* case of negligence had been established, which was not displaced by the neutral fact of skidding, but that the skid itself under the circumstances of the case was due to negligence on the part of the driver.

Where there has been a collision between motor vehicles due to the fact that one of them skidded on a slippery or icy road the face of skidding should not be considered apart from the circumstances that caused it. Proof of the mere fact of such skidding raises no presumption of negligence on the part of the driver of the vehicle and it is not in itself evidence of negligence on his part. The Court should look at the surrounding circumstances and draw from them such inference as may be reasonable, but no inference as to the presence or absence of negligence is to be drawn from the mere fact of skidding in itself, for that fact is a neutral one.

The same view should be taken of the mere fact that a motor car at the time of a collision was on what is commonly called the wrong side of the road. It cannot properly be considered apart from the circumstances that caused it to be there.

(1) (1942) 1 K.B. 152.

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

I cannot, therefore, accept the contention that a *prima facie* case of negligence on the part of the driver of the carrier was established by proof either of its mere presence on the wrong side of the road or of the fact that it suddenly skidded into the path of the suppliant's motor ambulance.

There may be cases where, on proof of facts which in themselves do not establish any actual breach of a duty to take care, the law will assume that the burden of proving negligence has been discharged and the respondent will have to meet a *prima facie* case through the operation of the maxim *res ipsa loquitur*. Counsel for the suppliant contended that the maxim should be applied in this case. It is applied in a variety of classes of cases, as was pointed out by Duff C.J. in *United Motor Service, Inc.* v. *Hutson et al* (1) where, after dealing with the kind of cases where the maxim is most frequently applied, he went on to say:

> The phrase *res ipsa loquitur* is, however, used in connection with another class of cases, where by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the category of inevitable accident.

He gave as an example of such class of cases the rule of law in admiralty cases that when a ship in motion runs into a ship at anchor there is *prima facie* evidence of negligence on the part of the ship in motion and the onus is cast upon her to show that the collision was due to inevitable accident —vide *The Merchant Prince* (2). In cases of that sort, as Duff C.J. points out, there is an onus cast upon the defendant because "there is a presumption of law established, the defendant is liable". There is no such rule of law applicable in the present case and it does not come within the category of cases thus described.

That being so, it is unnecessary for the respondent in this case to show that the collision was the result of inevitable accident, even although such a plea appears in the statement of defence. The onus of establishing such a defence, which is not an easy one to discharge, rests upon the defendant only when a *prima facie* case of negligence has been made against him by the operation of some rule of law. That is not the case here and the respondent need not establish affirmatively either that the skidding was due to inevitable accident or that there was absence of negligence on the part of the driver of the carrier.

(1) (1937) S.C.R. 294 at 297. (2) (1892) P. 179.

The suppliant must, therefore, prove negligence in the operation of the carrier on the part of its driver unless the case falls within the kind of cases in which the maxim is most frequently applied. The principle was stated by Erle C. J. in *Scott* v. *London and St. Katherine Docks Company* (1) as follows:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

From this statement of principle it would appear that the *prima facie* case of negligence established by the maxim, where it applies in such classes of cases, may be displaced by a reasonable explanation of the way in which the accident may have happened without any negligence on the part of the defendant, even although there is no proof that it did actually happen in the way suggested. This is the view expressed by Lord Dunedin in *Ballard* v. *North British Railway Company* (2), where he said:

> I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

This statement was quoted with approval by Scrutton L.J. in *Langham* v. *Governors of Wellingborough School* (1).

The meaning of the maxim was explained by Kennedy L.J. in *Russell* v. *London & South-Western Railway Company* (2), as follows:

> The meaning, as I understand, of that phrase * * * is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectured, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of care under the circumstances.

(1) (1865) 3 H. & C. 596 at 601.
(2) (1923) S.C. 43 at 54.

(1) (1932) 101 L.J. K.B. 513 at 516.
(2) (1908) 24 T.L.R. 548 at 551.

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

and later:

> It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of thinks which is complained of.

In the light of these statements as to the circumstances under which the maxim comes into operation I cannot accept the contention that the maxim should apply on mere proof of the skidding of the carrier for if the skidding of a motor vehicle on a slippery or icy road is a matter of common occurrence and may happen without negligence on the part of its driver, and, if the fact of such skidding is a neutral one from which in itself no inference of negligence is to be drawn, then it cannot be said that the fact of such skidding is "eloquent of negligence" nor is it a matter of reasonable argument that negligence was the probable cause of it. The fact of such skidding being a neutral one it follows that it can by itself have no legal consequences. Proof of it cannot, therefore, operate in such manner as to shift the onus of proof from the suppliant or impose any onus of proof upon the respondent. In my view the maxim *res ipsa loquitur* has no application in such a case as this.

It may be well to bear in mind the caution expressed by Davis J. in *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (1) in the following terms:

> It is unfortunate that the maxim *res ipsa loquitur*, which serves satisfactorily when applied to certain cases in which the cause of the accident is known, has become a much over-worked instrument in our courts in recent years and has been extended to apply to a great many different sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application. The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities.

There is no need for the application of the maxim to the facts of the present case. All of the circumstances surrounding the skidding are before the Court and it is for the Court to determine whether the circumstances are such that an inference of negligence on the part of the driver of the carrier should be drawn or not.

In claims made under section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 24, as amended, the onus of proof rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer

(1) (1938) S.C.R. 172 at 177.

or servant of the Crown while acting within the scope of his duties or employment. If he fails to discharge this onus he is not entitled by law to any of the relief sought by him in his petition. In a motor vehicle collision case he cannot escape from the onus that rests upon him by mere proof that the collision was caused by the skidding on a slippery or icy road of a motor vehicle driven by a servant of the Crown, nor can the proof of such a fact cast upon the respondent any onus of proof that the collision or skidding was due to inevitable accident or was not due to negligence on the part of the driver. The suppliant must prove negligence in the operation of the vehicle on the part of its driver, that is, some breach of the duty of care, skill and judgment that might reasonably be expected from him. If the Court cannot draw a fair and reasonable inference of negligence from all the circumstances surrounding the skidding and consequent collision, it should not give effect to the suppliant's claim for damages for he has not brought his claim within the terms of section 19 (*c*) of the Exchequer Court Act, and apart from the terms of this section no liability for negligence is imposed upon the Crown.

In many motor vehicle collision cases where the collision was caused by one of the vehicles skidding on a slippery or icy road it has been an easy matter for the court to draw a fair and reasonable inference from the circumstances of the case that the skidding was due to negligence on the part of the driver of the skidding vehicle, for great care is required of the driver of a motor vehicle when the road is slippery or icy. Most frequently, perhaps, excessive speed, having regard to the condition of the road, has been found to be the cause of the skidding. This Court had no difficulty in drawing such an inference recently in the case of *Huston et al* v. *The King* (unreported). In that case an army truck had skidded down an incline on a curve in the road into the suppliant's car which had come to a stop on its right side of the road with its right wheels off the pavement. I held that the army truck was being driven at too great a rate of speed, having regard to the icy condition of the road and the nature of the curve, and that the driver of the truck was attempting to make the turn to his left down the incline at too great a rate of speed, having regard to the icy condition of the

1943

GAUTHIER & COMPANY LIMITED v. THE KING.

Thorson J.

road, and that this was the cause of the skidding. The road was in a very bad condition and the driver had been travelling at an average of 30 miles per hour until shortly before the collision when this speed had been somewhat but not greatly reduced. In that case speed in excess of what was reasonable under the circumstances constituted negligent operation of the vehicle and was the cause of the skidding and the collision with the suppliant's car. But each case stands on its own facts and the determination by the Court as to whether there has been negligence or not must depend upon the circumstances of the case before it.

That being so, the Court must consider whether an inference should be drawn from the circumstances of the present case that the skidding of the carrier was the result of negligence on the part of its driver. If such an inference cannot fairly and reasonably be drawn, the suppliant's claim cannot be allowed.

The carrier had been doing what was called a track test on the Montreal road. It is equipped at the rear with caterpillar treads on each side. Each set of treads is called a track. There were various kinds of metal in the treads and the purpose of the track test was to see which metals in the treads would stand the most wear. The test could not be carried on at the proving ground, south of the Montreal road and west of Orleans, for a smooth road was required for the purpose and the Montreal road was the smoothest road near the proving round that was available. The track test involved no manoeuvring of the carrier on the road but only a steady run to see how the various kinds of metal in the treads would stand up under the wear and tear of running on the road.

Private Dunn had been sent out on this track test and had taken his carrier as far as Cumberland, about 10 miles east of the proving ground. The drivers of carriers on such tests were under orders to report back to the proving ground with their carriers if the road should become dangerous through sleet or snow. The day had been clear but shortly before the collision it started to snow and sleet. Dunn stated there had been a kind of rain and sleet. This had not shown any effect on the road but he was afraid that it would make the road slippery. He decided to discontinue the road test and report back to the proving ground and he was on his way back to the proving ground when the collision occurred.

Dunn was an experienced driver. He had been driving carriers for about 3 months of which 6 weeks had been on winter roads. Prior to his enlistment he had been a truck driver on the highways since 1928.

[The learned President here considers the evidence and finds that there is no justification for assuming that under the circumstances the rate of speed of the driver of the carrier was unreasonable, and that there is no credible evidence of lack of control of the carrier on the part of the driver up to the moment that it began to skid, and can see no negligence on the part of the driver in continuing to drive as he had safely been doing.]

Private Dunn was unable to give any explanation as to the cause of the skid. He said that he could see no reason for it to happen; it happened so quickly; he saw nothing ahead of him to cause it and afterwards he could not see what had caused it. Staff Sergeant Hall said that the only thing he could attribute the slide to was that the left track of the carrier must have struck a frozen spot somewhere on the road, but he did not see any such spot. This could easily have been the cause of the skidding; it would be a reasonable explanation of how it might have occurred and would be sufficient to displace the effect of the maxim *res ipsa loquitur* if it were applicable leaving the suppliant with the onus of proof of negligence still upon him.

Both Private Dunn and Staff Sergeant Hall gave their evidence in a frank and straightforward manner and I accept their statements.

After the most careful consideration which I have been able to give to the evidence in this case I have come to the conclusion that it would not be reasonable or fair, having regard to all the circumstances, to find that the skidding of the carrier or the collision that resulted from it was due to any negligence on the part of Private Dunn and I am unable to make any such finding. He was under a duty to bring the carrier back to the proving ground and was doing his best to do so.

The result is that, much as the loss to the suppliant is to be regretted, the suppliant has failed to bring its claim within the ambit of section 19 (*c*) of the Exchequer Court Act, as amended, and is, therefore, not entitled to any of the relief sought by the petition of right herein. The suppliant's claim will, therefore, be dismissed with costs.

Judgment accordingly.

1943
Mar. 15, 16.
1944
Mar. 17.

BETWEEN:

MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN ..... } CLAIMANT,

AND

THE CUSTODIAN ..... RESPONDENT.

Enemy property—Claim against Custodian of enemy property—Purpose and effect of Consolidated Orders Respecting Trading with the Enemy, 1916—Orders 6 (1) and 28—Situs of company shares for purpose of determining dispute as to ownership—Treaty of Peace—The Treaty of Peace (Germany) Order, 1920, Sections 33, 34 and 41.

In October, 1919, Jacob G. Braun, a naturalized citizen of the United States, purchased in Cologne, Germany, share certificates for 470 shares of the common stock of the Canadian Pacific Railway Company. The share certificates stood in the names of alien enemies and were bought on the Berlin Stock Exchange through a German banking house. The shares were on the New York register of the Company and transfers were registrable only in New York. Share certificates had transfers on the back endorsed in blank by the registered owners. On April 23, 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy, 1916. In November, 1919, Braun presented the certificates for registration in his own name at the New York office of the Company. Registration was refused on the ground that the shares had been vested in the Canadian Custodian by the Order of April 23, 1919. Share certificates were at all relevant times outside of Canada. The claimant as administratrix of the estate of Jacob G. Braun brought action for a declaration of ownership of the shares with the written consent of the Custodian of Enemy Property given under Section 41 (2) of the Treaty of Peace (Germany) Order, 1920.

Held: That Order 6 (1) of the Consolidated Orders Respecting Trading with the Enemy, 1916, had the effect of nullifying all transfers made, after the publication of the Orders, by or on behalf of an enemy of any securities issued by or on behalf of any government, municipality, or other authority or any corporation or company subject to the legislative authority of Canada, no matter where or to whom the transfer was made or where the security had been issued or where the certificate representing it was physically situate and of preventing the transferee from acquiring any rights or remedies in respect of any such sceurities. *Arpad Spitz* v. *Secretary of State of Canada* (1939) Ex.C.R. 162 followed.

2. That the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by

the court. *Jellenik* v. *Huron Copper Mining Co.*, (1899) 177 U.S. 1, followed. *Disconto-Gesellschaft* v. *U.S. Steel Co.*, (1925) 267 U.S. 22, and *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for United States* (1931) S.C.R. 169 discussed. *Rex* v. *Williams* (1942) A.C. 541 discussed and distinguished.

3. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. The shares in dispute were therefore subject to the jurisdiction of the Court when it made the vesting order of April 23, 1919, were effectively covered by it, and were made the property of Canada and vested in the respondent under The Treaty of Peace (Germany), Order, 1920.

ACTION by the claimant for a declaration as to the ownership of 470 shares of the common stock of the Canadian Pacific Railway Company, represented by certificates purchased in Cologne, Germany, in 1919.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

D. L. McCarthy, K.C., and *W. R. Wadsworth, K.C.*, for claimant.

O. M. Biggar, K.C., and *Christopher Robinson* for respondent.

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

THE PRESIDENT now (March 17, 1944) delivered the following judgment:

The claimant proceeds in this Court with the written consent of the Custodian of Enemy Property, given under section 41 (2) of The Treaty of Peace (Germany) Order, 1920, for a declaration as to the ownership of 470 shares of the common stock of the Canadian Pacific Railway Company, represented by certificates which the late Jacob G. Braun purchased in Cologne, Germany, on October 6, 10 and 17, 1919.

The facts which were placed before the Court in the form of a stated case are not in dispute. The late Jacob G. Braun was until his death a United States citizen, having become naturalized as such in 1886, and was domiciled in Chicago, Illinois, where he carried on an iron and steel business. He had business connections with manu-

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

facturers and others in Cologne, Germany, from whom he obtained supplies, and was in the habit of visiting that city about once a year.

The Government of the United States having granted its citizens a general licence to trade with the enemy, subject to certain exceptions, Braun went to Germany on business on September 5, 1919, and while in Cologne purchased the certificates for the shares in dispute, as well as others, on October 6, 10 and 17, 1919, on the Berlin Exchange through a German banking house. He received 48 share certificates, 4 standing in the name of C. Schlessinger-Trier & Co. and the remainder in the name of Nationalbank fur Deutschland. Both registered holders were German banking houses and alien enemy corporations, and the certificates which Braun acquired were delivered to him by an alien enemy.

The stated case sets out the following important facts. These certificates formed part of a group of certificates issued by the Canadian Pacific Railway Company to the two banking houses mentioned covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchange in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the Company upon each transfer of ownership. The certificates covering the 140,000 shares issued to the two banking houses were registered in the Company's transfer office which it had been authorized to establish and had in fact established in New York City and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

Braun brought the 48 certificates back with him to the United States and shortly after his return in November, 1919, presented them for transfer and registration in his own name at the office of the Company's Registrar of Transfers in New York. Acceptance of the transfers was refused on the ground that they could not be accepted having regard to the Consolidated Orders respecting Trading with the Enemy, 1916. The certificates have since remained in the possession of Braun or the claimant and have at all relevant times been outside of Canada.

Certain steps had been taken in Canada. The Governor in Council had by Order in Council enacted the Consoli-

dated Orders respecting Trading with the Enemy, 1916. Under the authority of Order 28 of the Consolidated Orders the shares of the Canadian Pacific Railway Company standing in the names of C. Schlessinger-Trier & Co. and Nationalbank fur Deutschland, as well as other shares, were made the subject of a vesting order, dated April 23, 1919, by Mr. Justice Duclos of the Superior Court of the Province of Quebec. A copy of this order was furnished to the transfer agents of the Canadian Pacific Railway Company in New York on October 9, 1919, with instructions from the Minister of Finance, who was then the Custodian of Enemy Property, to make appropriate notations on the records, and between that date and October 24, 1919, the transfer agents placed against the accounts in the share register of each of the shareholders named in the order a note to the effect that the shares had been vested in the Custodian by virtue of the order of April 23, 1919. This was the situation that faced Braun when he presented his certificates for transfer and registration in his own name early in November, 1919.

On July 15, 1931, an agreement was made between the Custodian and the Canadian Pacific Railway Company pursuant to which new certificates covering 5,045 shares which then still remained in the names of C. Schlessinger-Trier & Co. and Nationalbank fur Deutschland were issued to the Custodian on July 24, 1931, without the surrender of the certificates which they replaced. These included certificates for the shares, of which the ownership is now in dispute.

The Custodian has exercised the right to exchange the shares for four times the number of new shares in the Company. Of these new shares 1,880 were earmarked as representing the 470 shares upon which the claimant's claim is based and these 1,880 shares still remain in the name of the Custodian.

The Custodian has also received dividends on the shares in question. If Braun had been registered as the owner on his application of November, 1919, and had continued to hold them until 1931, when the Company ceased to pay dividends, he would have received by way of dividends the sum of $81,075 and an additional sum of $3,974.95 in respect of the sale of rights. In addition to her claim for a declaration of ownership of the shares the claimant also seeks judgment for these amounts together with interest thereon.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Braun made unsuccessful efforts to obtain a settlement of his claim almost continuously from 1920. The written consent of the Custodian for the present proceedings was finally given on March 30, 1942, and they were launched on January 28, 1943.

I am unable to distinguish this case in principle from *Arpad Spitz* v. *Secretary of State of Canada* (1). In that case, the claimant was a citizen of Czechoslovakia, which had been recognized as an independent Republic by the Allied Powers in October, 1918. In February, 1919, he purchased in Amsterdam, Holland, from the Berlin Bank 400 shares of the common stock of the Canadian Pacific Railway Company. He sold 110 shares to continental brokers and as to the remaining 290 shares sought a declaration of the Court that the Secretary of State of Canada, as Custodian of Alien Enemy Property, had no interest or right therein and that he was the owner of them. The shares were of exactly the same kind as those now in dispute. They stood in the register in the name of an enemy and the certificates were purchased from an enemy. The shares were on the New York register of the Company and were transferable on the register only in New York. The share certificates themselves had transfers on the back of them endorsed in blank by the registered owner, were in the possession of the claimant and were outside of Canada. In that case also the shares, together with others, were made the subject of a vesting order, by Mr. Justice Duclos of the Superior Court of Quebec on April 23, 1919. The difference in facts between the two cases is that in the *Spitz Case (supra)* the claimant purchased from an enemy before the date of the vesting order, whereas in the present case Braun made his purchase from an enemy after the date of the vesting order. In that respect, the case of the present claimant is even weaker than that of the claimant in the *Spitz Case (supra)*.

Counsel for the claimant contended that Mr. Justice Duclos had no jurisdiction to make the vesting order of April 23, 1919, at all, and that it was a nullity, on the ground that, since the shares in dispute were on the New York register of the Company and transfers were registrable only in New York, the situs of the shares was in New York and the shares were not property in Canada,

(1) (1939) Ex. C.R. 162.

and, consequently, not subject to the jurisdiction of any Canadian court. It followed, according to this argument, that the respondent had no title to the shares either under the Consolidated Orders respecting Trading with the Enemy, 1916, or under The Treaty of Peace (Germany) Order, 1920.

While somewhat similar contentions were made on behalf of the claimant in the *Spitz Case (supra)*, the argument as to the situs of the shares was not advanced as directly in that case as in the present one and further consideration of the important principles involved seems desirable.

The Court is requested to make a declaration as to the ownership of the shares in dispute. Two questions are involved. The first one is whether Braun acquired any rights in the shares when he purchased the certificates from an enemy in Cologne in October, 1919. If he did not, no declaration of ownership in favour of the claimant can be made for if she is to succeed she must do so on the strength of her own claim. The second question is from the viewpoint of the respondent; did he become entitled to the shares under the vesting order of April 23, 1919, or under The Treaty of Peace (Germany) Order, 1920? If the answer is in the affirmative, he has a complete defence to the claim. The two questions are in a sense interlocked with one another and the issue as to ownership is between the parties, each claiming property formerly owned by an enemy, the claimant under a transfer made to Braun by or on behalf of an enemy and the respondent through the vesting order and under the provisions of The Treaty of Peace (Germany) Order, 1920.

Two sets of regulations must be considered, one, a wartime measure, namely, the Consolidated Orders respecting Trading with the Enemy, 1916, and the other, enacted after the war was over, namely, The Treaty of Peace (Germany) Order, 1920.

The situation under the wartime measure must first be dealt with. The Consolidated Orders respecting Trading with the enemy, 1916, were enacted by Order in Council, P.C. 1023, dated May 2, 1916, under the authority of the War Measures Act, and had, therefore, the force of law. They constituted war legislation. One of the purposes of the Consolidated Orders was to prevent any effective

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

enemy dealing with securities of a Canadian company or other body so that they could not validly be sold in neutral countries and become a source of exchange with which war supplies might be bought for enemy use. This purpose was partially served by Order 6 (1) which reads as follows:

> 6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection) by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

The effect of Order 6 (1) was carefully considered in the *Spitz Case (supra)*. Counsel for the claimant in that case had contended that four limitations must be read into it, namely, that the transferee must be a Canadian, that the transfer must be made in Canada, that the registration of the securities must be in Canada, and that the locus of the certificates must be in Canada. These contentions were all rejected by Maclean J., who held that Order 6 (1) effectively prevented the claimant from acquiring a legal or equitable title, or any rights or remedies, to or in the shares under the transfer made to him by the German national.

Order 6 (1) covers securities wherever issued, whether in Canada or outside of Canada, for the term "securities" is defined in Order 1 as follows:

> 1. (1) (*d*) "Securities" shall extend to and include stock, shares, annuities, bonds, debentures or debenture stock or other obligations issued by or on behalf of any government, municipal or other authority or any corporation or company whether within or without Canada.

In this case the issuing company, the Canadian Pacific Railway Company, is incorporated under Canadian law and subject to the paramount legislative authority of Canada. Canada may, therefore, validly legislate on such subjects as the validity or otherwise of the transfers of its shares wherever made, and prohibit it from recognizing any specified persons as having any rights or remedies in respect of such shares. Order 6 (1) of the Consolidated Orders respecting Trading with the Enemy, 1916, had the effect of nullifying all transfers made, after the publication of the Orders, by or on behalf of an enemy of any securi-

ties issued by or on behalf of any government, municipal or other authority or any corporation or company subject to the legislative authority of Canada, no matter where or to whom the transfer was made or where the security had been issued or where the certificate representing it was physically situate and of preventing the transferee from acquiring any rights or remedies in respect of any such securities. Under this state of the law it is clear that Jacob G. Braun did not become the owner of the shares in dispute when he acquired the share certificates. The share certificates were not the shares and his acquisition of them from an enemy gave him no rights at all in respect of the shares. As long as Order 6 (1) of the Consolidated Orders remained in effect, his share certificates were worthless documents.

The rights of the respondent under the Consolidated Orders may now be considered. A further purpose of the Consolidated Orders was to give some Canadian authority exclusive power to deal with enemy-owned Canadian securities during the period of war emergency. Order 28 of the Consolidated Orders had this purpose in view. It provided as follows:

28. (1) Any Superior Court of Record within Canada or any judge thereof may, on the application of any person who appears to the court or judge to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any department of the Government of Canada, by order vest in the custodian any such real or personal property as aforesaid, if the court or the judge is satisfied that such vesting is expedient for the purpose of these orders and regulations, and may by the order confer on the custodian such powers of selling, managing and otherwise dealing with property as to the court or judge may seem proper.

Order 6 (1) prevented the transferee from acquiring any rights from the former enemy owner and a vesting order made under Order 28 (1) transferred all the rights of such enemy owner to the Custodian. The securities were thus frozen and immobilized as far as legislative action in Canada could accomplish such a result.

Under the authority of Order 28, Mr. Justice Duclos of the Superior Court of Quebec made an order on April 23, 1919, vesting in the Custodian 86,831 shares of the Canadian Pacific Railway Company standing in the name of

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Nationalbank fur Deutschland and 50,914 standing in that of C. Schlessinger-Trier & Co. and authorizing him to cause them to be transferred into his own name as Custodian and to vote upon and manage them. The shares thus vested included the shares now in dispute.

It is contended on behalf of the claimant that this vesting order was a nullity so far as the shares in question are concerned on the grounds already stated, namely, that the situs of the shares was in New York because transfers were registrable only there, that the shares were, therefore, not property in Canada and that, consequently, no Canadian court could validly deal with them.

The strength of this contention must be examined and the authorities dealing with the question of the situs of shares must be considered. Before this question is dealt with it is necessary to consider the kind of securities that are involved. The transfers on the back of the share certificates were all endorsed in blank by the registered owners and were part of a group of certificates issued by the Company to be traded in on the stock exchanges in Germany and other European countries as bearer securities. They had, in the ordinary course of events, a sort of negotiability or currency that made them marketable and valuable documents in themselves and were the very kind of certificates and transfers that were considered by the House of Lords in *Colonial Bank* v. *Cady* (1). In that case Lord Watson said, at page 277:

> When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour.

This statement of principle would ordinarily have been applicable to the certificates and transfers in this case but, of course, was no longer applicable to them after the change in the law made by Order 6 (1) of the Consolidated Orders. Lord Watson was careful, however, to make a clear dis-

(1) (1890) 15 A.C. 267.

tinction between the ownership of the certificate and the ownership of the shares represented by it for he went on to say:

> The appellants' witnesses say that the delivery of the certificate, with the transfer executed in blank, "passes the property" of the shares; but that statement must be accepted subject to the explanation by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the Company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.

This classic statement of the fundamental difference between the share certificate and the share must be borne in mind even when the share certificate has on the back of it a transfer endorsed in blank by the registered owner. A share certificate by itself is merely evidence of ownership of the share, but when the transfer on the back of it has been endorsed in blank by the registered owner the document is something more than mere evidence of ownership for it has become a valuable and marketable document in itself because of the right of the holder of it to fill in his own name as transferee and become the registered owner of the share, but it should be noted that this peculiar quality in the nature of negotiability or currency which the document possesses is derived from the endorsement of the transfer in blank and not from the certificate itself. The certificate even with the transfer endorsed in blank is, however, not the same thing as the share. Ownership of the share certificate implies a *jus ad rem*, a right to the thing, that is, a right to obtain the property of the share, whereas ownership of the share denotes a *jus in re*, a right in the thing itself, that is, the property of the share itself. The distinction is as between the property itself and the right to obtain the property. It follows, I think, as a matter of course, that the rights of the holder of such a certificate and transfer endorsed in blank may exist in one place, whereas the share itself may be property in another. In so far as the right to obtain a particular

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

property is in itself property which has value and is marketable as such, a share certificate with a transfer endorsed in blank is property in that sense, but it is not the same property as the property of the share itself. The fallacy of the claimants contention as to situs of the shares now in dispute results largely from failure to observe the distinction between the share certificate and the share, so clearly pointed out by Lord Watson in *Colonial Bank* v. *Cady (supra)*.

In considering decisions as to the situs of shares it is necessary to observe certain cautions. A share is intangible property, a chose in action, a relationship between the shareholder and the company involving rights and duties. In that sense, shares have no fixed and certain physical locality such as land or a chattel would have, but for certain purposes a situs must be found for them. In *Rex* v. *Williams* (1), Viscount Maugham said:

> Shares in a company are "things in action" which have in a sense no real situs, but it is now settled law that for the purposes of taxation under such a statute as the Succession Duty Act they must be treated as having a situs which may be merely of a fictional nature.

A further caution to be observed was stated by Duff J. in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (2) in these terms:

> True it is, that the considerations determining the situs of an intangible item of property, for one purpose, may not be conclusive where it may be necessary to ascribe to it a constructive situs in some other connection, or for some other purpose.

The situs of shares for taxation purposes may, therefore, not be the same as their situs for other purposes. Indeed, even for taxation purposes different tests have been applied in income tax cases from those which have governed in succession duty ones. The purpose for which the situs is fixed must always be kept in mind.

A leading case on the subject of situs of shares is *Attorney-General* v. *Higgins* (3). The question before the court was whether the Crown could claim duty in Scotland in respect of shares in certain public companies in Scotland, which belonged to a testator domiciled in England. Probate of the will had been taken out in England and it was contended that no duty was payable in

(1) (1942) A.C. 541 at 549. (2) (1931) S.C.R. 170 at 195.
(3) (1857) 2 H. & N. 339.

Scotland on the Scottish shares. Pollock C.B. held that the property in Scotland must pay its duty there and Martin B. held, at page 351:

> It is clear that * * * the evidence of title to these shares is the register of shareholders, and that being in Scotland this property is located in Scotland.

In that case the companies were Scottish companies constituted under the Companies Clauses Consolidation (Scotland) Act, 1845, with their chief offices in Scotland. Where there is only one register and that is at the head office of the Company and at the place of its incorporation there is no difficulty in determining the situs of the shares. Their situs is where the register is.

This authority was followed in *Brassard* v. *Smith* (1), where the Judicial Committee had to fix the situs of certain shares of the Royal Bank of Canada for succession duty purposes. The Bank had power by statute to maintain in any province a registry office at which alone shares held by residents in that province were to be registered and could validly be transferred. A person resident and domiciled in Halifax, Nova Scotia, died there leaving shares registered at the office maintained by the Bank at Halifax under its statutory power. Succession duty in respect of these shares was claimed by the Province of Quebec under its Succession Duty Act, on the ground that the head office of the Bank was in Montreal and the shares were, therefore, actually situated in the Province of Quebec. Lord Dunedin quoted with approval the following words of Duff J. in *Smith* v. *Levesque* (2):

> And the Chief Baron's judgment, I think, points to the essential element in determining *situs* in the case of intangible assets for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction."

and then said, at page 376:

> This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question.

The situs of shares for succession duty purposes was thus fixed at the place where the shares could be effectively dealt with. In a subsequent case, *Rex* v. *Williams (infra)*, it was explained that this phrase meant "where the shares can be effectively dealt with as between the shareholder and the company".

(1) (1925) A.C., 371.
(2) (1923) S.C.R. 578 at 586.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Rex v. *Williams* (1) was another succession duty case. There the shares in dispute were those of Lake Shore Mines Ltd., a company incorporated by Letters Patent under the Ontario Companies Act. The company had its head office in Ontario and had two agency offices, one in Toronto, Ontario, and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in the State of New York; the share certificates themselves were physically located in that State; and the transfers on the back had been endorsed in blank by the testator. The question before the Judicial Committee was whether the Province of Ontario had the right under its Succession Duty Act to collect succession duty on the shares on the ground that at the date of death they were situate in Ontario. The shares were transferable on the register either in Buffalo or in Toronto irrespective of where the certificates had been issued. There were, therefore, two places where the shares could be effectively dealt with as between the shareholder and the company. Since the case was a succession duty one the Board had to select one or other of these places as the situs of the shares. The problem was a practical one. The Board recognized that there are special considerations that govern in succession duty cases and approved the statement of Duff J. in *The King* v. *National Trust Co.* (2), where he formulated certain propositions pertinent to the question of the situs of shares for succession duty purposes, one of which is as follows:

> First, property, whether moveable or immoveable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation.

The Board also made it plain that it must deal with the problem in the same way as if there were competing claims for succession duty by two Canadian provinces. If the sole test of the situs of the shares for succession duty purposes were the presence of a register at which the shares could be effectively dealt with as between the shareholder and the company, the Ontario court could have found the situs in Ontario quite as easily as in New York, and, like-

(1) (1942) A.C. 541. (2) (1933) S.C.R. 670 at 673.

wise, there would be nothing to prevent the New York court from fixing the situs in New York. In the result, this might have meant a situs of the shares for succession duty in two places. It was essential to avoid such a result, since for succession duty purposes as between two provinces shares can have only one situs. It was obvious, therefore, that the place of the register could not be the determining factor. It should be noted that the will had been probated in New York and succession duty had been paid there without protest. If a double situs for succession duty purposes was to be avoided an additional test had to be found. At page 559, Viscount Maugham said:

> One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

The Board found this rational ground in the facts that the certificates with transfers endorsed in blank were valuable documents situate in Buffalo and marketable there and that the lawful holder of them could be registered as owner of the shares without leaving New York, whereas in Ontario no transfer could be registered without production of the certificates and the legal personal representatives of the testator in New York could not be compelled to part with them in order to enable the transfers to be effected in Ontario. Therefore, as Viscount Maugham put it, at page 560:

> In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.

A practical solution of the problem which resulted in only one situs for succession duty purposes was thus found. The decision is a special one depending upon the peculiar circumstances of the case and the particular considerations that govern succession duty cases. It cannot be regarded as an authority of general application on the subject of the situs of shares.

In other taxation cases, the situs of shares has been fixed without regard either to the place of incorporation of the company or the place of register. In *Bradbury* v. *English Sewing Cotton Co.* (1), for example, the House of Lords held that for the purpose of the Income Tax Acts the locality of shares of stock of a company was to be determined not by its place of incorporation or registration but by its place of residence and trading. For income tax

(1) (1923) A.C. 744.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

purposes, the test is not where the shares can be effectively dealt with as between the shareholder and the company but where are the shares to be regarded as a source of income for income tax purposes. *Swedish Central Railway Co.* v. *Thompson* (1).

It is apparent that, in fixing the situs of shares, the courts have not adopted a uniform standard for all purposes. Decisions on the subject must be applied with great care and always with due regard to the purpose for which the situs was fixed.

The Court is not now concerned with the situs of the shares for taxation purposes. Furthermore, the test as to where the shares can effectively be dealt with "as between the shareholder and the company" is not applicable at all, in view of the fact that under Order 6 (1) of the Consolidated Orders the shares in dispute cannot be effectively dealt with anywhere as between the shareholder and the company. In the present case, the Court must ascertain the situs of the shares for the purpose of determining the dispute as to their ownership between the claimant and the respondent. For this purpose, even apart from the provisions of Order 6 (1) of the Consolidated Orders, the test is not where the shares can be effectively dealt with "as between the shareholder and the company", but rather, where the dispute as to their ownership can be effectively dealt with; that is, where can the shares be effectively dealt with "by the court" in the sense that it can enforce its judgment as to their ownership and the answer is that the court can effectively deal with the shares where it has jurisdiction over the company which issued them, in accordance with the law of the domicile of the company under which it was created and to which it is subject.

This view as to the situs of shares is, I think, within the authority of *Attorney-General* v. *Higgins (supra)*, and within the real meaning of the statement of Duff J. in *Smith* v. *Levesque (supra)*, when he said that the essential element in determining situs in the case of intangible assets for the purpose of probate jurisdiction was "the circumstance that the subjects could be effectively dealt with within the jurisdiction". It is also in accord with the principle laid down by Lord Watson in *Colonial Bank* v. *Cady (supra)*, at page 275, where he said of the company, which was incorporated in New York:

(1) (1925) A.C. 495 at 504.

The Company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York.

The view thus expressed is the settled rule in the United States, as laid down by the Supreme Court of the United States in the leading case of *Jellenik* v. *Huron Copper Mining Co.* (1). In that case, a suit was brought in Michigan against a Michigan mining corporation and certain individual defendants, who were citizens of Massachusetts. The plaintiffs, who were not citizens of Michigan, claimed that they were the real owners of certain shares of stock of the corporation, the certificates of which were held by the Massachusetts defendants, and sought a decree that they were entitled to them. The defendant corporation pleaded to the jurisdiction of the court that the stock in dispute was not personal property within the district in which the suit was brought. This plea was sustained by the Circuit Court of the United States which held that the proper forum for the litigation of the question involved would be in the State of which the individual defendants were citizens. On appeal to the Supreme Court of the United States this judgment was reversed. Mr. Justice Harlan, giving the opinion of the Supreme Court of the United States, said, at page 13:

> Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individuals domiciled in another State, is a question not presented in this case and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the Company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers of stock may be kept.

The Court also held that the Michigan corporation, being subject personally to the jurisdiction of the court might be required by decree to cancel the certificates held by persons outside of the State and regard the plaintiffs as the real owners of the property interest represented by them.

(1) (1899) 177 U.S. 1.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

The *Jellenik Case (supra)* has been applied and uniformly followed by the federal courts of the United States in determining the validity of the seizure of shares of stock by the Alien Property Custodian of the United States under the provisions of the Trading with the Enemy Act. *Columbia Brewing Co.* v. *Miller* (1); *Garvan* v. *Marconi Wireless Telegraph Co.* (2), and *Miller* v. *Kaliwerke* (3).

In *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft et al. (supra)* it was held that as between the Alien Property Custodian of the United States and the former enemy owner the situs of the shares in dispute was in the State which created the corporation and in which it resides, notwithstanding the location of the share certificates elsewhere and the prior claim of the British Public Trustee, as custodian of enemy property in Great Britain, based upon his seizure in Great Britain of the certificates with transfers endorsed in blank and a vesting order made by the Board of Trade before any steps had been taken by the Alien Property Custodian in the United States.

In England, a similar view was held in *Baelz* v. *Public Trustee* (4). The plaintiff claimed that he was the beneficial owner of certain preference shares and ordinary shares standing in the name of his father in the books of a trading corporation registered in England under the Companies Act and having its register in England. Subsequently all meetings of the members and directors were held in Holland and all the administration and business of the company was conducted by directors domiciled and resident in Holland. The defendant was sued as custodian of enemy property under the Trading with the Enemy Amendment Act 1914 and a declaration was sought by the plaintiff that the shares claimed by him were not on January 10, 1920, a property, right or interest within His Majesty's Dominions or subject to the charge imposed by the Treaty of Peace Orders, 1919-1921, made pursuant to the Treaty of Peace Act, 1919, on the ground that the location of the shares was in Holland, where the company's principal place of business was. The plaintiff's action was dismissed. It was held by Eve J. that there was nothing to support the view that a change of residence by the company would operate to transplant the

(1) (1922) 281 Fed. 289.
(2) (1921) 275 Fed. 486.
(3) (1922) 283 Fed. 746.
(4) (1926) Ch. D. 863.

interest of the individual as a shareholder to the locality of the new residence. At page 869, he said:

> For the contributory's title to his shares, his status as a shareholder and the enforcement of his rights, recourse must be had to the statutory register, which remains localized at the registered office; and to the Court, with which alone, under s. 32 of the Companies (Consolidation) Act, 1908, abides the power to rectify the register.

There were thus two reasons assigned for the decision that the shares were in England, one, the presence of the register there, and the other, that the court had power to rectify the register under the law that governed the company because of its incorporation under such law. It was not merely the presence of the register in England, but also the jurisdiction of the court there over the company and its register, that fixed the situs of the shares in England for the purposes of the case.

It is, I think, a sound rule of law that the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by the court.

The Canadian Pacific Railway Company was incorporated in Canada under the law of Canada and is governed by it and, under such law, is subject to the jurisdiction of the Canadian courts. The situs of the shares in dispute for the purposes of the present case is, therefore, in Canada and they constitute property in Canada. It was within the jurisdiction of the Superior Court of Quebec to make the vesting order of April 23, 1919, and such order effectively vested the shares in the Custodian and transferred the rights of the former enemy owners therein to him, so that, even apart from Order 6 (1), no rights passed to Braun when he acquired the share certificates.

The result is that under the Consolidated Orders respecting Trading with the Enemy, 1916, Braun had no rights in the shares at all and the Custodian had a valid title to them.

Although the Custodian thus became entitled to the shares, his ownership of them was not absolute for no con-

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

fiscation of enemy property was contemplated by the Consolidated Orders. The Custodian was appointed, as Order 23 (1) shows, "to receive, hold, preserve and deal with such property as may be paid to or vested in him in pursuance of these orders and regulations"; and he was to hold and preserve the shares with full power of control and management of them as trustee for Canada until it was determined in the light of the Treaty of Peace what final disposition should be made of enemy property.

The Treaty of Peace between Germany and the Allied and Associated Powers was signed at Versailles on June 28, 1919, and ratified on January 10, 1920. By the Treaties of Peace Act, 1919, Statutes of Canada, 1919, Second Session, Chap. 30, it was provided that the Governor in Council might make Orders in Council for carrying out the peace treaties and giving effect to their provisions. Under this authority The Treaty of Peace (Germany) Order, 1920, was passed by Order in Council, P.C. 755, dated April 14, 1920. This Order superseded the Consolidated Orders respecting Trading with the Enemy, 1916.

Under the provisions of the Treaty of Peace the Allied and Associated Powers (of whom Canada was one) reserved the right to retain and liquidate all property, rights and interests belonging to German nationals within their territories; the validity of all vesting orders and other orders made in pursuance of war legislation with regard to enemy property, rights and interests was confirmed; the liquidation of such property was to be carried out in accordance with the laws of the Allied or Associated State concerned and the proceeds were to be credited by it on its claim against Germany; Germany, on the other hand, undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States. Under this scheme, no property went back to the German national; his only recourse was against Germany.

The effect of The Treaty of Peace (Germany) Order, 1920, upon the issues in this case must now be considered.

In the first place, it should be noted that section 39 of The Treaty of Peace Order contained the following provision:

> 39. No transfer, whether for valuable consideration or not, made after the sixth day of May, 1916, without the leave of some competent

authority in Canada. by or on behalf of an enemy as defined in paragraphs (*a*) and (*b*) of Section 32 of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipality or other body by whom the securities were issued or are managed shall take any cognizance of or otherwise act upon any notice of such transfer.

Order 6 (1) of the Consolidated Orders was thus carried forward into the Treaty of Peace Order. Even if it be assumed that Order 6 (1) of the Consolidated Orders contemplated only a suspension of rights or remedies in respect of a transfer of securities made by or on behalf of an enemy, the suspension was made permanent by the Treaty of Peace Order. From the point of view of Braun, he was left without any rights or remedies in respect of the shares in dispute. He was in the same position under the Treaty of Peace Order as he had been under the Consolidated Orders. That being so, and the rights of the claimant being dependent upon those of Braun, she cannot be declared to be the owner of the shares and her action must fail on that ground alone.

The question should, however, also be considered from the standpoint of the respondent. In what position did the Treaty of Peace Order leave the Custodian with regard to the shares which had been vested in him by the vesting order of April 23, 1919?

The relevant sections of The Treaty of Peace (Germany) Order, 1920, read as follows:

33. All property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada and are hereby vested in the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

34. All vesting orders * * * * , and all other orders, directions, decisions, and instructions of any Court in Canada or any Department of the Government of Canada made or given or purported to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, * * * * are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

41. (2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Cutodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.

(3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

It was under the terms of section 41 (2) that the present proceedings for a declaration of ownership of the shares in dispute were brought.

Under section 34 the vesting order of April 23, 1919, was validated and confirmed and made final and binding upon all persons, subject to the provisions of sections 33 and 41.

The vesting order did not settle the status of the property covered by it as being enemy owned. Section 41 safeguards the rights of persons to property that was not enemy property and was not intended to be retained by the Custodian. The question as to whether any property, right or interest, on January 10, 1920, or theretofore, belonged to an enemy is left by section 41 (2) for this Court to determine and it is obvious that if the Court is to deal with such a question the vesting order cannot be binding upon it. No question of this sort arises in the present case, for at the time of the vesting order the shares stood in the names of enemies and the certificates were held by enemies.

Section 33 had the effect of a general vesting order. Under it all property, rights and interests in Canada that belonged to enemies on January 10, 1920, were declared to belong to Canada and were vested in the Custodian. This covered property, rights and interests that had not been made the subject of any vesting order under the Consolidated Orders. A similar declaration was made in respect of all property, rights and interests in Canada that had belonged to enemies before January 10, 1920, and were in the possession or control of the Custodian on

April 20, 1920, even if such property, rights and interests had been covered by a vesting order under the Consolidated Orders.

Then section 33 (2) made it clear that, although property, rights and interests formerly belonging to an enemy had been vested in the Custodian by vesting orders under the Consolidated Orders and such orders were final and binding upon all persons under section 34, the title of the Custodian was not absolute, for such property, rights and interests belonging to Canada, and when vested in the Custodian by section 33, were held by him in the right of Canada.

It may be argued that the words 'in Canada" in section 33 have the effect that a vesting order is validated and confirmed and made final and binding upon all persons under section 34 only in so far as it covers enemy property, rights and interests "in Canada". While I am not inclined to agree with this view, it is not necessary to decide the point in this case in view of the fact that the shares in dispute come within the terms "property, rights and interests in Canada".

The result is that under The Treaty of Peace (Germany) Order, 1920, the shares in dispute belonged to Canada and were lawfully vested in the respondent. The respondent has by this entitlement a complete defence to the claim made herein.

In view of the argument put forward on behalf of the claimant, it is, I think, desirable to review briefly certain important decisions, other than those already examined.

In *Disconto-Gesellschaft* v. *U.S. Steel Co.* (1), the Supreme Court of the United States had to consider conflicting claims regarding certain shares of the defendant corporation, incorporated in New Jersey. The plaintiff German corporation sought a declaration that they were the owners. The Public Trustee of the United Kingdom, one of the defendants, claimed that he was entitled to be registered as owner, on the ground that the share certificates with transfers endorsed in blank had been in London, England, and had been vested in him as custodian of enemy property in the United Kingdom under a vesting order made by the Board of Trade and that he had seized the share certificates under such vesting order. The Court

(1) (1925) 267 U.S. 22.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

upheld the claim of the Public Trustee as against that of the alien enemies. At page 28, Mr. Justice Holmes said:

> Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things being done by the law of the place to transfer the title * * * *. The things done in England transferred the title to the Public Trustee by English law.

There is nothing in this judgment inconsistent with the *Jellenik Case (supra)*. The judgment does not decide that the situs of the shares was in England, but only that the share certificates with transfers endorsed in blank entitled the owner, both by the law of New Jersey and that of England, to become registered as owner of the shares; that the ownership of the certificate must be determined by the law of England, since the certificate was there; and that the Public Trustee, having validly acquired the ownership of the certificate according to the law of England, was entitled as against the alien enemies, in the absence of a claim by the United States under its paramount power, to be registered as owner of the shares. That the case does not turn upon the situs of the shares, and that, if the United States had asserted its paramount power and claimed the shares as property in the United States, the decision would have been otherwise, is clearly indicated by Mr. Justice Holmes at page 29, as follows:

> If the United States had taken steps to assert its paramount power, as in *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, a different question would arise that we have no occasion to deal with. The United States has taken no such steps. It therefore stands in its usual attitude of indifference when title to the certificate is lawfully obtained.

The judgment, in my opinion, is not an authority on the question of the situs of shares at all.

Counsel for the claimant relied strongly upon the decision of the Supreme Court of Canada in *Secretary of State*

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

of Canada and Custodian v. *Alien Property Custodian for the United States* (1), (known as the *Alien Property Custodian Case*) in support of his main contention. I find no such support in the decision and nothing that weakens in any way the authority of the *Spitz Case (supra)*. Both cases were decided in this Court by Maclean J., the *Alien Property Custodian Case* 10 years before the *Spitz Case*. In the former case his judgment was affirmed unanimously by the Supreme Court of Canada, and in the latter no appeal was taken. The two cases deal with fundamentally different facts. In the *Alien Property Custodian Case*, there was a contest between the United States Custodian and the Canadian Custodian as to which was entitled to certain securities which had belonged to enemies. The United States Custodian, acting under the authority of an Act of Congress, the Trading with the Enemy Act, had demanded the property represented by certain certificates, which were physically situate in New York, issued by Canadian Companies existing under Canadian law with their respective head offices in Canada, and the certificates had all been delivered to him pursuant to such demand between March 27, 1918, and April 27, 1919, and were in his hands before the Canadian vesting orders, under which the Canadian Custodian claimed, were made. It was held that the United States Custodian was entitled to the securities in dispute. The fact that the contest was between the Custodian of two nations, associated with one another in the prosecution of the war and having the same purpose in mind, namely, preventing the enemy from making effective use of securities formerly belonging to enemy nationals, was a dominating fact in the case.

The decision in the *Disconto Case (supra)* carried great weight with the Supreme Court of Canada. There were two important facts which appeared to distinguish the case from the *Disconto Case*, namely, the existence in Canada of the Consolidated Orders respecting Trading with the Enemy, 1916, with no counterpart thereof in the United States case, and the assertion by Canada of her paramount power by the making of the Canadian vesting orders, whereas no steps to assert the paramount power of the United States had been taken in the United States case, but, when both Lamont J. and Duff J. held that

(1) (1931) S.C.R. 169.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

Order 6 (1) of the Consolidated Orders had no application in the case before them, and Duff J. held, in effect, that there had been no assertion by Canada of her paramount power and Lamont J., speaking for the majority of the Court, held that Canada under The Treaty of Peace (Germany) Order, 1920, had relinquished her paramount claim, the two facts which appeared to distinguish the case from the *Disconto Case* disappeared, and the Supreme Court of Canada was able to apply precisely the same principles as had been adopted by the Supreme Court of the United States in the *Disconto Case*.

The validity of the Consolidated Orders respecting Trading with the Enemy, 1916, was not questioned, and the effectiveness of Order 6 (1), where an allied nation was not involved, was fully recognized. Indeed, it was strongly asserted, particularly by Duff J. when, at page 191, he said:

> It was, no doubt, within the power of Canada, and, it may be assumed that such is the effect of Order 6, to nullify transfers so effected of the securities of Canadian companies at whatever undeserved injury to innocent and friendly persons, by prohibiting recognition by Canadian companies of any claim originating or depending upon a transfer by or on behalf of an alien enemy to a transferee however innocent, after the publication of the Consolidated Orders.

Both Lamont J. and Duff J. were agreed that, while Order 6 (1) was valid and effective legislation, it did not apply to the proceedings taken by the United States Custodian under his statutory powers. They both held that the seizure of the certificates made by the United States Custodian, or, as Duff J. put it, the "compulsory proceedings" taken by him could not be regarded as a "transfer made by or on behalf of an enemy" within the meaning of Order 6 (1) and was therefore excluded from its scope. The second ground taken was that the Consolidated Orders were directed solely at the enemy and were not intended to apply to the actions of allied countries.

Having eliminated Order 6 (1), both Lamont J. and Duff J. were agreed that the principles of *Colonial Bank* v. *Cady (supra)* and the *Disconto Case (supra)* should apply, unless there were reasons to the contrary. Lamont J. held that under United States law the United States Custodian became, by his seizure, the lawful owner of the certificates, that the rights of the former enemy owners had been lawfully extinguished and vested in the United States Cus-

todian before the Canadian vesting orders were made, and that at the date of such orders there was no property, right or interest in the securities that belonged to an enemy. Duff J., expressed similar views.

Thus far there is no difference of opinion between the two members of the Court, but there is a divergence of view between them as to the effect of the vesting orders and The Treaty of Peace (Germany) Order, 1920. Duff J. held that, since Order 28 of the Consolidated Orders authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy", it had no application to any of the properties in question. From this it would follow that the vesting orders made under it did not cover them since they were not enemy property. In answer to the argument that the vesting orders were validated and confirmed by section 34 of the Treaty of Peace (Germany) Order, 1920, and made binding on all persons including the United States Custodian, he held that the United States could not be bound by section 34 since the phrase "all persons" in that section did not include the United States of America as a nation. He also held that the Canadian Custodian, under the circumstances, did not represent the "paramount power" of Canada. Lamont J. took a different view and, since he spoke for the majority of the Court, it should, I assume, be regarded as the view of the Court. He held that, even although there was no enemy interest in the securities at the time of the Canadian vesting orders, nevertheless, the securities were validly covered by the vesting orders, since Canada had paramount legislative power over the companies which had issued the certificates and had asserted such power when the shares were vested in the Canadian Custodian by the Courts under the Consolidated Orders but that, under the terms of the Treaty of Peace Order, Canada had relinquished her claim to all vested property that was not enemy property at the time of the vesting orders and that since all the securities had ceased to be enemy property when vested in the Canadian Custodian, the United States Custodian was entitled to them.

It is important to determine not only what the *Alien Property Custodian Case* did decide but also what it did not decide. It does not support the claimant's main contention that the situs of the shares was in New York

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

because transfers were registrable only in New York, for it should be remembered that the United States Custodian was held entitled to all the securities involved in the case, even although in respect of some of them transfers were registrable only in Canada. The place of registration of transfers had nothing to do with the decision.

Nor did the case decide that the situs of the securities involved was not in Canada. The case did not turn upon the situs of the securities at all but upon the existence of rights in the United States flowing from the ownership by the United States Custodian, according to the law of the United States, of the certificates with transfers endorsed in blank and the question was whether such rights constituted "property, rights or interests" in the United States, which could be validly acquired there by the United States Custodian. Lamont J. held that they did. At page 182, he said:

> I think the question may be determined as to all the securities on the ground that, both by Canadian law and the law of the United States, share certificates endorsed in blank by the registered owner are, in the hands of a lawful holder, recognized as "property, rights or interests" which entitles the possessor to be registered as owner.

The situs of the rights involved in the ownership of certificates with transfers endorsed in blank was held to be in the United States, but this did not mean that the shares themselves were in the United States or that they did not constitute property in Canada.

And, most certainly, the case did not decide that the shares and the share certificates even with transfers endorsed in blank are the same thing. Lamont J., after the passage just quoted, cited *Colonial Bank* v. *Cady (supra)* and referred to the distinction made by Lord Watson in that case between the "property of the shares" and "the title which will enable the holder" of the certificate "to vest himself with the shares", and recognizing, as clearly as Lord Watson did, the difference between the property of the shares themselves and the rights of the lawful holder of the certificates, the former a *jus in re* and the latter only a *jus ad rem,* he said, at page 184:

> This right to compel title passed to the United States Custodian on the seizure of the certificates. Even if this right could not be termed property in the strict sense, it is, in my opinion, a right or interest in property which, under both Canadian and United States war legislation, was intended to be dealt with as property of which the beneficial enemy owner was to be deprived.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

It is inherent in the distinction thus drawn that the rights of the holders of the certificate may be in one place, whereas the "property of the shares" may be in another.

Far from supporting the contention of the claimant that the situs of the shares was outside of Canada and, therefore, beyond the jurisdiction of the Canadian Courts, the judgment of the majority of the Court completely repudiates such a contention, for Lamont J. expressly recognized that the securities were subject to the jurisdiction of the Canadian courts because of Canada's paramount legislative authority over the company issuing the certificates, when he said, at page 184:

> Canada, in my opinion, did assert her paramount power when the shares were vested in the appellant by the Courts under the Consolidated Orders.

This, in my opinion, amounts to a holding that the situs of the shares themselves was in Canada, although the rights of the holders of the certificates were in the United States. The case can be put briefly. The United States Custodian, being the lawful holder of the certificates with transfers endorsed in blank, had rights in the United States to property in Canada.

The judgment of the majority of the Court (Rinfret, Lamont and Smith JJ.) is, in my opinion, a strong authority against the contention of counsel for the claimant. Nor can he derive any real comfort from the judgment of Duff J. (for himself and Newcombe J.) upon which he relied. In a supplementary argument in writing, he laid special stress upon the remarks of Duff J., at page 195:

> In addition to everything that has been said as to the importance for the purposes of war measures of getting at the document, which in ignorance of its enemy character could itself be circulated as a valuable asset, there is the circumstance that, in the case of the Canadian Pacific Railway Company's shares, the place for perfecting the legal title and thereby completing the disposition was New York.

as though the Court had thus decided that the shares were beyond the territorial boundaries of Canada and, therefore, outside the jurisdiction of the Canadian Courts to make a vesting order in respect of them. If these remarks were to have such a meaning they would be at variance with the views of the majority of the Court as expressed by Lamont J., but no such construction is reasonably possible. Duff J. did not have to deal with the situs of the shares themselves at all but only with the existence

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

of rights in the United States which could be appropriated there by public authority acting under United States war measures. It is implicit in the majority judgment that, if the Canadian vesting orders had been made before any action had been taken by the United States Custodian, the Canadian Custodian would have held the securities which had been vested in him by the courts, as against the former enemy owners or an individual claiming through them, for the jurisdiction of the courts to make the vesting orders in respect of the securities was expressly recognized. Duff J. did not say that it was beyond the jurisdiction of the Canadian courts to deal with the securities. He did not touch that subject at all, but merely held that Order 28 had no application to any of the properties in question, because it authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy". Nor did he deny the validity of Order 28; on the contrary, it is implied in the very grounds assigned by him for its non-applicability to the securities that, if no action had been taken by the United States Custodian and they were still held by enemies or claimed by an individual through enemies, Order 28 would have applied and a vesting order made under it would have been recognized as valid. In any event the majority judgment recognizes the jurisdiction of the court to make the vesting order and the minority judgment, although silent on the subject, is reasonably capable of the same inferences.

The jurisdiction of the Canadian courts under the Consolidated Orders to make a vesting order covering shares of a Canadian company, even although they were transferable on a register in the United States and the share certificates with endorsed transfers were held there, and the validity of such an order as against a United States company claiming under a transfer from an enemy was fully recognized by the United States Circuit Court of Appeals in *United Cigarette Machine Co.* v. *Canadian Pacific Railway Co.* (1).

There remains only the contention of counsel for the claimant that the *Spitz Case (supra)* is no longer an authority in view of the decision of the Judicial Committee in *Rex* v. *Williams (supra)*. In my view, that decision has no applicability to the case under review either on the facts or in principle.

(1) (1926) 12 Fed. (2nd) 634.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

It is clear from such cases as *Colonial Bank* v. *Cady (supra)*, the *Disconto Case (supra)* and the *Alien Property Custodian Case (supra)* that the property of a share may be in one place, and the rights of the holder of the share certificate may be in another. If the rights of the holder are in themselves property, then there may be "property, rights or interests" in respect of shares in more than one place. In that sense, it is unsound to assign only one situs for all purposes to such tangible property as a share or other chose in action involving a relation between two parties. This view is well put by Learned Hand J. in the judgment of the District Court of the United States in *Direction der Disconto-Gesellschaft* v. *United States Steel Corporation* (1), where he says:

> a share, if we do not wish to call it a chose in action, is at least a legal relation, and can have no special character except by virtue of the parties to the relation. Wherever either party is, there is the property as respects such parts of the relation as touch that party.

It is quite logical, therefore, to say that shares may have a situs in two places, in the sense that a shareholder has rights in one place to shares held by the company for him in another, and that is why it is so necessary in fixing the situs of shares to keep constantly in mind the purpose for which the situs is fixed. For succession duty purposes no such division of a share into a *jus ad rem* and a *jus in re* is possible for everything related to it must be found in one place since the share for such purposes can have only one locus. A succession duty decision such as *Rex* v. *Williams* is not applicable, therefore, in a suit to determine the ownership of the share for that question vitally affects the company part of the relation, since the decision of the court imposes a duty upon the company to recognize as shareholder the person found by the court to be the owner. This, I think, was implied by the Supreme Court of the United States in the *Jellenik Case (supra)* when it said "that the interest represented by the shares is held by the Company for the benefit of the true owner" and "the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner".

(1) (1924) 300 Fed. 741 at 746.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

On the facts, *Williams* v. *Rex* cannot help the claimant, for she is not in the position of the legal personal representative of the testator in that case. She cannot show that her share certificates with transfers endorsed in blank are marketable and valuable documents in themselves; under Order 6 (1) of the Consolidated Orders they were worthless documents and there were no rights of any kind in the shares in the United States, and the shares could not be effectively dealt with there.

The acceptance of counsel's contention would mean that a Canadian company, by establishing a register for its securities outside of Canada, could put all its securities beyond the legislative authority of Canada. The mere statement of the proposition, as counsel for the respondent put it, carries its own contradiction. The argument is quite untenable. Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be.

The shares in dispute were therefore subject to the jurisdiction of the Court when it made the vesting order of April 23, 1919, were effectively covered by it, and were made the property of Canada and vested in the respondent under The Treaty of Peace (Germany) Order, 1920.

The declaration of the Court as to the ownership of the shares in dispute is that they never at any time belonged to the late Jacob G. Braun or the claimant but as at January 10, 1920, and since that date belonged to Canada and were vested in the respondent.

The claims for judgment for the amounts received by the Custodian by way of dividends and in respect of the sale of rights are also dismissed.

In view of the terms of the written consent given by the Custodian that no costs should be awarded against either of the parties, the dismissal of the claim herein will be without costs to either party.

Judgment accordingly.

BETWEEN:

EDWARD BITTER ..... CLAIMANT,

AND

THE SECRETARY OF STATE OF CANADA, AS CUSTODIAN OF ALIEN ENEMY PROPERTY ..... } RESPONDENT.

1942
Dec. 9 & 10.
1944
Apr. 24.

Enemy property—Claim against Custodian of Enemy Property—Consolidated Orders respecting Trading with the Enemy, 1916—Order 28—Definition of enemy—Situs of company obligations and debts—Treaty of Versailles, Part X, Section IV Annex para. 10—The Treaty of Peace (Germany) Order, 1920, Sections 32, 33, 34 & 41.

The action is for the proceeds of note-certificates issued by the Canadian Pacific Railway Company on March 2, 1914, payable on March 2, 1924. The note-certificates were issued from the New York register of the Company and were transferable only on such register until discharged therefrom. They were bought in the name of the Deutsche Bank (Berlin) London Agency for the claimant who then resided in London, England, and remained in the custody of the Bank until after the claimant had left for Germany. On January 4, 1917, the claimant went to Berlin, Germany, where he resided and worked for the head office of the Deutsche Bank until he returned to England in June, 1920. On January 5, 1917, the note-certificates were delivered to the Guaranty Trust Company of New York (London Office) who held them for the claimant subject to the instructions of the Public Trustee of the United Kingdom. They were endorsed by the registered owner to nominees or employees of the Trust Company. On November 6, 1919, the note-certificates were made the subject of a vesting order under the Consolidated Orders respecting Trading with the Enemy, 1916. Possession of them was not obtained by the respondent until November 30, 1925, when they were delivered to the London representative of the respondent by the Guaranty Trust Company of New York (London Office) with a transfer thereof. Payment of the note-certificates and interest was made to the respondent in New York in December, 1925, the note-certificates being payable at Montreal, London or New York. The action is brought by the claimant for the proceeds with the written consent of the Custodian of Enemy Property under section 41 (2) of The Treaty of Peace (Germany) Order, 1920.

Held: That while the claimant was the real and beneficial owner of the note-certificates on November 6, 1919, he was on that date an enemy within the meaning of the Consolidated Orders respecting Trading with the Enemy, 1916, and on January 10, 1920, he was an enemy within the meaning of The Treaty of Peace (Germany) Order, 1920.

2. That the situs of a simple contract debt is in the country where the debtor resides for that is where the debtor is subject to the jurisdiction of the Court and where the debt is properly recoverable or payment of it can be enforced.

3. That for the purposes of the Treaty of Versailles and as between an "enemy" and the Canadian Custodian of Alien Enemy Property the

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

term "all property, rights and interests in Canada", contained in section 33 of The Treaty of Peace (Germany) Order, 1920, includes any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of Canada.

4. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction on Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. When the vesting order of November 6, 1919, was made, Canada asserted her paramount power over the Canadian Pacific Railway Company which had issued the note-certificates and in effect ordered the Company to pay the obligation or debt represented by them to the Custodian instead of the enemy owner. The obligation or debt was thus, by valid and effective Canadian war legislation, localized in Canada. The assertion by Canada of her paramount power over the company was confirmed by the Treaty of Peace and section 34 of The Treaty of Peace (Germany) Order, 1920.

ACTION by the claimant for the proceeds of certain note-certificates issued by the Canadian Pacific Railway Company.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

Auguste Lemieux, K.C. for claimant.

Aimé Geoffrion, K.C. and *Aldous Aylen, K.C.* for respondent.

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

THE PRESIDENT now (April 24, 1944) delivered the following judgment:

The claimant seeks to recover from the respondent the proceeds of certain note-certificates of the Canadian Pacific Railway Company of the face value of $3,500, issued on March 2, 1914, and payable on March 2, 1924.

The note-certificates, usually referred to as 6 per cent Special Investment Fund Notes, were issued in the name of Deutsche Bank (Berlin) London Agency, the London Branch of the Deutsche Bank, whose head office was in Berlin, Germany, from the New York register of the company, and delivered soon after their issue to the registered owner in London, England, in whose custody they remained until January 5, 1917. On that date they were delivered by a clerk in its employ to the Guaranty Trust Company

of New York (London Office), which received them for the account of the claimant and held them subject to the instructions of the Public Trustee of the United Kingdom.

All the 6 per cent Special Investment Fund Notes of the company standing in the names of Deutsche Bank (Berlin) London Agency and other alien enemies on the stock and transfer books of the company or its transfer agents in New York were made the subject of a vesting order, dated November 6, 1919, by Mr. Justice Duclos of the Superior Court of Quebec under the authority of Order 28 of the Consolidated Orders respecting Trading with the Enemy, 1916, by which they were vested in the Custodian of Alien Enemy Property appointed by the Consolidated Orders. The evidence establishes that the note-certificates in question in this action were included in this vesting order.

No formal action to obtain physical possession of the note-certificates was taken by the respondent, who was the Custodian of Alien Enemy Property under The Treaty of Peace (Germany) Order, 1920, until October 26, 1925, when his London representative demanded delivery of them from the Guaranty Trust Company of New York, with the result that they were delivered into his possession on November 30, 1925.

The note-certificates together with a transfer, which had been obtained from the Guaranty Trust Company of New York, were forwarded to the Under-Secretary of State of Canada in Ottawa and reached him on December 15, 1925. They were then sent for payment to the Transfer Office of the company in New York, and on December 24, 1925, the Bank of Montreal at New York sent a cheque for $3,500 to the Deputy Custodian. The Custodian has also realized interest from September 1, 1914, to July 1, 1923, amounting to $1,960. The total amount of $5,460 was placed to the credit of Germany on the Custodian's books, under part II of The Treaty of Peace (Germany) Order, 1920.

Ever since the return of the claimant from Germany to England in June, 1920, he has repeatedly demanded from the respondent either the release of the securities or payment of the proceeds. Written consent for the institution of proceedings in this Court for a declaration as to the ownership of the note-certificates and their proceeds was given under Section 41 (2) of The Treaty of Peace (Germany) Order, 1920, on May 15, 1937, and the present proceedings were launched on June 3, 1937.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

Counsel for the claimant made two main contentions, first, that the claimant was the real owner of the note-certificates at the time of the vesting order, notwithstanding the fact that they stood in the name of Deutsche Bank (Berlin) London Agency, and, secondly, that since the claimant's note-certificates were, at the time of the vesting order and on January 10, 1920, in England, the situs of his property was in England and he had no property, right or interest in Canada that could be covered by the vesting order or The Treaty of Peace (Germany) Order, 1920.

The Consolidated Orders respecting Trading with the Enemy, 1916, were enacted by Order in Council, P.C. 1023, dated May 2, 1916, under the authority of the War Measures Act, 1914, and had, therefore, the force of law. Their purpose was to freeze and immobilize as far as possible all enemy-owned property so that it could not be used as an economic resource for enemy purposes. With that end in view, Order 6 (1) nullified all transfers made after the publication of the Orders by or on behalf of an enemy of any securities issued by or on behalf of any government, municipal or other authority or any corporation or company and Order 28 (1) gave jurisdiction to any Canadian Superior Court or judge thereof to vest in the Custodian of Alien Enemy Property any property belonging to or held or managed for or on behalf of an enemy.

It was not intended that a vesting order made under Order 28 should operate as a confiscation of enemy property, but only, as is shown by Order 23 (1), that the Custodian was "to receive, hold, preserve and deal with such property as may be paid to or vested in him in pursuance of these orders and regulations", until it was determined in the light of the Treaty of Peace what final disposition should be made of it.

The Treaty of Peace between Germany and the Allied and Associated Powers was signed at Versailles on June 28, 1919, and came into force on its ratification on January 10, 1920, which date officially marked the termination of the war. The scheme of the Treaty with regard to the property, rights and interests of German nationals is outlined in Part X, Section IV, Article 297 of the Treaty. The Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests

belonging at the date of the coming into force of the Treaty to German nationals within their territories; the liquidation of such property was to be carried out in accordance with the laws of the Allied or Associated State concerned and the proceeds were to be credited by it on its claim against Germany; Germany, on the other hand, undertook to compensate her nationals in respect of the sale or retention of their property, rigths or interests in Allied or Associated States. The validity of all vesting orders and other orders made in pursuance of war legislation with regard to property, rights and interests was confirmed. Under this scheme no property went back to the German national, his only recourse being against Germany; there was no suspension of his rights to the property taken from him; he lost it permanently and was left only with his claim for compensation against Germany, whose national he was.

By the Treaties of Peace Act, 1919, Statutes of Canada, 1919, Second Session, chap. 30, it was provided that the Governor in Council might make Orders in Council for carrying out the Peace Treaties and giving effect to their provisions. Under this authority, The Treaty of Peace (Germany) Order, 1920, was passed by Order in Council, P.C. 755, dated April 14, 1920. Sections 33 and 34 of this Order read as follows:

33. All property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada and are hereby vested in the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

34. All vesting orders . . . , and all other orders, directions, decisions, and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, . . . are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

The making of a vesting order under the Consolidated Orders did not fix the status of the property covered by it as enemy owned. While Order 28 authorized only the

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

vesting of property "belonging to or held or managed for or on behalf of an enemy", it is clear from Order 33 that a vesting order might be made covering property belonging to a person who was in fact not an enemy although appearing to the Court making the order to be so.

It was, I think, contemplated by the Consolidated Orders that, after the period of war emergency was terminated, provision would be made by legislation for the return of non-enemy property to its non-enemy owners, leaving property that had been owned by enemies to be dealt with in accordance with the Treaty of Peace.

Provision for dealing with a dispute or question whether any property, right or interest belonged on January 10, 1920, or theretofore, to an enemy was inserted in The Treaty of Peace (Germany) Order, 1920, by section 41 as follows:

> 41. (2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.
>
> (3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

Section 41 was intended to provide machinery for several purposes. One was the restoration to its non-enemy owner of property which had come into the hands of the Custodian under a vesting order, made under the Consolidated Orders, where such property had belonged to a person who was in fact not an enemy. It was never intended that any such property should be permanently retained by the Custodian. For that reason it was provided that, although vesting orders made under the Consolidated Orders were validated and confirmed and made final and binding upon all persons by section 34, such orders were, nevertheless, made subject to section 41. Under that section the question of determining whether any property covered by a vesting order had belonged to an enemy was left to this

Court, and it was obvious that if the Court was to determine such a question it could not regard the vesting order as final and binding upon it. Another purpose to be served by section 41 was the ascertainment by the Court whether any property, right or interest was covered by section 33, which operated as a general vesting order.

Under section 41 (2) the Court is required to make a declaration as to the ownership of the note-certificates now in dispute and must determine not only whether they belonged to the claimant on January 10, 1920, or theretofore, but also whether at such times he was an enemy within the meaning of the regulations. It will not be sufficient for him to satisfy the Court that he was the real and beneficial owner of the securities, for he must also show that his property did not belong to an enemy on January 10, 1920, or theretofore. If the Court cannot make the declaration that the property in question or dispute did not belong to an enemy there is no provision in the regulations for relinquishing the proceeds to him.

The facts as to the ownership of the note-certificates are not complex.

[The learned President here deals with the evidence relating to the ownership of the note-certificates and concludes.]

The evidence, I think, amply supports his contention that he was the real and beneficial owner of the note-certificates in question at the date of the vesting order.

While I make this finding, it does not help the claimant, if he was an "enemy" within the meaning of the regulations.

Whether he was such an "enemy" is mainly a question of fact. The term "enemy" is defined by the Consolidated Orders respecting Trading with the Enemy, 1916, as follows:

1. (1) (*b*) "Enemy" shall extend to and include a person (as defined in this order) who resides or carries on business within territory of a State or Sovereign for the time being at war with His Majesty, or who resides or carries on business within territory occupied by a State or Sovereign for the time being at war with His Majesty, and as well any person wherever resident or carrying on business, who is an enemy or treated as an enemy and with whom dealing is for the time being prohibited by statute, proclamation, the following orders and regulations, or the common law, but said expression does not include a subject of His Majesty or of any State or Sovereign allied to His Majesty who is detained in enemy territory against his will, nor shall such last-mentioned person be treated as being in enemy territory.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

The term is given a narrower meaning in The Treaty of Peace (Germany) Order, 1920, where the definition, so far as relevant to this case, is as follows:

> 32. In this Part
>
> (1) "Enemy" means
>
> (*a*) A German national who during the war resided or carried on business within the territory of a Power at war with His Majesty;

Under the Peace Order only a German national could be an "enemy", whereas under the Consolidated Orders there was no such limitation.

That the claimant was a German national during the whole period of the war admits of no doubt.

[The learned President here deals with the evidence relating to the nationality of the claimant and concludes.]

The claimant's own evidence establishes beyond dispute that on January 10, 1920, the claimant was, and had been during the whole period of the war, a German national.

That being so, the determination of whether he was an "enemy" depends upon whether during the war he resided or carried on business within the territory of a Power at war with His Majesty. Under Section 2 (*c*) of The Treaty of Peace (Germany) Order, 1920, the term "during the war" means at any time between August 4, 1914, and January 10, 1920. The fact is undisputed that the claimant was in Germany from early in January, 1917, to June, 1920, and that during that time he worked for his employer, the Deutsche Bank, at its head office in Berlin.

[The learned President here deals with the evidence relating to whether the claimant was an enemy and concludes.]

There is nothing to indicate that he went to Berlin under compulsion or that his residence in Berlin was otherwise than voluntary. This case is clearly distinguishable from that of *Baumfelder* v. *Secretary of State of Canada* (1). The evidence is conclusive that the claimant, a German national, during the war resided and carried on business within Germany, a Power at war with His Majesty. This makes him an enemy within the meaning of the definitions above referred to. The Court cannot, therefore, make a declaration that the property in dispute in this action did not belong to an enemy. On the contrary, the Court finds that while the claimant was the real and beneficial owner of the note-certificates in dispute on November 6, 1919, he

(1) (1927) Ex. C.R. 86.

was on that date an enemy within the meaning of the Consolidated Orders respecting Trading with the Enemy, 1916, and that on January 10, 1920, he was an enemy within the meaning of The Treaty of Peace (Germany) Order, 1920.

The second contention of counsel for the claimant was that since the claimant's note-certificates were in England at the date of the vesting order of November 6, 1919, and at January 10, 1920, the situs of his property was in England, and he had no property, right or interest "in Canada" that could be covered by the vesting order or The Treaty of Peace (Germany) Order, 1920.

While the adoption of this contention would not result in the release of the proceeds of the claimant's property to him since he was an enemy, it does not follow that he is barred from contesting the right of the respondent to retain such proceeds. If he loses his rights to his property under the Peace Treaty and is left only with his claim for compensation against Germany, he does so only if his property has been retained and liquidated in accordance with the Treaty. Each Allied or Associated Power reserved the right to retain and liquidate all property, rights and interests belonging to German nationals within its territory; and it was only with respect to the sale and retention of such property that Germany undertook to compensate her nationals. There was no right given to any Allied or Associated Power to retain or liquidate property that was not within its territory and no undertaking by Germany to compensate her nationals for the loss of such property. The claimant, even though an enemy, is, I think, entitled to have his property dealt with by the Associated or Allied Power that has the right under the Treaty to deal with it. If the situs of his property was in England, he has the right to have it dealt with by the proper authorities in England.

The matter of situs cannot, therefore, be brushed aside as irrelevant. Moreover, the Court, if it is to make a declaration as to the ownership of the property in dispute, must deal with such question from the point of view of the respondent as well as that of the claimant.

Whether the claimant's property, rights or interests were within the territory of Canada is a question of law.

In the recent case of *Mary Braun* v. *Custodian* (1), this Court dealt with the situs of certain shares of the Canadian

(1) (1944) Ex. C.R. 30.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

Pacific Railway Company and rejected contentions somewhat similar to the one now under discussion. In the present case the securities involved are not shares, but obligations of the company evidenced by note-certificates, and, while much of what I said in the *Braun Case* is applicable here, there are considerations governing the situs of company obligations that do not apply to the situs of company shares.

Before the question of situs can be dealt with it is necessary to ascertain the exact nature of the property in dispute. Each note-certificate is described as a "note-certificate of participation in a loan to the company of $52,000,000". A special investment fund of $55,000,000 was set up, of which The Royal Trust Company was the Trustee. The Trustee certifies that the registered owner is a participant in the loan to the amount named and that he is entitled to receive payment in gold at the Canadian Pacific Railway Company's bankers in Montreal, London or New York on March 2, 1924, with interest payable half yearly at 6 per cent per annum, and the company promises to pay the amount thus certified both as to principal and interest. The note-certificate is signed by both the Trustee and the company. It is not under seal and the company's debt is, therefore, not a debt by specialty, but a simple contract debt. It is specified on the face of the note-certificate that it shall not be valid until countersigned by the Transfer Agent and also by the Registrar of Transfers and that it shall be transferable upon the books of the Trustee in the Transfer Office of the company in Montreal, London or New York in person or by attorney upon the surrender of the note-certificates. The note-certificates in question show that they were countersigned, under date of March 2, 1914, by the Transfer Agent in New York, and countersigned and registered, under date of March 31, 1914, by the Registrar of Transfers in New York. Mr. Aljoe, the Vice-President of the Bank of Montreal Trust Company of New York which took over the duties of the Transfer Agent of the company in New York, stated that the note-certificates were on the New York register of the company and were transferable only on that register; that the certificates were not interchangeable and that once they were on a particular register they

remained on such register until discharged from it. I accept his evidence on the matter. The transfers on the back were not endorsed by the registered owners in blank, but to specified persons, namely, J. P. Earnshaw and S. J. Murley, employees or nominees of the Guaranty Trust Company of New York (London Office). The note-certificates could not pass by mere delivery but required a transfer which was registrable only in New York as long as they remained on the New York Register. The securities were, therefore, of a different nature from the share-certificates and transfers endorsed in blank referred to in the *Braun Case*. They did not have the qualities of negotiability and currency that were possessed by the share-certificates and transfers in that case. They were not valuable and marketable documents in themselves but mere evidence of the obligation of the company and of the simple contract debt owed by it. That is the kind of property the situs of which is said by the claimant to be in England and not in Canada.

In the *Braun Case* (*supra*) I pointed out that the courts in fixing the situs of company shares had not adopted a uniform standard for all purposes and that decisions on the question must be applied with great care and always with due regard to the purpose for which the situs was fixed.

There has been much less difficulty in fixing the situs of obligation or debts, such as simple contract debts or debts by specialty, and the basic principles of the common law on the subject are firmly established. The authorities go back to the time of Elizabeth. At first they were confined to cases where it was necessary to ascertain the situs of assets for probate or probate duty purposes, since the probate courts could deal only with personal property that was situate within their jurisdiction. Where the assets were of an intangible nature such as debts or other choses in action, which could not be physically situated in any place, a situs had to be ascribed to them.

The earliest authority that need be referred to is the leading case of *Attorney-General* v. *Bouvens* (1). In that case the test as to the situs of personal property for probate duty purposes was laid down by Lord Abinger C.B., at page 191, as follows:

> Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can

(1) (1838) 4 M. & W. 171.

1944

EDWARD BITTER
v.
SECRETARY OF STATE OF CANADA.

Thorson, J.

be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in *pios usus*.

Then the Chief Baron proceeds with the following well-known and frequently-cited statement:

> As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found.

It is clear from this case that the test as to whether an asset had a situs within the jurisdiction was whether the ordinary could administer it there. He could not administer a debt owed by a debtor resident outside his jurisdiction, for he could do nothing with regard to such a debtor, and it followed that an ordinary could administer a debt within his jurisdiction only if the debtor was resident there. This led to the rule that for probate duty purposes the situs of a simple contract debt is where the debtor resides at the time of the death of the testator, for that is the only place where an ordinary can administer the debt within his jurisdiction.

This is the situation which Duff J. referred to in *Smith* v. *Levesque* (1), when he said that the Chief Baron's judgment pointed to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction".

The actual decision in *Attorney-General* v. *Bouvens* (*supra*) is not applicable to the securities of the claimant. In that case the court had to determine the situs of certain foreign government bonds for probate duty purposes. They were all payable to bearer, were transferable by delivery and nothing had to be done by the holder outside of England in order to make the transfer valid. They were marketable and saleable within the jurisdiction and had value there.

(1) (1923) S.C.R. 578 at 586.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson J.

The court held that the instruments were of the nature of valuable chattels, saleable and capable of administration within the jurisdiction and that probate duty was payable on their value. In the present case the claimant's note-certificates were of quite a different nature, not payable to bearer and not transferable by delivery.

In *Commissioner of Stamps* v. *Hope* (1) the Judicial Committee had to deal with the situs of a debt for probate duty purposes and held that it had been long established that a debt by contract could have no other local existence than the personal residence of the debtor, and was *bona notabilia* within the area of the local jurisdiction within which he resided; whereas a debt under seal or specialty was *bona notabilia* where it was "conspicuous", i.e., within the jurisdiction where the specialty was found at the time of death. The reason assigned for holding that a simple contract debt was located where the debtor resided was that that was the place "where the assets to satisfy it would presumably be". Where the assets of the debtor are, there the debt can be effectively dealt with within the jurisdiction by seizure of the assets if necessary to satisfy the debt.

The rule has been expressed as a general maxim in Dicey's Conflict of Laws, 5th Edition, at page 341, in the following terms:

> whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.

The rule has also been applied in succession duty cases.—*The King* v. *Lovitt* (2); and in cases where no taxation purpose was involved—*New York Life Insurance Co.* v. *Public Trustee* (3).

It was finally established beyond dispute by the House of Lords in *English Scottish and Australian Bank, Limited* v. *Commissioners of Inland Revenue* (4) that the rule as to the situs of simple contract debts was not confined to probate duty cases but was of general application. The leading authorities are there referred to. They are also cited in Dicey's Conflict of Laws, 5th Edition, at page 341 note (*e*).

(1) (1891) A.C. 476.
(2) (1912) A.C. 212.
(3) (1924) 2 Ch. 101.
(4) (1932) A.C. 238.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

It is established law that the situs of a simple contract debt is in the country where the debtor resides for that is where the debtor is subject to the jurisdiction of the court and where the debt is properly recoverable or payment of it can be enforced.

The rule is usually a simple one to apply where the debtor is an individual, but its application is more difficult when the debtor is a corporation, for it is well settled that a corporation may have more than one residence. Indeed, it may be said to reside wherever it carries on business.

In *The King* v. *Lovitt* (*supra*) the question before the Judicial Committee was whether the executors of the will of a person who was domiciled in Nova Scotia and died there were liable to pay succession duty to the Province of New Brunswick in respect of a sum of money which had been deposited by the testator in the branch of the Bank of British North America at Saint John, New Brunswick. The bank had its head office in London, England. The decision depended upon whether the debt of the bank was property situate within the province of New Brunswick. The Judicial Committee, reversing the judgment of the Supreme Court of Canada, *Lovitt* v. *The King* (1), held that it was and that succession duty was payable to the Province of New Brunswick. The controversy was whether the situs of the debt owed by the bank was at the branch where the deposit had been made or at its head office or elsewhere. The Board held that, having regard to the necessary course of business between the parties, the bank had localized its obligation to its customer or creditor so as to confine it, primarily at all events, to the branch at Saint John and that the debts were "property situate within the Province of New Brunswick".

The King v. *Lovitt* (*supra*) was followed in *New York Life Insurance Co.* v. *Public Trustee* (*supra*). In that case the plaintiffs sought a declaration that certain sums due and payable on January 10, 1920, to various German nationals under policies of assurance issued to them in England were not "property, rights and interests within His Majesty's Dominions" belonging to German nationals on January 10, 1920, and subject to the charge created by the Treaty of Peace Order, 1919. The Court of Appeal, unanimously reversing the judgment of the court below

(1) (1910) 43 Can. S.C.R. 106.

on this aspect of the case, declared that the debts due under the policies were within His Majesty's Dominions and subject to the charge. The line of reasoning was clear; the rule laid down by Lord Abinger C.B. in *Attorney-General* v. *Bouvens* (*supra*) that simple contract debts are assets "where the debtor resides at the time of the testator's death" was followed; and the statement of Dicey that "debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced" was approved. The plaintiff corporation since it did business in England as well as in New York resided in both places. Under the circumstances it was permissible and necessary to look at the terms of the contract to determine at what place the debts were recoverable. The reasoning adopted in *Rex* v. *Lovitt* (*supra*) was applied and the conclusion was arrived at that since by the contracts the debts were recoverable in London where they were expressed to be payable the debts were situate within His Majesty's Dominion and subject to the charge.

The ratio of these two judgments is that where a corporation has more than one residence, and the payment of a simple contract debt owed by it has been localized either by the course of business between the parties or by the express terms of the contract, the situs of such debt is in the country where the payment of it has thus been localized.

The fact that the claimant's note-certificates were transferable on the register only at New York has no bearing on the situs of the debt represented by them. This is, I think, established by *The King* v. *National Trust Co.* (1), where Duff C.J. speaking of a specialty debt said there was nothing in the judgment in *Brassard* v. *Smith* (2) or in *Attorney-General* v. *Bouvens* (*supra*) to justify the conclusion that a specialty debt had its situs at a place where some formality had to be observed in order effectually to transfer it. The same remarks are equally applicable to a simple contract debt.

In the present case the obligation or debt of the company was payable at Montreal, London or New York. At each of these places the company could be said to have a residence since it did business there. There was nothing

(1) (1933) S.C.R. 670 at 677. (2) (1925) A.C. 371.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

THORSON, J.

in the course of business between the parties or in the contract between them that localized the obligation or debt exclusively in any of these places. At common law the situs of the debt or obligation could be at any one of them. The claimant cannot, therefore, rely upon the common law authorities in support of his contention that the situs of his property was exclusively in England, for according to them it could just as well be in Canada. Since no aid is to be found in the principles of the common law in fixing the situs of the property assistance must be sought elsewhere.

There are some dicta which are helpful. In *Lovitt* v. *The King* (1) Duff J., whose dissenting judgment was substantially approved by the Judicial Committee, recognized that there might be situations where the situs of a company obligation could not be exclusively in one place and suggested that, where the obligation was such that performance of it could be exacted at more than one place at the option of the creditor, it might be that the preference ought to be given to the place where the principal business was carried on. According to this view, which was, of course, purely obiter, the situs of the obligations now under review was in Canada.

The Treaty of Peace itself contains provisions relating to the situs of certain kinds of property, which have a bearing on the question before the Court. What legal effect should be given to the terms of a Treaty of Peace is an interesting question. In *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (2), Duff J. made the following striking statement:

> The Treaty, it is to be observed, being a Treaty of Peace, had the effect of law quite independently of legislation.

With the utmost respect, I venture the opinion that there is no authority for this statement and that it cannot be accepted without important qualifications. While a Treaty of Peace can be made only by the Crown, it still remains an act of the Crown. While it is binding upon the subjects of the Crown without legislation in the sense that it terminates the state of war, it has never, so far as I have been able to ascertain, been decided or admitted that the Crown could by its own act in agreeing to the terms of a treaty alter the law of the land or affect the private rights of

(1) (1910) 43 Can. S.C.R. 106. at 140 (2) 1931) S.C.R. 169 at 198.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson J.

individuals. In *Walker* v. *Baird* (1) the defendant sought to justify a certain act of trespass alleged against him on the ground that it had been done by the authority of the Crown for the purpose of carrying out a treaty. The Judicial Committee held that the act could not be justified on such a ground but declined to express any opinion with regard to the contention made in the case that since the power of making treaties of peace was vested by the constitution in the Crown, the power of compelling its subjects to obey the provisions of such a treaty must also reside in the Crown. The question is discussed in Anson's Law and Custom of the Constitution, 4th Edition, Vol. II, Part II p. 136. At page 142, the author suggests that there is a limit on the treaty making power of the Crown and that, where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, and be internationally valid, but it cannot be carried into effect without the consent of Parliament. It has been the practice in such cases to give legislative approval to the Treaty. This view appears more consistent with the general concepts of English law than the statement under discussion, but no decision on the subject need be made for both in England and in Canada parliamentary approval of the Treaty of Peace was given.

In England, it was expressly provided by the Treaty of Peace Order, 1919, that sections III, IV, V, VI and VII of Part X of the Treaty of Peace shall have full force and effect as law. The sections referred to thus became part of the municipal law of England—*Stoeck* v. *Public Trustee* (2). It has already been noted that under the scheme of the Peace Treaty the rights which a German national previously had by law in his property were extinguished when such property was retained and liquidated by the Allied and Associated Power entitled to do so. The Treaty itself recognizes, in my opinion, which Allied or Associated Power is entitled to retain and liquidate company securities and obligations, for paragraph 10 of the Annex to Section IV of Part X of the Treaty of Versailles provides as follows:

> Germany will, within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that

(1) (1892) A.C. 491.

(2) (1921) 2 Ch. 67 at 71.

1944

EDWARD BITTER
v.
SECRETARY OF STATE OF CANADA.

Thorson, J.

Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

The securities in question come within the provisions of this paragraph since they are obligations of the Canadian Pacific Railway Company, a company incorporated in accordance with the laws of Canada and subject to them. If the claimants note-certificates had been in Germany, there can be no doubt that under the Treaty they would have been deliverable to Canada, which would be the Allied or Associated Power entitled under the Treaty to retain and liquidate them. He cannot successfully claim that merely because they were in England the situs of the obligation or debt represented by them was different from that of precisely the same kind of obligation or debt, represented by note-certificates that happened to be in Germany. The physical location of the claimant's note-certificates, which are merely evidence of a simple contract debt, has according to the authorities referred to, nothing to do with the situs of the debt. Since the only right which the enemy claimant can have under the Treaty is to have his property retained and liquidated by the Allied or Associated Power entitled to do so, he cannot complain if his property was retained and liquidated in accordance with its terms. It was, I think, clearly intended by the Treaty of Peace that Canadian company obligations of the kind in question belonging to German nationals when the Treaty came into force might be retained and liquidated by Canada. By the terms of the Treaty, the situs of such property for the purpose of the Treaty was fixed in Canada.

Since the paragraph of the Peace Treaty under discussion is expressly made part of the law of England it would seem that by the law of that country the situs of the property in dispute was in Canada. The authorities in England seem to have acted upon that assumption. It appears from the evidence that while considerable property of the claimant was taken by the Public Trustee of the United Kingdom as Custodian of Alien Enemy Property there, and made subject to charge as enemy property, but subsequently released to him on special grounds which do not affect his legal position in these proceedings, no similar action was taken with regard to his Canadian securities. The note-certificates in question were never made the sub-

ject of any Order of the High Court of Justice in England under section 4 of the Trading with the Enemy Amendment Act, 1914, or of the Board of Trade under section 4 of the Trading with the Enemy Act, 1916, and no claim to them has been made by the Public Trustee in the United Kingdom or his successor, the Administrator of German Property. Indeed, the contrary is the case. When the London representative of the Canadian Custodian and Clearing House on October 26, 1925, wrote to the Guaranty Trust Company of New York (London Office), demanding the delivery of the note-certificates as the property of the Canadian Government, the Trust Company notified the claimant of the request and also wrote to the Public Trustee, informing him of the demand made and enquiring whether, in view of the fact that the notes had been held to the order of the Public Trustee, it would be in order to deliver the notes to the Canadian Custodian. On November 7, 1925, a reply was sent to the Trust Company by the secretary of the Public Trustee in which the following statement appears: "Inasmuch as the 3,500 dollars Canadian Pacific Railway 6 per cent notes, the property of Mr. E. Bitter, are subject to the control of the Canadian Custodian, the Administrator has no objection to your delivering the notes in question to the Canadian Custodian in accordance with that gentleman's request." This attitude of the English authorities with regard to the claimant's Canadian securities is consistent with the view that, under the English legislation on the subject, the claimant could not support his contention that the situs of his property was in England and that he had a right to have it dealt with there. Furthermore, it may be noted that, when the London representative of the respondent noticed that the note-certificates were endorsed on the back to Messrs. Earnshaw and Murley, nominees or employees of the Guaranty Trust Company of New York, and requested a stock transfer from the Trust Company, it was freely given. The Canadian Custodian, therefore, when he presented the note-certificates for payment had not only such rights as were vested in him by law but transfers of the note-certificates in his name as well.

The rights of the claimant, if any, are to be determined, however, not by the law of England, but by that of Canada. In Canada, the provisions of the Treaty of Peace

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

relating to property, rights and interests were not expressly made part of The Treaty of Peace (Germany) Order, 1920, as was done in the case of the similar order in England, but the effect is, I think, the same. The Treaty of Peace Act, 1919, was enacted for the purpose of giving the Governor in Council the power to "do such things as appear to him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties", and The Treaty of Peace (Germany) Order, 1920, was passed by Order in Council under this statutory authority and had by it the effect of law. In that view, the expression "property, rights and interests in Canada", contained in section 33, may properly be interpreted in the light of the provisions of the Treaty of Peace and a particular property, right or interest may be held to be in Canada if such an interpretation is not inconsistent with the Treaty of Peace. It was, as has been seen, contemplated by paragraph 10 of the Annex to Section IV of Part X of the Treaty of Peace, that as between Germany and the Allied and Associated Powers (of which Canada was one) the property, rights and interests of a German national situated within the territory of an Allied or Associated Power should include "any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power". Since the Treaty of Peace (Germany) Order, 1920, was passed to give effect to the provisions of the Peace Treaties, it must be read in the light of such provisions and the conclusion may be arrived at that for the purposes of the Treaty of Versailles and as between an "enemy" and the Canadian Custodian of Alien Enemy Property the term "all property, rights and interests in Canada" contained in section 33 of The Treaty of Peace (Germany) Order, 1920, includes any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of Canada. I hold, therefore, that the claimant's property was in Canada within the meaning of section 33 of The Treaty of Peace (Germany) Order, 1920.

There is a further important reason for rejecting the claimant's contention that his property could not be subject to the vesting order of November 6, 1919, or The Treaty of Peace (Germany) Order, 1920. In the *Braun Case* (*supra*) I held that Canada had complete legislative

authority over the companies of its incorporation and could confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities might be. I had reference in that case to the validity of the Consolidated Orders respecting Trading with the Enemy, 1916, passed under the authority of the War Measures Act, which by Order 28 conferred jurisdiction upon the Canadian Superior Courts to vest in the Custodian all property belonging to or held or managed for or on behalf of an enemy. Such property would, in my opinion, include the securities of companies subject to Canadian legislative authority. When the vesting order of November 6, 1919, was made, covering as it did the claimant's note-certificates, Canada asserted her paramount power over the Canadian Pacific Railway Company which had issued the note-certificates and in effect ordered the company to pay the obligation or debt represented by them to the Custodian instead of the enemy owner. That was the view taken by the Supreme Court of Canada with regard to the Canadian vesting orders covering Canadian company securities made under Order 28 of the Consolidated Orders in the case of *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (1). Lamont J., speaking for the majority of the Court, said, at page 184:

> Canada, in my opinion, did assert her paramount power when the shares were vested in the appellant by the Courts under the Consolidated Orders.

By that statement the majority of the Court expressly recognized the jurisdiction of the Canadian courts to make the vesting orders in that case because of Canada's paramount power over the companies which had issued the certificates and the validity and effectiveness of the legislation under which the jurisdiction had been conferred. Lamont J. went on to hold that Canada relinquished her claim to all vested property which was not enemy property at the time of the vesting and that, as all the securities in question had ceased to be enemy property when vested in the Canadian Custodian, the United States Custodian was entitled to them. This final disposition of the matter has, of course, no bearing on the facts of the present case. The vesting order of November 6, 1919, operated as a statutory

(1) (1931) S.C.R. 169.

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

transfer or assignment of the rights of the enemy owner to the Custodian. The only person who could recover and enforce payment of the obligation or debt evidenced by the note-certificates was the Custodian. Payment of the company's obligation or debt to the Custodian was made obligatory upon the company, and the obligation or debt was thus, by valid and effective Canadian war legislation, localized in Canada, in the sense that the rights of the former enemy owner were transferred to the Custodian. As between the Custodian and the company no question of situs arises. The assertion by Canada of her paramount power over the company by the vesting order of November 6, 1919, under war legislation was confirmed by the Treaty of Peace itself and the vesting order was validated and confirmed and made final and binding upon all persons by section 34 of The Treaty of Peace (Germany) Order, 1920. There is nothing in section 33 which affects this aspect of the matter except that by section 33 (2) it is declared that what was vested in the Custodian shall belong to Canada. Whatever temporary title or title in suspense the Custodian had under the vesting order became a permanent title of Canada and vested in the Custodian in the right of Canada.

The declaration of the Court is that the note-certificates in question in this action belonged on January 10, 1920, or theretofore, to an enemy and that under The Treaty of Peace (Germany) Order, 1920, they belonged to Canada and were vested in the respondent free from any claim of the claimant to them or any of the proceeds thereof.

Counsel for the claimant relied upon the decision of the Supreme Court of Canada in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (*supra*), sometimes called the *Alien Property Custodian Case,* as the main support for his contention that the situs of the claimant's property was in England. That case was discussed at some length in the *Braun Case* (*supra*) and I need do no more than refer to such discussion and incorporate it in these reasons for judgment, in so far as it deals with contentions similar to those made in the present case, but a brief comment may be made with regard to some of the particular contentions now put forward.

The *Alien Property Custodian Case* dealt with the competing claims of two Custodians, representing allied nations

associated with one another in the prosecution of the war, in a contest as to which was entitled to certain securities of Canadian companies formerly belonging to alien enemies. The fact that two nations were involved in the contest was the dominating feature of the case. The rights of the former enemy owners as against either Custodian were not in issue. It was held that the United States Custodian had under United States law validly extinguished and acquired the rights of the former enemy owners before the Canadian vesting orders were made, and that, since there was no enemy interest in the securities at the date of such vesting orders, Canada relinquished whatever claims she had under the vesting orders. That was the judgment of the majority of the Court delivered by Lamont J. It is implicit in that judgment that, if the Canadian vesting orders had been made before any action had been taken by the United States Custodian, the Canadian Custodian would have held the securities which had been vested in him by the courts as against the former enemy owners.

Counsel for the claimant argued that the *Alien Property Custodian Case* decided that the situs of a company security was where the certificate was and that the certificate was not merely evidence of title to the property represented by it but was the property itself. I cannot see how any such deduction could possibly be drawn from the judgment in that case. As I pointed out in the *Braun Case* (*supra*), the decision did not turn on the situs of the securities at all, but upon the existence in the United States of rights flowing from the ownership by the United States Custodian, according to the law of the United States, of the certificates endorsed in blank, which could be validly acquired in the United States. This did not mean that there was no property in Canada which could have been validly acquired by the Canadian Custodian. In fact, as has been seen, Lamont J. held that the Canadian company securities involved in that case were validly vested in the Canadian Custodian, but that Canada relinquished her claim to them in favour of the United States Custodian, because there was no enemy interest in them at the date of the Canadian vesting orders, such interest having been validly acquired by the United States Custodian. Nor is there any justification for the contention that the case decided that a company security certificate was one and the

1944

EDWARD BITTER v. SECRETARY OF STATE OF CANADA.

Thorson, J.

same thing as the property represented by it. It decided no such thing. Lamont J., as I pointed out in the *Braun Case* (*supra*), recognized, as clearly as Lord Watson did in *Colonial Bank* v. *Cady* (1), the difference between the property of a share and the rights of the lawful holder of a share-certificate, even where such share-certificate had a transfer on the back endorsed in blank. It is elementary that the rights flowing from the ownership of a share-certificate even with a transfer endorsed in blank are not the same thing as the property of the share itself. As Lord Watson put it, the former is a *jus ad rem* and the latter a *jus in re*. There is even less ground, if that is possible, for the contention that the claimant's note-certificates, which had no transfers endorsed in blank, were the same thing as the obligation or debt of which they were merely evidence.

Counsel's contention that the claimant had no property which could be subject to the vesting order of November 6, 1919, is completely answered by the statement of Lamont J., to which I have referred, relating to the paramount power of Canada over Canadian companies and the validity of the Canadian vesting orders and the legislation under which they were made. *The Alien Property Custodian Case,* as I read it, far from giving any support to the claimant is a strong authority against him.

The result is that the claimant's case must be dismissed with costs. In view of the fact that counsel for the claimant has informed the Court that the claimant has died since the close of the argument herein the Court directs that this judgment be dated as of December 10, 1942, the date when the trial was concluded and the judgment of the Court was reserved and that it be entered *nunc pro tunc,* but in order that the right of appeal may not be prejudiced by such direction the time for appeal from this judgment is extended to thirty days from the date hereof.

Judgment accordingly.

(1) (1890) 15 A.C. 267 at 277.

BETWEEN:

SAM YARMOLINSKY ..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943
Nov. 2.
1944
May 23.

Practice—Examination for discovery—General Rules and Orders 130 and 138—Departmental or other officer of the Crown.

Held: That Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts within the knowledge of the Crown and make such admissions on its behalf as may properly be made.

2. That the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130.

MOTION for order for examination for discovery of driver of army truck as an officer of the Crown under Rule 130.

The motion was heard before the Honourable Mr. Justice Thorson, President of the Court, in Chambers.

M. Greenberg for suppliant.

W. R. Jackett for respondent.

THE PRESIDENT now (May 23, 1944) delivered the following judgment:

This is a motion on behalf of the suppliant for an order for the examination for discovery of Lance-Corporal R. G. Booty, as an officer of the Crown, under Rule 130 of the General Rules and Orders of this Court, which provides that "any departmental or other officer of the Crown" may, by order of the Court or a Judge, be examined for discovery at the instance of the party adverse to the Crown. It is stated that Booty was the driver of the truck that collided with the suppliant and it is in respect of injuries alleged to have resulted from his negligence that the suppliant brings his petition of right for damages.

Rule 130 should, I think, be considered together with Rule 138 which provides, *inter alia,* that "where any departmental or other officer of the Crown has been examined for the purpose of discovery, the whole or any part of the

1944

YARMOLINSKY v. THE KING.

Thorson J.

examination may be used in evidence by any party adverse in interest to the Crown". Rule 130 has been in force ever since the first General Rules and Orders of the Exchequer Court were made in 1876, but Rule 138 in its present form did not come into effect until December, 1899.

Two purposes are sought to be served by these rules, namely, the discovery of facts from the Crown and the obtaining of admissions which can be used as evidence against it.

The determination of who may be examinable under Rule 130 is not free from difficulty and the practice under the Rule has not been settled. In the only reported case which I have been able to find, *Montgomery* v. *The King* (1), Cassels J. held that the master of a government dredge was not an "officer" within the meaning of the rule. On the other hand, in *Morrison* v. *The King* (2), orders were made for the examination of an officer of the Federal District Commission and also of the R.C.M.P. constable whose alleged negligence was in issue. No reasons for these orders were given. It is desirable that the principles involved should be further considered.

It is also desirable that the motion should be dealt with apart from the special reason that might properly be given for its dismissal, namely, that an enlisted soldier such as Lance-Corporal Booty is not an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act as amended in 1938—*McArthur* v. *The King* (3), and cannot be an officer of the Crown within the meaning of Rule 130. Such a ruling would not be affected by the amendment of the Exchequer Court Act in 1943, whereby, for the purpose of determining the liability of the Crown, a member of the armed forces of Canada was deemed to be a servant of the Crown.

In England, the rules make no provision for a *viva voce* examination for discovery and recourse must be had to Canadian decisions based upon rules providing for the oral examination for discovery of an officer of a corporation.

Counsel for the suppliant relied upon a number of such decisions and contended that the test laid down by them as to whether a person was examined as an officer of a corporation was whether he was placed in a position of

(1) (1915) 15 Ex. C.R. 372. (2) (1940) S.C.R. 325.
(3) (1943) Ex. C.R. 77.

responsibility and control at the time of the cause of action and argued that since Booty was in charge of the army truck that collided with the suppliant he ought to be regarded as an officer of the Crown for discovery purposes.

The practice in the provinces of Canada with regard to the examination for discovery of an officer of a corporation is not uniform and the general observation may be made that the decisions must be examined in the light of the rules in force at the time they were rendered, including, in my judgment, the rules relating to the use that might be made of the depositions.

In Ontario, after the Common Law Procedure Act, 1856, and until 1873, discovery in actions at law was obtained by means of interrogatories, as in England, although discovery by oral examination was provided for in the Court of Chancery under Chancery Order L of 1850. *Viva voce* examination for discovery was first introduced in the Common Law Courts by the Administration of Justice Act, 1873, sec. 24. This became section 156 of The Common Law Procedure Act, R.S.O. 1877, chap. 50, and, later, after The Ontario Judicature Act, 1881, Rule 487 of the Consolidated Rules, 1888. Rule 487 provided, *inter alia*, for the oral examination of "any one who is or has been one of the officers" of a corporation "touching the matters in question in the action". Originally there appeared to be no restriction on the number of officers who might be examined, and no special order was required, but the rule was later amended in this respect—Rule 439, Consolidated Rules, 1897. There was, however, no provision for the use of the examination as evidence at the trial; the rule served only the purposes of discovery.

Under this state of affairs, a very wide interpretation was given to the term "officer". It was not confined to officials of the corporation but was extended to include persons who would ordinarily be considered not as officers but rather as servants. The following were held to be examinable officers within the meaning of the section or rule; a station agent of a railway company—*Ramsay* v. *Midland Railway* (1); the local agent of a fire insurance company—*Goring* v. *The London Mutual Fire Insurance Company* (2); the local agent of a life insurance company

(1) (1883) 10 P.R. 48.

(2) (1885) 10 P.R. 642.

1944

YARMOLINSKY v. THE KING.

Thorson J.

—*Hartnett* v. *Canada Mutual Aid Association* (1); the driver of a traction engine—*Odell* v. *City of Ottawa* (2). In *Leitch* v. *Grand Trunk Railway Company* (3), which became the leading authority on the subject, the conductor of a train was held to be an examinable officer. In the Divisional Court, Armour C.J. held that "officer" was a word of very wide signification and stated, at page 672:

> The object of the provision is to discover the truth in relation to the matters in question in the action, and the examination ought to be of such officers as are best able to give information respecting such matters.

In the Court of Appeal (4), an appeal from Armour C.J. was dismissed on an equal division of the court; Osler J.A., after reviewing the history of discovery in Ontario, held, at page 383:

> It may sometimes be difficult to draw the line between an officer and one who is a mere servant of the company; yet a person who is entrusted with the charge of a railway train in the course of its transit,—the conductor of the train,—is, in my opinion, as to that particular occasion, and for that particular purpose, to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment or how summary the company's powers of dismissal;

Maclennan J.A. was of the view that the rule (Con. Rule 487) ought not to be limited to the higher or governing officers only, and stated further, at page 386:

> I think the Rule should be applied to every case to which it can be applied beneficially, irrespective of the greater or less importance of the office filled by the person proposed to be examined.

It is evident from a number of the Ontario decisions that the judges felt it quite proper to extend the meaning of the term "officer" for discovery purposes and that no harm could be done thereby, in view of the fact that the examination could not be used as evidence against the corporation at the trial, at any rate, if the corporation took no part in the examination.

An important change was made by Rule 461 (2) and (3) of the Consolidated Rules, 1897, whereby it was provided for the first time that where an officer of a corporation had been examined under Rule 439 the whole or any part of the examination might be used as evidence by any party adverse in interest to the corporation, and should

(1) (1888) 12 P.R. 401.
(2) (1888) 12 P.R. 446.
(3) (1888) 12 P.R. 541 & 671.
(4) (1890) 13 P.R. 369.

be evidence accordingly, and that where a former officer had been examined the same use might be made of the examination, by leave of the Judge. This change had no immediate effect on the decisions of the courts. In *Dawson* v. *London Street Railway Company* (1) both the conductor and the motorman of a street car were held examinable; and in *Casselman* v. *Ottawa, Arnprior and Parry Sound Railway Company* (2), a roadmaster of the railway company was held to be an officer under Rule 439. In the latter case, Street J. went so far as to say, at page 262:

> the decisions seem practically to have construed every one to be an officer who has personal control or supervision over the care or working of any portion of the railway or its property, with defined duties.

The Ontario practice was finally clarified by the Court of Appeal in *Morrison* v. *Grand Trunk R.W. Co.* (3), where it was held that an engine driver was not examinable under Rule 439. The Master had held (4), on the authority of *Dawson* v. *London Street Railway Company* (*supra*), that he was; Street J. had allowed an appeal from this decision but it had been restored by the unanimous judgment of the Divisional Court. The Court of Appeal were unanimous in allowing an appeal from the decision of the Divisional Court. Osler J.A., while he adhered to his judgment in the *Leitch Case* (*supra*), pointed out that Rule 461 (2) (3) had made a material change in the practice and that the deposition of an officer, no matter what his grade or authority, might be read against the corporation just as those of a natural party might be read against him, and expressed the view that under the circumstances the court ought not to extend the meaning of the word officer or carry the cases further than they had already gone, and went on to say, at page 40:

> It might be quite reasonable to examine for discovery merely any officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used against himself, is a practice the justice of which, in many cases at all events, is not so clear.

and Maclennan J.A. said, at page 41:

> At the time of our decision in *Leitch's* case, 13 P.R. 369, the officers of corporations could only be examined before trial for purposes of discovery, and the depositions could not be read against the corporation. I thought and held in that case that the Rule applied to every officer

(1) (1898) 18 P.R. 223.
(2) (1898) 18 P.R. 261.
(3) (1903) 5 O.L.R. 38.
(4) (1902) 4 O.L.R. 43.

1944

YARMOLINSKY v. THE KING.

Thorson J.

of a corporation who might reasonably be supposed to possess knowledge of the facts, discovery of which was sought. If the depositions could at that time have been read against the corporation, I think I would not have put so wide a construction upon the Rule.

In the *Morrison Case,* Osler J.A. recommended that Rule 439 should be enlarged to admit the examination of servants of a corporation but that if this were done Rule 461 (2) and (3) might be repealed. Effect was given to this recommendation in 1903 with the result that under the present Ontario Rule 327 there can be an examination for discovery, without any order, of any officer or servant of a corporation, but such examination shall not be used as evidence at the trial.

In Manitoba, a different attitude from that adopted in the *Morrison Case* (*supra*) was taken. In *Dixon* v. *The Winnipeg Electric Street Railway Co.* (1), Taylor C.J. had held, following the Ontario decisions, that an electrician in the defendant's employ who had the control and management of the power house of the defendant was an examinable officer under Rule 379, which was similar to Ontario Rule 487. At this time, as in Ontario, the Manitoba rules did not provide for the use of the examination of an officer of a corporation as evidence at the trial. In 1899, Manitoba followed the course taken in Ontario in 1897, and made provision for its use in a manner similar to that provided by Ontario Rule 461 (2) and (3). Under this new situation, it was held by Richards J. in *Gordanier* v. *Canadian Northern Railway Co.* (2), following the *Dixon Case* (*supra*) and *Leitch* v. *Grand Trunk Railway Company* (*supra*), that the conductor of a train was an examinable officer under Rule 387 of the King's Bench Act (formerly Rule 379). The *Morrison Case* (*supra*) was cited in the argument, but Richards J. took a different view from that taken by the Ontario Court of Appeal as to the effect of the new rule whereby the examination could be used at the trial. At page 5, he said:

> The Legislature, when it enacted that the depositions might be used in evidence, did not in any way restrict the meaning of the word "officer", but left the law, as to who might be examined as an officer, untouched.
>
> The tendency of decisions appear to be to give the rule a liberal construction.

(1) (1895) 10 M.R. 660. (2) (1904) 15 M.R. 1.

and in *Shaw* v. *City of Winnipeg* (1), it was held that a water meter inspector of the corporation, who had left a trap door open, was an officer under Rule 387.

In Alberta, the Court of Appeal in *Nichols & Shephard Co.* v. *Skedanuk* (2), reversing Beck J., held that a member of a firm which sold the company's wares on a commission was not an officer within the Rule. Rule 224, as amended in 1902, permitted the examination of an officer of a corporation to be used as evidence in the same way as the examination of a party. Harvey C.J., speaking for the court, after referring to the *Morrison Case* (*supra*), said, at page 1004:

> It appears to me that the above case effectually disposes of the authoritative value of the earlier cases in interpreting our rule which has the consequences it has.

The rules as to the examination of an officer of a corporation and the use that might be made thereof, that were in force at the time of the decisions in the *Morrison Case* (*supra*) in Ontario, the *Gordanier Case* (*Supra*) in Manitoba and the *Nichols & Shephard Co. Case* (*supra*) in Alberta, were similar in effect to Rules 130 and 138 of the General Rules and Orders of this Court. The weight of authority is, I think, strongly in favour of the view that where a rule provides for the examination for discovery of an officer of a corporation, the term "officer" ought not to receive as wide an interpretation when the deposition of the officer can be used as evidence against the corporation as it may properly receive when the examination is for the purpose of discovery only and no use can be made of it as evidence or its use as such is restricted. Even where a liberal construction has been given to the term "officer", notwithstanding the fact that the examination can be used at the trial, as in Manitoba, I have not been able to find any case in any jurisdiction with rules comparable to those now under discussion that would go so far as to support a decision that the driver of a motor vehicle is examinable for discovery as an officer of the corporation in whose service he is employed.

Counsel for the suppliant relied upon a number of British Columbia decisions. In that province, the courts have given a very wide meaning to the term "officer",

(1) (1910) 13 W.L.R. 706. (2) (1912) 2 W.W.R. 1002.

1944

YARMOLINSKY v. THE KING.

Thorson J.

following the tendency of the earlier Ontario decisions and carrying it forward. The following have been held examinable officers: a fire warden of a railway—*King Lumber Mills, Ltd.* v. *Canadian Pacific Ry. Co.* (1); a local agent of an insurance company—*Yamashita* v. *Hudson Bay Insurance Company* (2); a pilot in sole charge of an air transport company's aeroplane—*McDonald* v. *United Air Transport Ltd.* (3); a street car motorman—*MacRae* v. *B.C. Electric Ry. Co. Ltd.* (4). In *McDonald* v. *United Air Transport Ltd.* (*supra*), Martin C.J., speaking for the Court of Appeal, held that the governing circumstance in the case before the court was that the person sought to be examined was the pilot in sole charge of the aeroplane of the defendant corporation the alleged mismanagement whereof was the basis of the action. This case would give strong support to the suppliant's contention if the rules under which it was decided were the same as those of the Exchequer Court. In British Columbia, under Rule 370c (1), any officer or servant of a corporation may, without any special order, and any one who has been one of the officers may, by order of a Court or a Judge, be examined for discovery, but there is a very important provision in the rule that such examination may be used as evidence at the trial if the trial Judge so orders. That this provision has had some effect in giving the term "officer" a wide meaning in British Columbia is indicated by the decision of Morrison J. in the *Yamashita Case* (*supra*) where he stated that the examination could do the defendant no harm, for the examination could be used at the trial only if the trial Judge so ordered.

The practice in the other provinces affords no direct solution to the problem. In Nova Scotia and Prince Edward Island, the rules do not provide for discovery by *viva voce* examination, discovery being had through the medium of written interrogatories. In New Brunswick, under Order 31a of the Supreme Court Rules, 1927, provision is made for the examination for discovery not only of any officer of a corporation but also of any person who is or has been an officer or employee, but the examination of an officer can be used as evidence only where the officer has been selected to submit to the examination, the selec-

(1) (1912) 2 D.L.R. 345.
(2) (1918) 3 W.W.R. 671.
(3) (1939) 3 D.L.R. 27.
(4) (1942) 1 W.W.R. 532.

tion to be made by the corporation or, under certain circumstances, by a Judge. This procedure follows the practice adopted in Alberta in 1914, by rules 234 and 250 of the Consolidated Rules of that year. In Saskatchewan, under Rule 233 of the King's Bench Rules, 1942, anyone who is or has been an officer or servant of a corporation may be examined, but the examination of an officer can be used as evidence only where the Court has, after enquiry, designated the proper person to be examined. The practice in the three provinces last mentioned indicates the care that has been taken by the rule making authorities to serve the two purposes of an examination for discovery in such a way as to make for full discovery of the facts and, at the same time, ensure that a corporation, which cannot be examined in person, shall not be subject to being bound by admissions made by persons who do not properly represent it. In Quebec the practice is quite different. Article 286 of the Code of Civil Procedure makes very broad provisions for examination before trial but under Article 288 such depositions must be used as evidence in the case and form part of the record, with the result that examinations for discovery are not as frequently resorted to in Quebec as in the other provinces.

If discovery of the facts were the sole purpose of the examination for discovery, there could be no objection to giving the term "officer" a wide meaning, but, even on this assumption, it would, in my opinion, be stretching the term beyond a reasonable interpretation to say that it includes such a person as Lance-Corporal Booty. While it is desirable that the suppliant should have full discovery of the facts from the Crown, it is not proper that the Crown should be subject to being bound by admissions made by persons who are not its responsible officers. While the suppliant should as far as possible be put in the same position in the matter of discovery in proceedings against the Crown as he would occupy in a suit against a private individual he has no right to be in a better position. He has no greater right to examine a servant of the Crown and bind it by the admissions made by such servant than he would have to examine the servant of an individual and bind such individual. Nor should the Crown be in a worse position in the matter of discovery than a

1944

YARMOLINSKY v. THE KING.

Thorson J.

private individual would be. Since the Crown cannot be examined for discovery in person, discovery can be made only through a person who represents the Crown. When an order has been made under Rule 130 for the examination of a person as a departmental or other officer of the Crown, the Crown will be bound by whatever admissions such a person may make on his examination. The Crown has, therefore, a right to have the proper kind of person examined, since on the examination the person ordered to be examined represents the Crown and speaks for it. The difficulty involved in giving full effect to the two purposes of an examination for discovery has been realized in the various provinces. In Ontario, as has been seen, full effect has been given to the discovery purpose of the examination and the rule allows the examination not only of an officer of a corporation but also of a servant, but the other purpose has been abandoned altogether for no use of the examination as evidence is permitted. In other provinces, such as Alberta, Saskatchewan and New Brunswick, the difficulty has been met by allowing the use of the examination of an officer of a corporation as evidence but only if the officer has been selected by the corporation or the court or designated by the Court for the purpose. It was suggested, that a similar practice should be adopted in this Court and that the Judge before whom an application under Rule 130 is made should name the deputy minister of the department concerned or such officer as the deputy minister might designate. There have been cases where such an order has been made, and there is merit in the suggestion, but I have come to the conclusion that such a practice is not authorized by the Rule. The suppliant has the right to make his application and the Judge who hears it must deal with it on its merits and either allow or dismiss it; he has no right to delegate the appointment of the officer to be examined to anyone else.

The kind of officer who should be ordered to be examined under this Rule is suggested by the definition of an officer of a corporation given by Moss J.A. in *Morrison* v. *Grand Trunk Ry. Co.* (*supra*), at page 43:

> the officer of a corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arose, would, *prima facie*, be the proper person to be examined in

the first instance under Rule 439. And I would venture to say further that the fact that a person holding some position of subordinate rank or grade which some might call an office, happened to be the person whose dealing or conduct had given rise to the action, ought not necessarily to subject such person to examination on behalf of the corporation for the purposes of discovery any more than if he was an officer or employee under an individual party to an action.

In my view, similar principles should be adopted in this Court as long as Rules 130 and 138 remain in their present form. Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts with the knowledge of the Crown and make such admissions on its behalf as may properly be made. Beyond this general statement I do not think it possible to go. I agree with the remarks made by Moss J.A. in the *Morrison Case* (*supra*), at page 43:

> The question of what persons are examinable under the Rule as officers of a corporation must always become more or less a question of fact, and it may generally be found more easy to say who is not an officer within the Rule than to lay down any rule for general guidance.

I am unable to accept the contention that the term "officer" in Rule 130 is wide enough to include the driver of an army truck. To hold that it is would mean that in a case such as this there is no distinction between an officer and a servant of the Crown. The elimination of such a distinction is not warranted and I must hold that the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130. The suppliant's motion must, therefore, be dismissed.

No injustice to the suppliant need result from this decision. The fact that a person in the service of the Crown may know more about the facts of a case than anyone else or, indeed, be the only person with any personal knowledge of them does not give the suppliant the right to examine such person for discovery, if he does not come within the meaning of the Rule providing for such examination. He has no right under the rule to examine a servant of the Crown for discovery. Nor does the fact that a person has no personal knowledge of the facts prevent

1944

YARMOLINSKY v. THE KING.

Thorson J.

him from being a proper officer to be examined, for he is being examined, not as an individual as to his own knowledge of the facts, but in his capacity as an officer of the Crown as to the facts that are within the Crown's knowledge; it is discovery from the Crown that is being sought. It is well established that where an officer of a corporation is being examined for discovery he cannot refuse to answer merely because he has no personal knowledge of the facts. In *Goodbun* v. *Mitchell et al.* (1), it was held by the Court of Appeal of Manitoba that a witness on his examination for discovery as an officer of a company must not only answer as to his individual knowledge but must also enquire and get such information as he can from the other officers or servants of the company who have personal knowledge of the facts. This follows the English authorities which lay down a similar rule with regard to the answering of interrogatories—*Bolckow* v. *Fisher* (2); *Southwark Water Co.* v. *Quick* (3). The same practice should be followed on an examination under Rule 130. Such person as is ordered to be examined as an officer of the Crown under the Rule must acquaint himself with the relevant and admissible facts and, if he cannot answer the questions asked, the examination may be adjourned in order that he may ascertain the necessary facts and give the answers on the resumption of the examination. If such a course is followed adequate effect can be given to the two purposes of an examination for discovery that have been referred to.

In view of the unsettled practice under the Rule thus far, while I dismiss the suppliant's motion, the dismissal will be without costs.

Order accordingly.

(1) (1928) 37 M.R. 451. (2) (1882) 10 Q.B.D. 161.
(3) (1878) 3 Q.B.D. at 321.

1944

Mar. 6.
Apr. 6.

BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MARION BARROWS FRASER ET AL... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MARION BARROWS FRASER ET AL... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

MRS. CHARLES (MARION) FRASER
ET AL. ..... DEFENDANTS;

AND

HIS MAJESTY THE KING..... PLAINTIFF,

AND

FLORENCE BARROWS McKELVEY
ET AL. ..... DEFENDANTS.

Practice—Costs—Disallowance of separate bills of costs to defendants—Plaintiff contending for allowance of only one set of costs—Allowance of separate bills of costs to defendants where one defendant added at trial on plaintiff's motion.

Held: That defendants having identical interests who severed in their defence are entitled to only one set of costs.

2. That a defendant added at trial on plaintiff's motion is entitled to a separate bill of costs.

APPEAL from the decision of the Registrar upon the taxation of defendants' bills of costs.

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

C. Stein for plaintiff.

Gordon F. Henderson for defendants.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

ANGERS J. now (April 6, 1944) delivered the following judgment:

These are verbal applications by way of appeal: (*a*) in the first three cases by the defendants from the decision of the Registrar that there should be only one bill of costs taxed in each one; (*b*) in the fourth case by the plaintiff from the decision of the Registrar allowing separate sets of costs to each of the defendants.

The Registrar said that in order to avoid a multiplicity of taxations he had decided not to tax any bill for the present, pending the decision on appeal from him on this question.

The taxation of costs by the Registrar or his deputy and the review thereof by a Judge in Chambers is governed by rule 263 of the General Rules and Orders of the Court, which reads thus:

> All costs between party and party shall be taxed pursuant to Tariff A contained in the Appendix to these Rules. Such costs shall be taxed by the Registrar or by his Deputy, and they shall be the Taxing Officers of the Court, exercising exclusive authority in respect of such taxation; subject, however, to review by a Judge in Chambers.

Counsel for defendants relied on rule 261, being the general rule applying to costs. It enacts (*inter alia*):

> The costs, of and incidental to all proceedings in the Court, shall be in the discretion of the Court or a Judge and shall follow the event unless otherwise ordered . . . .

I do not think that rule 261 offers any assistance in the present case.

The Ottawa agent of counsel for defendants submitted that Martha MacPherson, who lived in Roxbury, Mass., U.S.A., and who is one of the defendants in each of the above cases, was not on friendly terms with the other defendants and that in the circumstances she had an interest in choosing her own counsel. There is no evidence concerning the relations between Martha MacPherson and the other defendants.

In support of his contention that two bills of costs ought to be taxed, counsel cited the following authorities: *Rogers* v. *Davis et al.* (1); *Lamport* v. *Thompson et al.* (2); *Remnant* v. *Hood* (3). Reference was also made to Annual Practice, 1942, p. 1494.

(1) (1932) S.C.R. 546; (1932) 4 D.L.R. 207.

(2) (1942) 2 D.L.R. 65.

(3) (1859) 27 Beavan 613.

In the case of *Rogers* v. *Davis* the matter at issue was an application by way of appeal from the decision of the Registrar of the Supreme Court upon the taxation of the respondents' bills of costs with respect to the allowance by the latter of separate sets of costs to each of three groups of respondents. The action dealt with the validity of a will.

The report shows that before the Registrar the appellant objected to the taxation of a separate bill of costs for each of the three groups of respondents for the following reasons: (1) the interest of all the respondents on the appeal was identical; (2) only one joint factum was filed by the respondents, other than the official guardian; (3) all the respondents were represented by one Ottawa agent, who presented three separate bills for taxation on behalf of the allegedly separate respondents.

Rinfret J., who heard the matter in Chambers, dismissed the appellant's application. In his judgment, he made the following statements (p. 547):

> I know of no law or rule—and none was cited to me—which compels persons who have different shares in an estate to appear by the same solicitor because their interest, as regards their opposition to the claim of the plaintiff, may be identical (See *Remnant* v. *Hood*, 27 Beav. 613, at p. 614, 54 E.R. 243).
>
> In this case there were three separate firms of solicitors representing the three separate groups of respondents, and the rights of these groups to retain the services of the respective firms of solicitors may not be disputed.

Rinfret J. then deals with the fact that only one factum was filed by the respondents and the fact that they were all represented by the same Ottawa agent, stating that he does not think that this can affect their right to separate bills of costs, a question which has no materiality in the present instance. The learned judge thereafter makes the following observations, which are more pertinent (p. 547):

> The judgment of this Court, when dismissing the appeal, was "that the costs of all parties in this Court will be paid out of the said Estate"; and, in my view, the result is that each party separately and properly represented before this Court is entitled to the taxation of his bill of costs. Whether, under the circumstances, there should have been given only one set of costs was a question for the Court, when pronouncing its judgment, and is not a question for the taxing officer, who has only to give effect to the order upon costs, as adjudicated by the Court. The point now raised by the appellant should have been taken, if at all, by speaking to the minutes of judgment.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

This judgment may be of some comfort for the defendants but one must not overlook the fact, as noted by the Registrar, that in the Rogers-Davis action the litigation concerned a dispute about shares in an estate and had to do with the validity of a will and that the costs of all parties were to be paid out of the estate. In the present case the burden of the costs would fall on the Crown alone.

In the case of *Lamport* v. *Thompson et al.*, the matter in question is an appeal by the defendants from an order of Hogg, J. dismissing their motions by way of appeal from the taxing officer's refusal to award two sets of costs. Leave of appeal was granted by Roach, J., who expressed the following opinion (p. 67):

> I do not think these findings alone would be decisive of the question as to whether or not the defendants were entitled to sever in their defences. It is not the ultimate result that governs. If the "foresight" of counsel was always as good as their "hindsight" then defendants taking the advice of counsel would never unnecessarily sever in their defences. The time when the decision has to be made is generally early in the litigation and if at that time having regard to the allegations in the statement of claim and the known facts there is sufficient reasonable grounds for thinking that there would be a substantial difference between the defences at the trial on material points then, I think, that is sufficient justification for severance.

And further on (p. 68):

> Now the plaintiff's position was as follows. She was either bound by the agreement or she would revert to her position and rights under the will. As far as the agreement was concerned it has been appropriately described in the judgments as a "family settlement". In relation to it the position of the trust company as between the members of the family was neutral. If it was set aside the position of the trust company under the will was dominated by the balance of power vested in the brothers. That being the situation at the beginning of the litigation, I should have considered that the trust company was justified in severing its defence from that of the brothers so as not to identify itself with the brothers, who conceivably might through their counsel take positions as to policy in the administration of the estate, particularly under the will if the agreement was set aside, and put forward propositions at the trial as to which the trust company might be indifferent or what is more important, in violent disagreement. In such a contingency one counsel could not represent all defendants; and no one could foresee with certainty that such a contingency would not arise.

As appears from the report, the plaintiff's claim was based on a provision in the will of Alexander M. Thompson which required the executors Harry and Stanley Thompson (both sons of the testator) and Chartered Trust & Executor Company to set aside a trust fund of $100,000 for

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

the benefit of plaintiff, a sister of Harry and Stanley Thompson. The two brothers were entitled in certain contingencies to the capital of this trust fund on the death of the plaintiff. Shortly after the death of the testator, the trust fund was set up to the extent of $60,000 only, in which was included a mortgage of $30,000. To complete the trust fund it would have been necessary to sell shares to the extent of $40,000 or to the extent of $70,000 if the mortgage of $30,000 was not to be included in the trust fund. The brothers as residuary legatees were interested in the price which might be realized on the sale of those shares and they took the position that, due to the depressed condition of the market, the time was not opportune to sell them. Even at that early date the trust company felt it necessary to seek separate legal advice as to its duties in the circumstances. Then, due largely to the efforts of the trust company, an agreement was made between the plaintiff, her brothers and the trust company in virtue of which the securities allocated to the trust fund totalling $60,000 were approved and regarding the balance of $40,000 the unrealized assets were to be transferred to the trust company as security, but restrictions were imposed on their sale.

In her action the plaintiff sought: 1, judgment setting aside the agreement; 2, judgment directing the executors to set up the $100,000 trust fund in accordance with the provisions of the will; 3, consequential relief on the basis that the $30,000 mortgage was not a proper security to be included in the trust fund; 4, damages for breach of trust; 5, the removal of the trustees from office.

The report shows that there were common defences put up by the trust company and the Thompson brothers, among them being the Statute of Limitations. The trial judge held that any claim which the plaintiff could have had was barred by the statute and that the agreement was binding on the plaintiff.

Henderson, J., delivering the judgment of the Court of Appeal, made the following remarks (p. 69):

> Upon the argument we are of opinion that the matter involves no principle of law which is not well settled by the cases, and that the only matter to be determined is whether the appellant, Chartered Trust & Executor Co., was justified in severing in its defence from its co-defendants, and in retaining solicitors and counsel on its behalf.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

In the light of the allegations and charges made by the plaintiff in her amended statement of claim, and in particular in para. 8 (*b*) and subsequent paragraphs of the same, we think the appellant, Chartered Trust & Executor Co., was fully warranted in severing in its defence. The appellant, Chartered Trust & Executor Co., was entitled to make its election to sever in its defence upon the plaintiff's statement of claim.

In this case of *Lamport* v. *Thompson et al.* it seems evident that separate defences were justified as the trust company had reason to believe that its defence would differ substantially from that of the other trustees. I do not think that the decision in that case can be of much assistance to the defendants.

The facts in the case of *Remnant* v. *Hood* (as reported in 27 Beavan, p. 74) may be summarized briefly as follows:

By his will Sir Nathaniel Thorold directed his trustees to convey his real estates to Samuel Thorold for life, with remainder to his first and other sons successively in tail male, with remainder to his first and other daughters in tail male. He directed that in the settlement should be inserted a power to Samuel Thorold to jointure and a power enabling him to charge the estates with any sum not exceeding £2,000 for the portion of his younger children.

No settlement was made but, on his marriage with Miss Anderson, Samuel Thorold exercised his power of jointuring and charged the estates "with the sum of £2,000, for the portion or portions of the daughter or daughters, younger child or younger children of Samuel Thorold on the body of the said Ann Anderson lawfully to be begotten, to be raised and levied within three calendar months after the decease of Samuel Thorold, by such ways and means as shall be expedient in that behalf, and to be forthwith paid and payable in manner following (that is to say, if there shall be an eldest or only son, and one such daughter or younger child, the same to be raised and paid for the portion of such only daughter or younger child; and if there shall be two or more such daughters or younger children, then the said sum of £2,000 to be equally divided between them, share and share alike, for the portion and portions of all and every such daughters or younger children."

There were seven children of the marriage, consisting of a son and six daughters. The son attained twenty-one and died unmarried. Two of the daughters died infants

in the life of their father; a third, Theodicia, attained twenty-one and married a Mr. Gibbons and died in the same year, in the lifetime of her father. The remaining three daughters survived their father; Ann, as eldest, became entitled to the estates, the other two being Louisa Margaret Moye and Sophia Katherine Whitehouse. After Samuel Thorold's decease, one-half of the £2,000 was paid to Whitehouse and his wife and £50 on account to Mrs. Moye; £950 remained unpaid, which Mrs. Moye had assigned to the plaintiff.

The suit was instituted by the plaintiff to have the remainder of the £2,000 now raised by a sale or mortgage of the estate on which it was charged.

The question argued was whether Theodicia, who had attained twenty-one but had died in her father's life, was entitled to participate in the portion. Pending the suit an offer was made to pay plaintiff one-third of the portion.

The Master of the Rolls in his judgment declared that the question was "whether the sum of £2,000, provided for the portions of younger children, was divisible in thirds or in moieties; in other words, whether, under the terms of the power contained in the will, and of the clause contained in the deed executing the power, the interests of the three younger daughters in this charge vested in them upon their attaining twenty-one and marrying in the lifetime of their father, or whether the vesting was postponed until the death of their father."

The Master of the Rolls concluded that regarding the settlement upon the principles expounded by Sir William Grant in *Howgrave* v. *Cartier* (1) he thought that it was not necessary that the children should survive the father in order to enable them to become entitled to the fund. And he referred again to the words of the settlement which charges the estate "with the sum of £2,000, etc." hereinabove quoted, which it is useless to repeat here.

The Master of the Rolls said that he was of opinion "that the charge vested in the three younger children upon their attaining twenty-one, although it was not payable until within three months after the death of their father."

He held that the plaintiff must have costs down to the date when the tender was made, but that he must pay the costs of all parties from that time. He stated that there

(1) (1814) 3 Ves. & B. 79; 35 E.R. 409.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

must not be two sets of costs in respect of one share. He added that he could not allow trustees to appear separately and that a mortgagor and his mortgagees can only have one set of costs.

After the case had been decided a question arose as to the decision of the Court in regard to the costs and the matter was mentioned to the Master of the Rolls in Chambers by the Registrar. The Master of the Rolls then came to the conclusion that only one set of costs ought to be allowed in respect of the subsequent incumbrancers on the estate. In consequence a notice of motion was given to vary the minutes as handed out by the Registrar accordingly. This point is reported in 27 Beavan, at page 613.

The Master of the Rolls declared that he had carefully gone through this matter again and thought it was clear what the principle was upon which he had decided the question of costs at the hearing. He said that, from the date of the offer to pay plaintiff, the latter was to pay the costs of the suit in the usual manner; that is, the costs of all parties, "but only one set of costs where there were trustees and *cestuis que trust* was given where there was an interest mortgaged and sub-mortgaged". The Master of the Rolls added that any subsequent discussion ought to have been confined to ascertaining what he had then decided and that there would be little difficulty in carrying that into effect. However, he had the question brought before him in Chambers by the Registrar and he had reconsidered the whole matter.

The Master of the Rolls concluded thus (p. 614):

> I think the opinion I expressed at the hearing is the correct one, and that the costs of all parties must be paid, subject to the qualification I have expressed, and which is the usual direction given by the Court in such cases. The only question (if there be any) is the way in which this principle is to be worked out. The Court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the Plaintiff, are identical. I think that I have no right to make the Defendants suffer by reason of their not having adopted that course, the more so, when I am informed that the Plaintiff exhibited interrogatories to each of the Defendants, and required and obtained separate answers from each of them.

A note at the foot of page 614 indicates that this decision was affirmed by the Lords Justices in November, 1860.

Counsel for defendants referred to decisions and comments thereon contained in The Annual Practice, 1942, p. 1494. I have before me The Annual Practice of 1943, which contains at least the same references and annotations. The decisions cited are all founded on regulation (8) of rule 27 of Order 65 of the Rules of the Supreme Court, 1883; it reads thus:

> Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

It appears from the cases noted that the question of whether one or more sets of costs are to be allowed depends largely on the nature of the action. The question is also, to a large extent, subject to the identity or the conflict of interest of the parties.

The Annual Practice, 1943 (p. 1508), cites and comments upon various cases in most of which it was held that defendants having identical interests who severed in their defence were entitled to only one set of costs. An enumeration of these cases, with a brief notation of their respective subject and the judgment referring thereto, seems to me convenient:

Farr v. *Sheriffe* (1) where it was held that trustees and their *cestui que trusts*, and next of kin in the same interest, severing in their defences, were entitled only to one set of costs, although stated (at the bar, but not by the answers) to reside in parts of the country remote from each other.

Greedy v. *Lavender* (2) where it was held that in a simple administration suit the costs of all necessary parties are payable out of the estate, but that where some of the residuary legatees have assigned or incumbered their share they and their assignees are entitled to one set of costs only, namely, the costs of the assignors.

Remnant v. *Hood* (3), previously referred to.

Bull v. *West London School Board* (4). The head-note states that A. and B., two surveyors in partnership, who

(1) (1845) 4 Hare's Rep. 512, at 528.
(2) (1848) 11 Beavan 417.
(3) (1860) 27 Beavan 613.
(4) (1876) 34 L.T. 674.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

were employed as a firm with respect to the matters in question in the suit, were made defendants for the purpose of discovery only. The bill also prayed that "the defendants might pay the costs of the suit".

A. and B. put in separate answers and appeared by separate counsel at the hearing. Prior to the hearing they had dissolved partnership.

It was held that A. and B. were only entitled to one set of costs between them, as they were not justified in severing in their defence.

Bellew v. *Bellew* (1). This was a suit for the administration of the personal estate of an intestate. The plaintiffs were the children of a deceased brother and were entitled to one-fourth of the estate among them. The administrators were a brother and sister of the intestate and entitled to one-fourth each. The remaining fourth belonged to the two children of a deceased sister; on being served with notice of the decree, they obtained separate orders for leave to attend proceedings.

It was submitted by counsel for one of the administrators that the two children ought to have only one set of costs. It was then proposed by one of the other parties that this should be waived and that the costs of both should be allowed. The Vice-Chancellor declined to sanction this proposal and said that, as the authorities had established the rule, it ought to be enforced, in order to put a check upon the unnecessarily obtaining leave to attend proceedings.

Day v. *Batty* (2). Upon further consideration of an administration action in which judgment had been given in the ordinary form, it was held that "mere liberty to attend the proceedings under a judgment does not entitle the parties obtaining the liberty to the costs of their attendance in Chambers as a matter of course, but the Court still has a discretion as to allowing their costs. To entitle them thereto the order giving the liberty to attend should expressly provide that they are to be entitled to their costs of such attendance".

Catton v. *Banks* (3). Real estate divisible under a settlement in three equal shares, of which two were

(1) (1868) W.N. 253. (2) (1882) 21 C.D. 830.
(3) (1893) 2 Ch. 221.

incumbered and the third unincumbered, was sold in a partition action and the proceeds were paid into Court:

It was held that only one set of costs in respect of each share should be allowed out of the fund in Court (*Belcher* v. *Williams* (1) not followed).

Ancell v. *Rolfe* (2). In a partition action the chief clerk had certified that the property was divisible into six shares, two of which only were incumbered:

It was held that "only one set of costs in respect of each share ought to be allowed. *Catton* v. *Banks* (*ubi supra*) followed on this point . . . . The Court has a general discretion as to the costs, and as a rule will not allow parties representing an incumbered share any additional costs incurred by reason of such incumbrance . . . ."

Re Vase (3). An action for the sale and distribution of the proceeds in lieu of partition. It appeared from the chief clerk's certificate that six persons were interested in the property and that some had mortgaged their shares. The property was sold and the proceeds paid into Court. The question was raised whether each mortgagee who had been served with a notice of the proceedings and had attended ought to be allowed a separate set of costs or whether only one set of costs should be allowed in respect of each share.

Cozens-Hardy, J., said:

I shall follow the decision of Chitty, J., in *Ancell* v. *Rolfe* (*ubi sup.*), who followed the decision of Kekewich, J., in *Catton* v. *Banks* (*ubi sup.*), and allow only one set of costs in respect of each share of the property. I have no doubt I have a discretion as to what costs to allow, but in this and in other cases, unless there are special circumstances necessitating a different rule, I shall follow *Ancell* v. *Rolfe* (*ubi sup.*).

Carroll v. *Harrison* (4). This was a partition action. Some of the shares were incumbered. The question arose whether in taxing the costs only one set of costs should be allowed in respect of each of the incumbered shares or whether separate sets of costs should be allowed for each beneficiary and each incumbrancer.

Joyce, J., following *Catton* v. *Banks* in preference to *Belcher* v. *Williams* (5), held that only one set of costs should be allowed in respect of each share. He said that

(1) (1890) 45 C.D. 510.
(2) (1896) W.N. 9.
(3) (1901) 84 L.T. 761.
(4) (1910) W.N. 104.
(5) (1890) 45 C.D. 510.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

it would only create confusion if, after the decision in *Catton* v. *Banks*, *Ancell* v. *Rolfe* and *In re Vase*, he were to go back to what was held by North, J., in *Belcher* v. *Williams*, a case which had never been followed.

In re Catling's Estate (1). By his will John Catling devised to his wife, whose maiden name was Leach, certain copyholds so long as she lived, then at the death of his wife to her brother George Leach, then at the latter's death all his estate "to go to the next heir in the name of Leach as long as the world stands". After the testator's death a burial board took a portion of the copyholds under their statutory powers and paid the purchase money into Court. George Leach survived the testator and died without issue, having devised all the real estate vested in him under the testator's will to Thomas Leach, who, after the death of the testator's widow, petitioned to have the fund in Court paid out to him. There were four claimants to the fund: (1) the petitioner who contended that George Leach was absolutely entitled; (2) Frederick J. Leach who was the heir neither of George Leach nor of the testator; (3) a Mrs. Rowe who was the heiress of George Leach but whose name was not Leach at the time of the testator's death; and (4) the representative of the heir-at-law of the testator. The question was also raised whether the burial board were bound to pay the costs of all parties, the board contending that this was adverse litigation within section 80 of the Lands Clauses Consolidation Act, 1845, and that they ought to pay one set of costs only.

Stirling, J., held (*inter alia*) that the board was only bound to pay one set of costs and that the rest of the costs must be paid out of the fund.

Gaunt v. *Taylor* (2). The testator by his will had given his widow an income of £370 out of his estate and had appointed her his executrix, together with Shaw and Tottie as co-executors. This was a creditor's bill filed against the executors, executrix and heir-at-law of the testator for the administration of his estate. The executrix and executors appeared jointly, but the widow, having an interest different from that of her co-executors, severed in her defence and throughout the proceedings appeared by a different solicitor. By orders made on former occasions two sets of

(1) (1890) W.N. 75. (2) (1840) 2 Beavan 346.

costs had been allowed them, and the cause coming on for further directions it appeared that the personal estate was insolvent and that the testator was not a trader.

The Master of the Rolls held (p. 347):

Where several persons are made defendants in respect of a joint fiduciary character only, or if the beneficial interest which any of them may have in the matters of the suit is in no way conflicting with their other duty, they certainly ought to answer and defend together; if they do not, and there are no special circumstances, then, according to the settled rule of the Court, they will be allowed one set of costs only. On the other hand, if one has a personal interest which conflicts with his duty as trustee, or if one of several trustees can admit facts which the others believe not to be true, it then becomes impossible for them with prudence to answer together. Whether they are entitled to two sets of costs depends on the circumstances of each particular case. If a party creates unnecessary expense it is just that he should be deprived of his costs; and if several trustees unnecessarily sever their defences, it is right that one set of costs only should be allowed; the question always is, whether there was reasonable ground for them to sever.

The previous orders made in this case allowing two sets of costs have, I think, considerable bearing on the present question; and under all the circumstances I think two sets of costs must in this case be allowed.

Garey v. *Whittingham* (1). A testator gave his residuary estate to his wife for life and then to be divided into three shares; he gave one-third between the children of his brother, Thomas Baker, living at the death of his wife; one-third to his niece Frances Garey, and one-third to his nephew and niece, Thomas Baker and Sarah Baker; in case such, any, or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go between his or her children. Thomas Baker's children all died in the lifetime of the widow, but some left children. Held that the latter were entitled to the first-mentioned one-third.

Husband and wife, entitled in the wife's right to a share of residue, were living apart and defended separately. Held, entitled to only one set of costs.

A party entitled to a share of the residue became bankrupt. Held that he and his assignees were entitled to one set of costs between them.

Harbin v. *Masterman* (2). By his will John F. Duncan gave the residue of his personal estate to trustees upon trust to permit the same to remain in its actual state of

(1) (1842) 5 Beavan 268. (2) (1896) 1 Ch. 351.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

investment at the time of his death or, if necessary, to alter the same and, out of the annual income, to pay several annuities to certain persons ten of whom were still living. He then provided that in case at any time the annual income of the trust funds should not be sufficient for the payment of the whole amount of the annuities, then the trustees should apportion the deficiency between the annuitants according to the amount of their respective annuities.

It was held that where an annuity is payable out of the clear residuary estate of a testator the Court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatees.

Delivering the judgment of the Court of Appeal, Lindley, L.J., when dealing with the question of costs, stated (p. 364):

> In these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs; and the Court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel in the same interest can be heard here. I think it would be oppressive to allow more than one set of costs. What we are prepared to do is to exercise our discretion on this occasion, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like; but this is not a case where it was necessary for four sets of counsel to be instructed in order to protect the rights of the residuary legatees.

In the matter of Hopkinson's Patent (1). This was a petition for the prolongation of a patent by the patentee and a company to whom he had sold the whole beneficial interest in the patent. It appeared that the patentee had received a total amount of £19,750 in shares and cash for this patent and a German patent for the same invention, but that the company's expenditure had exceeded their receipts. The petition was opposed by the Crown on the ground that the inventor had been adequately remunerated; it was also resisted by seven sets of opponents. The petition was dismissed and the petitioners were ordered to pay one set of costs to the opponents.

(1) (1896) 14 R.P.C. 5.

Lord Hobhouse said (p. 10):

The petitioners must pay the costs. There are as many as seven sets of opponents, and in this case there ought not to be more than one set of costs allowed. The matter stood over to give the parties an opportunity of agreeing as to the amount. It was intimated that, in case of non-agreement, their Lordships would themselves name a sum, as has sometimes been done. As no agreement has been come to, the sum they name is £400.

See also *In re Henderson's Patent* (1).

Reade v. *Sparkes* (2). The bill was filed by a friend on behalf of plaintiff, then a minor, for the purpose of having the charge of £1,500 affecting the defendant's estate raised by sale of a term. The sum of £300, part of this charge, was claimed by the plaintiff in right of his mother, upon whose marriage it was vested in trustees, of whom Catherine Swan, the representative of the survivor, was made a defendant; all the other persons interested in the residue of the charge were made defendants. The plaintiff, having become of age, entered the usual rule and proceeded in his own name. The plaintiff's right to the sum of £300, with arrears of interest, was reported by the Master. The only question raised for the opinion of the Court was the right of the defendant Swan to her costs and by whom they were to be paid.

The Lord Chancellor, in the judgment, made the following observations (p. 12):

The infancy of the plaintiff at the institution of the suit, makes no difference. Having attained his age and adopted the suit instituted during his minority, he has rendered himself liable to the costs as any ordinary adult. The law has provided for his protection. He had the power, when he attained his age of twenty-one years, of repudiating the suit, and have left his next friend to try the question; but if he thinks proper to proceed, he adopts the suit with all its faults. I am of opinion that defendants, whose rights and titles are identical, having a common interest and defence, as trustee and *cestui qui trust*, should not split such defence, and file separate answers. The cause must be very short and very plain, when they may split and burden the opposite party with a double set of costs; and in general where *cestui qui trust* and trustee have an identity of interest relative to a demand, they should be co-plaintiffs.

Hubbard v. *Latham* (3). This was a suit for the administration of an estate.

(1) (1901) A.C. 616, 621. (2) (1827) 1 Molloy's Reports, 8.
(3) (1866) 35 L.J. Ch. 402.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

By the deaths of legatees during the testator's life, two-thirds of the personal estate comprised in the will lapsed and became divisible between his widow and next of kin. The Court having directed the usual inquiries, leave was granted to several parties claiming as next of kin to attend the taking of accounts and other proceedings.

The cause coming to be heard on further consideration, a question was raised as to the costs of the various parties (other than the plaintiff and the defendants) who, being in the same interest with the plaintiff, appeared nevertheless in separate classes by several solicitors. The plaintiff and defendants also appeared by separate solicitors.

Kindersley, V.C. said:

> I think that the rule laid down by the Master of the Rolls is so simple and wholesome in its application to cases like the present, where the same interests and position in respect of the suit are represented by a numerous class of persons, that I have no hesitation in following the authority of his decision in *Daubney* v. *Leake* (1 L.R. Eq. 495; 1866, 35 L.J. Ch. 347). Moreover, it seems to me that such a course is quite in accordance with the principle of those rules of the 35th Order which have been referred to, their object clearly being to save the expense of unnecessarily numerous appearances.
>
> I shall therefore allow no separate costs to the next-of-kin beyond the costs of proving their respective titles.

Twist and others v. *Tye* (1). The headnote states that "executors, who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will".

It further says that, where executors, also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased and, acting upon their opinion, propounded wills, which were pronounced against, on the ground of testamentary incapacity and want of knowledge and approval of the contents, it was held (Gorell Barnes, J.) that "not only was this a case in which their costs should not be allowed out of the estate, but that, following the general rule that costs follow the event, they should pay the costs of the defendant; but not of any of the parties cited, whose interests were practically identical with those of the defendant".

Hodson v. *Cash* (2). Motion for decree. The only point of interest was as to the costs of the defendant Rushbrooke who had severed in his defence from the defendant

(1) (1902) P. 92.

(2) (1855) 1 Jurist 864.

Cash, his co-trustee. Rushbrooke was authorized by power of attorney from Jemima Hull, the tenant for life, to take proceedings to obtain the annual interest to which she was entitled. Rushbrooke had never acted, except by signing documents for the sake of conformity.

Sir W. P. Wood, V.C., in his judgment, said in substance that Cash was a trustee and as such had but one duty to fulfil, viz., to hand over the money to the party entitled. Rushbrooke, the other trustee, severed in his defence on two grounds: first, because he did not know what the accounts were or what Cash had done, which is not a sufficient reason as he ought to have inquired of Cash and, had he then found something wrong, that might have given him good ground for severing; second, because he holds the power of attorney and is private solicitor of Jemima Hull, the tenant for life, a position which he ought not to have accepted. The Vice-Chancellor concluded: "A person who is a trustee for several *cestuis que trust* acts improperly in taking a power of attorney from one *cestui qui trust* only. He ought to have given up that position. Nor had he any right to instruct any person to appear for him separately, for one solicitor might have appeared for himself and Cash as joint trustees, offering jointly to pay over what was due whenever the Court should have determined who was entitled to receive it". Only one set of costs allowed.

Webb v. *Webb* (1). Two trustees, Webb and Yates, had employed separate solicitors and put in separate answers. Webb had misapplied the trust funds, but no imputation was cast upon Yates.

The Vice-Chancellor said that Yates was justified in severing in defence from Webb and that there must be only one set of costs and the whole of them paid to Yates' solicitor.

Smith v. *Dale* (2). Two executors, defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate and became bankrupt. It was held that the costs incurred by them prior to the bankruptcy be distinguished; that the solvent executor should be allowed only his own proportion out of the fund, the

(1) (1847) 16 Simons Reports, 55. (2) (1880) 18 Ch. 516.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

defaulter's proportion being set off against the debt due from him; but that the costs incurred by both subsequently to the bankruptcy should be allowed in full.

In re Isaac (1). A trustee ought not to be deprived of his costs out of the trust's estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate. He ought to have an opportunity of explaining the reasons for his severance, so that the Court may be able to decide whether the severance was improper.

As the following four decisions were rendered under the Rules of Practice of the Supreme Court of Ontario, it is apposite to quote rule 669 (rule 1162 before the revision and amendment of 1928), which reads as follows:

669. Where two or more defendants defend by different solicitors under circumstances entitling them to but one set of costs, the Taxing Officer shall allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their defences, or otherwise, the Taxing Officer shall allow but one defence and set of costs.

This rule differs materially from the English rule.

I think it is expedient to review briefly the judgments rendered under the scope of this rule, giving in each case a short résumé of the facts and a concise summary of the decisions.

In the case of *Gorham* v. *Gorham* (2), which was a suit by a residuary legatee for the administration of an estate, it was held that the plaintiff represents all the residuary legatees, that the other legatees are not entitled, as of course, to charge the estate with the cost of appearing by another solicitor and, to entitle them to such costs, some sufficient reason must be shown for their being represented by a separate solicitor.

Crawford v. *Lundy* (3). The bill in this case was filed by the executors of Francis Lundy for the construction of his will. Proudfoot, V.C., in his judgment, said (p. 251):

While I cannot say the construction of the will is so obvious that there was no need of asking the opinion of the Court, I do not think there was a necessity for the appearance of so many counsel. One counsel appeared for the plaintiffs; three for the heirs-at-law; some for one, some for others, and two for the grandchildren and the assignee of

(1) (1897) 1 Ch. 251. (2) (1870) 17 Gr. 386.
(3) (1876) 23 Gr. 244.

one of them. I see no reason for the same classes of parties severing in instructing counsel, and direct the attention of the Master to the subject on taxation. With that direction the costs of all parties will come out of the estate.

Re Shields, Shields v. *London and Western Trust Company* (1). This was an appeal by plaintiff from the judgment of Middleton, J. on an appeal from the taxation by the taxing officer of the costs of the defendants under several orders made in a matter originated by an application for an order for administration of the estate of James Shields. The judgment was affirmed. Middleton, J. in his judgment expressed the following opinion (p. 617):

> In cases of this kind, each defendant having a separate interest is justified in severing, if he sees fit; and, unless the Court at the hearing, in awarding costs, sees fit, in the exercise of its discretion, to provide that there shall be but one set of costs, each is entitled to his separate bill. The only exception to this general statement, at all relevant to this case, is that those who in truth represent the same estate and interest are not entitled to sever: mortgagors and mortgagees, execution creditors and their debtors, are not entitled to separate. This has been recognized as an established principle of equity for many years: for example, see the cases collected in Morgan on Costs, 2nd ed., p. 125.

The report notes that the Appellate Division affirmed the decision of Middleton, J. agreeing with the reason given by him for his order.

Re Murphy and Lindsay, Bobcaygeon and Pontypool Railway Company (2). In an action for compensation for lands taken for railway purposes, the claimants severed in their defence. Meredith, C.J. referred the case to the senior taxing officer to report whether the parties interested in the lands should be allowed two sets of costs. The taxing officer, after hearing counsel for all parties, made a report in which he said (p. 363):

> I should hold that all parties interested in a piece of land under the Railway Act, 1903, must appear together by one solicitor. The persons who on the arbitration herein appeared in opposition to the company were the life tenant, those who would take in succession on his death, or as beneficiaries on a forfeiture of his life estate, those who then became trustees for such beneficiaries, and the life tenant's mother, who was entitled to a yearly payment charged on the whole farm. Before the arbitration proceedings, one solicitor acted for all in negotiations with the company, which resulted in possession being given it. No reason appears for the employment of an additional solicitor on the arbitration * * * *

(1) (1920) 52 D.L.R. 615. (2) (1905) 6 O.W.R. 361.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

The proportions of their several interests could not be considered on the arbitration, but only the magnitude of one lump sum, during the ascertainment of which they could not be considered as having distinct shares * * * *

But the persons interested in the land are not defendants but plaintiffs. The nature of the case makes them such. Such is the actual procedure. And the Land Clauses Consolidation Act, 1845, on which the Railway Act is based (sec. 43), expressly makes them plaintiffs. As plaintiffs they would, of course, have only one solicitor.

No authority has been cited to me for allowing the claimants costs of severing as to solicitors upon the arbitration. I know of none. The cases cited to me are decisions under sec. 80 of the Land Clauses Consolidation Act (to which sec. 174 of our Railway Act is equivalent), and costs thereunder are in the discretion of the Court; and Judges have differed much as to giving costs to the several interests there separated or created.

This is the first such arbitration on which, to my knowledge, parties interested in a piece of land have asked for several bills of costs.

The report (p. 365) states that Anglin, J. adopted the senior taxing officer's report and requested him to tax the two bills of costs as one bill and to apportion the amount between the solicitors for the two sets of parties as he thought proper in the circumstances.

See also *Rex* v. *Commissioners of Taxes for St. Giles and St. George, Bloomsbury* (1), (also reported in (1915) 3 K.B., 768, under the heading of *The King* v. *Bloomsbury Income Tax Commissioners*).

There are a few cases in which two or more sets of costs were allowed. It seems appropriate to at least review briefly the most important.

Aldridge v. *Westbrook* (2). By certain marriage articles the husband covenanted with trustees to convey and settle certain real estates on the trusts mentioned therein. The articles not having been performed, a bill was filed for that object, to which the co-heiresses of the surviving covenantee were made parties. The bill prayed a specific performance, the appointment of new trustees and a conveyance to the co-heiresses or such new trustees. The co-heiresses lived at a distance from each other they were defended by separate solicitors. One of them put in a full answer to all the allegations in the bill, stating that, if she were a trustee, she submitted to act as the Court might direct on being paid her costs. The other put in a short

(1) (1915) 7 Rep. of Tax Cases, p. 59, at 73. (2) (1841) 4 Beavan 212.

answer, saying that she was a stranger to the matters, but that, if a trustee, she wished to relinquish the trust; and she submitted to act under the Court.

It was held by the Master of the Rolls (p. 213):

According to the facts as now represented, these two ladies are the co-heiresses of the surviving trustee. They never acted in common in the performance of the trusts, nor did they ever undertake to perform the duty which belonged to their ancestor: they appear also to have been living at a distance from each other, and therefore I do not think that they come within that very salutary rule, which prevents trustees from separating in their defences, and putting money into the pockets of third parties at the expense of the persons beneficially entitled. They are both, therefore, entitled to their costs as between party and party.

Boswell v. *Coaks* (1). An action to set aside the sale of a life interest to C. and B., on behalf of themselves and four other defendants, was dismissed by the House of Lords with costs. It was orderd that in taxing the costs the taxing master should consider whether any of the defendants who appeared separately had good reason for severing and if it should appear that they had not then the taxing master should allow only one set of costs or only as many as he thought right. He allowed the six defendants costs of separately defending.

It was held by North, J. that there was no appeal from the discretion of the taxing master. On appeal it was held that, as the House of Lords had delegated to the taxing master the decision of the question as to how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion.

In *Belchar* v. *Williams* (2), which was a partition action, it was held that the costs of all parties, including those of the mortgagees, must be paid first out of the proceeds of sale; that there is no fixed rule in partition actions, as there is in administration actions, that only one set of costs will be allowed in respect of each share of the property.

North, J. expressed the following opinion (p. 518):

I think, therefore, that in the present case the incumbrancers must be treated as if they were owners of a share, and must have their costs out of the fund. I am not, however, attempting to lay down any absolutely fixed general rule. It is quite clear, as I have already said, that the Court has a discretion as to costs, which it will exercise differently under different circumstances. In the present case, I think, the incumbrancers must be treated as owners of shares, and have their costs accordingly.

(1) (1887) 36 Ch. 444.
(2) (1890) 45 Ch. 510.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

Such a rule might, no doubt, work rather hardly in some cases; but the Court is strong enough to exercise its discretion so as that the costs shall be borne in the fairest way possible, having regard to the circumstances of each particular case.

Blakey v. *Latham* (1), a patent action which had been dismissed with costs. In delivering judgment Kay, J. held, as a matter of law, that the plaintiffs' patent was invalid, but expressed the opinion that "if the patent was valid" there had been an infringement. The defendants were partners, but after the action had been commenced and before trial the partnership was dissolved. The defendants severed and appeared by separate solicitors, though only one appeared at the trial by counsel, the other appearing in person and availing himself of the defence of his co-defendant. Questions having arisen before the Registrar as to the form of the judgment, the plaintiffs moved to vary the minutes by inserting a declaration that the defendants had infringed the plaintiffs' patent and by directing that the defendants should have only one set of costs.

Kay, J. said "he intended to give the defendants all their costs, and that whatever expense had been occasioned to them by the action the plaintiffs should pay".

Bagshaw v. *Pimm* (2) was an action to establish the third and, alternatively, the second will of a testator. It was separately defended by the executors of the first will and by two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The jury found that the execution of the two last wills was obtained by undue influence and the judge pronounced against them and for the first will. It was held by the Court of Appeal, reversing the judgment of Gorell Barnes, J. "that there was a sufficient divergence of interest between the defendants to justify the legatees in appearing by separate counsel and that, consequently, there was no good cause for depriving them of the costs of their separate appearance".

Petrie v. *Guelph Lumber Co. et al.*, *Stewart* v. *Guelph Lumber Co. et al.*, *Inglis* v. *Guelph Lumber Co. et al.* (3).

(1) (1888) W.N. 126. (2) (1900) P. 148.
(3) (1885) 10 O.P.R. 600.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrong-doers. They were sued for conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean and believed that the statement by them and McLean, which was the foundation of the actions, was true. It was held that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants.

In appeal, Burton, J.A. made an order that only one appeal book should be printed and the three cases were argued together. Held that the taxing officer was right in allowing separate counsel fees in each case.

Melbourne v. *City of Toronto* (1). This was an action for damages for injuries caused to a drain, in which two contractors who had constructed the drain and the assignee of one of them were added defendants. The two contractors were partners when the drain was constructed, but had dissolved partnership before the action was begun. One contractor defended by one solicitor and the other and his assignee by another solicitor. The judgment dismissed the claim against the added defendants with costs. It was held by Armour, C.J. that there was no "law of the Court" which, under the circumstances of the case, justified the taxing officer in refusing to allow more than one set of costs to the added defendants.

Rose & Laflamme Ltd. v. *Campbell, Wilson & Strathdee Ltd.* and *Grand Trunk Pacific Railway Co.* (2). This case, relied upon by plaintiff, dealt with an appeal from a decision of the judge in Chambers disallowing certain items in the railway company's bill of costs allowed by the taxing officer and affirmed by the Master. As stated by Lamont, J.A., who delivered the judgment of the Court of Appeal of the province of Saskatchewan, "the items are limited to costs incurred by the railway company in examining for discovery an officer of their co-defendant, obtaining dis-

(1) (1890) 13 P.R. 346.

(2) (1923) 4 D.L.R. 92.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

covery and inspection of their co-defendant's documents and attending on the examination for discovery of one of the Railway Company's officers at the instance of their co-defendant, and the attendance on the production and inspection of their own documents. With the incurring of these costs the plaintiffs had nothing to do. The plaintiffs, however, have to pay the Railway Company's costs, and are therefore liable for such costs as were necessarily incurred by the company".

The learned judge referred to rules 252, 256 and 265 of the Rules of Practice and Procedure of the Court of King's Bench of the province of Saskatchewan, the first one referring to the notice requiring discovery of documents, the second one to the inspection of documents referred to in the pleadings or affidavits and the third one to the examination of parties before trial. I do not think that it would serve any useful purpose to reproduce these rules here.

Lamont, J., in his judgment, made the following observations (p. 97):

> Where a plaintiff brings two defendants into Court who have adverse interests, and he is called upon to pay the costs, he is liable for such costs as are necessarily incurred by them in ascertaining the facts upon matters in reference to which their interests are adverse; but he cannot be held liable for the costs incurred in inquiring into matters not directly concerned with the point of conflict between the defendants.

Mitchell v. *Martin and Rose* (1). This was an appeal by the defendants, who had severed in their defences from the refusal of a taxing officer to allow them separate costs. It was held by Dysart, J., of the Court of King's Bench of the province of Manitoba, as follows (p. 264):

> Where the interest of two or more defendants is diverse in any material respect, the defendants are entitled to sever their defences. They are not bound to link themselves up to each other's fortunes: *McDonald* v. *Cunningham* (1885, 3 Man. L.R. 39). And the consequence that the severed statements of defence incidentally include much matter that is common to both is immaterial. Being practically unavoidable, it is all taxable.
>
> But where the interests, though diverse, are not conflicting, there is no good reason why the defendants may not employ the same solicitor—at least up to the trial. And conversely, it is quite proper for a solicitor to act for them. But in such a case he is limited to one bill of costs, in which there should be but one set of items to cover all the common matters, and separate sets of items for separate matters. That is the course followed by Deacon in this case, and is the correct one: *McDonald* v. *Cunningham, supra.*

(1) (1925) 1 D.L.R. 260.

See also *Cameron, The Principles of the Law of Costs,* p. 76 *Widdifield, The Law of Costs in Canada,* 2nd edition, p. 110.

The law pertaining to costs in the province of Quebec differs from that of this Court and of the other provinces. However it may be convenient to make a brief reference to it in order to exhaust the subject. Costs under the Code of Civil Procedure of Quebec are not payable to the parties but to their solicitors. Article 553 enacts:

> Every condemnation to costs involves, by the operation of law, distraction in favour of the attorney of the party to whom they are awarded.

The only article of the Tariff of Advocates' Fees before the Superior Court referring to defendants severing in their defences is article 14, which reads thus:

> Whenever there are several defendants who sever in their defence, the plaintiff's attorney receives, on each additional contestation, one half of the fee allowed by article 25, plus one half of the enquête and hearing fees (art. 45-46), with also one half of the additional fee mentioned in article 5, if there be reason; the same rule applies equally to interventions and to all the other proceedings enumerated in article 48 of this tariff.

As may be seen, this article merely provides for the case where the action is maintained. It says nothing of the costs of defendants, who have severed in their defences, which may be taxable against the plaintiff. One has to make his own deductions. The jurisprudence has almost always been constant in allowing to each defendant pleading separately a complete set of costs: *Frothingham and Workman Ltd.* v. *Shean et al.* (1); *Brown et vir* v. *Winterbottom et al.* (2) *Tassé et vir* v. *Tassé et al.* (3); *Renaud et vir* v. *Chartier et al.* (4); *Lavergne dit Renaud* v. *Larivière et al.* (5); *Barclay's Bank* v. *Paton et al.* (6); *Protestant Board of School Commissioners of Outremont* v. *Cooke et al.* (7); *Claude* v. *Bélisle et al.* (8); *Dion* v. *Gagnon et al. et Vanier et al., mis-en-cause* (9); *Cimon et al.* v. *Fortin et al.* (10).

Contra: *Wallace* v. *Languedoc et al.* (11).

(1) 17 Q.P.R. 159.
(2) (1917) 19 Q.P.R. 162.
(3) (1917) 18 Q.P.R. 340.
(4) (1923) 25 Q.P.R. 242.
(5) (1910) 12 Q.P.R. 149.
(6) (1933) 38 Q.P.R. 72.
(7) (1899) 2 Q.P.R. 251.
(8) (1938) 41 Q.P.R. 274.
(9) (1924) 27 Q.P.R. 93.
(10) (1930) 34 Q.P.R. 127.
(11) (1902) Q.R. 21 S.C. 298.

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

Of the decisions reviewed that *in re Murphy and Lindsay, Bobcaygeon and Pontypool Railway Company* is the most pertinent and I feel disposed to accept the principles therein laid down. I may add that the case of *Farr* v. *Sheriffe,* wherein it was held that trustees and *cestui que trusts* and next of kin of the same interest, although residing in parts of the country remote from each other, were entitled to only one set of costs, offers, on the point of residence, some relevance. The decisions in *Catton* v. *Banks, Ancell* v. *Rolfe, Re Vase, Carroll* v. *Harrison* and *Harbin* v. *Masterman,* though not so directly in point, uphold my view.

As stated by the Registrar all the defendants in the four cases had a common interest, namely to get the most for the properties expropriated. The cases offered no unusual difficulty. They were ordinary expropriation cases concerning properties of comparatively little value. I do not think that the matters at issue nor the amounts involved justified the retaining of the services of two solicitors.

The statements of defence filed on behalf of Martha MacPherson are in one case identical and in the other cases substantially similar to those produced on behalf of the other defendants. Moreover her statements of defence in the first, second and third cases are dated and were filed a day or two only after those of the other defendants. In the fourth case, her statement of defence was filed at the trial only, viz., on June 25, 1943, practically one month after the statement of defence of the defendant Florence Barrows McKelvey, because she was only added as defendant, at plaintiff's request, on that date.

True it is that the defendant Martha MacPherson was at the time of the expropriation, and had been for a certain time previous thereto, living in the United States. According to a statement by her counsel, she was not on friendly terms with the other defendants. Of this fact there is unfortunately no proof whatever.

When did Martha MacPherson become aware of the proceedings in expropriation and when did she instruct her counsel to look after her interests? We do not know; there is no indication in the record in this connection, except that her statements of defence followed very closely those of her co-defendants. However that may be, I do

1944

HIS MAJESTY THE KING v. FRASER ET AL.

Angers J.

not think that there was any necessity to put in a separate defence nor that the attendance of two solicitors at the trials was required.

After listening attentively to counsel's arguments and taking notes thereof, perusing the decision of the Registrar and examining carefully the judgments relied upon by counsel and by the Registrar and a number of others, I have reached the conclusion to dismiss the appeals of the plaintiff and of the defendants. One bill of costs should be taxed in the first three cases, the costs so taxed to be paid to the parties in the ratio of their proportionate interest in the compensation money. Two bills of costs should be allowed in the fourth case, in which Martha MacPherson was added as defendant at the trial on plaintiff's motion. I do not feel inclined to interfere with the discretion of the taxing officer.

As both plaintiff and defendants are partly successful there will be no costs to either party on these appeals.

Judgment accordingly.

1942

June 10, 11, 24 & 25.

1943

Nov. 24.

BETWEEN:

NORTHUMBERLAND FERRIES LIMITED ..... } CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Appropriation—War Measures Act, R.S.C., 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—"The value of the vessel * * *, no account being taken of any appreciation due to the war"—The doctrine of reinstatement discussed—"Compensation" and "value" distinguished.*

Under the War Measures Act, R.S.C., 1927, c. 206, the Crown appropriated two ships owned by the claimant. The action comes before the Court by way of reference by the Minister of Justice to have determined the amount of compensation payable to the claimant.

Held: That the compensation to be adjudged for property appropriated under the War Measures Act should be calculated and determined in the same manner as in the case of an expropriation made under the Expropriation Act, and the value to be determined under both Acts is the value to the owner.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

2. That the term "value" used in the Compensation (Defence) Act, 1940, is narrower than the term "compensation" used in the Expropriation Act since it does not comprise injurious affection to the residue.

3. That the doctrine of reinstatement applies to the acquisitioning of a vessel as well as to the expropriation of land.

4. That the "appreciation due to the war" in the Compensation (Defence) Act, 1940, does not refer merely to the value to the taker but means an appreciation in value generally.

REFERENCE by the Minister of Justice under the War Measures Act to have determined the compensation payable for two vessels appropriated by the Crown.

The action was tried before the Honourable Mr. Justice Angers at Charlottetown, P.E.I., and Halifax, N.S.

Hon. Thane A. Campbell, K.C. and *Geo. J. Tweedy, K.C.* for claimant.

J. G. Fogo, K.C. and *C. St. Clair Trainor, K.C.* for respondent.

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

ANGERS J. now (November 24, 1943) delivered the following judgment:

This is a reference by the Minister of Justice under Section 7 of the War Measures Act (R.S.C. 1927, chap. 206) of the claim of Northumberland Ferries Limited for compensation in respect of the ships *Charles A. Dunning* (formerly known as the *Seaborn*) and *Sankaty* appropriated by His Majesty the King for naval services.

The claim is for $298,335.37 as follows:

1941			
March 1.	To value of M.V. *Charles A. Dunning* (*Seaborn*)	$175,000.00	
March 1.	To value of S.S. *Sankaty*	300,000.00	
			$475,000.00
March 8.	By cash amount paid on account		176,664.63
			$298,335.37

Section 7 under which the reference is made reads as follows:

7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

A notice of the reference was served on the claimant and its solicitor on June 7, 1941.

A statement of claim on behalf of claimant was filed on June 12, 1941; the material allegations thereof may be briefly summed up as follows:

The claimant is a company incorporated under the laws of the Province of Nova Scotia and authorized to do business in the Province of Prince Edward Island;

The claimant was the owner of the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty* until they were acquired by His Majesty the King for war purposes, to wit for naval services;

The M.V. *Seaborn* (*Charles A. Dunning*) was acquired by claimant on July 14, 1939, previous to the outbreak of the war, and was requisitioned by the Director of Marine Services, on authority of the Minister of National Defence for Naval Services, for war purposes on December 2, 1939;

Upon the requisitioning of the M.V. *Seaborn* (*Charles A. Dunning*) the claimant acquired another ship the S.S. *Sankaty* on December 12, 1939;

The S.S. *Sankaty* was requisitioned by the Director of Marine Services, on authority of the Minister of National Defence for Naval Services, for war purposes on June 17, 1940;

The claimant before the said 2nd day of December, 1939, had entered into a contract with the Department of Trade and Commerce whereby the claimant is bound to operate a ferry service between Wood Islands, Prince Edward Island, and Caribou, Nova Scotia; the said contract is for a term of 10 years from the 1st day of May, 1940; for performing the terms thereof the claimant was to be paid a subsidy of $28,000 a year by the Department of Trade and Commerce;

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

His Majesty the King acting through the Minister of National Defence for Naval Services on March 1, 1941, acquired both the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty* for war purposes;

His Majesty the King acting through the Minister of National Defence for Naval Services on March 8, 1941, paid the claimant the sum of $176,664.63 on account of compensation for said ships and agreed with the claimant to refer its claim for compensation in respect of the acquisition of said ships to the Exchequer Court for adjudication as to the balance alleged to be payable to claimant upon such claim;

The claimant's claim is for the value of the M.V. *Seaborn* (*Charles A. Dunning*) and the S.S. *Sankaty,* to wit $475,000, less the sum of $176,664.63 paid on account, leaving a balance of $298,335.37 (as hereinabove detailed), with interest at the rate of 4 per cent from March 1, 1941.

In the defence in answer to the statement of claim the Attorney-General of Canada on behalf of His Majesty the King says in substance as follows:

He admits the allegation relating to the status of the claimant;

He admits that the claimant was the owner of the M.V. *Seaborn* and the S.S. *Sankaty* until they were acquired by His Majesty for war purposes;

He admits that upon the requisitioning of the M.V. *Seaborn* the claimant acquired the S.S. *Sankaty* on December 12, 1939;

He admits that before the 2nd of December, 1939, the claimant had entered into a contract with the Department of Trade and Commerce whereby it is bound to operate a ferry service between Wood Islands, P.E.I., and Caribou, N.S.;

He admits that the contract is for a term of 10 years from May, 1940, and provides for a yearly subsidy of $28,000 to be paid by the Department of Trade and Commerce;

He admits that the M.V. *Seaborn* was acquired by the claimant as alleged and was requisitioned for war pur-

poses but says that the requisition order was contained in a telegram from the Director of Marine Services to the claimant on December 2, 1939, and that the said ship was delivered pursuant thereto on December 6, 1939;

He admits that the S.S. *Sankaty* was requisitioned as alleged, but says that the requisition order was contained in a telegram from the Director of Marine Services to the claimant on June 17, 1940, and that the said ship was delivered pursuant thereto on June 24, 1940;

He admits that the M.V. *Seaborn* and the S.S. *Sankaty* were acquired by His Majesty for war purposes, but denies that the date mentioned is the correct date and refers to the dates stated in paragraphs 2 and 3 of the defence;

The amount paid by His Majesty on March 8, 1941, as compensation for the said ships was not $176,664.63 but $196,377.55, which sum was apportioned as follows: $92,764.63 with respect to the acquisition of the M.V. *Seaborn,* $83,900 with respect to the acquisition of the S.S. *Sankaty,* $8,200 with respect to balance Charter Hire of the M.V. *Seaborn* from August 6, 1940, to March 1, 1941, and $11,512.92 with respect to Charter Hire of the S.S. *Sankaty* from June 24, 1940, to March 1, 1941, and the said payment was expressly made without prejudice to the right of the Government to resist payment of any additional amount on any ground which would be otherwise open to it, including the Compensation (Defence) Act 1940;

Before this claim was referred to this Court for adjudication His Majesty had already paid to claimant in respect of the requisition and acquisition of said ships several sums amounting to $205,977.55 which amount was sufficient to satisfy all claims of the claimant in respect of said ships. the particulars of which payments are as follows:

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

April 8, 1940, Charter Hire in respect of the M.V. *Seaborn* from December 6, 1939, to April 5, 1940.....	$4,000.00
October 6, 1940, Charter Hire in respect of the M.V. *Seaborn* from April 6, 1940, to August 6, 1940.....	5,600.00
March 8, 1941, Pursuant to Order in Council P.C. 1893, $196,377.55, as follows:	
As compensation in respect of acquisition of the M.V. *Seaborn*.....	92,764.63
As compensation in respect of the acquisition of the S.S. *Sankaty*.....	83,900.00
Balance Charter Hire in respect of the M.V. *Seaborn* from August 6, 1940, to March 1, 1941	8,200.00
As Charter Hire in respect of the S.S. *Sankaty* from June 24, 1940, to March 1, 1941	11,512.92
	$205,977.55

The War Measures Act hereinabove referred to empowers the Governor in Council to appropriate property, a term, needless to say, broad enough to include vessels, during war, invasion or insurrection, real and apprehended.

Section 3 of the Act orders (*inter alia*) that:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; * * *

Section 6 enacts:

6. The provisions of the three sections last preceding shall only be in force during war, invasion, or insurrection, real or apprehended.

Section 7 hereinabove reproduced deals, as we have seen, with the fixing of the compensation.

The War Measures Act, obviously found inadequate, was supplemented in 1940 by an Act respecting the payment of compensation for the taking of certain property for war purposes, entitled "The Compensation (Defence) Act, 1940", assented to on August 7, 1940.

Section 2 of this Act contains, among others, the following definitions which are relevant:

(*a*) "acquisition", in relation to any vessel or aircraft, means the appropriation by or on behalf of His Majesty of the title to or property in the vessel or aircraft under the provisions of the War Measures Act;

(*f*) "requisition", in relation to any vessel or aircraft, means the appropriation of the use thereof or requiring it to be placed at the disposal of His Majesty under the provisions of the War Measures Act;

(*g*) "war" means the state of war now existing;

(*h*) "War Measures Act" means the War Measures Act, chapter two hundred and six of the Revised Statutes of Canada, 1927, and includes any order in council, order or regulation made pursuant thereto;

(*j*) "vessel" means any ship or boat or any other description of vessel used or designed to be used in navigation.

Section 4 refers to the compensation payable in respect of the requisition of a vessel; it offers no interest in the present instance as there is no dispute about the compensation for the use of the claimant's vessels from the time they were requisitioned to the time they were acquired or released.

Section 5 relating to the compensation payable for the acquisition of a vessel is the one on which the present claim is based. I deem it expedient to quote the provisions thereof which have some relevance to the question at issue.

5. (1) The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war, and shall, subject to the provisions of this Act, be paid to the person who is then the registered owner of the vessel or aircraft; provided that, for the purpose of assessing any compensation under this section, no account shall be taken of any compensation under paragraph (*a*) or paragraph (*c*) of subsection one of section four hereof which may have become payable in respect of the requisition of that vessel or aircraft.

(2) Where, at any time during the period for which the vessel or aircraft is requisitioned on behalf of His Majesty,—

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

(a) a written notice stating that the vessel or aircraft is to be treated as acquired on behalf of His Majesty is served on the registered owner thereof by a person acting on behalf of His Majesty, or

(b) the vessel or aircraft is sold on behalf of His Majesty,

then, for the purposes of this section, the vessel or aircraft shall be deemed to have been acquired on behalf of His Majesty immediately before the day on which the said notice was served or, as the case may be, the day on which the vessel or aircraft was so sold, and the period of requisition shall be deemed to have been ended at the time when the acquisition of the vessel or aircraft as aforesaid is deemed by virtue of this subsection to have been effected * * *

A proclamation declaring that a state of war exists and has existed in Canada as and from September 10, 1939, was published in *The Canada Gazette* of September 30, 1939, a copy whereof was filed as exhibit H.

The M.V. *Seaborn,* later known as the *Charles A. Dunning,* was first requisitioned by the respondent by telegram from the Director of Marine Services, Department of Transport, addressed to R. E. Mutch, president of Northumberland Ferries Limited, dated September 4, 1939, reading as follows (exhibit 5):

Confidential by authority of the Honourable the Minister of National Defence I have to inform you that the S.S. *Seaborn* of which your company is understood to be the present owner is hereby requisitioned in the interests of public safety and is to be handed over on the morning of Tuesday September fifth ninteeen hundred and thirty nine to the Commanding Officer Atlantic Coast Royal Canadian Navy His Majestys dockyard Halifax NS Stop Apply immediately to Registrar of Shipping to have vessel properly registered with present name also apply immediately for change of name and submit three names by order of choice you wish to give the vessel Stop Hire will be determined on a bare bottom basis and documents accordingly will be forwarded in a day or two for signature Stop Inventory of stores retained will be made by naval authorities Stop It is understood that master and members of the crew who are physically fit of military age and with qualifications of a satisfactory nature may volunteer for service Stop Officers will be given rank corresponding to their sea going qualifications in the RCNR temporary if accepted Stop Please confirm receipt and your understanding of this instruction.

The M.V. *Seaborn* or *Charles A. Dunning* was released temporarily. The release was conditional, the claimant being forbidden to make alterations on the vessel, as she might be requisitioned anew.

In fact by telegram sent by the Director of Marine Services to Northumberland Ferries Limited on December 2, 1939, the M.V. *Seaborn* or *Charles A. Dunning* was again requisitioned; the telegram (exhibit 6) is in the following terms:

By authority of Minister of National Defence *Charles A. Dunning* formerly *Seaborn* is requisitioned for naval service and should be delivered as soon as possible to flag officer commanding third battle squadron HM dockyard Halifax Stop Cancel all marine insurance policies from time vessel handed over Stop Report here day and hour handed over.

Between the date of the purchase of the *Seaborn* by claimant and the date on which she was first requisitioned, repairs were made to her and material supplied for her use to the extent of $1,992.42, as shown by invoices filed as exhibit 8.

The respondent having expressed his intention of acquiring the vessel a bill of sale was executed by claimant in favour of respondent on October 11, 1940; a duplicate of this bill of sale was filed as exhibit C. The price stipulated was $70,705.

In order to replace the M.V. *Seaborn* or *Charles A. Dunning,* the claimant purchased another vessel, called the *Sankaty.* This vessel in her turn was requisitioned by the respondent, as appears from a telegram addressed by the Director of Marine Services to claimant on June 17, 1940, a duplicate whereof was produced as exhibit 7. This telegram is worded thus:

By authority of power delegated to me by Minister of National Defence under Defence of Canada Regulations vessel *Sankaty* is hereby requisitioned for naval service to be delivered without delay to commanding officer Atlantic coast HM dockyard Halifax Stop Vessel requisitioned for hire on bare boat basis and terms of charter hire will be determined later Stop Cancel all marine insurance policies from time vessel handed over Stop Advise date and hour handed over.

Both vessels were definitely acquired by the respondent on March 1, 1941. The claim, as previously indicated, relates to compensation for these vessels which were successively requisitioned and later acquired by His Majesty for war purposes. The amount of the claim ($298,335.37) represents the balance outstanding on the alleged value of the vessels, the first one the M.V. *Charles A. Dunning* (formerly the M.V. *Seaborn*) estimated at $175,000, and the other one the S.S. *Sankaty* estimated at $300,000, after payment by the respondent of a sum of $176,664.63.

The M.V. *Seaborn,* later rechristened *Charles A. Dunning,* was purchased by the claimant in the United States on or about July 14, 1939, previous to the outbreak of the war, from Goldie Archanna Morrison, as appears

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

from a bill of sale filed as exhibit B. The bill of sale states that the sale was made for and in consideration of the sum of one dollar and other valuable considerations paid in lawful money of the United States. It stipulates that the delivery of the vessel is to be made at the port of New London, State of Connecticut, U.S.A.

(The learned Judge reviews the oral and documentary evidence and continues.)

The War Measures Act, as we have seen, empowers the Governor in Council to appropriate property, real and personal, of any description whatsoever, which, by reason of the existence of real or apprehended war, he may deem necessary or advisable for the security and defence of Canada. The power thus conferred upon the Governor in Council shall, in virtue of section 6 of the Act, hold "during war, invasion or insurrection, real or apprehended". Its duration is not explicitly definite. The question of determining when war is apprehended is evidently left to the discretion of the Governor in Council; it has no materiality in the present case inasmuch as the proof discloses that a state of war with the German Reich existed in Canada as and from the 10th of September, 1939.

The Act is rather reticent with regard to compensation. Section 7, hereinabove reproduced, provides that "whenever any property * * * has been appropriated by His Majesty under the provisions of this Act, * * * and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, * * *".

Section 7 of the War Measures Act contains the word "compensation", which is also used in the Expropriation Act (R.S.C. 1927, chap. 64), particularly in section 23 thereof. I think it may be assumed that the legislators in enacting the War Measures Act had in view the compensation to be adjudged for the property appropriated should be calculated and determined in the same manner as in the case of an expropriation made under the Expropriation Act.

I feel that, if the legislators had intended to have the compensation determined differently they would have said so and indicated the manner in which it should be calculated. Their silence induces me to believe that they were

satisfied that the general principles of the law of compensation should apply. The main difference between the Expropriation Act and the War Measures Act, in so far as expropriation is concerned, is that the former only deals with land as described in paragraph (*d*) of section 2 thereof or, in brief, real estate, and the latter deals with property in general, real and personal.

The Compensation (Defence) Act, 1940, relates (*inter alia*) to the requisition and acquisition of vessels or aircraft. We are only concerned in the present instance with acquisition, the question of requisition having been settled by agreement.

The relevant provisions of section 5 of the Act reproduced at greater length hereinbefore state:

> (1) The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war, and shall, subject to the provisions of this Act, be paid to the person who is then the registered owner of the vessel or aircraft;

The main object of the litigation is the meaning and exact scope of the words "the value of the vessel or aircraft, no account being taken of any appreciation due to the war".

It was submitted on behalf of claimant that the value of the vessel to the owner must be taken into account as is usually done in cases of expropriation and that, if the vessel appropriated by the respondent cannot be replaced by another one of about the same size and capacity and the same age and value, the doctrine of reinstatement is applicable. It was contended on the other hand on behalf of respondent that the compensation provided by the Compensation (Defence) Act, 1940, is exclusively the market value of the vessels appropriated as it was immediately before the declaration of war and that consequently the doctrine of reinstatement does not apply.

It seems apposite to point out at the outset that up to a year or so before the outbreak of the war requisitioning and acquisitioning proceedings dealt almost exclusively with land and appurtenances. In fact the Expropriation Act concerns only lands and real rights. Consequently there is not a great deal of specific connection between the facts herein and those of the various cases relied upon.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

The principles involved however are similar and this, in my view, is sufficient to allow the court to draw some assistance from the decisions hereinafter referred to.

It was urged by counsel for claimant that the principle upon which the compensation payable in respect of the acquisition of a vessel is to be determined is that it must be calculated on the basis of a sum equal to the value thereof to the owner, but that no account is to be taken of any appreciation due to the war.

The value to be paid is the value to the owner as it existed at the time of the appropriation, leaving aside any appreciation due to the war. As to the bearing of the expression "no account being taken of any appreciation due to the war", I shall endeavour to determine it in a moment.

The value consists in all the advantages which the property possesses, present and future, but it is the present value of such advantages which must be considered: *In re Lucas and Chesterfield Gas and Water Board* (1); *Fraser et al.* v. *City of Fraserville* (2); *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3); *Pastoral Finance Association, Limited* v. *The Minister* (4); *Sidney* v. *North Eastern Railway Co.* (5); *Stebbing* v. *Metropolitan Board of Works* (6); *The King* v. *Wilson* (7), affirmed by the Supreme Court June 14, 1915; *The King* v. *Estate of John Manuel* (8); *The King* v. *Halifax Graving Dock Co. Ltd.* (9); *The King* v. *Quebec Skating Club* (10); *Federal District Commission* v. *Dagenais* (11); *Cripps* on *Compensation,* 8th ed., 174; *Nichols* on *Eminent Domain,* 2nd ed., p. 630, No. 208, and p. 665, No. 219; *Browne and Allan, Law of Compensation,* 2nd ed., 97.

It seems to me apposite to quote a few short excerpts from some of these decisions, which, in my view, are particularly accurate and in point.

Fletcher Moulton L.J., in re *Lucas and Chesterfield Gas and Water Board* (*ubi supra*), made the following observations (p. 29):

(1) (1909) 1 K.B. 16, 29.
(2) (1917) A.C. 187, 194.
(3) (1914) A.C. 569, 576.
(4) (1914) A.C. 1083, 1087.
(5) (1914) 3 K.B. 629, 637.
(6) (1870) L.R., 6 Q.B. 37, 42.
(7) (1914) 15 Ex.C.R. 283.
(8) (1915) 15 Ex.C.R. 381.
(9) (1920) 20 Ex.C.R. 44, 59.
(10) (1931) Ex.C.R. 103.
(11) (1935) Ex.C.R. 25, 31.

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

In the case of *Cedars Rapids Manufacturing and Power Company and Lacoste* (*ubi supra*) Lord Dunedin, delivering the judgment of the Judicial Committee of the Privy Council, expressed the following opinion (p. 576):

For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Lord Moulton in the case of *Pastoral Finance Association, Limited, and the Minister* (*ubi supra*) said (p. 1087):

The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the appellants to realize the special value they thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the appellants' hands, but it by no means prevented the land having this special value, nor did it interfere with the appellants' right to have that special value duly assessed by the jury, as the amount of the compensation due.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

In the case of *Fraser* v. *City of Fraserville* (*ubi supra*) Lord Buckmaster, speaking for the Judicial Committee of the Privy Council, made the following remarks (p. 194):

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board* (1909, 1 K.B. 16), *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1914, A.C. 569), and *Sidney* v. *North Eastern Ry. Co.* (1914, 3 K.B. 629). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.

The late president, Maclean J., adopted the same principle in *Federal District Commission* v. *Dagenais* (1) in which he stated (p. 32):

> The same principle has been affirmed in Canadian courts, on many occasions. That principle is therefore to be applied in this case, and it is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it. In all such cases, if compensation is to be a reality, the Court must take into consideration all the circumstances and ascertain what sum of money will place the dispossessed man in a position as nearly similar as possible to that which he was in before. He should not be made poorer by the forcible taking of his property.

Further on the learned judge repeated the same statement in different words (p. 33):

> The principle which seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up.

See also *The King* v. *W. D. Morris Realty Limited* (2); *The King* v. *Beech* (3); *The King* v. *Spencer* (4).

(1) (1935) Ex.C.R. 25.
(2) (1943) Ex.C.R. 140, 146.
(3) (1930) Ex.C.R. 133, 142.
(4) (1939) Ex.C.R. 340, 353.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

Counsel for claimant in his argument admitted, rightly so to my mind, that, in connection with the *Seaborn*, the question of reinstatement did not arise. The only question at stake was the value of the vessel to the owner.

In endeavouring to determine the value of a property, real or personal, the cost to the owner may be taken into account; it may be an element of estimation but it is not always decisive. The circumstances surrounding the purchase must be looked into carefully.

The purchase price of the *Seaborn* was $80,000, of which $30,000 was paid in cash, $25,000 by shares and $25,000 by second mortgage bonds of the company. The vessel was in exceptionally good condition. Her cost was estimated at from $306,000 to $750,000.

The proof shows that the cost of overhauling her and bringing her from New London, Conn., to Halifax, and the cost of her maintenance until she was requisitioned totalled $16,651.94. It is also established that the structural changes, which were effected on her but were not completed on account of her being taken over by the respondent, cost $2,181.73. These various items form a total of $98,833.67.

Jagle and Strang, as previously noted, valued the *Seaborn* at the time immediately preceding the outbreak of the war at $175,000. The evidence discloses that they did not act in concert and did not compare notes.

Taking into consideration the drop in the market of high-priced yachts in the few years previous to the war and the possible lack of stability of the *Seaborn* if converted into a ferry boat—the evidence relating thereto, I may say, is not absolutely conclusive—make me feel somewhat hesitant as to her value to the claimant. From the evidence adduced I am inclined to think that the *Seaborn* was not the right kind of vessel to use for the carrying of trucks and automobiles, at least to carry the quantity which she was expected to carry. She was a beautiful yacht with first-class fittings, kept in excellent condition by her owner; she could unquestionably have loaded safely a certain number of cars, but perhaps not the quantity which she was expected to carry. This decreased to a certain extent her value to claimant. It may be that the latter, as intimated by counsel for respondent, was

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

endeavouring to acquire another vessel before the *Seaborn* was definitively acquired by the Crown, because it felt that, as a ferry boat she might possibly not have the stability required. In fact the evidence discloses that the claimant was looking for another boat before the respondent, after having requisitioned and later conditionally released her, finally decided to acquire the *Seaborn*. On the other hand this may well have been necessitated by the notification given to claimant by the respondent not to make any alteration to the vessel as she might possibly be again requisitioned. The evidence on this point, I may note, is not very categorical.

The offer of $92,764.63 made by the respondent is, in my opinion, too low. The cost of the *Seaborn* to claimant, including the purchase price, the cost of overhauling and bringing her to Halifax, the cost of maintenance before the requisitioning and the cost of structural changes commenced but not completed due to the requisitioning amounted to $93,264.63. The cost, if it is an element of estimation in some cases, is seldom decisive, particularly in a case like the present one where the owner, grown old and unable to use his yacht, had no other alternative but to put her up for sale at whatever price she could fetch.

After taking into consideration the various elements hereinabove referred to, I have reached the conclusion that the value of the *Seaborn,* rechristened the *Charles A. Dunning,* to her owner, Northumberland Ferries Limited, during the summer of 1939, before the declaration of war, was $100,000.

Great stress was laid by counsel for respondent on the fact that the purchase price of the vessel was only $55,000, made up of $30,000 in cash and $25,000 in second mortgage bonds, since the additional sum of $25,000, consisting of common shares of the claimant company, which completes the price of $80,000 mentioned by McKay and Mutch and shown in the books of the company, must not be taken into account seeing that the said shares were redeemed from the vendor Miss Goldie Archanna Morrison for $25,000. According to counsel for respondent the actual cash outlay for the *Seaborn* would have been $55,000. The evidence on this point is not very satisfactory. Be that as it may, I do not think that the price or cost of a property,

real or personal, to its owner is a definite criterion for determining its value, although it may be a relevant consideration: *Streatham and General Estates Co. Ltd.* v. *Commissioners of Works and Public Buildings* (1); *Federal District Commission* v. *Dagenais* (2).

There are various reasons which they may induce an owner to sell at a sacrifice, such as illness, old age, distress, etc. Unless one knows the circumstances in which a property was acquired it is somewhat hazardous to place much reliance upon the purchase price.

With regard to the *Sankaty,* counsel for claimant submitted that the doctrine of reinstatement applies. In support of his submission, he relied particularly on the following decisions: *Toronto City Corporation and Toronto Railway Corporation* (3); *A and B Taxis, Limited* v. *The Secretary of State for Air* (4).

It will suffice to quote a portion of the head-note in the case of *Toronto City Corporation* and *Toronto Railway Corporation,* which gives a substantial résumé of the notes of Viscount Cave who delivered the judgment of the Judicial Committee (p. 177):

> By contract and under a special Act of Ontario the appellant city corporation had the right, which they exercised, to take over the respondent company's street railways in Toronto at a price to be determined by arbitration. * * *
>
> The arbitrators based their reasoned award as to the value of the railway tracks, rolling-stock, and buildings (including plant and machinery therein) primarily upon the cost of reproduction less depreciation. * * *
>
> Held, (1) that the arbitrators had rightly taken the cost of reproduction less depreciation as a guide in making their award; and that as they had also taken into account obsolescence, comparative utility, and other relevant considerations, the above contention by the city failed.
>
> (2) That the cost of reproduction had rightly been based upon prices generally current at the date of the arbitration, even if the hypothetical work of reproduction would have taken three years to carry out. * * *

In the case of *A and B Taxis, Limited* v. *The Secretary of State for Air,* the report shows that the claimants carried on business as garage proprietors in Dublin and that they owned and occupied premises well suited to their purposes. These premises were taken by the Government. The claimants, having tried without success to

(1) (1888) 52 J.P. 615.
(2) (1935) Ex.C.R. 25, at 29.
(3) (1925) A.C. 177.
(4) (1922) 2 K.B.D. 328.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

acquire premises temporarily, bought other premises, fitted them for use as a garage and transferred to them the appliances of their business which they continued to carry on as well as they could. When the Government gave up possession of the original premises the claimants sold the substituted premises. They claimed that the difference between the amount expended in acquiring the substituted premises and fitting them for use as a garage and the sum received on the sale of the substituted premises amounted to £3429. They claimed this sum as an item of "direct loss or damage incurred or sustained by reason of interference with" their "property or business" within the meaning of section 2, subsection 1 (*b*) of the Indemnity Act, 1920.

It was held that "direct loss or damage" may include consequential damage and that the item claimed could not be entirely excluded as indirect loss, but that the amount to which claimants might be entitled in respect thereof must be assessed by the War Compensation Court.

Bankes L.J., dealing with the question of reinstatement, expressed the following opinion (p. 336):

> It is well recognized that there are claims for compensation in which the principle of reinstatement affords the only proper basis of compensation. I would refer to this passage from Cripps on Compensation, 5th ed. (1905), p. 118; 6th ed. (1922), p. 114: "There are some cases in which the income derived or probably to be derived, from land would not constitute a fair basis in assessing the value to the owner, and then the principle of reinstatement should be applied. This principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which would be to him of the same value. It is not possible to give an exhaustive catalogue of all cases to which the principle of reinstatement is applicable. But we may instance churches, schools, hospitals, houses of an exceptional character, and business premises in which the business can only be carried on under special conditions or by means of special licences." It must depend on the facts whether in a particular case the principle of reinstatement so stated applies; and the material considerations would seem to be, first, the nature of the business which is to be displaced; it would be unreasonable to incur great expense in reinstating a business which could only be carried on at a loss; secondly, the time during which the business is to be displaced; if the time was very short it might be unreasonable to incur any expense in reinstating it. But if it were not reasonable to shut up the business and claim compensation on the footing of its total destruction—if the reasonable course were to keep it alive by transplanting it elsewhere—then the next question would be, was it reasonable for the proprietor to take the premises he took and incur the expense he incurred in adapting them to the requirements of the business.

The passage from Cripps on Compensation cited by Bankes L.J. appears in the eighth edition of his work at page 180. The opinion of Bankes L.J. seems to me well founded and relevant.

Reference may also be had to the case of *Metropolitan Railway Company and Metropolitan District Railway Company* v. *Burrow;* the text of the judgments of the Divisional Court and of the Court of Appeal will be found in the appendix to the eighth edition of Cripps on Compensation at pages 906 to 916. According to a note on page 906, the company appealed to the House of Lords which dismissed the appeal. The following statements of the Lord Chief Justice of the Divisional Court are particularly interesting (p. 907):

> But the company, in its own best judgment, did not controvert the evidence that to carry on that business in that neighbourhood in an equally advantageous way—I use the word "way" on purpose—it was, under the circumstances, necessary to get premises costing so much more than the premises which the man occupied and to fit them up in a certain way. If the only way in which he could equally advantageously carry on the business which the company destroyed was by taking premises worth so much more and that was anticipated, I cannot myself see that there was anything wrong in leaving to the jury the value of the sum of money which it would so cost to replace the claimant in the same position from which they had turned him out. It may be said he was placed in a better position; but his answer is: "I cannot help that. I do not want to be in a better position; I am willing to stay where I am. You are not willing I should stay; you turn me out. The only place that you can put me into is a place that will cost me so much more, and I do not want to pay it." Why is not that the damage he has sustained by their action? I confess I am unable to see what other is the fair estimate of that damage. That the damage may have been over-estimated is quite another matter.

The judgments of the Divisional Court and of the Court of Appeal also appear in Appendix C in volume 2 of Hudson on Compensation.

In *Re Lennox and Toronto Board of Education* (1), the Appellate Division of the Supreme Court of Ontario adopted the rule laid down by the Privy Council in *Fraser* v. *City of Fraserville* that "the value to be ascertained is the value to the seller of the property in its actual condition at the time of the expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired". The exclusion

(1) (1926) 58 O.L.R. 427.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

hereinabove stipulated, needless to say, has no application in the case of the appropriation of a vessel. In the reasons of Mr. Justice Middleton there are, among others, certain pertinent remarks which I think advisable to cite (p. 441):

> I agree with them (the arbitrators) that the evidence by which the value is sought to be established by ascertaining what it would cost to reconstruct the buildings to-day, when the cost of building is greatly advanced, and then by abating that sum by some arbitrary figure to indicate the proportion which the original value has lost by reason of this incidental decay, cannot here be relied upon as any safe guide; it is too uncertain; there are too many contingencies; too many factors to be considered, all of which rest on opinion, or, in other words, mere guessing. Reconstruction cost is a proper method to be considered where the property taken is one which must be replaced by the landowner. A factory is taken; the owner must re-build. The result of the taking is that he is forced, presumably, to re-build a similar structure on a similar site. He is out of pocket what this costs, but he has a new building, and so the cost must be abated to meet this. But here the property was merely an investment.

See also *The School Board for London* v. *The South-Eastern Railway Company* (1); *Bidder and others and The North Staffordshire Railway Company* (2); *Nichols on Eminent Domain,* 2nd ed., vol. I, page 667, paragraph 222.

The cost of the *Sankaty* to claimant, including the purchase price, the outlay for temporary repairs in the United States necessary to bring her to Halifax and the expense of reconditioning her at Halifax, was $71,226.14. I do not think that this figure can be taken as representing the value of the vessel to the claimant at the time of her appropriation by the respondent; it is greatly inferior to such value. The *Sankaty* was purchased from the Washington Trust Company, at Westerly, Rhode Island, for a trifle, presumably at a judicial sale; the evidence on this point is not categorical.

From the time the *Sankaty* was taken over by the Crown, claimant made numerous endeavours to find a ship to replace her. The only ships which it found were the *Fishers Island,* the *Red Star* and the *Erie Isle.* The latter is the one which claimant purchased and rechristened the *Prince Nova.*

The price paid for the *Prince Nova* was $74,000, delivered at Amherstburg, Ont., but the original quotation by her owner was $110,000 (dep. McKay, p. 58, and Mutch, p. 95).

(1) (1886-7) 3 T.L.R. 710. (2) (1878-9) 4 Q.B.D. 412, 432.

She was not then in a state to go on the run at once; she needed reconditioning. Repairs and alterations were made to her amounting to $9,319.68, as shown by the invoices exhibits 14, 15, 16, 17, 18 and 19. Work for a further sum of $8,000 or $9,000 was required to complete the repairs and alterations (dep. McKay, p. 58). These various amounts bring the total cost of the *Prince Nova* when converted into a ferry boat to a sum varying between $91,319.68 and $92,319.68. Now the *Prince Nova* can only carry 16 or 17 cars, depending on their size, and she does not accordingly replace adequately the *Sankaty,* whose carrying capacity was from 30 to 34 automobiles. In order to be placed in as favourable a condition as it was in before the appropriation by the Crown of the *Sankaty* the claimant would have to acquire another vessel of the same capacity as the *Prince Nova* for a price, in round figures, of $92,000. Even then the claimant would not have been in as good a position since the operation of two ships entails higher overhead expenses.

The proof shows that the *Red Star* could have been bought for the sum of $52,500 payable in United States currency, equivalent to $58,275 in Canadian money, but that repairs to her engines amounting to about $12,000 would have been needed (Jagle, p. 20). By making various alterations to her she could have carried 14 automobiles. The cost of these alterations was not disclosed. Smaller than the *Prince Nova* and having a lesser capacity, the *Red Star* could obviously not replace the *Sankaty.*

The only vessel found by claimant which could have replaced the *Sankaty* almost satisfactorily, though not adequately, was the *Fishers Island,* which was about 35 feet shorter and 7 feet narrower than the *Sankaty* and could only carry from 20 to 25 automobiles according to their size. The price asked by her owner in February, 1941, was $285,000 in United States currency, for delivery at New London, Conn., the duty being at the expense of the purchaser (Jagle, p. 18). The rate of exchange being then 11 per cent the price in Canadian funds would have been $316,350. The proof shows that in 1941 the prices of vessels had increased materially over the pre-war prices. Strang estimated this increase at 50 per cent (p. 43). Roue declared that the cost of construction of ships in

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

1941-1942 was 10 to 15 per cent higher than in 1938-1939 (p. 34). I am inclined to fix this increase at 33⅓ per cent, the proportion suggested by counsel for respondent. One-third of $316,350 is $105,450; subtracting this amount from the price of $316,350 we have a balance of $210,900. Unfortunately the claimant could not finance the deal.

To build a ship of the size and capacity of the *Sankaty* in 1938 would have cost between $196,000 and $200,000, exclusive of the machinery, which would have meant an expenditure of $115,000 or $150,000, according to the type of engine and power used (Roue, p. 31). In taking the lowest figures, viz., $196,000 and $115,000, the cost of the vessel would have been $311,000. Of course depreciation must be allowed, notwithstanding Jagle's assertion that "age does not mean anything if a boat has been given proper care". However it may be, I am satisfied that a vessel 14 or 15 years old, even if kept in very good condition, is not worth as much as new. I would estimate her depreciation at 30 per cent at the utmost. Deducting 30 per cent from $311,000 leaves a value of $217,700.

The evidence discloses that the *Prince Nova* has not an adequate capacity for the purpose for which she is being used; in 1941, between the middle of June to the opening of the schools, about one-third of the traffic offering had to be turned away (Roberts, p. 53). The witness added that the vessel was not large enough and that in his estimation "she should be as large again".

Counsel for claimant contended that his client is entitled to replace the *Sankaty* with a ship having the same capacity. This contention seems fair and reasonable. The *Sankaty,* after her conversion into a ferry boat, could have carried between 30 and 34 cars depending on their size, while the *Prince Nova* can only accommodate a maximum of 16 or 17. Another difference is that the space for trucks on the *Prince Nova* is limited to 3 or 4 as compared with the *Sankaty* on which the automobile space could be used for trucks if necessary.

Counsel for respondent laid stress on the difference in the wording of the Expropriation Act and the Compensation (Defence) Act, the first one using the term "compensation" and the second the more restrictive expression "value" and he concluded that the decisions rendered

under the former and relied upon by counsel for claimant have no application in the present case. This contention is too broad and a distinction is appropriate. The compensation provided for by the Expropriation Act comprises not only the value to the owner of the land taken but also the injurious affection to the residue in case a portion only of the property is expropriated. The Expropriation Act, which by the way is not drawn up on a very logical plan, contains no definition of the word "compensation". In order to find a summary outline of a definition we must refer to section 23 which stipulates that the compensation money is to stand in the stead of the land or property; the provision thereof relevant to the point in question reads thus:

> 23. 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; * * *

The word "value" is not included in section 23 nor in fact in any part of the Expropriation Act. But as previously stated, the word "compensation" has been accepted by the jurisprudence and the doctrine as meaning the value of the land to the owner at the date of the taking, with all its advantages, present and future, the present value alone of the latter having to be considered. After giving the matter full consideration I am satisfied that the interpretation of the word "value" adopted by the Courts and the authors in connection with the Expropriation Act is applicable in cases under the Compensation (Defence) Act, 1940.

I may note in passing that counsel for respondent in his argument remarked that there was something significant about the figure of $175,000 adopted by Jagle and by Strang as the value of the *Seaborn* in that it coincides exactly with the amount of the claim. Counsel for claimant offered the explanation, which seems to me quite reasonable, that the amount of the claim was based on the figure which the claimant obtained from its valuators.

The fact that Jagle and Strang both arrived at the same figure may appear to be an extraordinary coincidence. It certainly is as these two men did not know one another before the trial, had not compared notes and had met for the first

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

time in Court. I am inclined to believe that their estimate is too high but I am satisfied that it was made in good faith and is based on serious reasons.

On the other hand the figure of $60,000 mentioned by Fletcher and Riddell is, in my judgment, much too low.

Counsel for respondent noted that a suggestion had been made that the payment by the Crown to claimant of the sum of $83,900 with respect to the *Sankaty* was based on the cost of the ship, including the purchase price and the amounts expended for repairs and reconditioning. He added that the evidence on this point is most satisfactory and that the claimant should have kept some record of the amounts paid to carpenters and engineers and to the crew. There is no doubt that the books of the company were not kept very carefully and that the information which they supply is incomplete. Be that as it may, I am satisfied that the *Sankaty* had, up to the time of her acquisition by the respondent, cost the claimant at least $71,090.48. As previously stated, the cost of the vessel to claimant is only one of the elements available to determine her value. It is not in itself decisive, particularly in a case of reinstatement as the one with which I have to deal.

It was further submitted on behalf of respondent that there is no proof of the value of the *Sankaty* on the part of claimant and that the only evidence in that respect was supplied by Fletcher and Riddell, the first placing a value of $68,000 on the ship and the second a value of $66,000. As I have previously said, these figures are too low, particularly if one takes into consideration that it is the value to the owner which is material and not the value to the taker.

It was urged on behalf of respondent that if the replacement of the *Sankaty* is to be taken into consideration one must not overlook the fact that, as admitted by Strang, one of claimant's witnesses, values have been inflated 50 per cent by the war. Fletcher and Riddell also referred to inflation but did not state any figure. The inflation is indisputable, but the figure mentioned by Strang seems to me excessive; as already said, I am inclined to assess it in the case of vessels at 33⅓ per cent, which is the proportion adopted by counsel in his argument.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

Counsel for respondent invoked regulation 48 of the Defence of Canada Regulations which authorizes the Minister of National Defence to requisition, if it appears to him necessary or expedient in the interests of public safety, the safety of the State or the efficient prosecution of the war or for maintaining supplies and services necessary to the life of the community, *any chattel* in Canada (including any vessel or aircraft or any article on board a vessel or aircraft) and to give such directions as appear to him necessary or expedient in connection with the requisition.

Regulation 48 was replaced by an Order in Council passed on February 9, 1942 (P.C. 995). The new regulation gives the Minister of Munitions and Supply the same requisitioning powers previously vested in the Minister of National Defence.

This regulation, as I think, adds nothing to the Compensation (Defence) Act in so far as vessels are concerned and it contains no reference to the matter of payment. It enacts however that the Minister of National Defence and, since the passage of Order in Council P.C. 995, the Minister of Munitions and Supply may requisition *any chattel* in Canada of any nature whatsoever, provided it appears to him to be necessary or expedient in the interests of the public safety, the safety of the State or the efficient prosecution of the war or for maintaining supplies and services necessary to the life of the community. His power has no limitation other than his discretion; but with this aspect of the question we are not concerned.

Counsel for respondent pointed out that section 7 of the War Measures Act does not create the authority for payment of compensation but merely indicates how the matter is to be dealt with by the Court failing an agreement, which seems obvious; the text of section 7 is clear. Counsel said that before the Compensation (Defence) Act, 1940, was enacted the situation in so far as land was concerned was set out in *Warner Quinlan Asphalt Company* v. *The King* (1), where Audette J. at p. 199 said:

> In the construction of statutes, the principle is recognized that an intent to alter the common law beyond the evident purpose of the Act is not to be presumed, and it has been expressly laid down that statutes are not presumed to make any alteration in the common law beyond

(1) (1923) Ex.C.R. 195.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

what the enactment explicitly declares, either in express terms or by unmistakable implication. In all general matters beyond, the law remains undisturbed. It is not to be assumed that the legislature would overthrow fundamental principles, infringe rights, or depart from, or alter the general principles of law, without expressing itself with irresistible clearness.

Maxwell, Interpretation of Statutes, 6th ed., 149 and 235; Craies, Statute Law, 2nd ed. 126 and 188; Endlich, Interpretation of Statutes, 95, 153 and 173.

The learned judge cites section 7 and continues:

In the present case the Crown did not appropriate in the sense of expropriating and acquiring the ownership of the vessel in question; but it appropriated the use of the property, i.e. the "use of" the vessel and accounted to the owners thereof for the same.

* * *

In other words the true intent, meaning and spirit of the section—relied upon at bar—is to maintain and preserve to the subject any right possessed by him at common law, and which he previously had, notwithstanding the Act. The section does not confer upon him any new right to compensation in addition to those which he theretofore had and enjoyed at common law. It recognized liabilities *in esse*—already existing—but does not create any new ones.

The Act did not alter the law, but merely maintained it as it stood at the time of the passing of the statute, in respect of all maters therein referred to.

Since the enactment of the "Compensation (Defence) Act, 1940", this question does not arise.

Counsel for respondent, as his opponent, relied upon section 5 (1) of the said Act which is indeed the one applicable in the present instance.

With the object of defining the words "compensation" and "value" in section 5 (1) counsel for respondent referred to the following observations of Mr. Justice Maclean in the case of *Federal District Commission* v. *Dagenais* (*ubi supra*) at page 33:

The Expropriation Act, section 23, speaks of "the compensation money * * * adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money", it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken", and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of lands.

As previously stated, the term "compensation" used in the Expropriation Act does not include only the value of

the land taken but also the injurious affection caused to the residue of the property. As suggested by counsel for respondent I believe that the term "value" used in the Compensation (Defence) Act, 1940, is narrower: it does not and indeed cannot comprise injurious affection to the residue, since in the case of a vessel or aircraft there is no residue. But the value to be determined under both acts is the value to the owner. As acknowledged by the doctrine and the jurisprudence there are certain cases in which the income derivable from the thing expropriated would not constitute a fair basis in assessing the value to the owner; then the principle of reinstatement ought to be applied. As observed by Cripps (*op. cit.*, p. 180 *in fine*), "this principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which would be to him of the same value". Notwithstanding counsel's argument to the contrary I believe that the doctrine of reinstatement applies to the acquisitioning of a vessel as well as to the expropriation of land and that the decisions governing the latter are relevant and applicable.

It was urged by counsel for respondent that a ship is a peculiar type of property which depreciates in value and in that respect is quite different from land. I think this statement is too broad. Land, as defined in the Expropriation Act, comprises not only lands of every description but also real property in general, including messuages and tenements, which are liable to depreciation. Needless to say depreciation must be taken into account.

Counsel for respondent drew the attention of the Court to the fact that the term "value", relating to a ship, is found in the Merchant Shipping Act, 1854 (17 & 18 Vict., chap. 104), s. 504, which fixes the limitation of the shipowners' liability; the section reads as follows:

504. No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity (that is to say),

(1) Where any loss of life or personal injury is caused to any person being carried in such ship;

(2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

(3) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;

(4) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat;

Be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than fifteen pounds per registered ton.

As indicated by counsel, a history of the legislation concerning the limitation of the owner's liability is related in *Maclachlan* on *Merchant Shipping,* 7th ed., p. 92. This history may be and is indeed interesting but it has no materiality herein.

An interpretation of the meaning of the term "value" in section 504 was given by Sir W. Page Wood, V.-C. in the case of *The African Steam Ship Company* v. *Swanzy and Kennedy* (1) where he said (p. 663):

The only question of which I have to dispose is, what is to be taken to be the value of this ship within the meaning of the term "value" in the 504th section of the Act.

The natural and obvious meaning of the term in question, and that which under ordinary circumstances the Court would attribute to it, is what the ship would have fetched had she been sold immediately before her loss.

It was contended, that this would lead to too low an estimate, and that the Court ought to inquire what, at the time when the ship was lost, was her peculiar value to the Plaintiffs, having regard to the business in which she was employed, and the growing nature of that business. But to adopt the peculiar value which the owner would have set upon his ship as the criterion of her value within the meaning of the Act, would be to open too large a field of inquiry.

It is true, that the sum which the ship would have sold for, cannot, in all cases, be a true criterion of its value. Cases might arise, in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic, and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One I venture to suggest might be, to ascertain the price given for the ship, and the subsequent deterioration. Some such criterion would have to be adopted; for otherwise the value of the ship would be what the ship would sell for to be broken up.

(1) (1856) 2 Kay & Johnson's Rep., 660.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

Counsel intimated that the decision in this case is an authority on "the very phrase" with which we are confronted. I may first observe that the Merchant Shipping Act has an entirely different object from that of the Compensation (Defence) Act, 1940. It may be that in determining under section 504 of the Merchant Shipping Act, 1854, the value of a ship for the purposes of the limitation of her liability it must be assessed at the current market value, assuming that such value exists. The sole object of section 504 is to limit the responsibility of the owner of a sea-going ship or of a share therein for loss of life or injury to passengers or damage to or loss of goods occurring without his fault or privity. The compass of the Expropriation Act and of the Compensation (Defence) Act, 1940, is much broader and consequential; their effect is to deprive the owner of a property, real or personal as the case may be, of his right of ownership against his will and quite often contrary to his interests. I do not think that, in such a case, the price which the property could fetch if put on the market and sold forthwith would be a fair and reasonable compensation to the owner.

With due deference I must say that I cannot share the view of the Vice-Chancellor when he says that "to adopt the peculiar value which the owner would have set upon his ship as the criterion of her value within the meaning of the Act would be to open too large a field of inquiry". One must not shun too readily the work involved in an extensive inquiry, provided it be pertinent and material.

Another statement of the Vice-Chancellor with which I may say with respect I cannot agree unreservedly is that a criterion of value might be "to ascertain the price given for the ship and the subsequent deterioration". As previously noted, the cost of a property, real or personal, to its owner is not necessarily a criterion in assessing its value, although it may sometimes be an important element.

Counsel for respondent finally relied upon the doctrine of contribution for the purposes of general average where it is necessary to determine the value of the ship in relation to the value of the cargo in order to establish what amounts each of the contributing parties should bear to take care of the damage which is a general average loss. In this

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

connection counsel referred to *Lowndes' General Average,* 5th edition, page 351; not having this edition at my disposal, I consulted the 6th edition (1922).

I think it may be useful to cite two brief extracts from this work. First, at page 358, the author defines the principle regulating the basis of contribution thus:

> The general principle of contribution may be summed up in one sentence: it must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss: and on this amount, which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute.

Lowndes then says that the first contributing interest is the ship and adds (p. 359):

> This must contribute upon its actual value to the owner, at that point of time which, according to the rules already laid down, is to form the basis of adjustment, and in the actual condition, whether sound or damaged, in which the ship was at that time.

And further he goes on to say:

> To determine the actual value of a ship is not always very easy. On principle, a merchant-ship being simply a machine for earning freights, the real value of a ship to her owner is, the present capitalized value of all her future earnings, so long as she can be used as a ship, after deduction of her working expenses; to which must be added, the present value of the sum for which she may eventually be sold to be broken up. But, as the data for such a calculation do not exist, we have to adopt other tests, in the way of approximation. One such test is the value in the market, which represents the current opinions of shipowners on the point. This test can be adopted when there is a market for ships of the kind, sufficiently extensive to give a fair approximation to the ship's real value. In the case of ships of a peculiar build, or exceptional size, or having qualities which specially adapt them to some one limited trade, the value in the market may not come near to the real value. In such a case it may be necessary to take account of the first cost; to make a deduction for age and wear and tear; to allow, likewise, for changes that may have taken place, since the ship was built, in the cost of materials or the price of labour, or for later improvements in construction which may diminish her relative value. In short, no inflexible rule can be laid down beyond this: the principle is, the ship is to be valued at that sum for which the owner as a reasonable man would be willing to sell her: and this sum must be ascertained by the adjuster as well as he can (See *African Steamship Co.* v. *Swanzy* (1); *Grainger* v. *Martin* (2). See also The Marmonides, 1903, p. 1).

The same doctrine is expounded in *Arnould* on *Marine Insurance,* 12th edition, vol. 2, at page 1321, where he says:

(1) (1856) 2 K. & J. 660.

(2) (1862) 4 B. & S. 9.

There is no dispute about the general principle: but there has been great difficulty in adopting any practical rule of valuation, a difficulty arising principally from the fact that the ship, generally speaking, is not, like the goods, actually sold at the port of destination. The method of valuation, in the absence of a sale, has been very generally, but very variously, fixed by the positive laws of almost all mercantile States, but in our own country we have no fixed rule upon the subject. The adjuster must ascertain the figure as well as he can—either, where there is a market for similar vessels, by estimation of her market value, or, where there is not, by considering her first cost, and then making proper allowances for wear and tear, changes in the cost of construction, materials and the like, which might either enhance or diminish her value at the date of adjustment.

As stated in connection with the Merchant Shipping Act, I may say here that the object of the law of general average is materially different from that of the Expropriation Act and the Compensation (Defence) Act, 1940, and the value of a ship under the Merchant Shipping Act or the Marine Insurance Act cannot, in my opinion, be determined in the same manner and with the same measure as under the two former acts. However it may be, Lowndes acknowledges that, in the case of a ship of a peculiar build or of an exceptional size or having qualities which make her specially adaptable to a limited trade, the market value may not come near to the real value.

Counsel for respondent intimated that the market value of ships is something liable to fluctuate rapidly, particularly that of freighters which depends largely on the fluctuation in freights. He admitted however that when the owner of a ship operates her on a regular service her value to him is not to the same degree open to fluctuation as the market value.

Regarding the decision in *A and B Taxis Limited* v. *The Secretary of State for Air,* counsel submitted that this was a case under a special act, the Indemnity Act, 1920, which indicates clearly what can be claimed, namely, the "direct loss or damage incurred or sustained by reason of interference of the Crown" and that it cannot be helpful in the present instance owing to its particular phraseology. The Indemnity Act, 1920, is undoubtedly more precise and definite than the Compensation (Defence) Act, 1940. It nevertheless remains that it is the value to the owner which must be assessed and that the principle of reinstatement must be applied if the owner cannot otherwise be placed in as favourable a position as he was in before the taking over of his property by the Crown.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

Dealing with the phrase "no account being taken of any appreciation due to the war" in section 5 (1) of the Compensation (Defence) Act, 1940, counsel for respondent argued that it should not be interpreted narrowly as suggested by counsel for claimant but should be given the same weight as any other part of the definition. In his view the difficulty in this case is not to understand the phrase which is unambiguous but lies in the application of it. In this connection counsel expressed his wish to refer to the experience in the United States arising out of the last war, where according to him something very akin to the question at issue arose. Counsel submitted that under the constitution of the United States a person whose property is taken by eminent domain is entitled to just compensation but that there grew on the law of just compensation a theory that one should not recover for what is known as an artificial enhancement or a boom value. He intimated that it was held that, if the taking by the State occurred at some moment when the market for the particular thing wanted was abnormally high, this constituted an artificial enhancement of the value and that it should not be taken into consideration; that however there was some doubt about this and that after the last war a number of actions were instituted in which owners of property taken had applied for compensation; that the Government of the United States took the position that the prevailing war-time prices at the time of the taking did not represent the fair market value and that the measure of compensation in such cases was the cost of production plus a just and reasonable profit. Counsel in this respect referred to the following decisions: *C. G. Blake Co.* v. *United States* (1); *National City Bank of New York* v. *United States* (2); *Prince Line Ltd.* v. *United States* (3).

The head-note of the report of the judgment of the District Court, which was affirmed in appeal, in the case of *C. G. Blake Co.* v. *United States,* contains a fair summary of the judgment and I deem it appropriate to quote an extract (p. 861):

(1) (1921) 275 Fed. Rep. 861; 279 Fed. Rep. 71.
(2) (1921) 275 Fed. Rep. 855; (1922) 281 Fed. Rep. 754.
(3) (1922) 283 Fed. Rep. 535.

(1) Where one is entitled to compensation based on the value of property, the measure of recovery, where such property can be procured in the market, is its market value, even though such market value is affected by laws and governmental regulations affecting the sale of such property, droughts, floods, commercial panics, crop failures, labour difficulties, or other similar causes; the true value being otherwise determined only where there is no market value.

4. Owner of coal requisitioned for the maintenance of the United States Navy under National Defence Act, par. 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, par. 3115 1/8 ii), suing the government for "just compensation" under such statute, was entitled to the market value, notwithstanding abnormal condition of market resulting from the war and governmental regulations, and was not limited to the cost of production plus a reasonable profit.

Reference may be had to the notes of Peck, District Judge, at page 863, *in fine*, and page 864. The judgment of the Circuit Court of Appeals affirming the judgment of the District Court contains no reasons of particular interest.

In the case of *National City Bank of New York* v. *United States*, paragraphs 4 and 5 of the head-note are interesting; they contain an accurate résumé of the part of the judgment defining the "just compensation". I may quote a passage from the judgment of Mayer, District Judge, on this subject (p. 859):

(4) It is the rule of law in condemnation cases that the just compensation guaranteed by the Constitution is the fair market value of the property taken (Lewis on Eminent Domain, 2d Ed., par. 706, p. 1048, and other authorities cited). * * * The Chandler-Dunbar case is a helpful illustration of the principle because the rule was applied in order to prevent the owner from recovering more than the fair market value. There it was contended that the parcel taken possessed "strategic value" with reference to a general scheme of water-front development, such as that for which the property was taken. The court, in disallowing this item of value, said (Mr. Justice Lurton, at 229 U.S. 81, 33 Sup. Ct. 679, 57 L. Ed. 1063):

"The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

Not only is market value the measure of just compensation, but it must be the value in a free market. Prices prevailing in a market which is not free are not the measure of just compensation (authorities cited).

It is well settled that a person whose property is taken is entitled to its market value for the most valuable use, although as matter of fact he did not devote it to that use, and for some reason or other could not do so. In such case, however, he would be free to sell it to a person who could so use it (authorities cited).

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court contains no material observations.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

In the case of *Prince Line Limited* v. *United States* it will suffice to quote a brief excerpt from the reasons of Chatfield, District Judge, relating to compensation (p. 540):

> (3) As was said in cases cited *supra*, the government cannot take private property without making just compensation, and just compensation is to be estimated by the value to the person at the time of the taking. Unless the government could properly say that all persons in the United States were to furnish the government property, supplies, and services at a pre-war price, and unless the government could constitutionally stamp as illegal all prices which, due to competition caused by the war, had increased in value, then just compensation would be a fair price in accordance with the laws of supply and demand at the time. From this standpoint, the demands of the plaintiffs in each of these cases are not only fair and just, but within the limits which have easily been established as fair market value. It has been shown that there was a market, and the plaintiffs should revover the amount asked.

As it was held in these three cases that the compensation was to be calculated on the abnormal condition of the market which existed during the war, counsel for respondent submitted that there was no statute in the United States at the time these cases arose similar to our Compensation (Defence) Act, 1940, that consequently appreciation due to the war entered the picture and that the claimants were entitled to be paid on the basis of the war prices. In this respect Orgel's recent work "Valuation under the Law of Eminent Domain" may be beneficially consulted, particularly at pages 84 to 88 where the author deals with the matter of war-time prices and discusses the decisions above referred to.

It was argued on behalf of respondent that the words "no account being taken of any appreciation due to the war" in the Compensation (Defence) Act, 1940, do not refer merely to the value to the taker, as hinted by counsel for claimant, but mean an appreciation in the value generally. I believe that this interpretation is correct; what I have to consider in this case is the appreciation of vessels attributable to war conditions.

Counsel for both parties have stated that they could not find any decision concerning the assessment of value of a vessel in a case of acquisition by the Crown and particularly the meaning of the phrase "no account being taken of any appreciation due to the war". I may say that, notwithstanding extensive search, I have been unable to find any precedent.

Counsel for respondent pointed out that the cases relied upon by his opponent were largely decisions under the Expropriation Act, which must be read in the light of the statute, the wording whereof is different from that of the Compensation (Defence) Act, 1940. This contention seems reasonable. In each case, however, the expressions "consideration" and "value" must be interpreted and, as previously set forth, they have, in my opinion, the same bearing and significance. I do not think that it would be useful to insist any further on this aspect of the question.

Counsel for respondent, before closing his remarks, drew the attention of the Court to four cases, which he said he had through an oversight omitted to cite: *Newcastle Breweries Limited* v. *The King* (1); *Lake Erie and Northern Railway Co.* v. *Brantford Golf and Country Club* (2); *The King* v. *Spencer* (3); *The King* v. *Macpherson et al.* (4).

Counsel suggested that the case of *Newcastle Breweries Limited* v. *The King* may be of interest, although not directly in point, because it deals with the provisions of the Army Act authorizing the taking of chattels by the Crown for the use of the army and providing for His Majesty paying a fair market value therefor.

A brief summary of the facts will be useful. On October 6, 1917, the suppliants, who are brewers and wine and spirit merchants, were the owners of 658 puncheons of rum. By a written notice of November 20, 1917, the Admiralty acquired 239 puncheons of the rum. The suppliants claim the market value of these puncheons and ask that, failing an agreement, the amount of such value be determined by a court of law. The Admiralty rejected both claims, but paid to the suppliants, without prejudice to the position of either party, a certain sum arrived at without reference to market value and being not much more than one-third of such value as set forth by the suppliants. The Admiralty said that no additional sum was payable unless a further payment be advised or determined by the Royal Commission of Inquiry as to compensation in respect of loss or damage to property or business appointed by His Majesty by command dated March 31, 1915.

(1) (1920) 1 K.B.D. 854.
(2) (1916) 32 D.L.R. 219.
(3) (1939) Ex.C.R. 340.
(4) (1914) 15 Ex.C.R. 215.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING.

Angers J.

The Solicitor-General, while reserving the matter for consideration elsewhere, did not rely on the Royal Prerogative, but on regulation 2B of the Defence of the Realm regulations.

The head-note contains the material portion of regulation 2B, apart from a summary of the judgment; I think it is expedient to cite it in extenso for the understanding of the question at issue (p. 854).

> Regulation 2B of the Defence of the Realm Regulations made under s. 1 of the Defence of the Realm Consolidation Act, 1914, provides that 'it shall be lawful for the Admiralty, Army Council, or Air Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. Where any goods, possession of which has been so taken, are acquired by the Admiralty, Army Council, or Air Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined.
>
> In determining such price regard need not be had to the market price, but shall be had: (*a*) if the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; (*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; * * *
>
> Provided that where, by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed * * *:"
>
> Held, that the regulation, so far as it purports to deprive persons whose goods are requisitioned by the naval or military authorities of their right to the fair market value and to a judicial decision of the amount, is *ultra vires*.
>
> It is an established rule that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so be clearly expressed. This rule applies no less to partial than to total confiscation, and it applies *a fortiori* to the construction of a statute delegating legislative powers.

This judgment is interesting in that it decides: (1) that a regulation purporting to take away the right of the subject, whose property is requisitioned, to the fair market value and to a judicial decision of the amount is *ultra vires;* (2) that a regulation, depriving the owner of a property of the statutory right to the fair market value and directing

that the sum payable shall be based on the cost price and not on the market price of the goods acquired, will not be read as authorizing the taking of the subject's property without payment unless an intention so to do be clearly expressed.

In the case of *Lake Erie and Northern Railway Co.* v. *Brantford Golf and Country Club,* it was held primarily by the Supreme Court that "upon an appeal from the award of arbitrators made under the Railway Act, R.S.C. 1906, ch. 37, the Appellate Court may increase the amount of the award". This decision was evidently not cited in connection with this particular aspect of the case which has no relevance whatever to the question at issue. Statements by Fitzpatrick, C.J. and Duff, J. were likely the cause of the citation. At page 221 the Chief Justice says:

> Personally, I am unable to appreciate the views set out by the Judge; it would be difficult as well as unnecessary to consider them in detail. He has a preference for a particular method of ascertaining the compensation which may be called that of "reinstatement"; he cites two cases from which he says it appears that this would afford a fair test of the damage suffered by the appellants. It is rather remarkable that he goes on to say that in the first of these cases Jessel, M.R., denied that the damages were really "reinstatement", and that in the second case Lord Shand decided that the principle of so-called "reinstatement" could not be applied. The Judge adds that "that method is of course not the only way of arriving at the compensation to be paid".

This observation acknowledges implicitly the doctrine of reinstatement.

On the other hand Duff, J. (now Sir Lyman Duff) expressed the following opinion (p. 229):

> It is needless to emphasize perhaps that the phrase does not imply that compensation is to be given for "value" resting on motives and consideration that cannot be measured by any economic standard.
>
> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Ass.* v. *The Minister* ((1914) A.C. 1083 at 1088) has given what he describes a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING

Angers J.

Further on Duff, J., dealing with the question of reinstatement, to which counsel for respondent particularly referred, made the following observations (p. 232):

However that may be, two things are quite clear. The respondents are not entitled as a matter of law to take the position: You have prejudiced by your works the utility of our property for the purpose to which we devote it, and consequently we require from you such a sum of money as will enable us by the expenditure of it to procure for ourselves a property equally useful for those purposes. The authority to which Hodgins, J.A., refers, namely, *Queen* v. *Burrow* (Boyle & Waghorn on Compensation, p. 1052), as well as the observation of Lord Shand in the explanation of an award in *Edinburgh* v. *N. British R. Co.* (Hudson on Compensation, p. 1530), are quite sufficient to establish that proposition. It must be shewn, as Bowen, L.J., points out in the *Burrow's* case, that purchase is the reasonable consequence of the taking or the injurious affection of the owner's lands. If I were obliged to answer that question I should infer from all that took place before the arbitrators that it was not the reasonable consequence and indeed that it was not the consequence at all; but I do not think that I am entitled to speculate about a point of that kind on behalf of the parties who did not see fit to bring it forward at the proper time.

These observations imply, as I think, the propriety in certain cases of the principle of reinstatement, although denying its applicability in the case under review.

The case of *The King* v. *Spencer* was cited particularly on account of my statement regarding the cost of replacement of the buildings and the deduction therefrom of the depreciation which the buildings then standing had suffered since their erection. I may say that, on this point, rightly or wrongly, I am still of the same opinion.

The fourth case cited by counsel for respondent was that of *The King* v. *Macpherson et al.*, in which it was held (*inter alia*) that the price paid for the property by the defendant Holland should be taken as its actual market value for the purpose of compensation. Cassels, J., adopted the opinion expressed by the Supreme Court in *Dodge* v. *The King* (1) regarding the basis of valuation of a property expropriated; I deem it convenient to quote a passage from his judgment (p. 217):

In *Dodge* v. *The King* (38 S.C.R. 155), the following is said in the judgment of the Court:

"The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance

(1) (1906) 38 S.C.R. 155.

measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession."

I think a careful analysis of the authorities as a whole will show that the above is an accurate and concise statement of the law that should govern.

The learned judge then made a careful review of the doctrine and jurisprudence to which reference may be had with profit.

After mature deliberation I am disposed to conclude that the principle of reinstatement is applicable in the case of the *Sankaty*.

It will be convenient to sum up briefly the evidence relating to the replacement of the *Sankaty*.

According to the testimony of Roue, who prepared plans for a proposed ship for the Wood Islands-Caribou ferry service at the request of claimant's predecessors, the cost of a ship of about the same capacity as the *Sankaty*, although somewhat smaller, towards the end of 1938 or the beginning of 1939 including the machinery would have been $311,000 or $346,000, depending upon the type of engine and power used (p. 31). If we deduct from $311,000, the lower price at which the ship could have been built and equipped, a depreciation of 35 per cent, seeing that the *Sankaty* which was to be replaced was 29 or 30 years old, there remains a value of $202,150.

If, instead, the claimant had decided to purchase the *Fishers Island* at the price of $285,000 in United States currency asked by her owner in February, 1941, this would have represented an expenditure of $316,350, the rate of exchange between United States and Canadian funds being at the time 11 per cent. We must not overlook the fact however that this price of $316,350 was the price claimed in February, 1941, and that since the outbreak of the war there had been a substantial appreciation in vessels generally. As previously mentioned, this appreciation was fixed by Strang at 50 per cent and Roue declared that the cost of construction of vessels in 1941-1942 was 10 to 15 per cent higher than in 1938-1939. The figure mentioned by Strang seems to me too high. On the other hand, the figure stated by Roue applies not to the sale but to the construction of vessels, which explains to a certain extent the large difference between his figure and

1942

NORTHUMBERLAND FERRIES LIMITED v. THE KING

Angers J.

that of Strang. As I have said, I am disposed to assess the appreciation at 33⅓ per cent. If we subtract from the sum of $316,350 one-third thereof, we have a balance of $210,900.

There is a third alternative. The claimant might have purchased another vessel of the type of the *Prince Nova;* this would have meant an expenditure, in round figures, of $92,000. The price of the two vessels purchased to replace the *Sankaty* would thus have amounted to $184,000. With its two vessels the claimant would not have been in as advantageous a position as with the *Sankaty,* seeing that the operation of two vessels would have involved heavier overhead expenses.

After perusing the evidence carefully, listening attentively to and later reading the exhaustive argument of counsel and examining the various acts relied upon and studying the precedents invoked, I have reached the conclusion that in order to put the claimant in as favourable a position financially as it was in before the taking of the *Sankaty* by the respondent and to enable it to obtain a suitable substitute for the said vessel, of approximately the same size and carrying capacity, it must be granted a compensation of $205,000.

The sums of $100,000 for the *Seaborn* or *Charles A. Dunning* and $205,000 for the *Sankaty* form a total of $305,000 from which must be subtracted the sum of $176,664.63 paid to claimant by respondent, leaving a balance of $128,335.37.

The claimant, upon giving to the respondent a good and valid title to the said vessels, namely the M.V. *Seaborn* or *Charles A. Dunning* and the S.S. *Sankaty,* free from all charges and encumbrances whatsoever, will be entitled to be paid and to recover the said sum of $128,335.37, with interest at 4 per cent from March 1, 1941, date of the acquisition of the vessels by the respondent, to the date hereof.

Claimant will also be entitled to its costs.

Judgment accordingly.

1944

May 17.
July 28.

BETWEEN:

PETER ZAKRZEWSKI ..... SUPPLIANT,

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Right of the Crown to avail itself of provincial laws relating to prescription and limitation of actions in force at the time the Crown is called upon to make its defence—Petition of Right Act, R.S.C. 1927, chap. 158, s. 8—Exchequer Court Act, R.S.C. 1927, chap. 34, s. 32.

Suppliant's action is for damages resulting from injuries suffered by suppliant allegedly due to the negligence of a servant of the Crown while acting within the scope of his employment. The accident occurred in Winnipeg, Manitoba, on November 12, 1941. Suppliant lodged his Petition of Right with the Secretary of State on November 14, 1942, and the same was filed in the Exchequer Court on January 7, 1943. The respondent pleaded *inter alia* that the suppliant was barred by section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93. The question of law whether the suppliant was barred by such statute was heard before the trial of the Petition of Right.

Held: That the provincial laws relating to prescription and the limitation of actions referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a Petition of Right, are those of the province in which the cause of action arose that are in force in such province at the time the Crown is called upon to make its defence to the Petition of Right.

2. That the respondent may rely upon section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93.

3. That the suppliant sustained his damages on November 12, 1941, and, since his Petition of Right was not lodged with the Secretary of State until November 14, 1942, two days after the expiration of twelve months from the time when his damages were sustained, he is barred from proceeding with his Petition.

ARGUMENT on question of law pleaded by respondent that suppliant was barred by the provision of The Highway Traffic Act, being chapter 93 of the Revised Statutes of Manitoba, 1940.

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

Jean Genest, K.C. for suppliant.

W. R. Jackett for respondent.

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

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

THE PRESIDENT now (July 28, 1944) delivered the following judgment:

In this case a question of law was ordered to be heard and disposed of before the trial of the Petition of Right herein. The suppliant claimed damages for injuries alleged to have been sustained by him resulting from negligence in the operation of a motor vehicle by a servant of the Crown while acting within the scope of his employment. The facts alleged were that as he was proceeding in an easterly direction on Portage Avenue in Winnipeg, in the Province of Manitoba, the motor vehicle overtook him, threw him to the pavement and ran over him, causing a fracture of the pelvic bones, bruises of the lower extremities and internal injuries. The respondent by his statement of defence denies these allegations, claims that the suppliant's injuries were the result of his own negligence and, in addition, pleads as follows:

> 3. The plaintiff's claim is barred by statute, the Petition herein having been left with the Secretary of State and filed in this Court more than 12 months from the time of accrual of the cause of action alleged herein.

In the Special Case submitted to the Court it was stated that the accident occurred on a street in Winnipeg on November 12, 1941, and that the petition herein was lodged with the Secretary of State on November 14, 1942, and filed in this Court on January 7, 1943. The statute on which the respondent relies is section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93, which provides as follows:

> 84. (1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The question of law to be determined is whether this statute bars the suppliant from the relief sought by him. Section 8 of the Petition of Right Act, R.S.C. 1927, chap. 158, provides in part as follows:

> 8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject.

And section 32 of the Exchequer Court Act, R.S.C. 1927, chap. 140, reads as follows:

32. The laws relating to prescription and the limitation of actions in force in any province between subject and subject, shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province.

In England it was held in *Rustomjee* v. *The Queen* (1) that the Statute of Limitations, 21 Jac. I, chap 16, did not apply to a petition of right. In that case Blackburn J. said, at page 491:

> The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it.

and, at page 496:

> With regard to the Statute of Limitations, I do not think it is necessary to say any more. There seems to be no pretence for saying that the statute applies at all to the Crown. It would, no doubt, be very proper, and right, and judicious for the legislature to pass an Act to say that in future some statute of limitation shall apply, but it has not been done yet.

Robertson on Civil Proceedings by and against the Crown, at p. 393, points out that text writers have objected to this decision, and the advisers of the Crown have also expressed dissatisfaction with it, on the principle that the Crown can claim the benefit of any statute, in which it is not mentioned, although it is not adversely bound by it, but he agrees with it on the ground that the Statute of Limitations applies only to "actions" and a petition of right is not an "action".

Whatever the law on the subject may be in England, it is well settled in Canada. The English Petitions of Right Act, 1860, did not contain any provision similar to section 8 of the Canadian Petition of Right Act, originally enacted as section 7 of the Petition of Right Act of 1876.

In *Tylee* v. *The Queen* (2) the Supreme Court of Canada held that under section 7 of the Petition of Right Act of 1876, the Statute of Limitations could be pleaded by the Crown in answer to a petition of right, and a similar view was taken by the same court in *McQueen* v. *The Queen* (3). While the judges in that case were divided as to whether section 7 of the Petition of Right Act was retroactive they had no doubt that the Act gave the Crown the right to invoke the Statute of Limitations.

(1) (1876) 1 Q.B.D. 487. (2) (1876) 7 Can. S.C.R. 651 at 676
(3) (1887) 16 Can. S.C.R. 1 at p. 60, 80, 97, 113, & 118.

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

Effect has been given in this Court to provincial statutes of prescription and the limitation of actions in proceedings against the Crown by way of petition of right and the claim of the suppliant has been held to be barred thereby in a number of cases such as *Penny* v. *The Queen* (1); *Fradette* v. *The King* (2); *Thomson* v. *The King* (3); *Oliver* v. *The King* (4); *Besnier* v. *The King* (5); and *Miller* v. *The King* (6).

While under Rule 6 (2) of the General Rules and Orders of this Court a petition of right becomes an action in the Court on its being filed therein, it has been the practice of the Court to regard the period of prescription or limitation laid down by a provincial statute as having been interrupted if the petition of right was lodged with the Secretary of State before the period had expired, even although it was filed in the Court subsequently to the expiration of such period. *Vide—Saindon* v. *The King* (7); *Hudon* v. *The King* (8); *Courteau* v. *The King* (9); *Dionne* v. *The King* (10); and *Mavor* v. *The King* (11). No question of this sort arises in the present case.

The real question of controversy is as to the meaning of the phrase "the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall . . . apply" contained in section 32 of the Exchequer Court Act. Counsel for the suppliant contended that since the section does not specify that the provincial laws in force at any particular time shall apply, it must be read as meaning only the provincial laws relating to prescription and the limitation of actions that were in force at the time the Exchequer Court Act was first enacted in 1887. Counsel for the respondent, on the other hand, contended that the section is prospective and contemplates the provincial laws in force at the time the respondent is called upon to make his statement of defence. The question raised is a new one and not free from difficulty.

The Petition of Right is brought under section 19 (*c*) of the Exchequer Court Act, as amended, which imposes a

(1) (1895) 4 Ex.C.R. 428
(2) (1918) 17 Ex.C.R. 137
(3) (1921) 20 Ex.C.R. 467 at 469
(4) (1921) 21 Ex.C.R. 49.
(5) (1924) Ex.C.R. 26.
(6) (1927) Ex.C.R. 52.
(7) (1914) 15 Ex.C.R. 305
(8) (1914) 15 Ex.C.R. 320
(9) (1915) 17 Ex.C.R. 352
(10) (1914) 18 Ex.C.R. 88.
(11) (1919) 19 Ex.C.R. 307

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

liability upon the Crown for the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, where such negligence has resulted in death or injury to the person or to property. The question as to what law of negligence should be applied in such a claim has come before the courts on a number of occasions and it is, I think, settled that the law to be applied is the law of negligence of the province in which the alleged negligence occurred that was in force, not at the time when the negligence occurred, but at the time when the liability for it was first imposed upon the Crown: *Vide—The King* v. *Armstrong* (1), and *Gauthier* v. *The King* (2). The question was recently dealt with in this Court in *Tremblay* v. *The King* (3) where, following the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (*supra*) and *Gauthier* v. *The King* (*supra*), I held that in claims against the Crown made under section 19 (*c*) of the Exchequer Court Act of Canada, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, that being the date when the amendment by which liability for such negligence was first imposed upon the Crown came into effect. The principle underlying these decisions is that when liability for negligence was imposed upon the Crown by Parliament, there was no law by which such liability could be determined except that which was in force in the several provinces and it was liability in accordance with such law that was imposed. It is, therefore, necessary, before any provincial law relating to negligence is applied in a claim under section 19 (*c*) of the Exchequer Court Act, to consider whether such law was in force in the province at the time when the liability for such negligence was first imposed upon the Crown, since such liability, having been imposed by Parliament in the light of the provincial laws

(1) (1908) 40 Can. S.C.R. 229 at 248.

(2) (1918) 56 Can. S.C.R. 176 at 180.

(3) (1944) Ex.C.R. 1 at 12.

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

of negligence then in force and having no existence apart from the Parliamentary enactment by which it was imposed, cannot be altered by subsequent provincial enactment.

The result of this state of the law is that the liability of the Crown for the negligence of its officers and servants may not be the same as that of an individual or corporation for the negligence of his or its officers or servants. If the Crown is to be put in exactly the same position in the matter of liability for negligence as an individual or corporation would be, such a result, which seems a desirable one, can be accomplished only by a Parliamentary enactment declaring that in claims under section 19 (*c*) of the Exchequer Court Act, as amended, the law of negligence to be applied shall be the law of the province in which the cause of action shall arise that is in force in such province at the time of such cause of action and would be applicable if the proceeding were a suit or action between subject and subject.

While, under the law as it stands, it is necessary, for the reasons mentioned, to consider in each case the extent to which, if at all, a particular provincial law is applicable against the Crown in order that the statutory liability imposed upon the Crown by Parliament shall not be subject to enlargement or alteration by a provincial enactment, the same considerations do not govern in determining whether the Crown may avail itself of the rights given by provincial laws, for the reason that, while liability can be imposed upon the Crown only by statute and must be confined to the express words by which it is imposed, there is no reason for putting the Crown in a different position in the matter of rights from that which a subject would enjoy. Certainly the Crown should not be in an inferior position. That would be the result in the present case if effect were given to the contention of counsel for the suppliant.

Section 16 of the Interpretation Act, R.S.C. 1927, chap. 1, declares that no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. But while this is so, it is established law that the Crown may avail itself

1944

ZAKRZEWSKI v. THE KING.

Thorson J.

of the provisions of any statute. *Vide*—Robertson on Civil Proceedings by and against the Crown, at p. 567, and the authorities there cited. This rule did not, however, apply in the case of a petition of right, as held in *Rustomjee* v. *The Queen* (*supra*), but once the distinction between a petition of right and any other suit or action in the matter of defences that might be raised was removed by section 7 of the Petition of Right Act of 1876, it would seem to follow that the Crown may avail itself of any defence to a petition of right that would be available to a subject if the proceeding were a suit or action between subject and subject, without any further statutory authority and that section 32 of the Exchequer Court Act is to this extent merely declaratory of the existing law and necessary only for the purpose of specifying that the provincial laws of prescription and the limitation of actions to be applied shall be those of the province in which the cause of action arose. In that view, the Crown may clearly avail itself in a petition of right proceeding of such provincial laws of prescription and limitation of actions as may be in force in the appropriate province at the time it is called upon to make its statement of defence in the same way as a subject might avail himself of such laws in a suit or action between subject and subject. Section 32 of the Exchequer Court Act cannot be read as restrictive of the rights of the Crown in this respect in the absence of words clearly indicating such restriction, nor can it be read as limiting in any way the generality of section 8 of the Petition of Right Act. Far from restricting the rights of the Crown, the section declares them and specifies which provincial laws are to be applied. It seems clear to me that Parliament intended by section 8 of the Petition of Right Act and section 32 of the Exchequer Court Act to put the Crown in the same position when it came to write its statement of defence to a petition of right as a subject would occupy if the proceeding were a suit or action between subject and subject. I cannot read the two sections as indicating any other intent and must hold that the provincial laws relating to prescription and the limitation of actions, referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a petition of right, are those of the province in which the cause of action

1944
ZAKRZEWSKI
v.
THE KING.
Thorson J.

arose that are in force in such province at the time the Crown is called upon to make its defence to the petition of right.

It follows that the respondent may rely upon section 84 (1) of the Highway Traffic Act of Manitoba. The statute began to run from the time when the damages of the suppliant were sustained. He was struck, thrown to the pavement and run over by the respondent's motor vehicle on November 12, 1941, and suffered the injuries already described on that date. It is clear, therefore, that he sustained his damages on November 12, 1941, and, since his Petition of Right was not lodged with the Secretary of State until November 14, 1942, two days after the expiration of twelve months from the time when his damages were sustained, he is barred from proceeding with his petition and is not entitled to any of the relief sought by him. The respondent is entitled to costs.

Judgment accordingly.

1943
Feb. 15.
1944
June 6.

BETWEEN:

KENNETH B. S. ROBERTSON LIMITED ..... APPELLANT,

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, Chap. 97, sects. 3, 6 ss. 1 (d), 9—Reserve against contingencies—Income taxable in year in which received—Amounts held as deposits—Quality of income.

Appellant was agent for certain underwriting members of Lloyd's of London, England, in the writing of Workmen's Compensation, Employer's Liability and Occupational Disease insurance. It dealt exclusively with insurance brokers in the United States who acted for employers there and placed insurances with the underwriters through the appellant. Under such policies of insurance the underwriters undertook to indemnify the insured employers in respect of losses in excess of a specified percentage. The full amount of the premium payable by the insured employer was based upon the entire remuneration earned by all employees of the employer during the whole period of the contract and could not be ascertained until its expiry. The employer paid an advance fee at the time the contract took effect. This was based upon an estimate made by the employer

as to what he thought his payroll for the year would be. The advance fee was to be held as a deposit by the underwriters and to be applied or refunded as specified in the contract when the amount of the earned fee based upon total payroll could be ascertained.

The policies also provided for a minimum fee which was the amount to be accepted and retained by the underwriters regardless of the earned fee developed after audit of the payroll. They also provided for refunds in the event of cancellations. The appellant's fee for its services was a percentage of the amount which the insured employer had to pay. At the end of each of the years in question in the appeal there were policies in force in respect of which refunds might have to be made either in the event of cancellations or because the estimate on which the advance fee had been based exceeded the total payroll of the employer during the policy year. The appellant set up in its books a "reserve for unearned commissions" which was really provided to enable the appellant to distribute the amounts received by it during the year into the amounts that had been earned in such year and those which had not yet been earned, in the sense that refunds might have to be made either due to cancellations or because of over-estimating of total payroll. The so-called reserve being disallowed, an appeal was taken. The appeal was allowed in part.

Held: That every reserve set up out of profits or gains of whatever kind, which seeks to provide against the happening of unascertained future events is excluded as a deduction except in so far as the Act permits. *Western Vinegars Limited* v. *Minister of National Revenue,* (1938) Ex. C.R. 39, commented upon. *Brown* v. *Helvering,* 291 U.S. 193, approved.

2. That the test of taxability of the income of a taxpayer in any year is not whether he earned or became entitled to such income in that year, but whether he received it in such year and the taxpayer has no right to have income received by him during a taxation year distributed for taxation purposes over the years in respect of which he may have earned or become entitled to such income. *Capital Trust Corporation Limited et al.* v. *Minister of National Revenue* (1936) Ex. C.R. 163; (1937) S.C.R. 192, followed and commented upon.

3. That where an amount is paid as a deposit by way of security for the performance of a contract and held as such, it cannot be regarded as profit or gain to the holder until the circumstances under which it may be retained by him to his own use have arisen and, until such time, it is not taxable income in his hands, for it lacks the essential quality of income, namely, that the recipient should have an absolute right to it and be under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

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

D. C. Abbott, K.C. and *Paul Casey* for appellant.

Roger Ouimet and *H. H. Stikeman* for respondent.

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

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

THE PRESIDENT now (June 6, 1944) delivered the following judgment:

The appellant acted as agent or correspondent for certain underwriting members of Lloyd's of London, England, in the writing of Workmen's Compensation, Employer's Liability and Occupational Disease insurance, under an annual memorandum of authorization by which the appellant was authorized to accept or reject risks, fix rates of premium, issue policy contracts, collect premiums and settle claims. The appellant did not directly solicit insurance business but dealt exclusively with insurance brokers in the United States who acted for employers there. When the negotiations for a policy contract were concluded the appellant in Montreal issued an indemnification certificate to the insured employer on behalf of the underwriters, which operated as a binder until the final contract was issued and then was attached to and became part of such contract. The final contract was issued in London by the underwriters, sent to the appellant and delivered by it to the insured employer. The underwriters undertook to indemnify the employer in accordance with the terms of the certificate. There were two types of contracts; in one, the underwriters undertook to indemnify the employer against all loss in excess of 70 per cent of his normal premium and, in the other, in excess of 75 per cent. A limit of liability was imposed. The contract was really one of re-insurance whereby the employer looked after 70 or 75 per cent of his losses himself and the underwriters insured him in respect of the balance. Policies were mainly for one year but in a few instances for two years.

The provisions in the certificate relating to the normal premium, the advance fee and the minimum fee are of special importance. The amount of the "normal premium" was derived by multiplying the entire remuneration earned by all employees of the employer during the whole period of the contract by the rates provided for the various operations conducted by the employer. It could, therefore, not be ascertained until the expiry of the contract.

Under the circumstances the employer paid an "advance fee" at the time the contract took effect. This advance fee was for a specified period, either of six months or a year, and a further advance fee was paid at the end of such period. The advance fee, the amount of which was specified in the certificate, was based upon an estimate made by the employer as to what he thought his total payroll for the year would be. At the end of the specified period, the employer paid an "additional fee" computed on the remuneration earned by all his employees during the preceding period. It was also provided that if the contract was terminated prior to its expiry date the "earned fee" therefor should be computed on the total remuneration earned by all employees during its currency. The indemnification certificate contained the following important stipulation with regard to the advance fee:

> The advance fee shall be held as a deposit by Underwriters, and shall be applied against the audited fee in the annual adjustments under this contract as follows: If the earned fee on any such adjustments shall be greater than the advance fee, the Employer shall thereupon pay the difference to Underwriters: if it be less, Underwriters shall thereupon refund the difference to the Employer.

In addition to fixing the amount of the advance fee the certificate also fixed a "minimum fee", which was defined as:

> the minimum amount to be accepted and retained by underwriters as fee for this indemnity, regardless of the earned fee developed after audit of payroll.

Provision was also made for cancellation by either party on 30 days' notice. If the cancellation was at the request of the underwriters or the employer when for reasons beyond his control he was actually retiring from the business described in the declarations, the underwriters' fee was to be computed as an earned fee based on the total payroll up to the time of the cancellation and adjusted pro rata in which event the minimum fee was to be applied to such adjustment. But if the cancellation was at the employer's request and he was not retiring from business, the underwriters' fee was to be computed as an earned fee based on the total payroll and adjusted at short rates in which event the minimum fee was to apply if it was greater than the earned fee developed at such short rates.

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

The indemnification certificate also required the employer to utilize the services of a service organization approved by the appellant and operating under its supervision. This service organization was charged with certain duties, such as the strict discharge of the employer's insurance obligation to his employees, the maintenance of records, the furnishing of complete inspection and safety engineering devices and the furnishing of monthly claims' records.

The relationship of the appellant to the underwriters and its authority to act for them was set out in the annual memorandum of authorization. The appellant had authority to accept insurances up to certain limited amounts and to issue policies on behalf of the underwriters, whereby the underwriters indemnified employers for losses in excess of 75 or 70 per cent of their normal premiums. Consequently the employer paid only 25 to 30 per cent of such normal premium. This was received by the appellant and distributed by it as follows: 10 per cent to the underwriters for the re-insurance, 10 per cent to the service organizations for servicing the risks, and the remaining 5 or 10 per cent was used by the appellant to pay brokerage fees and its own fees. Where 10 per cent was available, from 7 to 9 per cent was paid out for brokerage, leaving a balance of from 1 to 3 per cent for the appellant, but where only 5 per cent was available, the brokerage fees came to from $3\frac{1}{2}$ to 4 per cent, leaving 1 to $1\frac{1}{2}$ per cent for the appellant. The appellant's fee came out of the 25 or 30 per cent paid by the employer and was a fixed percentage of it.

The practice followed by the appellant in dealing with the amounts received by it from employers on behalf of the underwriters may be summarized as follows: the appellant did not wait until the full amount that each employer was required to pay under his contract had been ascertained, but distributed the fees received by it, whether advance fees, minimum fees, additional fees or earned fees, immediately upon their receipt, to the underwriters, the service organizations, the brokers and itself, in the percentages, already mentioned; if adjustments had to be made subsequently involving refunds to employers either because of cancellations or by reason of overestimated payrolls the appellant arranged with the persons who had

shared in the distribution of the fees already received for proportionate refunds out of the percentages respectively received by them. While the liability to make a refund in the event of a cancellation or the duty to refund out of the advance fee, if it developed that the payroll of the employer had been overestimated, was that of the underwriters, they looked to the appellant to see that the necessary refund was made. Since the appellant's fee was a fixed percentage of what the employer had to pay to the underwriters it followed that if the underwriters had to make a refund to the employer the appellant would have to make a proportionate refund of the percentage which it had retained for itself.

The appellant was incorporated in 1934, and during its first two fiscal years ending August 31, 1935, and 1936, respectively, it dealt with all the fees received by it during each fiscal year as income for that year. In its annual statements for these years the auditors pointed out that no provision had been made for the proportion of commissions unearned at the end of the year which might be returnable in the event of policies being cancelled. As a result of the recommendation of its auditors, the appellant altered its former practice and in each of the years ending August 31, 1937, 1938 and 1939, made provision in its books at the end of such year, which it described in its statement of liabilities as a "Reserve for Unearned Commissions". The amount of this so-called reserve was $3,000 in 1937, $5,631 in 1938 and $10,846.08 in 1939. The amount of $3,000 provided as at August 31, 1937, was a guess, but the amounts provided at the end of each of the two following years were the result of exact computation arrived at by calculating the unearned amount in respect of all the policies still in force at the end of such year, taking policy by policy, and making a deduction for the unexpired portion of each; for example, if a policy had still eight months to run, two-thirds of the fee in respect of that policy was regarded as unearned and included in the so-called reserve for unearned commissions.

While the amount thus stated to be a reserve for unearned commissions included amounts that might have to be paid to an employer in the event of a cancellation or be

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

refunded to him out of the advance fee if it developed that he had overestimated his payroll, it went further than making provision for these two events. It is, I think, clear that the chief purpose of the appellant's new practice was to allot to each of its fiscal years the proportion of fees that was applicable to such year. The so-called reserve for unearned commissions was really provided to enable the appellant to distribute the amounts received by it during a fiscal year into the amounts which had been earned in that year and those which had not yet been earned. The reserve represented the amounts not yet earned in the fiscal year, although received during it. It was said that the change was made in order to show the true income position of the appellant. I have no doubt that this is true and that from an accounting standpoint the practice was a sound one, but it does not follow that, because an accounting practice is a sound one, it is permissible for income tax purposes. If there is a conflict between sound accounting practice and the clear intendment of the taxing Act, the latter governs.

Of the amount of $5,631 as at August 31, 1938, the appellant returned all except $1,627.09 during the following fiscal year. Such returns were because of both cancellations and overestimated payrolls. There is no evidence to show how much was returned for each of these reasons except the statement that there were very few cancellations, the bulk of the refunds becoming necessary through the fact that the normal premium developed at the end of the policy year was less than the amount of the advance fee. As refunds had to be made they were paid out of the current revenues of the appellant. At the end of August, 1939, the whole of the so-called reserve was then thrown back into income for the 1939 fiscal year, the net result being that out of the reserve of $5,631, only $1,627.09 was income for the fiscal year ending August 31, 1939. It made no difference, in my opinion, whether the refunds were charged directly against the reserve or paid out of current revenue for the net result was the same. The procedure in the following year was the same.

The balance sheet of the appellant for each of the years in question showed the amount of the "Reserve for Unearned Commissions" in its statement of liabilities and

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

was filed with its income tax returns for that year. The notices of assessment for each of the three years were all dated January 20, 1941. The appellant was additionally assessed in respect of 1937 for the whole amount of the reserve of $3,000, but in respect of 1938 only for $2,631, and in respect of 1939 only for $5,215.08, as though the reserves had been cumulative. The evidence is quite conclusive that such was not the case; the reserve of $5,631 in 1938 did not include that of $3,000 in 1937, nor did the reserve of 1939 include that of 1938. At the end of August, 1939, for example, the whole of the reserve of $5,631 set up as at August 31, 1938, was accounted for, either through refunds having been made or through the net balance having been thrown back into income, so that nothing was left of the reserve set up for the year before. The same was true with regard to the following year. The additional assessments for the years 1938 and 1939 were, therefore, erroneous in their amounts.

The appellant appealed from the assessments on the ground that it should be assessed only in respect of the income from commissions earned by it during each year and that the amounts included in the reserve were not taxable income in the year in which they were received. The view of the Minister was that the amounts received by the appellant were properly taxable as income in the year in which they were received, under section 3 of the Income War Tax Act, R.S.C. 1927, chap. 97, and that the reserve set up by the appellant was not allowable under section 6.1 (*d*) of the Act. The assessments were affirmed by the Minister and from his decision this appeal is brought.

It is desirable to deal with section 6.1 (*d*) of the Income War Tax Act first. It provides as follows:

> 6.1. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Minister may allow and except as otherwise provided in this Act;

In order to come within the prohibition of deduction enacted by this paragraph there must have been a transfer or credit from profits or gains. If the amounts transferred or credited were not from profits or gains, the paragraph

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

has no application at all. Only two transfers or credits from gross income in order to arrive at taxable income are permitted, one being such an amount for bad debts as the Minister may allow and the other such deductions as are "otherwise provided in this Act", such as for depreciation and depletion.

So far as I am aware, there is only one Canadian case that deals with the paragraph under discussion—*Western Vinegar Limited* v. *Minister of National Revenue* (1). In that case, the appellant sought to deduct profits charged on containers (barrels and kegs) in which it had sold its products, it being a condition of the contract of sale that on the return of the containers the purchaser would be credited with the price charged for them. The evidence was that between 75 and 85 per cent of the containers were usually returned. The appellants in the light of such experience set aside out of their profits an estimated amount to cover the losses on the return of the containers and the respondent contended that such a deduction was not allowable under section 6, ss. 1 (*d*) of the Act. Angers J. rejected this contention and held, in effect, that the estimated amount was not a reserve within the meaning of the paragraph. At page 45, he said:

> The profits on the containers are not, as I conceive, a reserve properly called; and the loss of these profits, on the returns of the containers, is not merely a contingency but a certainty. The only thing uncertain is the quantity of the containers which will be returned and the time at which the returns will be effected.

The deduction claimed by the appellant for losses on the returns of the containers was allowed, although such losses had not yet been sustained. While the importance of the decision lies in the distinction drawn between a loss that is certain and one that is merely contingent, I find it difficult to reconcile the decision with the authorities that apply the general rule that profits are to be taxed in the year in which they are received and losses borne in the year in which they are sustained.

The deductions prohibited by the paragraph under discussion would, in my opinion, not be permissible, even if the paragraph were not in the Act at all, for they are really dispositions of income after it has been received. That is

(1) (1938) Ex. C.R. 39.

clearly the effect of the English authorities. In *Edward Collins & Sons, Ltd.* v. *The Commissioners of Inland Revenue* (1), it was held that a deduction for an apprehended future loss was not permissible. At page 781, the Lord President (Clyde) stated the principle clearly:

> It is, however, quite consistent with this that a prudent commercial man may put part of the profits made in one year to reserve, and carry forward that reserve to the next year, in order to provide against an expected, or (it may be) an inevitable, loss which he foresees will fall upon his business during the next year. The process is a familiar one. But its adoption has no effect on the true amount of the profits actually made, and does not prevent the whole of the profits, whereof a part is put to reserve, from being taken into computation in the year in question for purposes of assessment. On the contrary, the balance of profits and gains is determined independently altogether of the way in which the trader uses that balance when he has got it; and, if he puts part of it to reserve and carries it forward into the next year, that has no effect whatever upon his taxable income for the year in which he makes the profit.

The same principle appears in such cases as *Whimster & Co.* v. *The Commissioners of Inland Revenue* (2); and *The Naval Colliery Co., Ltd.* v. *The Commissioners of Inland Revenue* (3).

The law is the same in the United States. Losses that have been sustained are deductible but the American courts have not allowed any deductions from profits for the purpose of meeting losses or liabilities that were apprehended or contingent on the happening of an uncertain future event. The Supreme Court of the United States dealt with the matter in *Brown* v. *Helvering* (4). In that case, the facts were: a general agent of fire insurance companies received "over-riding commissions" on the business written each year, subject however to the contingent liability that when any of the policies was cancelled before its term had run, a part of the commission thereon, proportionate to the premium money repaid to the policy holder, must be charged against the agent in favour of the company. In his accounts and income tax returns involved in this case, he deducted from the accrued commissions of each year a sum entered in a reserve account to represent that part of them which, according to the experience of earlier years, would be returnable because of cancellations. It was held that he was not entitled to make any deduction

(1) 1924) 12 T.C. 773.
(2) (1925) 12 T.C. 813.
(3) (1928) 12 T.C. 1017.
(4) (1934) 291 U.S. 193.

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

for such purposes. Mr. Justice Brandeis, in delivering the opinion of the Supreme Court of the United States, said, at page 199:

> The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income * * * When received, the general agent's right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

A great many United States decisions to the same effect could be cited.

The authorities, both in England and in the United States establish that, even apart from such a provision as is contained in paragraph (*d*) of subsection 1 of section 6 of the Income War Tax Act, a taxpayer cannot deduct from his income any amounts to meet contingent liabilities. The fact that it would be wise or prudent to do so has no bearing on the matter. The case against any deduction from profits or gains becomes all the stronger by reason of the language of the paragraph under discussion with its specific and imperative prohibition and I agree with the contention of counsel for the respondent that every reserve set up out of profits or gains of whatever kind, which seeks to provide against the happening of uncertain future events, is excluded as a deduction, except in so far as the Act permits.

It follows from what has been said that the appellant was not entitled to deduct from the income received by it during any fiscal year any amount for the purpose of providing for refunds that might have to be made because of cancellations in the future. Any loss resulting from necessary refunds due to cancellations must be borne in the year in which the refund was made.

Nor was the appellant, no matter how sound its accounting practice was, entitled to distribute the amounts received by it as income during any fiscal year into the amounts earned during such year and those that were not yet earned, for the test of taxability of the income of a taxpayer in any year is not whether he earned or became entitled to such income in that year but whether he received it in such year, and the taxpayer has no right to

have income received by him during a taxation year distributed for taxation purposes over the years in respect of which he may have earned or become entitled to such income. For example, if a taxpayer received in any year amounts which are income, such as arrears of salary or interest, he is taxable on the whole amount of the income received by him in that year, including such arrears, regardless of the year or years in respect of which he earned or became entitled to such salary or interest. This is clearly laid down in *Capital Trust Corporation Limited et al.* v. *Minister of National Revenue* (1). In that case, a testator by a codicil to his will had directed that his son, who was one of his executors, should be paid "the sum of $500 per month in addition to any sum which the Courts or other proper authorities may allow him in common with the other executors". The testator died on December 5, 1923, but the son did not receive any of the monthly payments of $500 until March 10, 1927; on that date, he received the sum of $19,500, representing 39 payments of $500 each from December 5, 1923, to March 5, 1927, and, subsequently, he received the monthly payment regularly until his death on July 16. 1932. His income tax returns for the years 1927 to 1932, filed by him or his executor, made no mention of these monthly payments of $500. Subsequently, his estate was assessed in respect of them in addition to the amounts mentioned in the returns made and for the year 1927 the assessment included the $19,500 received on March 10, 1927, as well as the monthly payments received during the balance of that year. An appeal was taken to this Court on the ground that the amounts of $500 per month were a bequest under a will under subsection (*a*) of section 3 of the Income War Tax Act, and that, in any event, the assessment in respect of the year 1927 should not be for more than the amount payable for that year. Angers J. held that the amounts in question were not a gift or bequest under section 3 (*a*) of the Act but constituted additional remuneration to the son for his services as executor and, as such, were taxable income. He also held that it was the intention of the legislature to assess income for the year in which it was received, irrespective of the period during which it was earned or

(1) (1936) Ex. C.R. 163; (1937) S.C.R. 192.

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

accrued due, and pointed out that there was no stipulation in the Income War Tax Act providing for the apportionment of accumulated income, paid in one sum, over the period in respect of which it became receivable. The appeal to this Court was, therefore, dismissed. On appeal to the Supreme Court of Canada, the judgment of Angers J. was affirmed. Davis J., delivering the judgment of the Supreme Court of Canada, agreed that the amounts directed to be paid were additional remuneration and held that section 3 of the Income War Tax Act defined income as "income received" and that section 9 imposed the tax upon "the income during the preceding year". In the Exchequer Court, Angers J. commented on the hardship that might be caused to the taxpayer by increasing his burden, depriving him of his annual exemption, raising the rate of his income tax and rendering him liable to a surtax, and in the Supreme Court of Canada, Davis J. stated that, while the law worked an injustice to the taxpayer, that could not affect the liability plainly imposed by the statute, and that the court could not escape the conclusion, which seemed a harsh one, that the appeal must be dismissed. The injustice that may result to a taxpayer from this state of the law is obvious, but the law itself, as settled in the *Capital Trust Corporation Case* (*supra*), is clear.

It seems equally clear that if income is received in any one year it is taxable in that year, even although it has not yet been earned, and it follows that the appellant was not entitled to make any deduction from income received by it in any year on the ground that it was not earned in such year.

This does not, however, dispose of this appeal, for the question remains whether all of the amounts received by the appellant during any year were received as income or became such during the year. 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* (*supra*). 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?

Applying this test, I think a distinction must be drawn between the minimum and additional fees, on the one hand, and the advance fees, on the other, received from employers by the appellant on behalf of the underwriters. The minimum fee on each contract, as has been seen, could be retained by the underwriters, regardless of what the earned fee, developed after the audit of the payroll, might be. There were, therefore, no restrictions upon the right of the underwriters to keep the minimum fees; their right to them was absolute. The same applies to the additional fees, for they were paid as the result of ascertained facts. The right of the appellant to its percentage of such minimum and additional fees was equally absolute and unrestricted. The evidence is not entirely clear whether the appellant included in its so-called reserves any amounts in respect of its percentages of minimum fees or additional fees, but, if it did, it was not entitled to do so, for such percentages had the quality of income at the time of their receipt by the appellant, in that its right of retention of them was absolute and unrestricted. They were clearly items of profit or gain to the appellant from its business and properly taxable in the year of their receipt.

The "advance fee" paid by the employer to the underwriters and received by the appellant on their behalf had, in my judgment, a different quality, for under the contract between the underwriters and the employer, as shown by the indemnification certificate, it was stipulated that the advance fee should be "held as a deposit", and dealt with in a specified manner. It was to be applied against the audited fee in the annual adjustments that had to be made, and not before then. In so far as the minimum fee was included in the advance fee the underwriters were entitled to retain it, but in respect of the excess of the amount of the advance fee over that of the minimum fee there was no certainty that the underwriters would ever have any

1944

ROBERTSON LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

right of retention. If the earned fee on an adjustment, based upon the ascertained total payroll, exceeded the amount of the advance fee, the underwriters could retain the advance fee, but if the reverse were true, the underwriters would have to refund it.

The nature of a "deposit" paid by one of the parties to a contract to the other was fully discussed by the English Court of Appeal in the leading case of *Howe* v. *Smith* (1). In that case, a sum was paid as "a deposit and in part payment of the purchase price". The court gave the term "deposit" the same meaning as that of "earnest", and regarded it as security for the completion of the contract by the payer of the deposit. It should, in my opinion, have a similar meaning in the present case, that of security by the employer that he would perform his part of the contract, namely, pay 25 or 30 per cent of the normal premium when it could be ascertained.

Where an amount is paid as a deposit by way of security for the performance of a contract and held as such, it cannot be regarded as profit or gain to the holder until the circumstances under which it may be retained by him to his own use have arisen and, until such time, it is not taxable income in his hands, for it lacks the essential quality of income, namely, that the recipient should have an absolute right to it and be under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

The difference in the stipulations with regard to the minimum fee and the advance fee indicates a difference in the nature of the payments made and received and in the rights of the recipient to their disposition, use and enjoyment. The underwriters could keep the minimum fee immediately upon its receipt on their behalf by the appellant; they could not do the same with the advance fee—they had to hold it as a deposit, with a right to retain it to their own use only under specified circumstances, which might or might not arise. Until the right of retention arose, the amount of the deposit could not be profit or gain to the underwriters. If the amounts of the advance fees did not have the quality of income in the hands of the underwriters, neither did any percentages of them have such quality in the hands of the appellant. It cannot be in

(1) (1884) 27 Ch. D. 89.

any different position with regard to percentage of advance fees than the underwriters would be with regard to the whole. The appellant was entitled to a fixed percentage of the 25 or 30 per cent which the employer had to pay; there was no right to a percentage of the advance fee as such. The fact that the appellant did not wait until the end of each policy year but distributed fees immediately upon their receipt and then worked out such adjustments as might become necessary cannot, in my judgment, affect the true character of the advance fee or any percentage of it. The right of the appellant to distribute the advance fee, except that portion which was a minimum fee, before it was known whether the underwriters might retain it or would have to refund it is highly questionable, but, if it could not be income to the underwriters, no percentage of it could be income to the appellant.

The conclusion to which I have come on this aspect of the appeal is that the appellant was not taxable in any of the years in dispute in respect of that portion of the amounts received by it during such year, which consisted of percentages of advance fees paid by employers to be held by the underwriters as deposits, excluding minimum fees therefrom, where the right of retention of such advance fees had not accrued to the underwriters during such year. To the extent that such portion was included in the so-called reserve for unearned commissions, it was not a reserve within the meaning of Section 6, ss. 1 (*d*) of the Income War Tax Act at all, for there was no transfer or credit from profits or gains, but rather a segregation of amounts received, which were not yet profits or gains from its business and, therefore, not taxable in its hands, and might never become such.

To the extent that I have indicated, the assessments were erroneously made and the appeal must be allowed with costs.

Judgment accordingly.

1944

May 15 & 16, Aug. 2.

BETWEEN:

ST. JOHN DRY DOCK & SHIPBUILDING COMPANY LIMITED..... } APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sec. 3—Dominion Government subsidy paid under The Dry Dock Subsidies Act, 1910, 9-10 Edw. VII, c. 17, as amended, as an aid to the construction of a dry dock—Purpose of Act may determine non-taxable character of payment authorized by it.

The Dry Dock Subsidies Act, 1910, 9-10 Edw. VII, c. 17, as amended, now R.S.C. 1927, c. 191, authorized the payment of a subsidy "as an aid to the construction of any dry dock" when the Governor in Council was satisfied that such a dry dock was needed in the public interest. On July 18, 1918, a subsidy agreement was entered into between the appellant and His Majesty the King, under which the appellant agreed to build a dry dock of the first class which had to be large enough to receive and repair therein with ease and safety the largest ships or vessels of the British Navy then existing, and His Majesty agreed on completion of the dry dock to pay the subsidy authorized by the Act. The subsidy was based on the cost of construction of the dry dock which was fixed by the Governor in Council at $5,500,000 The subsidy payable under the Act was described as a sum not exceeding 4½ per cent of the cost of the work as fixed by the Governor in Council half yearly during a period not exceeding thirty-five years. Bonds could not be issued by the appellant without the consent of the Minister of Public Works. The Act, however, authorized payments on account of the subsidy during construction and as such payments were approved bonds were issued with the consent of the Minister and the subsidy payments were assigned to the trustee of the bondholders as security for the bonds issued. The dock was completed by the appellant on June 30, 1924, and the final payments on account of the subsidy were approved. The appellant thereupon became entitled to subsidy payments of $247,500 per year for a period of thirty-five years, payable in semi-annual instalments. The subsidy payments were all assigned to the trustee for the bondholders as security for the bonds issued. The semi-annual instalments of subsidy were each exactly equal to the aggregate of the interest and principal that fell due on the bonds in each half year.

Up to 1939 the appellant carried the amount of the two semi-annual instalments of subsidy into its profit and loss account and charged against it the amount applied by the trustee in payment of interest on the bonds, but paid income tax on the amount applied in payment of the instalments of principal. Having been advised by a firm of accountants that it had been in error in this practice, it appealed against the 1939 assessment on the grounds that the subsidy payments were capital payments and did not constitute taxable income, and that, in any event, it had never received them. The

decision of the respondent was that the subsidy payments were directly or indirectly received by the appellant and subject to tax under the Income War Tax Act. From this decision the appellant appealed.

Held: That the appellant did not receive the subsidy in the course of its trade or business operations or because of them. It was not a trade or business receipt or revenue or an item of trade or business profit or gain and had nothing to do with the trade or business operations of the appellant. The subsidy was given as an aid to the construction of the dry dock, and not as an aid to its operation.

2. That the appellant did not receive the subsidy as interest or as a return on its capital. It was a construction subsidy payable in respect of a capital expenditure of the appellant. It was a fixed sum payable by instalments, calculated on the cost of the dock as fixed by the Governor in Council, and was paid and received in respect of its construction and as an aid to its construction. *Blake* v. *Imperial Brazilian Railway* (1884) 2 T.C. 58 and *H.R.H. The Nizam State Railway Co.* v. *Wyatt* (1890) 24 Q.B.D. 548, distinguished.

3. That when a payment is made under the authority of an Act of Parliament, the statutory purpose for which such payment is authorized may be considered in determining whether the payment is to be regarded as an item of annual net profit or gain or gratuity and taxable income in the hands of the recipient, within the meaning of section 3 of The Income War Tax Act. Parliament can so fix the character of a payment authorized by it that it cannot properly be regarded as taxable income in the hands of the recipient within the meaning of the Income War Tax Act.

4. That the purpose of The Dry Dock Subsidies Act, 1910, as amended, and the agreements and Orders in Council made under its authority was to secure the construction of a dry dock of the first class on the Atlantic Coast and the subsidy payments were made as an aid to such construction in order to accomplish the purpose of the Act. That purpose was a special one, in the public interest, quite apart from the trade and business operations of the appellant and had nothing whatever to do with its trade or business profits or gains. The subsidy was paid and received for the purpose which the Act was designed to achieve and the statutory purpose stamps the subsidy as an amount that should not be regarded as an item of annual net profit or gain or gratuity to the appellant or taken into computation for income tax purposes. *The Seaham Harbour Dock Co.* v. *Crook* (1931) 16 T.C. 333, followed and applied.

APPEAL under the provisions of The Income War Tax Act from the decision of the Minister of National Revenue.

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

R. O. Daly, K.C. and *W. Judson* for appellant.

R. Forsyth, K.C. and *E. S. McLatchy* for respondent.

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

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

THE PRESIDENT now (August 2, 1944) delivered the following judgment:

The issue in this appeal is whether a Dominion Government subsidy paid under the authority of the Dry Docks Subsidies Act, 1910, as amended, constitutes taxable income to the appellant under the Income War Tax Act.

There is no dispute as to the facts. The Dry Docks Subsidies Act, 1910, Statutes of Canada, 1910, Chap. 17 (now R.S.C. 1927, Chap. 191), intituled "An Act to Encourage the Construction of Dry Docks", authorized the payment of a subsidy "as an aid to the construction of any dry dock" and prescribed the conditions under which it might be paid. Section 3 reads as follows:

> **3.** The Governor in Council may, as an aid to the construction of any dry dock, authorize the payment out of any unappropriated money forming part of the Consolidated Revenue Fund of Canada of a subsidy, in accordance with the provisions of this Act, to any incorporated company, approved by the Governor in Council as having the ability to perform the work, which shall enter into an agreement with His Majesty to construct a dry dock under the provisions of this Act, with all necessary equipment, machinery and plant, for the reception and repairing of vessels.
>
> 2. No such aid shall be granted unless the Governor in Council is satisfied, upon a report of the Minister, based upon a report of the chief engineer of the Department of Public Works, and such other evidence as he deems necessary, that such dry dock is needed in the public interest, and is, as proposed, of sufficient capacity to meet the public requirements where such dry dock is to be located.

Three classes of dry docks were contemplated by the Act. We are concerned only with dry docks of the first class, which were for naval and general purposes and had to be large enough to receive and repair therein with ease and safety the largest ships or vessels of the British Navy existing at the time at which the contract was entered into for the Act provided that priority in the use of the dry dock was to be given to ships or vessels in the British or Canadian naval service or owned or employed by His Majesty.

The subsidy was to be calculated on the cost of the dry dock as fixed and determined by the Governor in Council before a subsidy agreement was entered into and in the case of a dry dock of the first class the cost for the purposes of the subsidy calculation was not to exceed

$5,500,000. The amount of the subsidy payable in respect of such a dry dock was specified by section 9 of the Act as follows:

> **9.** The subsidy payable in respect of dry docks which have been constructed under this Act of the first class shall be a sum not exceeding four and one-half per cent per annum of the cost of the work as fixed and determined under the last preceding section, half yearly during a period not exceeding thirty-five years from the time the Governor in Council has determined under this Act that the work has been completed.

The construction of the dry dock had to be in accordance with plans and specifications submitted to the Department of Public Works and the work of construction had to be done under the supervision of such Department.

At the outbreak of the last war there was no first-class dry dock on the Atlantic Coast. A company known as Norton Griffiths & Company, Limited, had tried to build one without any subsidy agreement with the Government but had gone into bankruptcy in 1916, having done work to the value of over $1,093,000. The appellant, which was incorporated in June, 1916, under the Dominion Companies' Act, with a capital of $1,000,000 consisting of 10,000 shares of the par value of $100 each, then entered into negotiations with the Government to complete the dock and applied for a subsidy under the Act. By Order in Council, P.C. 1532, dated June 22, 1918, authority was granted for the making of a subsidy agreement with the appellant and on July 18, 1918, a subsidy agreement was entered into between it and His Majesty the King under which the appellant agreed to construct a dry dock of the first class and His Majesty agreed upon the completion of the work to pay the appellant in half yearly payments an annual subsidy of 4½ per cent per annum during 35 years upon the sum of $5,500,000, being the maximum amount allowed under the Act.

The appellant then proceeded with the construction of the dry dock, having acquired the work previously done by Norton Griffiths & Company, Limited, and used its share capital for such purpose.

Section 9 of the Act provided for half-yearly payments on account of the subsidy, during the construction of the dock, at the rate of 4½ per cent per annum on 75 per cent

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

of the cost of all work done and materials provided at the time of such payment. From time to time as the work of construction proceeded the appellant applied for semi-annual payments on account of the subsidy. The first series of these was approved by Order in Council, P.C. 39, dated January 26, 1920, and was based upon the cost of the new work done by the appellant at the time of the application and the value of the old work done by the previous company and acquired by the appellant, the total cost being calculated at $1,694,781.25. The first semi-annual payment was fixed at $28,599.44, and payment of 70 such semi-annual payments was guaranteed.

Section 9 of the Act forbade the issue of any bonds, debentures or securities without the consent in writing of the Minister of Public Works, but provided that after $1,000,000 had been expended the Minister might permit the issue of bonds, debentures, or other securities and that any subsidy might with the approval of the Minister be assigned to a trustee for the holder of such bonds, debentures, or other securities and that the subsidy should in such event be payable directly to such trustee.

The appellant, having obtained approval for the first series of semi-annual instalments on account of the subsidy, proceeded to realize upon the subsidy. With the consent of the Minister it determined to create bonds to the extent of $3,826,272.34, bearing interest at 5½ per cent per annum, in respect of the whole of its assets, including the dry dock; appointed Montreal Trust Company as trustee for the bondholders; and determined to issue immediately a first series of bonds amounting to $884,276.50. On February 23, 1920, the appellant assigned the first series of semi-annual subsidy payments to Montreal Trust Company as trustee for the bondholders as security for the first series of bonds. The Minister of Public Works consented in writing to the creation of the whole bond issue, the immediate issue of the first series of bonds and the assignment of the first series of semi-annual subsidy payments. On the same date the appellant entered into a trust deed with Montreal Trust Company as trustee for the bondholders. The bonds issued were payable by instalments and were so arranged that the aggregate amount of

principal and interest falling due in each half year was exactly equal to the semi-annual payment of $28,599.44.

A similar procedure was followed on three other occasions. In each case an application was made by the appellant for semi-annual payments on account of the subsidy, based on the cost of construction done since the previous payments were authorized; the semi-annual payments were approved by Order in Council; as they were approved, a further series of bonds was issued; and the semi-annual payments on account of the subsidy were assigned to the trustee as security for the series of bonds issued. In each case the approval and consent of the Minister of Public Works was given. The semi-annual subsidy payments were always exactly equal to the semi-annual payments of principal and interest of the series of bonds for which they were security.

After the trustee for the bondholders had been appointed the payments of semi-annual instalments on account of the subsidy were, on their assignment to the trustee, ordered to be paid directly to the trustee and payment of them for the 35-year period was guaranteed to the trustee.

The construction of the dry dock was completed on June 30, 1924, and by Order in Council, P.C. 1199, dated July 11, 1924, the fifth and final series of semi-annual payments on account of the subsidy was approved. This authorization differed from the previous ones in that it was not based upon a progress report, nor on 75 per cent of cost, but upon a final report that the dock had been completed and the total cost as fixed. The amount finally approved was a semi-annual payment of $24,520.27, and represented the amount remaining to be paid of the whole subsidy, namely $247,500 per year in semi-annual payments of $123,750, less the four payments already approved.

The fifth and final series of bonds, exhausting the whole bond issue, was then issued and the final semi-annual payments were assigned to the trustee as security for the final series of bonds. Order in Council P.C. 1199 (filed as Exhibit 12) recites in detail the whole history of the subsidy arrangements made with the appellant and the trustee for the bondholders.

The final result was that the total annual subsidy of $247,500, being $4\frac{1}{2}$ per cent per annum of the cost of the

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

dock, fixed at $5,500,000 for calculation of the subsidy, was payable in semi-annual instalments of $123,750 each for a period of 35 years. The whole subsidy had been assigned to Montreal Trust Company as trustee for the bondholders as security for the bonds totalling for the five series issued the sum of $3,826,277.34. The annual payment of $247,500 was exactly sufficient to pay the interest and the instalments of principal that fell due on the bonds each year, so that when the subsidy payments had all been made, all the bonds would be fully paid both as to interest and principal.

Subsequently, in 1934, and again in 1936, the appellant, with the approval and consent of the Minister, re-arranged its bond issues, whereby it put out larger issues of bonds at lower rates of interest. These two refundings, in my opinion, cannot alter the quality of the subsidy payments made and received or affect in any way the questions involved in this appeal.

Up to 1939 the appellant had taken into its annual profit or loss account the full amount of the two semi-annual subsidy payments which had been made direct to Montreal Trust Company as trustee for the bondholders and had charged against it such amounts as the trustee had applied each year in payment of interest on the bonds, and had paid income tax on the balance, namely, the amounts which the trustee had applied in payment of the instalments of principal of the bonds as they fell due. In its income tax return for 1939, the appellant had included as income—Dominion Government Subsidy applicable to Retirement of Bonds—$145,761.78. The practice followed by the appellant had not seriously affected it in the earlier years for the reason that the amounts of principal that fell due on the bonds were relatively small as compared with the payments of interest, which had been allowed by way of deduction, and the appellant had also received substantial allowances for depreciation, a factor which also prevented the matter from coming to a head earlier, but as the payments of principal increased and those for interest decreased the question became one of grave importance to the appellant and in 1940 it called in the services of a firm of chartered accountants, who advised it that it had been in error in ever taking any part of the subsidy payments

into its accounts as income at all, with the result that when the appellant received its assessment notice, dated December 29, 1943, it took the ground that the item of $145,-761.78, which represented the amount applied by Montreal Trust Company in payment of the instalments of principal due on the bonds, was wrongfully included in its income tax return for 1939 and appealed from the assessment on the grounds that the Government subsidy of $247,500 was a capital payment and did not constitute taxable income and that in any event it had never received it. The decision of the Minister of National Revenue was that the subsidy payments constituted income directly or indirectly received by the appellant within the meaning of the Income War Tax Act and the assessment was affirmed. From this decision an appeal to this court is taken.

The appeal raises two issues, one, whether the Dominion Government subsidy paid under the authority of the Dry Dock Subsidies Act, 1910, was income, and the other, whether it was ever received directly or indirectly by the appellant. The determination of the latter issue will be necessary only if it be held that the subsidy was income.

The fact that an amount is described as a Government subsidy does not of itself determine its character in the hands of the recipient for taxation purposes. In each case the true character of the subsidy must be ascertained and in so doing the purpose for which it was granted may properly be considered.

There are no Canadian decisions on the subject. Counsel for the respondent relied entirely upon two English decisions, *Blake* v. *Imperial Brazilian Railway* (1), and *H.R.H. The Nizam State Railway Co.* v. *Wyatt* (2), in support of his contention that the annual subsidy payments now under discussion were income to the appellant and taxable under the Income War Tax Act.

In *Blake* v. *Imperial Brazilian Railway* (*supra*), the Company was formed for the purpose of constructing and working a railway in Brazil, with a share capital of £500,000, of which £250,000 was issued as Preference shares. The Company also issued £368,300 in debentures.

(1) (1884) 2 T.C. 58. (2) (1890) 24 Q.B.D. 548.

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

The Brazilian Government guaranteed 7 per cent per annum for 30 years on the sum of £618,300. The debentures carried interest at 5½ per cent per annum for 30 years. Under a deed of trust between the Company and the trustees for the debenture holders the debentures were to be redeemed by an annual sinking fund extending over 30 years, the difference between the 5½ per cent paid to the debenture holders and the 7 per cent received from the Brazilian Government being applied to the sinking fund. The Company contended that the amount thus set aside for the purpose of the sinking fund was not subject to income tax. The English Court of Appeal unanimously held that the 7 per cent per annum received by the Company had been received as interest. Brett M.R. held that it was interest upon money paid or found by the Company for the Government. Cotton L.J. held that it was not a contribution towards the cost of constructing the railway but was paid as interest on a certain sum and "not as a sum which was to go towards the providing of capital which was to be expended, or as a sum to be expended in the construction of the line". Lindley L.J. was of the same opinion.

This case was followed in *H.R.H. The Nizam State Railway Co.* v. *Wyatt* (*supra*). In that case, the facts were that the Company was formed for the purpose of making and carrying out an agreement with the Government of the Nizam for the acquisition, extension and working by the Company of a certain railway in India. The capital of the Company was to be £2,000,000, divided into 100,000 shares of £20 each, and debentures to the extent of £2,500,000 bearing interest at 4 per cent per annum were to be issued. The Government of the Nizam agreed for the period of 20 years to pay to the Company an annuity equal to 5 per cent per annum on the issued capital of the Company, both share and debenture, not exceeding £4,500,000, the Company being bound to apply the same in payment of interest at 5 per cent per annum on the paid-up share capital, in payment of the debenture interest at 4 per cent per annum, and to pay the remainder, being 1 per cent on the debenture capital, to trustees to be invested and form a sinking fund

for the redemption of the debenture capital. The Company received the annuity, paid the 1 per cent balance to the trustees and claimed that this amount was not subject to income tax. Counsel for the Company sought to distinguish the case from *Blake* v. *Imperial Brazilian Railway* (*supra*) on the ground that in that case the Company had not been under any obligation to the Government to apply any portion of the 7 per cent received from it to a sinking fund but that in this case the Company was obliged to pay 1 per cent of the interest on the debenture capital to trustees for sinking fund purposes. The Court held that *Blake* v. *Brazilian Railway* (*supra*) governed the case, that the whole amount of the annuity was subject to income tax, and that the company was not entitled to any deduction in respect of the 1 per cent paid to the trustees for sinking fund purposes, even although it was under an obligation to make such payment.

On the strength of these two decisions counsel for the respondent contended that the subsidy payments in this case constituted taxable income to the appellant.

Counsel for the appellant took the position that the subsidy payments were not income at all but capital receipts. His contention was that the only portion of the definition of taxable income contained in Section 3 of the Income War Tax Act under which the appellant could possibly be taxed was that which referred to "annual net profit or gain or gratuity" as being "profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business", and that the annual subsidy payments were not trade or business gains or profits or trade or business receipts at all. He relied upon the decision of the House of Lords in *The Seaham Harbour Dock Co.* v. *Crook* (1) as conclusive in his favour. In that case, the Company contemplated an extension to its docks, obtained an Act of Parliament enabling it to do so and commenced work on the extension, the estimated cost of which was £152,000. The Act of Parliament allowed the Company to raise by debenture issue only the sum of £75,000, and debentures to this amount were issued. Of

(1) (1931) 16 T.C. 333.

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

the balance required for the extension, £75,000 was obtained by unsecured loans from other sources. This left a small amount of capital still to be found. On September 10, 1923, the Company applied to the Unemployment Grants Committee asking for assistance in carrying through the work of extending the docks and on November 6, 1923, the Committee replied that they were prepared to sanction a grant "equivalent to half the interest at a rate not exceeding an average up to 5½ per cent per annum on approved expenditure met out of loan (not exceeding £152,000) for a period of two years from the date or dates on which the payments are made". Applications for payment of the grant in respect of the work done, as certified by the engineer and auditors of the Company in conformity with the letter from the Unemployment Grants Committee, were made periodically by the Company and instalments of the grant were received periodically by it during the years 1924 to 1928, totalling altogether £7,500. The instalments of the grant were always credited to revenue in the accounts of the Company. On being assessed for income tax in respect of the grants the Company appealed on the grounds that the grant was capital; that it was not made for the purpose of meeting interest but in respect of expenditure and for the purpose of helping the Company through with its cost of construction; that the term "equivalent to half the interest" was only a method of calculation for arriving at the amount of grant to be paid; and that there was no trading and no revenue at that time and that there were no profits or gains in carrying on a business or trade and, as no trade was being carried on, that there could be no revenue and that the grant was a capital payment only and not taxable income. The Commissioners, before whom these arguments were made, held that the grant was revenue and taxable income of the Company. An appeal from their decision was dismissed by Rowlatt J. The Court of Appeal, however, unanimously reversed the decision of Rowlatt J., and the House of Lords unanimously dismissed an appeal from the judgment of the Court of Appeal. Lord Hanworth M.R. took the view that an application had been made by the Company, which was slightly short of capital, for assistance in order to carry on

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

the work and that its request had been granted. The amount of the grant was arrived at by the formula indicated by the Committee, and was paid according to the formula for the purpose of the dock extension. This was a capital outlay by the Company. He agreed with the arguments on behalf of the Company before the Commissioners. Lord Hanworth M.R. distinguished the cases previously referred to. With respect to *Blake* v. *Imperial Brazilian Railway* (*supra*), his view was that all that it decided was, that when the Company received 7 per cent under the guarantee to it it received such sum as interest, and the fact that it devoted a portion of it to a sinking fund for the repayment of capital did not alter its original character; that this was merely in accordance with the principle of *Mersey Docks and Harbour Board* v. *Lucas* (1), that the application which the recipient makes of a sum has nothing to do with the question of whether it was at the time of its receipt a taxable profit or gain to him. Lord Hanworth took a similar view with regard to the *Nizam State Railway Co. Case* (*supra*) and concluded his opinion with the view that the sums were paid in order "to advance a capital expenditure to be made by the Seaham Harbour Dock Company" and could not be said to be sums received in respect of trade and so taxable. With these views the other judges of the Court of Appeal agreed. While the House of Lords unanimously dismissed an appeal from the judgment of the Court of Appeal, and agreed that the grant was not a trade receipt or an item of profit or gain from trade, its decision is of particular importance by reason of the special grounds upon which it is based. The House of Lords was not concerned with whether the sums received by the Dock Company were applied for capital or revenue purposes, but looked rather at the purpose of the grant in order to determine whether the amount of it should be included in taxable revenue. Lord Buckmaster after stating "most unhesitatingly" that the grant was not a trade receipt, went on to say, at page 353:

> It appears to me that it was nothing whatever of the kind. It was a grant which was made by a government department with the idea that by its use men might be kept in employment, and it was paid to and

(1) (1883) 2 T.C. 25.

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

received by the Dock Company without any special allocation to any particular part of their property, either capital or revenue, and was simply to enable them to carry out the work upon which they were engaged, with the idea that by so doing people might be employed. I find myself quite unable to see that it was a trade receipt, or that it bore any resemblance to a trade receipt. It appears to me to have been simply a grant made by the Government for the purposes which I have mentioned, and in those circumstances cannot be included in revenue for the purposes of the tax.

Lord Atkin was of the same opinion but was more explicit. He pointed out that the sum was paid under the authority of the Appropriation Act of 1924, which authorized grants "for assistance in carrying out approved schemes of useful work to relieve unemployment", and after certain remarks to which reference will be made later, he said, at page 353:

> It appears to me that when these sums were granted and when they were received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade. It is a receipt which is given for the express purpose which is named and it has nothing to do with their trade in the sense in which you are considering the profits or gains of the trade. It appears to me, with respect, to be quite irrelevant whether the money, when received, is applied for capital purposes or is applied for revenue purposes; in neither case is the money properly said to be brought into a computation of the profits or gains of the trade.

Lord Macmillan considered it sufficient to say that the moneys received were not profits or gains of the trade. The ratio of the decision, in my opinion, is that the grant was made under statutory authority for unemployment relief purposes; that such purposes had nothing to do with the trade of the Dock Company; and that, since the amount of the grant was received for the purposes for which it was paid, it could not be regarded as a trade receipt or revenue, or as an item of trade profit or gain. It was the purpose of the statute, under the authority of which the grant was paid, that determined its non-taxable character in the hands of the recipient.

In my opinion, the principles underlying this decision are applicable to the subsidy payments under review. The present case is quite different from the case in which a subsidy payment has been held to be taxable. An illustration of an income subsidy is to be found in *Charles Brown & Company* v.*Commissioners of Inland Revenue* (1). There the Company carried on its business as a miller under the control of the Food Controller from 1917 to 1921 and was

(1) (1930) 12 T.C. 1256.

compelled to buy and sell at prices fixed by the Controller. In lieu of making an application before the Defence of the Realm (Losses) Commission for compensation for losses sustained through the exercise of the Crown's powers, the Company entered into an agreement with the controller under which a standard profit was fixed. Under this agreement, if the profits exceeded the standard the Company was to pay the excess to the Controller, but if the profits fell short of the standard the deficiency was to be paid by the Controller to the Company. In respect of two periods of account the Company paid excesses to the Controller but in respect of four periods it received payments of the amounts by which its profits fell short of the standard. The Company contended that such amounts were not part of its trading receipts but were a compensation for loss or damage and were not subject to excess profits duty. Rowlatt J. held that the Company received the amounts because of continuing the operations of its trade and with this view the Court of Appeal unanimously agreed. The Government had given a guarantee of a standard profit and the amounts paid by the Controller were received by the Company as trade profits, although they came from the Crown, just as much as if they had come from customers.

Another illustration of an income subsidy is to be found in *Lincolnshire Sugar Company, Limited* v. *Smart* (1). In that case the Company carried on business as manufacturers of sugar from beet grown in Great Britain. It had received subsidies under the British Sugar (Subsidy) Act, 1925, but in 1931, in view of the fall in the price of sugar, further state aid was given to companies which would otherwise have experienced difficulty in paying the prices contracted to be paid to beet growers. This was authorized by the British Sugar Industry (Assistance) Act, 1931, whereby "advances" were to be made during the period of one year, with provision for repayment under certain circumstances. The Company had received advances under this Act, without any liability to repay having arisen, but contended that under the Act the amounts received were not trading receipts in that year but loans. The Commissioners and Findlay J. upheld

(1) (1937) A.C. 697.

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

that view, but it was unanimously reversed by the Court of Appeal. The House of Lords unanimously agreed with the Court of Appeal. Lord Macmillan held that the advances were made to enable the Company to meet its trading obligations and were intended to supplement its trading receipts, and were properly taken into computation in arriving at the Company's profits and gains. With this view the other members of the House of Lords concurred.

Similar instances of income subsidies are to be found in such United States decisions as *Texas & Pacific Ry. Co.* v. *United States* (1), where the Supreme Court of the United States held that the amount paid to a railroad by the Government under the Transportation Act to make up the minimum of operating income guaranteed for the six months following the relinquishment of federal control was taxable income, and *Helvering* v. *Claiborne-Annapolis Ferry Co.* (2), where the Circuit Court of Appeals held that an amount paid on a mileage basis by the State of Maryland to the Company for the maintenance of a ferry was as much an earning by the ferry company as were the tolls collected from vehicles and passengers.

These two United States decisions are to be distinguished from *Edwards* v. *Cuba Railroad Company* (3), where Mr. Justice Butler of the Supreme Court of the United States held that certain subsidy payments made by the Republic of Cuba to the Company to promote the construction of railroads in Cuba and in consideration also of reduced rates to the public as well as reduced rates and other privileges for the Government, the payments being on the basis of mileage actually constructed, were for the purpose of reimbursing the Company for capital expenditures and were not profits or gains from the use or operation of the railway and did not constitute taxable income.

The subsidy payments in this case clearly fall outside the ambit of the cases which I have cited as illustrations or instances of income subsidies, such as amount to a guarantee of profits or earnings or result in supplementary or additional revenues. Such subsidies come into the hands of the recipient in the course of trade or business opera-

(1) (1932) 286 U.S. 285. (2) (1938) 93 Fed. (2nd) 875.
(3) (1925) 268 U.S. 628.

tions or because of them and, being operational revenues, may properly be described as income subsidies subject to tax. The situation in the present case is quite different. The appellant was not entitled to receive nor did it receive the subsidy in the course of its trade or business operations or because of them. The subsidy was not a trade or business receipt or revenue or an item of trade or business profit or gain. There was no guarantee of trade or business profits or earnings nor was the subsidy given to supplement or increase the operational revenues of the appellant. Indeed, the subsidy payments had nothing to do with the trade or business operations of the appellant at all. It became entitled to them immediately upon construction of the dry dock pursuant to the agreement authorized by the Act. At that time, it was not in the business of dry dock construction and was not yet engaged in the business of operating the dry dock. The appellant, moreover, would continue to be entitled to the subsidy payments even if it never operated the dry dock at all. While it is true that section 14 of the Act requires that the agreement shall include a provision that the dock shall, after completion, be kept in repair and working order by the company, default on the part of the company in this respect does not in any way affect the payment of the subsidy. This is clear from sections 15 and 16 which provide for expropriation and operation of the dry dock by the Government if it appears that it is not in a condition of repair. It was the construction of the dock and not its operation that entitled the appellant to the subsidy. The subsidy was given as an aid to the construction of the dry dock, and not as an aid to its operation; it was not an operational subsidy at all nor in any way the kind of subsidy held to be taxable in the income subsidy cases.

Nor is the case governed by the *Blake Case* (*supra*) and the *Nizam Case* (*supra*), upon which counsel for the respondent entirely relied. It may be observed, however, that, if these cases did apply, then the whole of the annual subsidy of $247,500, and not merely that portion of it that was applied by the trustee in payment of the instalments of principal, is subject to income tax. It cannot have the character of being partly income and partly not income.

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

It is all subject to tax or none of it is. What is done with it afterwards by the recipient cannot affect its taxable or non-taxable character at the time of its receipt. This fundamental principle of income tax law was recognized in the *Blake Case* (*supra*) and the *Nizam Case* (*supra*). In these cases the companies claimed exemption from income tax only in respect of that portion of the guarantee which the company had applied to sinking fund purposes, and no question whatever was raised as to the taxability of the remainder. That was taken for granted. The essence of the decision in each case, as pointed out by Lord Hanworth in *The Seaham Dock Co. Case* (*supra*), was that the guarantee was received as interest and the subsequent application of part of it to a capital purpose such as a sinking fund could not change its character. The whole amount received by the company in each case was held to have been received as interest. In the *Blake Case* (*supra*) the guarantee was 7 per cent per annum on the total of the issued share capital and the issued debentures and was subject to reduction to the extent that any of the money deposited in the bank earned bank interest and in the *Nizam Case* (*supra*) the annuity was 5 per cent per annum on the issued capital of the company, both share and debenture. In the present case the subsidy was not based upon share or debenture capital at all. There is no reference in the Act, or in the subsidy agreement, or in any of the orders in council, to share or debenture capital. There was no guarantee of interest or a return on capital found or invested. I am quite unable to see how the receipt of the subsidy could be regarded as a receipt of interest. Section 8 of the Act makes it clear that the amount of the subsidy is to be calculated on the cost of the dry dock as fixed by the Governor in Council and the evidence shows that when each of the five series of subsidy payments was authorized, the amount approved for payment was calculated upon the cost of construction done up to the time of the application for payment. If the subsidy had been paid in a lump sum the amount of it certainly would not have been interest but a capital contribution and a capital receipt by the appellant rather than a receipt of income. The reason for paying the subsidy in annual instalments over a period of years rather

than a lump sum was no doubt due to considerations of government policy and convenience and the annuality of the payments cannot affect their character. Nor does the fact that section 9 of the Act describes the subsidy as a "sum not exceeding four and one-half per cent per annum of the cost of the work * * * half yearly during a period not exceeding thirty-five years" make the subsidy a payment or receipt of interest. The section makes it quite clear that it is not interest on a sum that is payable; it is a sum that is payable, a fixed amount calculated on the cost of the work; the formula used merely determines the amount of the sum payable by instalments over a period of years. The fact that it is payable by instalments does not change its character. A similar view was taken of the formula used by the Unemployment Grants Committee in *The Seaham Dock Co. Case* (*supra*). The formula merely projects the amount that would be payable in a lump sum into the amounts of the instalments that are to be paid. That is quite different from a guarantee of interest or return on share or debenture capital. The subsidy was a construction subsidy based on the cost of the dock as fixed. Counsel for the respondent sought to distinguish the case from *The Seaham Dock Co. Case* (*supra*) by contending that the subsidy was not to go into the construction of the dock but was payable in respect of what had been done rather than what was to be done. It is quite clear that the subsidy was a construction subsidy and equally clear that the expenditure made by the appellant in constructing the dock was a capital expenditure. That the subsidy was payable in respect of a capital expenditure is, I think, made clear by section 9 of the Act which refers to the subsidy as being "payable in respect of dry docks which have been constructed under this Act". If the subsidy was, therefore, payable and, of course, likewise received in respect of a capital expenditure it seems immaterial to me whether the subsidy payments were made "to advance a capital expenditure to be made by the company", to use the words of Lord Hanworth in *The Seaham Harbour Dock Co. Case* (*supra*), or "for the purpose of reimbursing" the appellant "for capital expenditures", in the language of Mr. Justice Butler in *Edward* v. *Cuba Rail-*

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J.

road Company (*supra*). As a matter of fact both purposes are involved in the present case. It was only after the first series of semi-annual instalments on account of the subsidy was approved that bonds were permitted to be issued. The first series of bonds provided the capital which enabled the appellant to continue with the construction. This was intended by the Act with its provisions authorizing payments on account of the subsidy during construction, the issue of bonds only with the consent of the Minister of Public Works and the assignment of the subsidy payments as security for the bonds so issued. In that sense the first series of payments on account of the subsidy were paid to advance a capital expenditure by the appellant. The same might be said of the second, third and fourth series of payments, but it could not be said of the fifth and last series of payments, for when they were authorized the dock was fully completed. The final payments, therefore, may more properly be described as having been made for the purpose of reimbursing the appellant for capital expenditures made by it, for it will be remembered that the appellant used its own share capital before any payment on account of the subsidy was authorized to be paid. The subsidy was a fixed sum payable by instalments, calculated on the cost of the dock as fixed by the Governor in Council and was paid and received in respect of its construction and as an aid to its construction. It was in no sense paid or received as interest and, in my judgment, is clearly distinguishable from the guarantee on share and debenture capital held to be taxable in the *Blake Case* (*supra*) and in the *Nizam Case* (*supra*).

Moreover, the case, in my view, comes within the principles enunciated by the House of Lords in *The Seaham Dock Co. Case* (*supra*). As I read the reasons of Lord Buckmaster and Lord Atkin in that case, they support the view that, when a payment is made under the authority of an Act of Parliament, the statutory purpose for which such payment is authorized may be considered in determining whether the payment is to be regarded as an item of annual net profit or gain or gratuity and taxable income in the hands of the recipient, within the meaning of section 3 of the Income War Tax Act. Both judges stressed the purpose of the statute under the authority of which the grant

in that case was made. That purpose was a special one, namely, "for assistance in carrying out approved schemes of useful work to relieve unemployment". Unemployment relief had nothing to do with the trade of the Dock Company and the grant, since it was paid and received for "unemployment relief purposes", could not be a trade receipt or an item of trade profit or gain in the hands of the Company. It was received for the purpose for which it was paid and the statutory purpose of the grant determined its non-taxable character.

Parliament can, I think, so fix the character of a payment authorized by it that it cannot properly be regarded as taxable income in the hands of the recipient within the meaning of the Income War Tax Act. The decision of the House of Lords in *The Seaham Dock Co. Case* (*supra*), in my opinion, fully justifies such a statement of principle.

The purpose for which the subsidy payments in the present case were made and received is to be found in The Dry Dock Subsidies Act, 1910, as amended, and in the agreements and Orders in Council made under its authority. The Act is intituled "an Act to encourage the Construction of Dry Docks" and was designed by Parliament to procure the construction of dry docks, when the Governor in Council was satisfied that they were needed in the public interest, by state aid to their construction. At the time the subsidy agreement with the appellant was authorized in July of 1918, there was no dry dock of the first class on the Atlantic Coast and the construction of such a dry dock, large enough to receive and repair therein with ease and safety the largest ships of the British Navy then existing and in which British and Canadian naval and other government-owned vessels would have priority over all other vessels was considered in the public interest. The construction of such a dry dock was not likely to be undertaken as a commercial venture and either construction by the state or state aid to its construction was necessary. Parliament had by the Act authorized the latter alternative and it was adopted. The construction of the dock, which was designed to serve a purpose of national importance particularly in a time of war, was entrusted to the appellant and state aid to its construction was approved. The whole Act shows the concern of Parliament for the construction of

1944

ST. JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J

such a dock as would meet the public requirements; the dock had to be constructed in accordance with plans and specifications approved by the Department of Public Works and the work had to be done under the supervision of that department. The subsidy was paid as an aid to its construction, was payable, as section 9 shows, in respect of its construction and its amount was calculated on the cost of its construction. That Parliament was concerned with the construction of the dock, rather than with its maintenance or operation, is shown by the fact that no forfeiture of the subsidy payments took place if the dock was not, after its construction, kept in repair and working order. In such event the Government had the remedy of taking possession of the dock and operating it. Parliament also clearly showed that the subsidy was intended exclusively for dock construction purposes by the provisions of the Act relating to the issue of bonds. No bond issue that would be a charge on the dock was permitted at all, until not less than $1,000,000 had been spent on it. After that, bonds might be issued but only with the consent of the Government and the Act clearly contemplated such a bond issue by allowing payments on account of the subsidy during construction, the issue of bonds with the necessary consent, and the assignment of the subsidy payments as security for such bonds. Such a bond issue was the device used by the appellant to realize the immediate value of the subsidy payments as they were approved and was part of the scheme of state aid to construction contemplated by the Act. Complete control over everything relating to the issue of bonds was vested in the Government and no consent was given for the issue of bonds that would be a charge on the dock unless the subsidy payments were assigned to the trustee for the bondholders as security for such bonds. Parliament intended by these provisions to make sure that the dock would be constructed and be available in the public interest without any risk that it would ever pass into the hands of the bondholders through any default in payment of the bonds.

In the present case, the purpose of the Act and the agreements and Orders in Council made under its authority was to secure the construction of a dry dock of the first

class on the Atlantic Coast and the subsidy payments were made as an aid to such construction in order to accomplish the purpose of the Act. That purpose was a special one, in the public interest, quite apart from the trade and business operations of the appellant and had nothing whatever to do with its trade or business profits or gains. Since the subsidy was paid and received for such special purpose, in the national interest, it cannot be said to be a trade or business receipt or revenue in the hands of the appellant or an item of trade or business profit or gain to it. It was paid and received for the purpose which the Act was designed to achieve and, in my opinion, that statutory purpose stamps the subsidy as an amount that should not be regarded as an item of annual net profit or gain or gratuity to the appellant or taken into computation for income tax purposes.

In *The Seaham Dock Co. Case* (*supra*), Lord Atkin, after referring to the statutory purposes for which the grant in that case had been made, said, at page 353:

> It would appear to me to be a remarkable proposition that Parliament assented to that sum being appropriated for that purpose, but intended, in certain events at any rate, only fifteen shillings in the pound to be appropriated for that purpose, five shillings in the pound of the full amount coming back in the way of Income Tax. I do not think that was the effect.

Similar remarks would be appropriate in the present case. I do not think that it was ever intended by Parliament that, after payment of the subsidy had been authorized by the Government in aid of the construction of the dry dock by the appellant, and after the dock had been completed by the appellant and the purpose of the Act accomplished, a substantial and increasingly large portion of the aid to construction should come back to the Government in the form of income tax.

The subsidy payments, even if it be assumed that they were received by the appellant, were not trade or business receipts of the appellant or part of its operating revenues, or items of its trade or business profits or gains, nor were they paid or received as interest or a return on share or debenture capital, but rather for the purpose of advancing or re-imbursing a capital expenditure by the appellant and as a capital contribution or grant in respect of such expenditure, and, furthermore, they were paid and received for the

1944

ST JOHN DRY DOCK & SHIP-BUILDING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE.

Thorson J

accomplishment of a special purpose in the national interest quite apart from the trade or business operations of the appellant and not connected with them. For these several reasons I conclude that the subsidy payments in this case were not subject to income tax under the Income War Tax Act.

In view of this finding, it is not necessary to deal with the other contention of the appellant that the subsidy payments were not received by it directly or indirectly after the trustee for the bondholders became entitled to them as security for the bonds which had been issued.

For the reasons mentioned I find that the appellant was erroneously assessed for income tax in respect of the subsidy payments made in 1939. Its appeal must, therefore, be allowed with costs.

Judgment accordingly.

1942

Feb. 23.

1943

Mar. 1.

BETWEEN:

MIGUEL ZAMACOIS ..... PLAINTIFF;

AND

RAYMOND DOUVILLE ET AL.....DEFENDANTS.

Copyright—Parties—Reproduction of text in entirety—"Fair dealing"—Good faith—Infringement—Injunction.

Held: That the reproduction by the press of an article on a current economic, political or religious topic is authorized by article of the Berne Convention, unless the reproduction thereof be expressly reserved.

2. That the article given below at length treating of the supposed experiences of animals in war-time, being of a fanciful and whimsical character, is not such as may be reproduced without the permission of the author in virtue of article 9 of the Berne Convention.

3. That the reproduction in a newspaper of the said article in its entirety, with critical comments upon it, is not "fair dealing" with the article, as authorized by 17 (1) of Copyright Act, R.S.C. (1927), c. 32, and constitutes an infringement of the copyright therein.

4. That an agent authorized under an unrevoked power of attorney, given by a foreign society of which plaintiff is a member, may legally bring action in the name of such plaintiff, though it does not clearly appear that the said plaintiff was aware of the action being instituted.

5. That where a defendant, in good faith, believes he was not infringing, plaintiff is not entitled to punitive or exemplary damages.

6. That in the case of a single and isolated act of infringement (such as reproducing an article in one issue of a newspaper) and which is not likely to be repeated, an order for Injunction will not be granted.

7. That where, in an action for infringement of copyright by reproducing an article in a newspaper, it appears that the defendant has in his possession only a few infringing copies of the paper which form part of the archives of the paper and are not for sale the defendant should not be ordered to surrender them to the plaintiff, pursuant to section 21 of the Copyright Act.

ACTION for a declaration that the Defendants have infringed the Copyright of the Plaintiff, for an injunction and for damages resulting from the infringement.

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

Jean Genest, K.C. for plaintiff.

Alexandre Taché, K.C. for defendants.

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

ANGERS J. now (March 1, 1943) delivered the following judgment:

Il s'agit d'une action en violation de droit d'auteur.

Le demandeur, qui est citoyen français, est écrivain et homme de lettres et il a son domicile à Paris, France.

Les défendeurs sont les directeurs-propriétaires d'un journal hebdomadaire intitulé *Le Bien Public* qu'ils publient dans la cité des Trois-Rivières, province de Québec. Le journal des défendeurs circule dans ladite cité et ailleurs dans la province de Québec ainsi que, quoiqu'en quantité plus restreinte, dans les provinces avoisinantes.

Le demandeur publie dans *Candide,* hebdomadaire littéraire publié à Paris, France, des articles et nouvelles sous le titre "Vérités et Bobards". Il en a publié, entre autres, dans les numéros des 20 et 27 décembre 1939, des 3, 10, 17 et 24 janvier 1940, du 7 février 1940 et du 29 mai 1940; des copies de chacun de ces numéros ont été produites comme pièces A, C et 2 (1 à 6), les deux premières par le demandeur et les six autres par les défendeurs.

Le demandeur a produit comme pièce 1 une copie du journal *Le Bien Public* du 8 février 1940, dans lequel a paru, sous la signature de Léon Dufrost, un article intitulé "Vérité et Bobards" que je crois à propos de reproduire textuellement:

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

Vérités et Bobards

J'étais en chemin de fer, lisant un journal de France, *Candide,* quand mon œil fut attiré par un nom, celui de Zamacoïs.

Zamacoïs, ce n'est plus un jeune, hélas, mais comme son esprit est resté plein de fraîcheur! Je me suis hâté de parcourir les dix paragraphes de son article, "Vérités et bobards", et j'en suis encore tout amusé!

Si bien, que je voudrais essayer de vous faire partager ma joie. Nous sommes tellement sérieux, tellement graves, tellement austères!

C'est peut-être par là que nous ressemblons le moins aux Français, nos pères, et que nous nous rapprochons le plus des Anglais sans avoir acquis, malheureusement, le sens si aigu de l'humour qui les caractérise. Perte, d'un côté, imitation, de l'autre, de ce qui est naturel à nos amis anglo-saxons et nous rend ridiculement solennels puisque leur humour si spécial n'est pas imitable, en somme recul sur toute la ligne.

Rire, sourire, s'amuser, blaguer, ne pas s'en faire, c'est si bon, si sain et si naturel! Prendre au sérieux les choses sérieuses, c'est parfait, et voilà qui est dans le droit fil de la tradition et du caractère français. Mais savoir aussi, à l'occasion, en parler avec détachement, avec aisance; voir ce qui est amusant et s'en amuser; chercher et trouver ce qui fait sourire et détend, c'est peut-être encore la meilleure façon d'en venir à traiter sérieusement les choses sérieuses.

La France est en guerre. Une menace plus grave, je pense, que toutes celles qui ont pesé sur cette nation au cours de sa longue et glorieuse histoire, prend à la gorge tous et chacun de ses fils.

Zamacoïs est un écrivain de renom. C'est un fantaisiste ailé. Comme tous les autres, il ne peut penser qu'à une chose: la guerre. Comme tous les autres il lui faut en parler! Mais comme il y mettra de finesse et de discrétion, et de verve, et de souplesse, et d'ingéniosité, et d'esprit.

Son sujet, d'abord: que deviennent les animaux dans la tourmente? Mais parfaitement, les animaux ne sont pas épargnés! Et tandis qu'on y pense, qu'on en parle, d'un ton léger, dégagé, amusé, on pense moins et on parle moins de ceux auxquels on ne peut penser pour en parler, sans un tressaillement au cœur.

C'est une façon de soutenir le moral. Au front, les soldats vont se gondoler des mots, des à-peu-près, que le rappel incessant de la guerre provoque sous la plume de Zamacoïs, et, à l'arrière, on va se défatiguer aussi, si l'on peut dire, en souriant à cette façon de répondre à la "guerre des nerfs" du Sieur Adolf...

Le *Bien Public* reproduit ailleurs "Vérités et bobards" de M. Miguel Zamacoïs. Nos lecteurs voudront bien s'y reporter. Ils trouveront plaisir à le lire, un plaisir d'une qualité exceptionnelle, que le journal est heureux de leur procurer. Ils sont menacés de tant de discours électoraux...

L'article de Dufrost commence sur la première page du journal et se termine sur la seizième.

L'article de Zamacoïs est reproduit sur la page 12; il me semble convenable de le citer ici intégralement, afin d'en faire voir le genre:

Vérités et Bobards

Et les animaux?... que deviennent-ils dans la tourmente?

Eh! bien, comme les hommes, ils ont des destins plus ou moins enviables.

Les Britanniques, dont on connaît le penchant sentimental à l'égard des bêtes, ont créé, à Londres, des postes de secours, en cas de bombardements, pour les chiens et les chats. On ne nous a pas dit si on impose à ces animaux le port du masque à gaz. Ce qu'il y a de certain c'est que le premier chien qui a vu un homme avec cette adjonction sur le museau a dû penser:

—Tiens! lui aussi?

Mais son cerveau n'a pas été jusqu'à la perception de cette vérité, à savoir, que si nous portons des muselières c'est, paradoxalement, parce que ce sont nos voisins qui sont enragés.

Comme jusqu'à présent, Dieu merci, il n'y a pas eu de bobo, les infirmiers et les infirmières préposés aux postes de secours zoologiques sont demeurés inoccupés, et réduits, pour se maintenir en état d'entraînement, à meubler leurs loisirs en jouant exclusivement à pigeon-vole, chat-perché et saute-mouton.

* * * *

On a annoncé dans les journaux qu'un chien avait été fait prisonnier sur un navire allemand capturé. Le toutou ayant à point aboyé "kamarade!" aux arraisonneurs, fut emmené généreusement en Angleterre. Mais on sait qu'un individu de la race canine n'entre pas facilement outre-Manche. Le prisonnier est en train de subir une quarantaine sévère dans une niche de concentration, en attendant qu'ayant opté pour un pays où il y a encore du sucre à volonté, il soit dressé à faire le beau en l'honneur des alliés, et à grogner férocement au seul nom prononcé d'Adolf.

* * * *

Un chat nommé Fawny, engagé à bord du chalutier *Caldew,* pour faire filer les rats avant la voie d'eau, a, lui aussi, connu de fortes émotions. Le *Caldew* torpillé n'a pas manqué d'embarquer avec lui dans une chaloupe Fawny terrorisé à l'idée du contact avec l'eau, son ennemi numéro un. Recueillis par un bateau suédois qu'un destroyer allemand arrêta bientôt, les rescapés furent finalement emmenés prisonniers. Fawny eut la chance inouïe que lesdits Allemands n'ayant pas réalisé sa qualité d'ersatz du lapin, il fut adopté par une mémère sensible.

Que de souvenirs impressionnants à aller miauler sur une gouttière, un beau soir de printemps! Et quelle chatte demeurera indifférente au prestige d'un amoureux s'il sait jouer au cabotin et au Matou-vu?

Parmi les chevaux, deux catégories: les éprouvés et les privilégiés. Il y a ceux qui triment durement dans la zone militaire, et puis les embusqués des écuries de courses, abusivement accapareurs des bandes molletières en flanelle. Couchés dans le foin avec les lads et les entraîneurs pour témoins, ils attendent la reprise des courses annoncée pour le 31 décembre. Qui aurait cru qu'en pleine guerre, il pourrait être glorieux pour une quelconque créature d'arriver le premier au poteau de Vincennes?... Après Vincennes, ce sera Auteuil, puis Longchamps, non seulement parce qu'il ne faut pas laisser les nobles coursiers tourner à la fois en rond et en bourriques dans des paddoks, sans profit pour personne, mais aussi parce qu'il ne faut pas empêcher le pari mutuel d'apporter sa contribution de petit ruisseau à l'énorme rivière dont M. Reynaud a besoin.

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

Profitons de l'occasion pour rappeler que l'Agha Khan, une tête de turf des plus sympathiques, vient de vendre les chevaux de courses—prononcez yearlings—qu'il possédait de l'autre côté du channel. L'idée que l'Agha Khan était un peu gêné n'est venue à aucun de ceux qui savent qu'il n'a qu'à rentrer dans son pays—où il est prophète exceptionnellement —pour toucher son propre poids en or, ce qui, entre parenthèses, doit l'inciter à négliger les cures amaigrissantes. Non, croyons plutôt que, ami des alliés, l'Agha Khan aime mieux tenir que de faire courir.

En dépit des circonstances défavorables, un de ces chevaux a été payé 200,000 francs, un autre, 600,000... Tout porte à croire qu'ils ne sont pas, pour le moment, voués à la boucherie.

* * * *

Les moutons, eux, n'en mènent pas large. Non seulement ils continuent à contribuer intensément, malgré eux, au ravitaillement, mais jamais on ne les a si précipitamment débarrassés de leur laine, en dépit des rigueurs de la saison, ce qui autorise à affirmer qu'ils passent un mauvais cardeur. Il faut bien fournir de matière première le zèle tricoteur de tant de mères, épousés, sœurs, fiancées, de tant de cousines dont la vie a son secret, de tant de petites poules dont la liaison a son mystère.

En tricotant, les femmes et fillettes
Sont, malgré tout, un peu moins inquiètes:
Grâce à leurs soins bientôt un combattant
Va recevoir l'envoi réconfortant:
Le coton souple et les laines douillettes
Sont transformés en plastrons, en manchettes,
Et c'est un peu de son cœur palpitant
Qu'on glisse dans les mailles et chaînettes,
En tricotant.

C'est une sorte de fièvre manufacturière qui a saisi d'innombrables femmes. L'une d'elles n'a-t-elle pas écrit à son journal pour demander que l'on réservât dans chaque train de banlieux un compartiment aux tricoteuses de guerre, avec, la nuit venue, lumière et fenêtres calfeutrées, histoire de ne pas interrompre la production laineuse intensifiée? C'est le type de la pétition à adresser à l'Administration des Réseaux, service des aiguilles.

Il y aurait un chapitre à consacrer aux tricoteurs, depuis la solitaire qui en met, qui en met, multipliant les mailles avec la foi touchante qui fait égrener les chapelets, jusqu'aux participantes aux tricotage-parties où l'on cause, brodant aussi les sujets de conversation les plus variés, et examinant les faits et gestes des amies et connaissances sur toutes les coutures.

Le tricotage lui-même est prétexte à éclosion d'énormes bobards. Un malin stratège de café ayant lu dans sa feuille que l'on recommandait surtout l'envoi de passe-montagnes!

—Comprenez? disait-il mystérieusement à ses copains de belote... On demande, d'urgence, des passe-montagnes... Clair comme le jour! C'est qu'on prépare une grande offensive par une chaîne montagneuse... Ça crève les yeux... Mais chut!... A qui à jouer?

* * * *

Dans l'espèce ovine on n'aperçoit qu'un personnage qui ait de la chance: c'est un certain bélier que des soldats marocains ont amené de leur pays à titre de mascotte. Il leur rappelle le temps où ils gardaient les moutons avant d'aller chasser les loups.

Voici donc des combattants de 1939 qui, en dépit des fantastiques perfectionnements apportés aux armements, font encore la guerre avec un bélier.

* * * *

N'abandonnons pas les ruminants sans signaler que le Transvaal a décidé d'envoyer aux troupes alliées du biltong, viande salée et séchée, excellente, paraît-il. N'en ayant jamais goûté, même au fameux déjeuner de la Société d'acclimatation de France, nous n'en pouvons rien dire, sinon que fabriqué avec de l'antilope et de la gazelle, le biltong ne peut être qu'une nourriture particulièrement légère.

* * * *

Passons à la zoologie à laquelle est nécessaire un copieux espace vital. La femelle hippopotame du Zoo de Vincennes vient d'être mère. Sitôt né le bébé costaud, la dame a fait grise mine à son époux. C'est un usage très répandu dans le monde animal, où certains insectes femelles vont même jusqu'à faire de leur époux le plat de résistance du banquet nuptial... Mais le petit hippopotame est mort. On espère que le malheur rapprochera le couple comme cela se voit dans une espèce supposée par elle-même supérieure, et les sentiments tendres étant rallumés l'espèce hippopotame ne s'éteindra pas.

* * * *

On a fêté les cent cinquante ans d'un éléphant répondant au nom de Siam, animal historique au même titre que le cheval d'Attila, l'âne de Balaam, l'aspic de Cléopâtre, l'oie du Capitole et le chien de Jean de Nivelle.

Ce proboscidien avait été offert à Napoléon premier, lequel, allant demander à Vienne la main de Marie-Louise, emmena l'animal. Il est très rare, en Europe, que les fiancés déposent un éléphant dans la corbeille de mariage. Le présent spectaculaire dut faire sensation dans un temps où ces grosses bêtes ne couraient pas les zoos, et où l'on n'était pas familiarisé encore avec l'aspect de leurs défenses passives.

Siam est encore au jardin zoologique de Budapest, et fournit aux philosophes qui le contemplent l'occasion de penser que les empereurs passent et que les éléphants restent, cette similitude subsistant cependant qu'ils peuvent être trompés tous les deux.

* * * *

Et voici le maximum. Une pauvre baleine de dix-huit mètres de long, touchée par une mine, a échoué en piteux état sur la côte belge.

Voyons-y un symbole: le C'est assez!!! prochain des neutres.

(The learned judge refers to the pleadings and continues.)

Il a été produit de la part du demandeur comme pièce 3 une procuration par la Société des Gens de Lettres, de Paris, France, faite et passée par devant Me André Oudard, notaire, à Paris, le 21 novembre 1930, constituant pour

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

fondé de pouvoir et représentant général de ladite société M. Louvigny de Montigny, hommes de lettres, demeurant à Ottawa, Canada. Cette procuration lui donne, entre autres, le pouvoir de représenter la Société des Gens de Lettres et chacun de ses membres et adhérents en particulier pour les fins de la protection des œuvres leur ressortissant dans le Dominion du Canada.

Ladite procuration donne en outre à M. Louvigny de Montigny le pouvoir

de prendre les mesures et exercer les procédures qu'il jugera nécessaires ou opportunes pour sauvegarder, défendre ou revendiquer les droits de la Société des Gens de Lettres ou des organisations à elle affiliées comme susdit, ou ceux des membres, adhérents ou ayants droit de la Société des Gens de Lettres ou desdites organisations affiliées, et d'exercer tous les recours possibles, d'après les législations nationales et internationales en vigueur au pays, afin d'empêcher la contrefaçon des œuvres ressortissant aux auteurs en cause ou à leurs ayants droit.

D'autoriser ou défendre, selon le cas, la reproduction des ouvrages ressortissant aux auteurs en cause, quelle que soit la forme ou les procédés de reproduction, de formuler et faire valoir des réclamations devant les tribunaux canadiens dans le cas de reproduction non autorisés ou autrement illicite, d'exercer toute action judiciaire pour prévenir pareille reproduction, pour la faire cesser ou pour réclamer les dommages-intérêts auxquels elle pourra donner lieu, d'exécuter tout jugement rendu, et de transiger, s'il y a lieu, soit avant, soit après jugement.

Il est stipulé dans ladite procuration qu'elle sera valable tant que la Société des Gens de Lettres, par elle-même ou par son délégué général, ne l'aura pas révoquée par avis de six mois, auquel cas M. Louvigny de Montigny devra remettre la procuration à la Société des Gens de Lettres avant l'expiration des six mois de l'avis de révocation.

Le procureur du demandeur durant sa plaidoirie a produit comme pièce 5 une liste des sociétaires et adhérents de la Société des Gens de Lettres pour l'année 1938-1939 dans laquelle apparaît le nom du demandeur.

La procuration et la liste des sociétaires et adhérents de la Société des Gens de Lettres me paraissent établir le droit du fondé de pouvoir et représentant général de la Société en Canada, M. Louvigny de Montigny, de prendre au nom de Miguel Zamacoïs, sociétaire de la Société des Gens de Lettres, l'action pendante devant moi.

Entendu comme témoin de la part du demandeur, Louvigny de Montigny dit qu'il connaît Miguel Zamacoïs et que celui-ci est membre de la Société des Gens de Lettres.

Il ne peut affirmer qu'au moment du procès, savoir, le 23 février 1942, Zamacoïs vivait encore, mais il sait bien qu'il était vivant il y a deux mois, soit le 23 décembre 1941.

Le témoin dit qu'il connaît et lit le journal *Candide,* qui est un hebdomadaire littéraire de Paris. Il produit comme pièce 2 (1 à 6) six numéros de *Candide,* ceux des 20 et 27 décembre 1939, des 3, 10 et 17 janvier et du 7 février 1940. Tous ces numéros contiennent un article intitulé "Vérités et Bobards", portant, sous le titre et sous le texte, le nom du demandeur.

Contre-interrogé, de Montigny déclare que Zamacoïs est avant tout un poète et qu'il n'a jamais été journaliste. Depuis quelque temps il est un collaborateur assez régulier du journal *Candide.* Au dire du témoin, en temps de guerre, des journaux et revues d'un caractère littéraire écrivent des articles ayant trait à la guerre.

de Montigny affirme qu'il a été autorisé par la Société des Gens de Lettres et la Société des Auteurs dramatiques de prendre la présente action; il avoue qu'il n'a pas obtenu d'autorisation de Zamacoïs personnellement. Il ne peut dire si celui-ci demeure à Paris actuellement, mais il sait qu'il y demeurait avant la capitulation.

Le témoin déclare qu'il n'a pas de preuve officielle que Zamacoïs est citoyen français, mais il ajoute que c'est un fait généralement connu. Le dictionnaire Larousse—le Larousse du XXe siècle—le mentionne comme tel.

Le procureur des défendeurs demande à de Montigny de prendre connaissance d'une lettre en date du 12 janvier 1939, adressée à Raymond Douville, directeur, *Le Bien Public,* et portant apparemment la signature du témoin. Après avoir lu la lettre (cotée comme pièce B), de Montigny reconnaît qu'elle est bien de lui.

Cette lettre, qui traite divers sujets, contient un passage concernant deux reproductions provenant du journal *Candide,* évidemment publiées dans *Le Bien Public,* lesquelles ne sont pas plus amplement désignées; il ne me semble pas hors de propos de citer ce passage, bien qu'à mon avis il n'ait guère de portée sur l'issue du procès, la lettre étant antérieure à la prétendue contrefaçon de plus d'un an:

- Il est exact que la reproduction de *certains* articles est libre, et que les journaux peuvent publier gratuitement des reproductions d'un *genre*

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

particulier, à la condition que ces articles aient été publiés pour la première fois sans interdiction de reproduire, et à la seconde condition que la provenance soit indiquée dans la reproduction. Cette faculté couvre seulement les éditoriaux portant sur des questions d'actualité et d'intérêt général.

Or, j'ai cru, et je crois encore, que les deux reproductions provenant de *Candide* n'entrent pas dans cette catégorie.

Le témoin déclare qu'il n'a pas changé d'opinion depuis qu'il a écrit cette lettre.

de Montigny dit qu'il considère la guerre comme un sujet d'actualité et d'intérêt général.

Selon lui, la Société des Gens de Lettres ne permet point la reproduction d'un article isolé.

Raymond Douville, l'un des défendeurs, déclare qu'il est copropriétaire avec Clément Marchand, du journal *Le Bien Public*.

Lui-même est journaliste depuis 1927. Avant de publier avec Marchand *Le Bien Public*, il a écrit dans *Le Nouvelliste*, des Trois-Rivières, et *La Presse*, de Montréal.

Le témoin dit que *Le Bien Public* a reproduit l'article de Zamacoïs intitulé "Vérités et Bobards" dans son numéro du 8 février 1940 et que la direction du journal n'a pas l'intention de le reproduire de nouveau.

Douville affirme que le tirage du *Bien Public* n'a pas augmenté à la suite de l'article de Zamacoïs. Son associé Marchand et lui ont considéré cet article comme un article d'actualité.

Selon le témoin, l'article de Léon Dufrost, nom de plume de Louis Durand, avocat des Trois-Rivières, commente l'article de Zamacoïs. Il a lu cet article avant de le reproduire et l'a considéré comme étant article d'actualité de discussion politique ou économique. Il a aussi lu l'article de Dufrost et il dit partager son opinion.

En contre-interrogatoire Douville déclare qu'il a publié l'article de Zamacoïs à cause de son actualité. Il reconnaît volontiers que cet article a une valeur littéraire, mais il croit qu'il n'a qu'un intérêt passager et que dans cinquante ans d'ici il n'offrira plus le même intérêt. Pour lui c'est un article d'actualité de discussion économique ou politique.

Charles Gautier, journaliste et rédacteur en chef du journal quotidien *Le Droit*, publié à Ottawa, dit qu'il corrobore le témoignage de Douville relativement à la

nature de l'article de Zamacoïs. Il a lu cet article et le considère comme un article d'actualité; c'est un article traitant un sujet d'actualité de façon légère.

Au dire du témoin, Zamacoïs s'est fait journaliste à l'occasion de la guerre comme Maurice Barrès et Henri Lavedan s'étaient faits journalistes durant la dernière guerre.

En réponse à une question du procureur du demandeur, Gautier, décrivant l'article de Zamacoïs, déclare qu'il s'agit d'un article fantaisiste traitant un sujet d'actualité.

Maurice Desjardins, journaliste au journal *Le Droit* depuis 1939, dit qu'il a entendu le témoignage de Douville et qu'il est d'opinion comme lui que l'article de Zamacoïs est un article fantaisiste sur un sujet d'actualité. En contre-interrogatoire, il admet qu'il n'y voit pas de but polémique.

Clément Marchand, copropriétaire avec Douville du journal *Le Bien Public,* déclare que Louis Durand, qui est un avocat de plusieurs années de pratique, collabore assez souvent au *Bien Public* sous le pseudonyme de Léon Dufrost.

Le témoin dit que la publication de l'article de Zamacoïs n'a rapporté aucun profit à son journal. Le tirage oscillait entre 2,000 et 2,300 copies. La direction n'a reçu aucun commentaire des lecteurs à propos de l'article de Zamacoïs.

Marchand dit que *Le Bien Public* a eu un contrat avec la Société des Gens de Lettres tant qu'il a pu supporter cette dépense. Un duplicata de ce contrat a été produit comme pièce 4. Quand le journal a dû mettre fin à ce contrat, il a cessé de publier les articles littéraires paraissant dans les journaux et revues français; il a continué à publier uniquement les articles d'actualité. Pour lui l'article de Zamacoïs en est un d'actualité, traité de façon légère.

Marchand affirme que *Le Bien Public* n'aurait pas publié l'article de Zamacoïs seul, s'il n'avait été accompagné d'un commentaire de l'un de ses collaborateurs.

Il dit qu'il n'y a dans le journal *Candide* aucune réserve quant à la reproduction des articles de Zamacoïs. Il fait remarquer qu'il y a dans le numéro du 24 janvier 1940 (pièce C) d'autres articles au sujet de la reproduction desquels il y a une réserve. Le fait est que dans ce numéro se trouve une tranche d'un roman inédit de Charles Trenet intitulé "Dodo manières", portant au bas la note d'usage

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

"*Copyright by*—pourquoi pas Droit d'auteur?—Charles Trenet, 1940." J'observerai qu'à mon avis l'absence de pareille note au bas des articles du demandeur ne peut préjudicier à son droit d'auteur.

Marchand affirme que dans son ensemble l'article de Zamacoïs reproduit dans *Le Bien Public* est un article d'actualité de discussion économique ou politique qui, dans cinquante ans d'ici, n'offrira plus aucun intérêt.

D'après le témoin l'article de Léon Dufrost était d'abord joint à celui de Zamacoïs; comme le tout était trop long pour être publié sur une seule page, les deux articles ont été séparés et publiés sur deux pages différentes.

En contre-interrogatoire Marchand dit que le contrat qu'avait *Le Bien Public* avec la Société des Gens de Lettres a été terminé vers la fin de 1939 ou le début de 1940.

Au dire du témoin, c'est sur la clause A faisant suite à l'article 2 du contrat que les défendeurs se sont basés pour reproduire dans leur journal l'article de Zamacoïs. Il ne croit pas que cet article tombe sous le coup du premier alinéa de cette clause; selon lui il est régi par le deuxième, qui se lit comme suit:

> Par "articles de *journaux*" s'entendent les "éditoriaux": écrits éphémères paraissant au jour le jour et non susceptibles d'entrer ultérieurement dans la composition d'un volume ou recueil littéraire ou scientifique. Ces écrits sont caractérisés par l'actualité de leur sujet, par la discussion que ce sujet entraîne et par l'intérêt général qu'il comporte. Ils ne doivent, à aucun égard, être confondus avec des "articles de *revues*" qui, signés par les auteurs, constituent des œuvres littéraires et sont protégés comme tels.

Marchand déclare qu'à sa connaissance il n'y a pas eu de commentaires au sujet de l'article de Zamacoïs de la part de lecteurs du *Bien Public*.

Marchand dit que *Le Bien Public* a publié deux ou trois poèmes une fois le contrat terminé, mais que le journal a payé pour ces ouvrages à la demande de la Société des Gens de Lettres.

Entendu comme témoin en contre-preuve, de Montigny dit qu'il a lu l'article 9 de la Convention de Berne et qu'il ne croit pas que l'interprétation qu'en a donnée Gautier soit correcte.

Il déclare qu'il ne s'agit pas en l'espèce d'un article éditorial mais d'une œuvre littéraire. A son avis, l'article

de Zamacoïs est une chronique; or, la chronique, en vertu du contrat intervenu entre les défendeurs et la Société des Gens de Lettres, ne peut être touchée.

En contre-interrogatoire, de Montigny soutient qu'il n'y a ni discussion, ni polémique dans l'article en question; il y a tout au plus des allusions.

Il dit que Zamocoïs ridiculise les embusqués; il ne sait pas si le journal *Candide* lui-même le fait.

de Montigny affirme qu'il n'y a point discussion parce que Marchand a déclaré qu'il n'y avait pas eu de commentaires de la part des lecteurs du *Bien Public*. Il ajoute que, pour qu'il y ait discussion, il faut la présence d'au moins deux parties, ce qui paraît assez juste. Egalement juste est la prétention du témoin que, s'il n'y a qu'une partie, il s'agit d'un simple exposé.

Rappelé en arrière-contre-preuve, Marchand dit que de Montigny fait erreur quand il affirme qu'il ne peut y avoir discussion résultant du fait qu'un article traite une question.

La Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886, amendée à Paris le 4 mai 1896 par un acte additionnel, revisée par la Convention de Berlin faite le 13 novembre 1908 et un protocole additionnel fait à Berne le 20 mars 1914 et revisée de nouveau à Rome le 2 juin 1928, contient, entre autres, les dispositions suivantes qui me paraissent pertinentes:

ARTICLE 2

(1) Les termes "œuvres littéraires et artistiques" comprennent toutes les productions du domaine littéraire, scientifique et artistique, quel qu'en soit le mode ou la forme d'expression, telles que: les livres, brochures et autres écrits;...

(3) Les pays de l'Union sont tenus d'assurer la protection des œuvres mentionnées ci-dessus.

ARTICLE 4

(1) Les auteurs ressortissant à l'un des pays de l'Union jouissent, dans les pays autres que le pays d'origine de l'œuvre, pour leurs œuvres, soit non publiées, soit publiées pour la première fois dans un pays de l'Union, des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux, ainsi que des droits spécialement accordés par la présente Convention.

(2) La jouissance et l'exercice de ces droits ne sont subordonnés à aucune formalité; cette jouissance et cet exercice sont indépendants de l'existence de la protection dans le pays d'origine de l'œuvre. Par suite, en dehors des stipulations de la présente Convention, l'étendue de la

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

protection, ainsi que les moyens de recours garantis à l'auteur pour sauvegarder ses droits, se règlent exclusivement d'après la législation du pays où la protection est réclamée.

(3) Est considéré comme pays d'origine de l'œuvre: pour les œuvres non publiées, celui auquel appartient l'auteur; pour les œuvres publiées, celui de la première publication;...

(4) Par "œuvres publiées" il faut, dans le sens de la présente Convention, entendre les œuvres éditées...

ARTICLE 7

(1) La durée de la protection accordée par la présente Convention comprend la vie de l'auteur et cinquante ans après sa mort.

(2) Toutefois, dans le cas où cette durée ne serait pas uniformément adoptée par tous les pays de l'Union, la durée sera réglée par la loi du pays où la protection sera réclamée et elle ne pourra excéder la durée fixée dans le pays d'origine de l'œuvre...

ARTICLE 9

(1) Les romans-feuilletons, les nouvelles et toutes autres œuvres, soit littéraires, soit scientifiques, soit artistiques, quel qu'en soit l'objet, publiés dans les journaux ou recueils périodiques d'un des pays de l'Union, ne peuvent être reproduits dans les autres pays sans le consentement des auteurs.

(2) Les articles d'actualité de discussion économique, politique ou religieuse peuvent être reproduits par la presse si la reproduction n'en est pas expressément réservée. Toutefois, la source doit toujours être clairement indiquée; la sanction de cette obligation est déterminée par la législation du pays où la protection est réclamée.

(3) La protection de la présente Convention ne s'applique pas aux nouvelles du jour ou aux faits divers qui ont le caractère de simples informations de presse.

ARTICLE 15

(1) Pour que les auteurs des ouvrages protégés par la présente Convention soient, jusqu'à preuve contraire, considérés comme tels et admis, en conséquence, devant les tribunaux des divers pays de l'Union, à exercer des poursuites contre les contrefacteurs, il suffit que leur nom soit indiqué sur l'ouvrage en la manière usitée.

Le Canada a adhéré à la Convention de Berne, telle que revisée par la Convention de Berlin le 13 novembre 1908 et par le protocole additionnel de Berne le 20 mars 1914, au moyen d'un arrêté en conseil adopté le 27 juillet 1923 (C.P. 1395), publié dans la *Gazette du Canada* du 10 mai 1924. Le 10 avril 1928 il a, comme pays unioniste contractant, réitéré son adhésion à la Convention de Berne, revisée tel que susdit, comme en fait foi une lettre circulaire du Conseil fédéral suisse du 27 avril 1928, adressée aux membres de l'Union, dont une copie a été transmise au Secrétaire d'Etat pour les Affaires extérieures du Canada par lettre du Secrétaire d'Etat britannique pour les Colonies

et les Affaires des Dominions du 25 mai 1928. Jusqu'au 10 avril 1928 le Canada faisait partie de l'Union à titre de colonie britannique, aux termes de ladite lettre circulaire, ou de fragment de l'empire britannique, selon Lapradelle et Niboyet, Répertoire de Droit international (p. 745).

Le 2 juin 1928 le Canada a signé l'acte de Rome revisant de nouveau la Convention de Berne. Il a donné son adhésion à la Convention de Berne ainsi revisée au moyen d'un arrêté en conseil (C.P. 1390) adopté le 12 juin 1931 conformément à l'article 12 de la Loi modificative du droit d'auteur, 1931 (21-22 Geo. V, chap. 8) sanctionnée la veille. Cet arrêté en conseil n'a pas été publié dans la *Gazette du Canada*. La ratification du Canada a été déposée à Rome le 27 juin 1931. Ceci apparaît au bulletin n° 3 du Recueil des Traités, 1931, publié en 1933 par l'Imprimeur du Roi au Canada.

L'article 3 de la Loi du droit d'auteur (S.R.C. 1927, chap. 32) définit ainsi le droit d'auteur:

> Pour les fins de la présente loi, le "droit d'auteur" désigne le droit exclusif de produire ou de reproduire une œuvre sous une forme matérielle quelconque, d'exécuter ou de représenter ou, s'il s'agit d'une conférence, de débiter en public, et si l'œuvre n'est pas publiée, de publier l'œuvre ou une partie importante de celle-ci;...
>
> 2. Pour les fins de la présente loi, l'expression "publication" désigne, par rapport à toute œuvre, l'édition d'exemplaires rendus accessibles au public;...

L'article 4 décrète, entre autres, ce qui suit:

> Subordonnément aux dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre originale littéraire, dramatique, musicale ou artistique, si, à l'époque de la création de l'œuvre, l'auteur était sujet britannique, citoyen ou sujet d'un pays étranger ayant adhéré à la Convention et au Protocole additionnel de cette même Convention, publiés dans la seconde annexe de la présente loi, ou avait son domicile dans les possessions de Sa Majesté; et si, dans le cas d'une œuvre publiée, l'œuvre a été publiée en premier lieu dans les possessions de Sa Majesté ou dans l'un de ces pays étrangers;...

L'article 5 fixe la durée du droit d'auteur; il est en ces termes:

> A moins de dispositions contraires et formelles contenues dans la présente loi, la durée du droit d'auteur comprendra la vie de l'auteur et une période de cinquante ans après sa mort.

L'article 12, ayant trait à la possession du droit d'auteur, contient, entre autres, les dispositions suivantes:

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

Sous réserve des dispositions de la présente loi, l'auteur d'une œuvre sera le premier titulaire du droit d'auteur sur cette œuvre...

Mais lorsque l'ouvrage est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, à défaut d'une convention à l'effet contraire, est censé posséder le droit d'interdire la publication de cet ouvrage ailleurs que dans ce journal, dans cette revue ou dans ce périodique.

L'article 17, définissant la violation du droit d'auteur, ordonne, entre autres, ceci:

Sera considéré comme ayant porté atteinte au droit d'auteur sur une œuvre, quiconque, sans le consentement du titulaire de ce droit, exécute un acte qu'en vertu de la présente loi seul ledit titulaire a la faculté d'exécuter. Toutefois, ne constituent aucune violation du droit d'auteur:

(i) L'utilisation équitable d'une œuvre quelconque dans un but d'étude privée, de recherche, de critique, de compte rendu ou sous forme de résumé destiné aux journaux;

(iv) La publication de courts passages empruntés à des œuvres littéraires encore protégées, publiées et non destinées elles-mêmes à l'usage des écoles, dans un recueil qui est composé principalement de matières non protégées, préparé de bonne foi pour être utilisé dans les écoles et désigné comme tel dans le titre et dans les annonces faites par l'éditeur;...

L'article 20 détermine les recours civils du titulaire du droit d'auteur; les dispositions pertinentes de cet article, tel que modifié par le statut 21-22 Geo. V, chap. 8, article 7, se lisent ainsi:

Lorsque le droit d'auteur sur une œuvre aura été violé, le titulaire du droit pourra recourir, sauf disposition contraire de la présente loi, à tous moyens de réparation, par voie d'ordonnance de cessation ou d'interdiction, de dommages-intérêts, de décomptes (*accounts*) ou autrement, moyens qui sont ou seront garantis par la loi en vue de la violation d'un droit.

(3) Dans toute action en violation de droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur, en pareil cas:

(*a*) L'œuvre sera, jusqu'à preuve contraire, présumée être une œuvre protégée par un droit d'auteur; et

(*b*) L'auteur de l'œuvre sera, jusqu'à preuve contraire, présumé être le possesseur du droit d'auteur.

Toutefois, lorsque la contestation concerne une question de cette nature, et si aucune concession du droit d'auteur ou d'un intérêt dans le droit d'auteur par cession ou par licence n'a été enregistrée sous l'autorité de la présente loi, en pareil cas:

(i) si un nom paraissant être celui de l'auteur de l'œuvre y est imprimé ou autrement indiqué, en la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué sera, jusqu'à preuve contraire, présumée être l'auteur de l'œuvre;

(4) Quiconque viole le droit d'auteur sur une œuvre protégée en

vertu de la présente loi sera passible de payer, au détenteur du droit d'auteur qui aura été violé, les dommages-intérêts que ce détenteur du droit d'auteur pourra avoir subis par le fait de cette violation, et, en sus, telle proportion, que le tribunal peut juger équitable, des profits que le contrefacteur aura réalisés en commettant cette violation de droit d'auteur. Pour prouver les profits, le demandeur ne sera tenu que d'établir les recettes ou les produits provenant de la publication, de la vente ou d'une autre utilisation illicite de l'œuvre, ou d'une représenta tion, exécution ou audition non autorisée d'une œuvre restée protégée; et le défendeur devra prouver chaque élément du coût qu'il allègue.

(6) La Cour de l'Echiquier du Canada, concurremment avec les tribunaux porovinciaux, a juridiction pour instruire et juger toute action, poursuite ou procédure civile pouvant être instituée sur motif d'infraction à quelque disposition de la présente loi ou sur réclamation des recours civils que prescrit la présente loi.

Vu le témoignage de Louvigny de Montigny, la liste des noms des sociétaires et des adhérents de la Société des Gens de Lettres, les divers numéros du journal *Candide* contenant des articles, tous intitulés "Vérités et Bobards" et portant le nom de Miguel Zamacoïs et vu la présomption créée par le paragraphe (3) de l'article 20 de la Loi du droit d'auteur, je crois qu'il y a lieu de conclure que le demandeur est l'auteur de l'article "Vérités et Bobards" publié dans le journal *Candide* et reproduit dans le journal des défendeurs *Le Bien Public*, que cette œuvre est protégée et que le demandeur est titulaire du droit d'auteur de ladite œuvre. Les défendeurs n'ont produit aucune preuve à l'encontre de la qualité du demandeur ni de son droit d'auteur; la présomption établie par l'article 20 demeure donc entière.

La loi anglaise sous ce rapport est substantiellement semblable à la nôtre; dans les circonstances il est intéressant de consulter *Copinger* on the *Law of Copyright*, 7e édition, à la page 164, et *Bullen & Leake's Precedents of pleadings*, 9e édition, page 858, note (p).

Le procureur du demandeur a plaidé que la reproduction de l'article de Zamacoïs n'est pas autorisée par le paragraphe (2) de l'article 9 de la Convention de Berne, vu que cet article n'en est pas un d'actualité de discussion économique ou politique. C'est là l'une des questions principales à déterminer. A ce sujet le procureur du demandeur invoque le fait que dans leur défense les défendeurs emploient le mot "nouvelle" à plusieurs reprises pour désigner l'article de Zamacoïs, concluant de là que les défendeurs reconnaissent,

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

au moins implicitement, que la "nouvelle" de Zamacoïs n'est pas un article d'actualité de discussion économique ou politique. Je n'attache guère d'importance à l'usage de ce mot qui n'a peut-être pas été employé par le procureur des défendeurs dans son sens purement littéraire; j'avouerai cependant que l'emploi répété du mot dans le paragraphe 6 de la défense incline à croire que celui-ci aurait pu inopinément lui attribuer cette signification. Le Larousse du XXe siècle donne deux définitions appropriées: 1° "Premier avis d'une chose, d'un événement"; c'est particulièrement le récit du fait divers lu dans les journaux ou entendu à la radio; 2° "Récit imaginatif de peu d'étendue et roulant le plus souvent sur des événements d'un genre peu compliqué". Littré, de son côté, fournit entre autres les définitions ci-après: 1° "Le premier avis qu'on reçoit d'une chose, renseignement sur quelque chose de lointain, de caché, d'ignoré"; 2° "Ecrit qui raconte ce qui se passe de nouveau. Nouvelles politiques, littéraires, etc."; 3° "Sorte de roman très court, récit d'aventures intéressantes et amusantes".

Le procureur du demandeur fait observer que dans le texte du paragraphe (2) de l'article 9 de la Convention de Berne il n'y a point de virgule entre les mots "articles d'actualité" et les mots "de discussion économique, politique ou religieuse" et il en conclut que pour que ce paragraphe s'applique il faut qu'il y ait à la fois "actualité" et "discussion économique, politique ou religieuse". Cette proposition me paraît bien fondée. Il soutient qu'il ne s'agit pas en l'espèce d'un article d'actualité de discussion économique ou politique et que conséquemment sa reproduction ne peut être justifiée par les dispositions du paragraphe (2) de l'article 9.

Le procureur du demandeur, invoquant l'article 21 de la Loi du droit d'auteur, prétend que les exemplaires contrefaits de l'œuvre de Zamacoïs publiée dans *Le Bien Public* doivent être considérés comme étant la propriété du titulaire du droit d'auteur et lui être remis. Question incidente que je devrai déterminer advenant le cas où j'en arriverais à la conclusion qu'il y a eu contrefaçon.

A ce propos il me semble opportun de consigner ici la définition du mot "contrefait" contenue dans le paragraphe (*b*) de l'article 2 de la Loi du droit d'auteur:

(b) "contrefait", appliquée à l'exemplaire d'une œuvre sur laquelle subsiste un droit d'auteur, désigne toute reproduction, y compris l'imitation déguisée, faite ou importée contrairement aux dispositions de la présente loi;

Le procureur du demandeur a fait valoir qu'une injonction ou ordonnance d'interdiction devrait être accordée pour prohiber la reproduction des autres articles, nouvelles ou chroniques de Zamacoïs. Autre question accessoire à décider pour le cas où je conclurais à l'existence d'une violation du droit d'auteur.

Le procureur des défendeurs fait observer que la règle 42 des règles et ordonnances de la Cour ne s'applique point, vu que le litige est régi par la Convention de Berne et la Loi du droit d'auteur. Je crois qu'il a raison et je ne sais pourquoi l'on a invoqué en demande les dispositions de cette règle qui sont, en l'espèce, inapplicables, vu les clauses formelles de la Loi du droit d'auteur.

Le procureur des défendeurs a prétendu que nous sommes en présence d'une action dont le demandeur n'a pas eu connaissance. La chose est possible; un auteur ne peut se tenir personnellement au courant de toutes les reproductions que l'on peut faire, à travers le monde, de ses œuvres. C'est l'une des raisons, j'ai lieu de croire, parmi nombre d'autres, qui suscité l'organisation de la Société des Gens de Lettres: la protection des auteurs en faisant partie contre la violation de leurs droits. Je ne crois pas cette objection sérieuse.

Le procureur des défendeurs a soutenu que la seule preuve qu'il y ait au dossier que Zamacoïs est vivant et qu'il fait partie de la Société des Gens de Lettres est le témoignage de de Montigny et la liste des sociétaires et adhérents de la Société produite comme pièce 5; or, cette liste date de 1939 et l'action a été intentée en 1940. L'exposé de réclamation a été produit au greffe de la Cour le 14 juin 1940. Il y a au dossier un numéro du journal *Candide* du 29 mai 1940, produit par les défendeurs comme pièce A. Lors du procès, savoir, le 23 février 1942, de Montigny a attesté qu'il ne pouvait dire si Zamacoïs vivait à cette date, mais qu'il savait cependant qu'il vivait il y a deux mois, ce qui nous reporte au 23 décembre 1941. De leur côté les défendeurs n'ont fait aucune preuve sur ce sujet. Dans les circonstances je crois qu'il incombait aux

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

défendeurs de prouver que Zamacoïs était mort ou bien qu'il ne faisait plus partie de la Société des Gens de Lettres. Je suis d'opinion que pour discuter l'existence ou le titre de Zamacoïs les défendeurs auraient pu procéder par voie de motion ou d'exception préliminaire: voir sur ce point Holmested & Langton's Ontario Judicature Act, 5è édition, p. 397, et l'article 174 du Code de Procédure civile de la province de Québec.

Le procureur des défendeurs tente naturellement de faire valoir que l'article de Zamacoïs reproduit dans *Le Bien Public* est un article d'actualité de discussion économique ou politique. C'est l'opinion, non seulement des défendeurs, mais aussi de Gautier et Desjardins, deux journalistes d'expérience. Au surplus le Larousse du XXe siècle définit le mot "discussion" par les mots: "Action de discuter, d'examiner"; puis il ajoute: "L'histoire est une science toute de discussion." C'est là l'une des questions principales à résoudre.

Le procureur des défendeurs suggère de plus que "discussion" ne veut pas nécessairement dire "polémique". Sur ce point en particulier je suis d'accord avec lui, mais ceci ne résout pas la question de savoir si l'article de Zamacoïs est bien un article d'actualité de discussion économique ou politique.

Le procureur des défendeurs affirme que ses clients ont été de bonne foi, ayant mentionné le nom de l'auteur et la provenance de l'article. De plus, dit-il, ils ont reçu l'article en question accompagné d'un article de Louis Durand, qui est un avocat de plusieurs années d'expérience exerçant sa profession aux Trois-Rivières. Je dirai tout de suite qu'à mon avis la bonne foi des défendeurs ne peut être mise en doute. Ils ont pu se tromper, mais je suis convaincu qu'ils ont agi honnêtement et franchement.

Le procureur des défendeurs prétend que la lettre de de Montigny à Raymond Douvelle, l'un des défendeurs, produite comme pièce B, autorise la reproduction d'articles du genre de celui qui fait la base de la présente action. Au soutien de sa prétention il invoque le troisième paragraphe de la lettre qui est reproduit ci-dessus. Je ne crois pas que ce passage de la lettre autorise la reproduction d'articles autres que les "éditoriaux portant sur des ques-

tions d'actualité et d'intérêt général". Il ne me paraît pas possible de classer l'article du demandeur dans cette catégorie.

Le procureur des défendeurs allègue qu'il s'agit d'un acte isolé, commis de bonne foi, et qu'il n'y a pas lieu dans les circonstances d'accorder une injonction ou ordonnance d'interdiction.

Il soutient en outre que, vu l'absence dans l'exposé de réclamation d'une demande de dommages spécifiques et le manque de preuve que les défendeurs ont réalisé des profits comme conséquence de la reproduction de l'article de Zamacoïs, il ne pourrait être question que d'indemnité pour les dommages généraux subis par le fait de la violation du droit d'auteur, si dommages il y a. A l'appui de sa prétention le procureur des défendeurs a cité la décision de l'honorable juge Joseph Archambault dans la cause de *Dame Osmont v. Petit Journal, Inc.* (1), dans laquelle le savant juge discute la question des dommages-intérêts telle que déterminée par le paragraphe 4 de l'article 7 de la Loi modificative du droit d'auteur (21-22 Geo. V, chap. 8), modifiant l'article 20 de la Loi du droit d'auteur (S.R.C. 1927, chap. 32).

Le "jugé", qui résume de façon satisfaisante le jugement sur ce point en particulier, énonce, entre autres, ceci:

> La publication dans un journal d'une œuvre littéraire telle qu'un roman sans l'autorisation de l'auteur, justifie un recours en dommages-intérêts. Si la publication a été faite de bonne foi, v.g. dans la croyance erronnée que l'auteur faisait partie de la société des gens de lettres—société constituée en France—et avec l'intention de se soumettre aux conditions prévues par les statuts de cette société, le tribunal, en l'absence de preuve que l'œuvre a été une source de profits pour le journal, ne doit allouer d'indemnité que pour les dommages généraux subis par le fait de la violation du droit d'auteur.

Le procureur des défendeurs fait observer que le sens du mot "nouvelle" employé dans les sous-paragraphes (*a*) et (*b*) du paragraphe 6 de la défense est expliqué dans le sous-paragraphe (*c*) de l'article 6 qui dit, entre autres, que ladite nouvelle constitue "un article d'actualité de discussion économique et politique prévu par l'article 9 de la Convention de Rome". Comme je l'ai déjà dit, je n'attache pas

(1) R.J.Q., 73 C.S., 465.

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

beaucoup d'importance à l'emploi de ce mot dans la défense; je ne crois pas que le procureur des défendeurs lui a attribué un sens purement littéraire.

Le procureur des défendeurs plaide enfin qu'il n'y a pas lieu d'ordonner la remise au demandeur des copies du numéro du journal *Le Bien Public,* qui sont au nombre de 10 ou 15, vu que celles-ci complètent les quelques séries du journal conservées par la direction pour ses archives.

En réponse à la plaidoirie du procureur des défendeurs, le procureur du demandeur représente que le demandeur a droit d'obtenir tous les exemplaires du numéro du *Bien Public* dans lequel a été reproduit l'article de Zamacoïs ou, s'ils ont été vendus, leur valeur.

Le procureur des défendeurs, touchant la question de la nécessité d'une motion pour faire établir si le demandeur était vivant au moment où l'action a été intentée et s'il faisait encore partie de la Société des Gens de Lettres, soumet qu'il ne s'agit point de discuter la qualification du demandeur et qu'il n'y a pas lieu en conséquence à une motion ou une exception à la forme. Je me suis déjà prononcé sur ce point et je me contenterai de répéter qu'à mon avis il incombait aux défendeurs, en face de la preuve mise au dossier, d'établir que le demandeur était mort ou qu'il avait cessé de faire partie de la Société des Gens de Lettres.

Ces quelques remarques résument, je crois, de façon assez substantielle les plaidoiries des procureurs des parties.

Il se présente deux questions principales à résoudre:

(*a*) L'article de Zamacoïs, "Vérités et Bobards", reproduit dans le numéro du journal *Le Bien Public* du 8 février 1940 est-il un article d'actualité de discussion économique ou politique au sens du paragraphe (2) de l'article 9 de la Convention signée à Rome le 2 juin 1928 pouvant être reproduit par la presse, étant donné que la reproduction n'en a pas été expressément interdite?

(*b*) Le collaborateur du journal *Le Bien Public,* Léon Dufrost (de son vrai nom Louis Durand), avait-il le droit en faisant une critique ou un commentaire de l'article de Zamacoïs de le reproduire intégralement?

Comme l'a fait observer le procureur du demandeur, l'expression "article d'actualité de discussion économique, politique ou religieuse" doit être interprétée comme un tout, en ce sens qu'il faut qu'il y ait un sujet d'actualité et que celui-ci ait pour objet une discussion économique, politique ou religieuse. Après avoir lu avec attention l'article dont il s'agit, il m'est impossible de conclure qu'il est compris dans la définition du paragraphe (2) de l'article 9 de la Convention. Il peut y avoir actualité puisque l'auteur y traite du sort des animaux dans la "tourmente", même s'il le fait d'une façon anodine et spirituelle. L'auteur, qui est un poète et dramaturge d'un esprit aisé, fin et gracieux et d'une grande facilité d'expression, ne pouvait traiter un sujet léger et fantaisiste avec lourdeur et monotonie. Il n'en reste pas moins que la chronique du demandeur ne peut être considérée comme un sujet d'actualité, au sens strict du mot. A moins qu'un article n'ait pour sujet l'histoire, il est rare qu'il n'y entre point une part d'actualité. A tout événement je ne pense pas que l'article contienne une discussion économique ou politique.

Le paragraphe (3) de l'article 9 de la Convention, qui déclare que la protection accordée par la Convention ne s'applique pas aux nouvelles du jour ou aux faits divers qui ont le caractère de simples informations de presse, n'offre, il va sans dire, aucun secours aux défendeurs. Il ne s'agit certes pas, dans le cas présent, de nouvelles du jour ou de faits divers ayant le caractère d'informations de presse.

Les articles 17 et 18 de la Loi du droit d'auteur ne sont guère explicites sur le sujet; il n'y est fait aucune mention de nouvelles du jour ni de faits divers. Le sous-paragraphe (i) du premier paragraphe de l'article 17 qui contient peut-être les seules dispositions que les défendeurs pourraient invoquer ne me paraît pas s'appliquer à la reproduction intégrale d'un article du genre de celui qui nous occupe.

Le sous-paragraphe (v) du premier paragraphe de l'article 17 de la loi qui dispose de la publication dans un journal d'un compte rendu d'une conférence et l'article 18 qui a trait aux rapports dans la presse de discours politiques ne peuvent évidemment être d'aucune assistance aux défendeurs.

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

Je crois opportun de citer un passage de l'ouvrage de Copinger (The Law of Copyright, 7e édition, p. 187), qui a quelque rapport avec la question à l'étude:

There can be no copyright in news as such, but only in the literary form given to news (Per North, J., *Walter v. Steinkopff*, 1892, 3 Ch. 489). The Courts have, nevertheless, in more than one case protected news agencies from having information obtained by them disseminated in breach of faith (*Exchange Telegraph Co. v. Gregory*, 1896, 1 Q.B. 147; *Exchange Telegraph Co. v. Central News*, 1897, 2 Ch. 48; *ante*, p. 37).

L'auteur fait ici un exposé des faits et un résumé des plaidoiries dans la cause de Walter v. Steinkopff et il ajoute:

North, J., in delivering judgment, said that it was said that there was no copyright in news, but there was or might be in a particular form of language or modes of expression by which information was conveyed, and not the less so because the information might be with respect to the current topics of the day. With regard to the quality of the matter copied, the paragraphs pirated were taken in their entirety for the very purpose for which they were used in *The Times*, viz., to convey information to the readers of the paper. It was not a case of the selection of a part or quotation, or an extract.

Comparant ensuite les dispositions de la loi anglaise du droit d'auteur avec celles de la Convention, Copinger écrit ceci (p. 188):

The English law gives a larger protection to newspaper articles than the Rome Convention requires, for under that Convention (article 9) no protection is given to news of the day, and it is provided that articles on current economic, political or religious topics may be reproduced by the Press unless the reproduction is expressly reserved, provided that the source is clearly indicated. Under English law all such matters are protected without conditions if they are the subject of copyright at all.

Huard et Mack, dans leur Répertoire de législation, de doctrine et de jurisprudence en matière de propriété littéraire et artistique (édition de 1909), exposant la doctrine en France qui, ayant également son fondement dans la Convention internationale de Berne, est dans son ensemble semblable à la nôtre, font les commentaires suivants—j'omets les références aux arrêts en vue de la brièveté,—qui me paraissent au point (pp. 156 et 157):

442. Les dispositions de la loi de 1793 s'appliquent aux journaux et feuilles périodiques, comme toute autre œuvre littéraire.

443. Un journal est une propriété littéraire composée soit d'articles-nouvelles, soit d'articles de politique ou de littérature. Les premiers, par leur nature, et lorsqu'ils ne contiennent que l'annonce des faits, appartiennent au domaine public; les seconds, qui sont l'œuvre de l'esprit et dont la rédaction est pour les journaux l'objet d'une dépense souvent considérable, forment une propriété privée.

444. La propriété d'un journal se compose non seulement des articles de rédaction, mais encore de la correspondance étrangère qui, étant le fruit de travaux rémunérés, ne peut être reproduite sans porter atteinte aux droits du journal.

445. La reproduction, dans un but de polémique, et pour en faire le texte d'une discussion, en dehors de tout but mercantile, d'articles publiés dans d'autres feuilles périodiques, ne saurait, surtout en l'absence de toute réserve insérée par elles, motiver une poursuite en contrefaçon. La reproduction des articles de polémique étant à bon droit dans les habitudes de la presse, surtout en matière politique, la bonne foi du journal poursuivi se trouve établie par le fait, et la reproduction ne saurait par suite tomber sous l'application des art. 425-427 du Code pénal.

Plus loin Huard et Mack ajoute (p. 166):

477. Est licite la reproduction, faite par un journal, dans un but de polémique, d'articles politiques parus dans un autre journal.

Je crois devoir conclure de ce qui précède que l'on doit répondre à la première question dans la négative et déclarer que l'article de Zamacoïs n'étant pas un article d'actualité de discussion économique ou politique ne pouvait être reproduit par *Le Bien Public* sans l'autorisation de l'auteur.

La seconde question qui se pose est celle de savoir si un rédacteur ou un collaborateur du *Bien Public* pouvait, en critiquant ou commentant l'article de Zamacoïs, le reproduire en entier.

Copinger n'apporte rien de bien intéressant sur le sujet. Après avoir, dans un paragraphe portant en marge l'indication "Quality taken only slight test", analysé trois décisions, les deux premières de lord Cottenham dans les causes de *Bramwell v. Halcomb* (1) et de *Saunders v. Smith* (2) et la troisième de la Cour d'appel dans la cause de *Hawkes & Son Ltd. v. Paramount Film Service Ltd.* (3), lesquelles déterminaient ce que l'on doit considérer être une partie importante ("substantial") d'un ouvrage aux termes de la Loi du droit d'auteur anglaise "Copyright Act 1911", 1 et 2 Geo. V, chap. 46, conclut dans le paragraphe suivant, intitulé dans la marge "Fair user", en ces termes (p. 113):

It would appear, however, that "substantially" is not to be considered as co-extensive with "fair user" under the old law, since it is expressly provided by section 2, sub-section 1 (i), that "any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" shall not constitute an infringement of copyright, and it would seem to follow that the Act contemplates that such fair dealing apart from this provision might constitute an infringement of copyright, and that it may be fair dealing to take a substantial part.

(1) (1836) 3 My. & Cr. 737. (2) (1838) 3 My. & Cr. 711.
(3) (1934) Ch. 593.

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

Dans le paragraphe suivant ayant en marge la note "Section 2, subsection (i)", qui est une référence à la Loi du droit d'auteur, Copinger s'exprime ainsi (p. 114):

> The principle of this and similar cases has been carried out in that proviso by limiting the right to fair user to purposes which in their nature are likely to differ from those of the works from which extracts are taken, but, no doubt, in considering whether a dealing with a particular work was fair, it would have to be considered whether any competition was likely to exist between the two works; a newspaper summary of an article in a rival paper would probably be restrained.
>
> In fact the limitation of purposes in regard to which the defence of fair dealing can be set up has probably not altered the law, but it has prevented any attempt to extend the defence to new purposes.

L'auteur commente ensuite la décision du juge Kay dans la cause de *Ager* v. *Collingridge* (1), qui n'offre aucun intérêt quelconque en l'espèce, et il termine ses remarques ainsi (p. 115):

> If a substantial part of a work is taken therefore, the defendant must show that it was taken for one of the purposes indicated in the proviso. Even this will not be sufficient if the dealing is not fair. Usually, however, these two questions will be intermingled since a publication under the guise of criticism or summary may be found really to be an unfair taking of the complete work for a competitive purpose.
>
> The meaning of the expressions "research," "criticism," and "review," seems to require no further consideration.

Au point de vue critique littéraire j'avouerai que les commentaires de Copinger sont plutôt minces. Peut-être est-ce dû au fait que la critique littéraire en Angleterre n'est pas un genre aussi répandu qu'en France.

Sous ce rapport il est plus instructif de consulter les auteurs français. Huard et Mack, comme nous l'avons vu, expriment l'opinion, à la page 156 de leur ouvrage précité, qu'un journal est une propriété littéraire composée soit d'articles-nouvelles, soit d'articles de politique ou de littérature, dont les premiers, par leur nature, quand ils ne contiennent que l'annonce des faits, appartiennent au domaine public, et dont les seconds, qui sont l'œuvre de l'esprit, forment une propriété privée. Au soutien de leur opinion les auteurs citent deux arrêts, qu'il est intéressant de consulter.

Eugène Pouillet, dans son Traité théorique et pratique de la propriété littéraire et artistique émet la même opinion, quand il dit (p. 45, n° 44):

(1) (1886) 2 T.L.R., 291.

Articles de journaux.—Il résulte de tout ce qui précède qu'un article de journal constitue au profit de son auteur une propriété tout aussi légitime, tout aussi respectable qu'un ouvrage de longue haleine. L'étendue, l'importance de l'œuvre ne comptent pour rien dans l'appréciation du droit. Il faut seulement que cet article puisse être considéré comme une production de l'esprit et témoigne d'un effort, d'un travail quelconque. Une simple annonce, une dépêche télégraphique, qui n'ont d'autre but et d'autre effet que de faire connaître au public un produit ou une nouvelle, ne semblent pas pouvoir être assimilées à une œuvre littéraire. Une fois livrées au public, elles lui appartiennent tout entières et le journaliste qui les a émises le premier n'en peut rien retenir.

Le paragraphe suivant (n° 45), qu'il serait trop long de reproduire, cite quelques arrêts à l'appui de ces commentaires.

Il est universellement reconnu que la reproduction par un journal dans un but de polémique ou de discussion d'articles parus dans un autre journal est licite; voir Huard et Mack, op. cit., p. 157, n° 445 et p. 166, n° 477.

Le droit de citation est permis par la loi; le refuser aurait pour effet de supprimer le droit de la critique littéraire. Cependant un critique ne peut, sans se rendre coupable de contrefaçon, reproduire la totalité de l'œuvre critiquée, sans autorisation de l'auteur: voir Huard et Mack, op. cit., p. 181, n°s 528 et 531; p. 180, n° 526; p. 193, n° 569; p. 593, n° 569 *bis*; p. 194, n° 572; Pouillet, n°s 511, 512 et 513.

Ces notes étant déjà longues, je me bornerai à citer les numéros 528, 531, 569 et 569 *bis* de Huard et Mack, y compris les références qui se trouvent à la suite de chacun de ces numéros, et le numéro 511 de Pouillet:

Huard et Mack

528. Si toute citation ou publication d'extraits d'une œuvre littéraire ne saurait constituer une atteinte aux droits de l'auteur, cependant il y a contrefaçon lorsqu'une pièce de vers formant par elle-même un tout est extraite d'un ouvrage et insérée dans un recueil composé de morceaux empruntés de la même manière à différents auteurs.

—Trib. de la Seine, 15 décembre 1882, aff. Ratisbonne c. Gédalge (le Droit, 16 décembre 1882).

531. Un critique ne peut, sans se rendre contrefacteur, reproduire la totalité de l'œuvre critiquée.

—C. de Paris, 24 mai 1845, aff. Sagnier et Bray c. Mallet (Blanc, p. 180). Voir également: C. de Paris, 26 décembre 1834, aff. Fayet c. Journal des connaissances usuelles (Gastambide, p. 110).

569. Si l'éditeur d'une revue ou d'un journal périodique peut, sans se rendre coupable de contrefaçon, donner des extraits d'un recueil ou d'un récit publié par un autre, soit pour en faire l'éloge ou la critique, soit pour appeler sur lui l'attention du public, il n'en saurait plus être ainsi lorsque l'éditeur de cette revue ou de ce journal reproduit textuellement, dans

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

l'intérêt exclusif de son œuvre, soit la totalité, soit les parties notables ou essentielles de cet écrit, de manière à porter préjudice à l'auteur ou à l'éditeur. L'indication de la source ne suffit pas pour faire disparaître la contrefaçon.

—C. de Paris, 24 décembre 1859, aff. Charpentier c. Lecompte (Pat., 1860, p. 31, et 1859, p. 271).

569 *bis*. Le droit de critique littéraire comprend le droit de citation des passages de l'œuvre critiquée, et le nombre ou l'importance des citations ne modifie pas le caractère de la publication, si celles-ci ne servent qu'à concourir à la démonstration de la critique entreprise.

Mais il y a contrefaçon littéraire si sous prétexte de critique on s'approprie en tout ou en partie le travail d'autrui, si on publie soit en entier, soit en abrégé les passages les plus saillants du livre critiqué, de manière à en donner une notion plus ou moins complète. Il en est ainsi quand même le nom de l'auteur critiqué serait cité dans l'œuvre de critique.

Par contre, n'est pas une contrefaçon le livre où les passages empruntés à l'œuvre d'autrui sont mêlés les uns aux autres, sans lien ni cohésion, de telle sorte qu'il soit impossible de saisir l'intrigue et les caractères étudiés dans cette œuvre d'autrui.

—Trib. corr. Seine, 24 fév. 1897, aff. Fasquelle c. Laporte (le Droit, 25 fév. 1897).

Pouillet

511. *Quid* du droit de citation? Si la loi punit la contrefaçon partielle, elle n'interdit pas le droit de citation. Il est clair que citer un passage d'un ouvrage, soit pour le discuter, soit pour en tirer un argument au profit d'une opinion ou d'une doctrine que l'on émet, est légitime et légal. Le droit, réservé à l'auteur, tout exclusif qu'il est, ne saurait aller jusqu'à empêcher cela. La citation non seulement ne cause aucun préjudice à l'auteur cité, mais même ne porte aucune atteinte à sa propriété privative; elle y rend bien plutôt hommage, par cela même qu'elle la reconnaît et la proclame. Refuser le droit de citation, ce serait supprimer le droit, pourtant inviolable, de la critique littéraire. Il va de soi, cependant, que, sous prétexte de citation, il n'est pas permis de contrefaire; et ce serait assurément contrefaire que d'abuser des citations au point de copier l'ouvrage tout entier, ou dans sa majeure partie, et de faire, de ces citations ainsi habilement rapprochées, une sorte d'abrégé de l'ouvrage original. Il peut y avoir là quelquefois des questions de fait délicates; c'est aux magistrats à les apprécier; ils doivent toutefois tenir compte, en pareille matière, de la nature de l'ouvrage où sont réunies ces citations et du but que l'auteur s'est proposé, indulgents s'ils reconnaissent une œuvre de critique sérieuse, impitoyables, s'ils ne découvrent là qu'un stratagème pour s'approprier le travail d'autrui.

MM. Helie et Chauveau disent dans le même sens: "Le critique qui, en annonçant qu'il veut examiner un livre, commencerait par le reproduire et le ferait suivre de ses observations, ne ferait pas une simple citation, mais bien une reproduction préjudiciable (Helie et Chauveau, t. 6, p. 37,"

L'indication du nom de l'auteur et de la source, si elle peut dans certains cas démontrer la bonne foi du contrefacteur, ne suffit pas pour faire disparaître la contrefaçon: Huard et Mack, op. cit., p. 193, n° 569.

Après étude de la loi, des auteurs et de la jurisprudence, j'en suis venu à la conclusion qu'il faut répondre négativement à la deuxième question. *Le Bien Public* n'avait pas, à mon avis, le droit de reproduire avec les commentaires de son collaborateur, Léon Dufrost, le texte complet de l'article de Zamacoïs. En ce faisant il outrepassait le droit de citation reconnu par la loi.

L'ignorance dans laquelle pouvaient être les défendeurs du fait que l'article de Zamacoïs était protégé par un droit d'auteur ne peut être une excuse pour sa violation: voir Copinger, ip. cit., p. 110; 7 Halsbury's Laws of England, 2e éd., p. 587, n° 911; Ladas, The International Protection of Literary and Artistic Property, t. 2, p. 816; Huard et Mack, op. cit., p. 595, n° 664 *bis*.

L'article 22 de la Loi du droit d'auteur, cependant, décrète ce qui suit:

> Lorsque, dans une action exercée pour violation du droit d'auteur sur une œuvre, le défendeur allègue pour sa défense qu'il ignorait l'existence de ce droit, le demandeur ne pourra obtenir qu'une ordonnance de cessation ou d'interdiction par rapport à ladite violation, si le défendeur prouve que, au moment de la commettre, il ne savait et n'avait aucun motif raisonnable de soupçonner que l'œuvre faisait encore l'objet d'un droit d'auteur.
>
> Toutefois, si lors de la violation, le droit d'auteur sur cette œuvre était dûment enregistré sous l'empire de la présente loi, le défendeur sera considéré comme ayant eu un motif raisonnable de soupçonner que le droit d'auteur subsistait sur cette œuvre.

Le droit d'auteur du demandeur n'était pas enregistrée; cette formalité, au reste, n'est pas nécessaire pour l'existence du droit d'auteur.

Les défendeurs ont soutenu qu'ils ignoraient l'existence d'un droit d'auteur sur un article du genre de celui du demandeur et qu'ils croyaient qu'en vertu de l'article 9 de la Convention cet article pouvait être reproduit. Etaient-ils justifiables d'ignorer l'existence de ce droit d'auteur? Non, s'il faut s'en tenir à l'interprétation plutôt étroite donnée par les tribunaux à l'article 8 de la Loi du droit d'auteur anglaise (Copyright Act, 1911, 1 & 2 Geo. V, chap. 46) et à l'article 22 de notre loi qui y correspond, avec cette différence cependant que nos législateurs, après avoir copié mot à mot le texte de l'article 8, à l'exception des mots "or interdict" après le mot "injunction" que l'on a retranchés, ont ajouté le deuxième paragraphe commençant dans le texte français

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

par le mot "Toutefois" et dans le texte anglais par le mot "Provided". Cette interprétation de l'article 8 de la loi anglaise et de l'article 22 de notre loi faite par les tribunaux a considérablement restreint la portée de ces articles quant à ce qui concerne la libération du contrefacteur du recours en dommages-intérêts; voir à ce sujet les décisions suivantes: *John Lane, The Bodley Head Ltd. v. Associated Newspapers Limited* (1); *Byrne v. Statist Company* (2); *Gribble v. Manitoba Free Press Co. Ltd.* (3); *Swinstead v. R. Underwood & Sons,* Macguillivray Copyright Cases, 39. Voir aussi Copinger on the Law of Copyright, 7e éd., p. 160.

Je crois opportun de citer un extrait des notes de l'honorable juge Dennistoun, de la Cour d'appel du Manitoba, dans la cause de Gribble v. Manitoba Free Press Co. Ltd. (p. 579):

> Sec. 22 of the Act is the only section behind which the defendants can take shelter, and it is under the provisions of this section that the learned trial Judge has passed in their favour. It says:
>
> (Suit le texte de l'article.)
>
> Par. 4 of the stated case, which was submitted by agreement of counsel, is as follows:
>
> > 4. At the time of the publishing of the said article by the defendant, the defendant had received no actual notice that copyright in the said article was claimed by any person, except such notice as may have been effected by the nature of the article and the publishing of the plaintiff's name at the head of the said article as it appeared in *The Ottawa Journal.*
>
> The trial Judge, commenting on this, says:
>
> > I am satisfied that the publishers of the defendant newspaper were not aware at the time of publication by them of the plaintiff's copyright and had no reasonable grounds for suspecting that copyright existed.
>
> Sec. 8 of the Imperial Act of 1911 is the source and origin of our sec. 22 and is *inpari materia* with it.
>
> It is discussed by Copinger (6th ed.) at p. 171 in a way which commends itself as sound reasoning.
>
> In what cases can the section apply? What "reasonable ground" can a direct copyist have for not suspecting the work he copies to be the subject of copyright? Copinger suggests, and I agree, that the proper attitude of mind of a copyist toward a work that he copies is that copyright in the latter exists, unless he has evidence to the contrary.
>
> > The only grounds for not suspecting copyright appear to be either (*a*) that the period of copyright protection has run out; (*b*)

(1) (1936) 1 All E.R., 379. (2) (1914) 1 K.B., 622.
(3) (1931) 3 W.W.R., 579.

that he thinks that the work is of such a character that it ought not to be a subject of copyright; or (c) that the work is a foreign work. (P. 173.)

* * * * *

The article in question is of a literary and biographical character and should have at once suggested to *The Manitoba Free Press* that it was subject to copyright. Despite the finding of the trial Judge, I do not think *The Manitoba Free Press* can rely on ignorance as a justification, but is fairly and properly testing its right under article 9 of the Berne Convention.

Si les défendeurs ont lu la chronique "Vérités et Bobards" dans le journal *Candide,* portant sous le titre et sous le texte le nom du demandeur, ils auraient dû savoir que cette œuvre était protégée par un droit d'auteur. S'ils ont cru que la chronique en question était aux termes du paragraphe (2) de l'article 9 de la Convention un article d'actualité de discussion économique ou politique, ils se sont trompés; ils l'ont fait de bonne foi, comme je l'ai déjà dit, mais leur bonne foi, malheureusement, ne les excuse point; personne n'est censé ignorer la loi.

La prétention des défendeurs que la Convention de Berne est aujourd'hui inexistante à cause de la guerre, sur laquelle, je dois dire, on n'a pas insisté, n'est pas soutenable.

Je ne crois pas qu'il y ait lieu d'ordonner la remise au demandeur des quelques exemplaires du numéro du journal *Le Bien Public* dans lequel a été reproduit l'article du demandeur, qui sont restés en la possession des défendeurs. Comme l'ont déclaré les défendeurs, ces exemplaires ne sont pas en vente et ils font partie des archives du journal.

Vu qu'il s'agit d'un acte isolé, qui n'est pas susceptible de se répéter, je ne pense pas qu'il y ait lieu d'accorder une ordonnance d'interdiction. Il est raisonnable de croire que les défendeurs ne projettent point de reproduire de nouveau la chronique du demandeur non plus qu'aucune autre chronique publiée par lui dans le journal *Candide* sous le même titre "Vérités et Bobards". Le motif invoqué pour le refus de semblable ordonnance dans les causes de Gribble v. Manitoba Free Press Co. Ltd. (*ubi supra*) et Byrne v. Statist Company (*ubi supra*) me semble s'appliquer en l'espèce. Il me paraît à propos de citer à ce sujet un passage des notes de l'honorable juge Prendergast, juge en chef du Manitoba, dans la cause de Gribble v. Manitoba Free Press Co. Ltd. (p. 576):

1943

ZAMACOIS v. DOUVILLE ET AL.

Angers J.

This only means, however, that the Court is not limited in this case to injunction, not that injunction could not be granted. But I agree with the learned trial Judge that this is not a case for such redress. The appellant would have to show, which he has not done, that there is a probability of future damage (Borthwick v. Evening Post, 1888, 37 Ch. D. 449, 57 L.J. Ch. 406) or that the defendant is likely to continue the infringement: Baily v. Taylor (1829) 1 Russ. & My. 73, 8 L.J. (O.S.) Ch. 49, and Cox v. Land and Water Journal Co. (1869) L.R. 9 Eq. 324, 39 L.J. Ch. 152.

Voir aussi Ladas, op. cit., p. 823.

Vu que j'en suis arrivé à la conclusion que le demandeur est titulaire du droit d'auteur de la chronique intitulée "Vérités et Bobards" publiée dans le journal *Candide* et reproduite dans le journal des défendeurs, *Le Bien Public*, que les défendeurs ont violé ce droit d'auteur et qu'ils doivent être tenus responsables des dommages que la reproduction de ladite chronique a pu causer au demandeur, si dommages il y a, il y aura renvoi de la cause au registraire, conformément aux dispositions de la règle 177 des règles et ordonnances de cette Cour afin d'établir le montant des profits qu'ont pu réaliser les défendeurs par la reproduction de ladite chronique, si profits il y a eu, de déterminer le quantum des dommages occasionnés par ce fait au demandeur et de faire rapport à la Cour. Les dépens de ce renvoi sont réservés pour adjudication ultérieure.

Je ferai observer incidemment que la seule preuve concernant les profits que les défendeurs auraient réalisés par la reproduction de l'article du demandeur consiste dans les témoignages des défendeurs eux-mêmes. Cette preuve révèle que le tirage de leur journal n'a pas augmenté à la suite de cette reproduction et que celle-ci n'a point rapporté de profits additionnels. Aucune preuve n'a été faite de la part du demandeur pour démontrer que la publication de l'article en question avait été une source de bénéfices pour les défendeurs.

Il est à peine nécessaire de noter que le demandeur n'a pas droit à des dommages-intérêts exemplaires ou punitifs, ceux-ci n'étant accordés que si la violation du droit d'auteur a été accompagnée de fraude ou de malice, ce qui n'est pas le cas en l'espèce. La bonne foi des défendeurs me paraît indiscutable. Relativement aux conditions dans lesquelles des dommages-intérêts de cette nature peuvent être accordés, il est intéressant de consulter les arrêts et les auteurs

suivants: *Shackell v. Drapeau et al.* (1); *Brossoit v. Turcotte* (2); *Noyes v. La Cie d'Imprimerie et de Publication* (3); *Chalin v. Gagnon* (4); *Girard v. Tremblay* (5); Ed. Fuzier-Herman, Code civil annoté, t. 4, n° 398 et seq.; Colin et Capitant, Droit civil français, t. 2, p. 187, n° 198, para. A; Salmond on The Law of Torts, 7e éd., p. 144.

Vu que le demandeur n'a prouvé ni perte de profits, ni dommages-intérêts et que je doute qu'il réussisse à faire la preuve de l'une ou des autres, je crois à propos de réserver ma décision quant aux frais; le procureur du demandeur pourra revenir devant moi, après avis régulier au procureur des défendeurs, pour demander une adjudication sur les frais, dès que le registraire aura rendu sa décision relativement à la perte de profits ou au montant des dommages subis par le demandeur ou dès que le procureur du demandeur aura décidé de ne pas exercer son recours sur le renvoi de la cause au registraire.

Judgment accordingly.

1944
Sept. 25 & 26.
Oct. 25.

BETWEEN:

THE BRITISH DRUG HOUSES, LIMITED ..... PETITIONER,

AND

BATTLE PHARMACEUTICALS ..... RESPONDENT.

Trade Marks—The Unfair Competition Act, 1932, Sec. 2, pars. (k) and (l), 26 ss. (1) par. (f)—Similar wares—Similar marks—Evidence as to likelihood of confusion—Maintenance of the purity of the register in the public interest—Tests of similarity of trade marks—Marks not to be compared side by side—Marks not to be broken up into elements but to be considered in their totality.

The petitioner registered the word mark "Multivite" in March, 1926, for use in association with a preparation for medicinal use of the vitamins A, D, C and the "B" complex. In May, 1943, the respondent obtained the registration of a word mark "Multivims" for use in association with a multiple vitamin and mineral tablet. The petitioner moved for an order expunging the registration of the respondent's mark on the ground that it was similar within the meaning of The Unfair Competition Act, 1932, to the petitioner's mark already registered.

(1) 17 R.L., 558.
(2) 20 L.C.J., 141.
(3) M.L.R., 6 C.S., 370.
(4) 5 R. de J., 320.
(5) 40 R. de J., 467

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Held: That the wares of the parties are similar within the meaning of the Act.

2. That in a dispute as to whether two trade marks are similar within the meaning of The Unfair Competition Act, 1932, while a witness may give evidence as to the effect the use of the mark in dispute would have on his own mind, he may not state his opinion of the effect it would have or be likely to have on the mind of some one else. Such evidence should be rejected as inadmissible, for whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark is a matter upon which the opinion of the Court is required.

3. That in determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar. *Sandow Ld's Application,* (1914) 31 R.P.C. 196, followed.

4. That when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. *Re Christiansen's Trade Mark,* (1886) 3 R.P.C. 54, followed.

5. That the respondent's trade mark "Multivims" is similar within the meaning of The Unfair Competition Act, 1932, to the registered trade mark "Multivite" and its registration must be expunged.

PETITION by Petitioner to have respondent's trade mark expunged from the Register of Trade Marks.

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

Christopher Robinson for petitioner.

Rutledge C. Greig for respondent.

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

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

THE PRESIDENT now (October 25, 1944) delivered the following judgment:

This is a motion under The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, to expunge the registration of the respondent's trade mark "Multivims" on the ground that it is similar to the petitioner's trade mark "Multivite". The petitioner's mark was first used on January 3, 1936, and was registered in the Trade Marks Office on March 26, 1936, Register No. 23, Folio N.S. 6592, for use in association with wares specified as "A Preparation for Medicinal use of the Vitamins A, D, C and the 'B' complex". The respondent's mark was first used on February 6, 1943, and was registered on May 7, 1943, Register No. 67, Folio N.S. 17526, for use in association with wares specified as "A multiple vitamin and mineral tablet". The petitioner's application for registration shows use of the mark principally in the United Kingdom, Irish Free State and Canada. In Canada the sales of its preparation have, since 1936, been made through an associated company, The British Drug Houses (Canada) Limited, and have been quite extensive. The respondent's use of its mark, according to its application for registration, has been principally in Canada. Its tablets have been on sale for only a short period of time and there is no evidence as to the extent of its sales.

The case is governed by section 26 of The Unfair Competition Act, 1932, the relevant portion reading as follows:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it (*f*) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

If the marks are similar and are used in connection with similar wares, the later mark was not properly registered and the owner of the first registered mark has the right to have its registration expunged.

The first question that arises is whether the two trade marks, in each case a word mark, are used in connection with similar wares. The Act defines "similar" in relation to wares as follows:

2. In this Act, unless the context otherwise requires:—

(*l*) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the condition under which or the class of persons by whom they were produced, or for their place of origin;

The definition specifies three conditions of similarity of wares, namely, their common characteristics, or the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or the manner or circumstances of their use. There is, I think, no doubt that in the present case the wares of the parties are similar. The pellets of the petitioner and the tablets of the respondent have common characteristics; one contains minerals as well as vitamins but both are essentially multiple vitamin preparations. The presence of any one of the conditions of similarity required by the definition is sufficient and the condition of common characteristics of the wares is clearly complied with. A second condition of similarity is also present in that the manner or circumstances of the use of the wares is the same for both are used by persons who are, or think they are, deficient in vitamins. Furthermore, while there is no evidence that the two preparations have been dealt with by the same druggists, they are both sold by druggists. I find that wares of the parties are similar within the meaning of the Act.

The real question of controversy is whether the two marks are similar. The Act defines "similar" in relation to marks by section 2 (*k*). The definition, so far as relevant here, reads as follows:

> 2. (*k*) "Similar", in relation to trade marks, * * * describes marks, * * * so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, * * *

The issue is whether there would be likelihood of confusion in the minds of dealers in and/or users of the wares as to the person responsible for their character or quality, if both marks were used at the same time and in the same area. If the multiple vitamin preparations in the present case were both offered for sale at the same time and in the

same area, one under the mark "Multivite" and the other under the mark "Multivims" and dealers in or users of such preparations or both would be likely to think that they were both put out by the same person, then the marks are similar. If such confusion is likely to arise, the registration of the mark responsible for such likelihood of confusion must be expunged.

Some comment is desirable with regard to one aspect of the evidence. In several affidavits of druggists filed in support of the motion the affiant stated his opinion that the use of the name "Multivims" on a vitamin preparation by any one other than the petitioner would probably cause confusion in the trade and would be likely to cause purchasers to think that the vitamin preparation sold under that name was put out by the petitioner. On the other hand, in affidavits of druggists filed on behalf of the respondent the affiant stated that, as a druggist, he did not consider there was any confusion or likelihood of confusion on the part of the public as to the two marks. Kerley on Trade Marks, 6th Edition, at page 290, makes the statement that the evidence of persons who are well acquainted with the trade concerned was formerly constantly tendered by the parties to show that in the opinion of such persons, as experts, the alleged resemblance between the contrasted marks was, or was not, calculated to deceive, and it was constantly admitted, but that, since the decision of the House of Lords in *The North Cheshire and Manchester Brewery Company Limited* v. *The Manchester Brewery Company Limited* (1), such evidence has frequently been disallowed. In that case, Lord Halsbury L.C. said, at page 85:

> upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to decide.

The affidavits filed on the petitioner's behalf also contained the statement of the affiant that he had never heard of the preparation sold under the name "Multivims" but if he had heard of such a preparation and had no information as to its origin he might have inferred that it was a

(1) (1899) A.C. 83.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

product of the petitioner. In some cases the affiant used the word "should" instead of "might". There can be no objection to such evidence. It is, I think, sound in principle and in accord with authority to hold that, in a dispute as to whether two trade marks are similar within the meaning of The Unfair Competition Act, 1932, while a witness may give evidence as to the effect the use of the mark in dispute would have on his own mind, he may not state his opinion of the effect it would have or be likely to have on the mind of some one else. Such evidence should be rejected as inadmissible, for whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark is a matter upon which the opinion of the Court is required.

There is no evidence of actual confusion as the result of the use of the two marks. While such evidence would be helpful in determining whether there would be likelihood of confusion, it is not necessary that there should be such evidence on a motion to expunge, where the issue is not whether there has been confusion but whether confusion is likely to occur. It is true, of course, that, if the mark in dispute has been in use for a long time and there is no evidence of actual confusion as a result of such use, that fact may be taken into account, but no inference should be drawn from the lack of evidence of actual confusion in a case such as this where the mark complained of has only recently come into use.

Whether confusion in the minds of dealers or users will be likely to result from the use of the marks under review in connection with multiple vitamin tablets may be said to be a question of fact. It would, I think, be more nearly correct to say that it is a matter on which the Court must form an opinion. In the conclusion to which it comes, there cannot be that objectivity of determination that is desirable and frequently possible when the Court is called upon to find facts, for, in the formation of its opinion as to the likelihood of confusion or otherwise in the minds of dealers or users, the Court cannot hold itself completely free from a subjective attitude to the problem. While the judge must seek to put himself in the position of dealers in or users of the wares and try to ascertain what

inference such persons would be likely to draw from the use of the marks on them, he cannot entirely dismiss from his mind the inference that he himself would draw from such use.

The Courts have realized the difficulty involved when a judge seeks to project himself into the minds of other persons in order to ascertain what the effect of certain circumstances would be likely to have on them and, with a view to reducing the extent of the subjective attitude to a given problem of this kind, have laid down certain principles, both general and specific, as guides to be followed. Cases in which trade marks have been held to be similar are numerous and lists of such similar marks are to be found in such text books as Kerley on Trade Marks, 6th Edition, at pp. 295-304, and Fox on Canadian Law of Trade Marks and Industrial Designs, at pp. 80-88. Such cases are not helpful except so far as they express or illustrate guiding principles, for each case is peculiar to itself so far as the actual trade marks involved in it are concerned. This view, frequently expressed in the authorities, was recently clearly stated by the Judicial Committee of the Privy Council in *Coca-Cola Company of Canada Limited* v. *Pepsi-Cola Company of Canada Limited* (1), where Lord Russell said:

> except when some general principle is laid down, little assistance is derived from authorities in which the question of infringement is discussed in relation to other marks and other circumstances.

The general approach to the solution of a problem of this kind was stated by Parker J. in *The Pianotist Company Ld's Application* (2), as follows:

> You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

(1) (1942) 2 D.L.R. 657 at 661. (2) (1906) 23 R.P.C. 774 at 777.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

This statement was quoted with approval by Davis J. in the *Pepsi-Cola* v. *Coca-Cola Case* (supra) (1).

From this statement it follows, I think, that the Court must not allow its consideration of the main issue, namely, whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark in dispute, to be deflected by taking irrelevant matters into account. The respondent filed samples of the bottles in which the respective preparations of the parties are sold. These differ somewhat in shape and there are differences in the labels. The Court is not concerned with the bottles in which the preparations are sold or the labels on them but with the trade marks under which they are put out. It is the effect of the trade marks, and not of the bottles or labels, that must be considered. If the use of the marks on the wares is likely to result in confusion as to the wares, differences in the bottles or labels might serve to lessen the confusion but do not eliminate it. Differences in the bottles or labels cannot turn similar trade marks into dissimilar ones. Such differences have nothing to do with the issue before the Court, for there is no reason why either party should continue the use of the present bottles or labels and nothing to prevent either of them from changing the present shape of the bottles or form of the labels. Neither the bottle nor the label is part of the trade mark. The protection given by the registration extends to any normal use of the trade mark and is not confined to any particular use of it such as its use with a particular shape of bottle or on a particular form of label. This is well established by the case of *In re Worthington & Co's Trade Mark* (2).

The same case also establishes that it is not necessary to show any attempt on the part of the respondent to deceive or create confusion and thus get the benefit of the petitioner's mark. There is no evidence of any such attempt in the present case, but no such evidence is necessary on a motion to expunge. The issue before the Court is the same whether the respondent knew of the petitioner's mark or not. Indeed, the Court should, on such a motion, proceed on the assumption that the second mark was registered in

(1) (1940) S.C.R. 17 at 32. (2) (1880) 14 Ch. D. 8.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

ignorance of the earlier one. In the case just cited, Brett L.J. dealt with both of the matters referred to. At page 15, he said:

> there is nothing in the statute to prevent the trade-mark which is registered from being used in any colour. Therefore, it seems to me that the proper construction is that where a trade-mark is registered, it is not merely the outline or design as printed in the advertisement in black, or black and white, which is to be protected, but that which is to be protected is the trade-mark as it may be used or will be used in the ordinary course of trade, that is, in any colour.

It follows from this statement that the mark must be divorced from any particular use that may be made of it and should be considered in relation to any normal and ordinary use. Just as the use of the mark in any particular colour should not be a governing consideration, so the use of the mark with any particular shape of bottle or on any particular form of label should not be taken into account. Then Brett L.J. proceeded to eliminate from consideration the question of intent to deceive or mislead or create confusion. He continued as follows:

> That being so, it seems to me that the proper test is this: assume both trade-marks to be registered, and let it be supposed that each person registering is ignorant of the other's trade-mark, would any fair use of the second be calculated to deceive?

It should be noted that Brett L.J. was dealing with the terms of a section which forbade the registration of a trade mark "so nearly resembling a trade mark already on the register as to be calculated to deceive". It is settled law that the phrase "calculated to deceive" does not mean "intended to deceive". In *Maeder's Application* (1), Sargant J. thought the phrase "so nearly resembling as to be calculated to deceive" meant "so nearly identical as to be confusing", and in *McDowell's Application* (2) the matter was put beyond dispute by the House of Lords. There Viscount Cave L.C. said that the words "calculated to deceive" did not mean "intended to deceive" but "likely (or reasonably likely) to deceive or mislead the trade or the public". It is, therefore, clearly established that whether the respondent had any particular motive or intent when it adopted its trade mark is entirely irrelevant to the issue before the Court. There is sound reason for such a conclusion on a motion to expunge, since on

(1) (1916) 33 R.P.C. 77 at 81. (2) (1927) 44 R.P.C. 335 at 341.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

such a motion it is the maintenance of the purity of the register so that the public will not be confused by the use of similar marks on similar wares that is the governing consideration. The issue is not whether one party may gain and the other lose through the confusion resulting from the use of the two marks but whether the public will be confused. Dealers and users are entitled to be protected against the likelihood of any such confusion. *Vide Eno* v. *Dunn* (1); *In re Boots Pure Drug Co. Ld's Trade Mark "Livron"* (2).

Having thus eliminated from consideration these irrelevant questions, the Court must proceed to consider the effect which the use of the trade mark "Multivims" in connection with the tablets sold by the respondent would be likely to have on the minds of dealers in or users of multiple vitamin preparations who were acquainted with the tablets sold by the petitioner under the trade mark "Multivite". Fortunately, there are to be found in the authorities specific guides which will assist the Court in forming its opinion and substantially reduce the extent of the subjectivity involved in it. The guides indicate not only what the Court should not do in arriving at its conclusion but also what are the positive tests that should be applied.

In determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar. The reasons for this guiding rule are sound. Similar marks are

(1) (1890) 15 A.C. 252 at 264. (2) (1937) 54 R.P.C. 327 at 336.

not identical marks and similarity of marks implies some difference between them, for without any difference they would be identical. A careful analysis of the marks with a view to ascertaining differences fails to observe this important distinction. Moreover, it is the likely effect of the use of the later mark on the minds of ordinary dealers or users generally that must be considered and people as a rule have only a general recollection of a particular thing, rather than a precise memory of it. This negation of careful analysis of the marks side by side together with the necessity of assuming only a general recollection of the earlier mark when the later one is seen by itself was clearly laid down in *Sandow Ld's Application* (1). In that case the mark proposed for registration consisted of the letter "S" twined round the figure of a female, described as a cottage worker, the whole being surrounded by a circular laurel wreath. The registration was opposed by a company which had a registered mark consisting of the letter "S" twined round the figure of a jay bird and surrounded by an oval, not a laurel, device. The two marks are reproduced in the report and the differences between them when compared with one another are obvious. The Comptroller General, acting as Registrar of Trade Marks, in allowing the registration said, at page 200:

> After carefully comparing these marks, I cannot think that there is any reasonable probability of deception to the ordinary man who would take care and tronuble in examining the marks. It is no doubt stated in the evidence by the members of many distinguished firms that they might themselves be deceived. I cannot think that this statement can mean that, if the marks are carefully compared, there will be any possibility of deception; I think it can only be taken to mean that, where no careful comparison is made and attention is fixed upon the letter "S" alone, there might be some possibility of confusion.

On an appeal from this decision it was held by Sargant J. that this test of careful comparison was not a true one. At page 205, he said:

> The question is not whether if a person is looking at two Trade Marks side by side there would be a possibility of confusion; the question is whether the person who sees the proposed Trade Mark in the absence of the other Trade Mark, and in view only of his general recollection of what the nature of the other Trade Mark was, would be liable to be deceived and to think that the Trade Mark before him is the same as the other, of which he has a general recollection.

(1) (1914) 31 R.P.C. 196.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

The same case lays down a further test of the similarity of trade marks when they consist of more than one element. It is the totality of the mark that must be considered. The Comptroller General in giving his decision had said, at page 200:

> Having regard, however, to the conclusion I have come to that the Opponents cannot obtain any monopoly rights in the letter "S", I do not think that the other features are so similar as to be likely to cause deception or confusion to reasonable people, or in the ordinary course of trade.

But Sargant J. held that he had erred in eliminating the "S" and concentrating on the other features of the marks. At page 205, he said:

> The true test is whether the totality of the proposed Trade Mark is such that it is likely to cause mistake or deception, or confusion, in the minds of persons accustomed to the existing Trade Mark.

This has been recognized as a cardinal principle ever since the case of *Re Christiansen's Trade Mark* (1). In that case a new trade mark for matches was registered on behalf of C. Later an old trade mark for matches was registered by N. N's mark, as registered, contained pictures of prize medals. C's mark, as registered, had two blanks, but, as used on matches, the blanks were filled with pictures of medals. Both marks contained much that was common to the trade, such as the word "Taendstikker". C's mark had the word "Medals" at the top and N's mark the word "Nitedals". N. moved to rectify the register by striking off C's mark. Chitty J. took the view that the distinguishing feature in the marks was the word "Medals" in the one and the word "Nitedals" in the other, and that there was sufficient distinction between the two marks to prevent C's mark from being calculated to deceive and refused the motion to expunge. The Court of Appeal unanimously reversed this decision and ordered C's mark to be expunged. At page 61, the Master of the Rolls said:

> We are to consider whether the one trade mark is so like the other trade mark that it is calculated to deceive. What is the trade mark? The trade mark is not the distinguishing feature of the trade mark. The trade mark is not one part of the matter. The trade mark is not in the one case "Medals" and in the other case "Nitedals". That is not the trade mark. If you say that, you strike out all the rest. The trade mark is the whole thing, the whole picture on each. You have, therefore, to consider the whole.

(1) (1886) 3 R.P.C. 54.

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

and went on to point out the fallacy involved in the contention that because there was a distinction between the trade marks in respect of some features, the trade marks as a whole were different. His view was that the distinction between the two marks was not sufficient to prevent confusion, when they were looked at as a whole by ordinary people in the ordinary way. Lindley L.J. was of the same view. He thought the resemblances between the two marks were so great that, although there were differences between them, the differences were not so obvious as to make the wholes dissimilar, and his conclusion was that the trade marks as a whole were similar, notwithstanding the dissimilarities that could be found in them. Lopes L.J. agreed that the combination of the elements in the mark as a whole was the thing to be considered. It is, I think, firmly established that, when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.

Affidavit evidence on behalf of the respondent was given that the name "Multivims" was coined from an abbreviation of parts of the words, "multi", "vitamins" and "minerals"; that many trade names have appeared on the market covering vitamin tablets, some with the prefix "multi" or "mult" and others with the suffix "vims" or "ims"; that it has become a practice in the drug trade to use the prefix "multi" or "mult" to denote strength; and that the use of such prefix has become common to the trade and in respect of vitamin preparations usually denotes that the same contains all or many of the vitamins. Counsel for the respondent sought to give the ending "vite" in the petitioner's mark the meaning of

1944

THE BRITISH DRUG HOUSES, LTD. v. BATTLE PHARMACEUTICALS.

Thorson J.

"life" and the ending "vims" in the respondent's mark the meaning of "strength" or "force", and argued that these endings after the common prefix of "multi", with the differing meanings he assigned to them made the marks different. I might point out that this argument is not consistent with the evidence that the mark "Multivims" came from abbreviations of the words, "multi", "vitamins", and "minerals", but even if he were right in assigning these different meanings to the suffixes, which I do not think he was, he has fallen into the same kind of fallacy as was pointed out in *Sandow Ld's Application (supra)* and *Re Christiansen's Trade Mark (supra)*.

While I agree with counsel for the respondent that there can be no monopoly in the use of such a common prefix as "multi", the danger of any such monopoly does not exist in the present case, since the Court is not concerned exclusively with the prefix. Nor is it concerned with the terminations of the two trade marks separately. It is the combination of the prefix and the termination which makes the trade mark. There is not, in my opinion, in the terminations of the two marks that degree of difference that is so obvious as to make the two marks as a whole dissimilar, to use the language of Lindley L.J. in *Re Christiansen's Trade Mark (supra)*. The two marks, when used at the same time and at the same place in connection with similar wares, namely, multiple vitamin tablets, would not, I think, be distinguished in the minds of ordinary users of multiple vitamin preparations; both marks would be likely to connote the same thing in the minds of such persons, that is, a kind of mark that is used in connection with multiple vitamin preparations; the difference in the endings would be lost in the general similarity of connotation which the two marks would convey, when heard or seen as a whole, separately and apart from each other.

Following the guides indicated in *Sandow Ld's Application (supra)* and *Re Christiansen's Trade Mark (supra)*, I have come to the conclusion that ordinary users of multiple vitamin preparations accustomed to the petitioner's trade mark "Multivite" in connection with the multiple vitamin tablets put out by the petitioner, would, on seeing the trade mark "multivims" by itself, used in

connection with multiple vitamin tablets, and having only a general recollection of the petitioner's trade mark as a whole, be quite likely to think that the multiple vitamin tablets of the respondent offered under the name "Multivims" were put out by the petitioner and to buy them in the mistaken belief that they were getting the petitioner's products with which they were acquainted. There would, I think, result from the contemporaneous use of the marks in the same area in association with the respective wares of the parties that likelihood of confusion in the minds of users of the wares as to the person responsible for their character or quality, which in the interests of the public, the Act is designed to prevent. I find, therefore, that the trade marks under review in this case are similar within the meaning of the Act. That being so, the respondent's trade mark "Multivims" should not have been registered and the petitioner's application for an order expunging its registration is granted with costs.

Judgment accordingly.

INDEX

ALLOWANCE OF SEPARATE BILLS OF COSTS TO DEFENDANTS WHERE ONE DEFENDANT ADDED AT TRIAL ON PLAINTIFF'S MOTION.

See PRACTICE, No. 1.

AMOUNTS HELD AS DEPOSITS.

See REVENUE, No. 1.

APPLICABILITY OF PROVINCIAL RULE OF THE ROAD GOVERNING CONDUCT OF DRIVER OF MOTOR VEHICLE AT INTERSECTIONS IN CLAIM AGAINST THE CROWN UNDER S. 19(C) OF EXCHEQUER COURT ACT.

See CROWN, No. 2.

APPROPRIATION.

1. "COMPENSATION" AND "VALUE" DISTINGUISHED, No. 1.
2. COMPENSATION PAYABLE FOR SHIPS APPROPRIATED, No. 1.
3. THE COMPENSATION (DEFENCE) ACT, 1940, 4 GEO. VI, c. 28, No. 1.
4. THE DOCTRINE OF REINSTATEMENT DISCUSSED, No. 1.
5. "THE VALUE OF THE VESSEL . . . , NO ACCOUNT BEING TAKEN OF ANY APPRECIATION DUE TO THE WAR", No. 1.
6. WAR MEASURES ACT, R.S.C., 1927, c. 206, No. 1.

APPROPRIATION—*War Measures Act, R.S.C., 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—"The value of the vessel * * *, no account being taken of any appreciation due to the war"—The doctrine of reinstatement discussed—"Compensation" and "value" distinguished.*]—Under the War Measures Act, R.S.C., 1927, c. 206, the Crown appropriated two ships owned by the claimant. The action comes before the Court by way of reference by the Minister of Justice to have determined the amount of compensation payable to the claimant. *Held:* That the compensation to be adjudged for property appropriated under the War Measures Act should be calculated and determined in the same manner as in the case of an expropriation made under the Expropriation Act, and the value to be determined under both Acts is the value to the owner.

APPROPRIATION—*Concluded*

2. That the term "value" used in the Compensation (Defence) Act, 1940, is narrower than the term "compensation" used in the Expropriation Act since it does not comprise injurious affection to the residue. 3. That the doctrine of reinstatement applies to the acquisitioning of a vessel as well as to the expropriation of land. 4. That the "appreciation due to the war" in the Compensation (Defence) Act, 1940, does not refer merely to the value to the taker but means an appreciation in value generally. NORTHUMBERLAND FERRIES LIMITED *v.* HIS MAJESTY THE KING **123**

CLAIM AGAINST CUSTODIAN OF ENEMY PROPERTY.

See ENEMY PROPERTY, Nos. 1 & 2.

CLAIM FOR DAMAGES UNDER S. 19(C) OF EXCHEQUER COURT ACT DUE TO COLLISION BETWEEN A VEHICLE OWNED BY SUPPLIANT AND ONE OWNED BY RESPONDENT AND OPERATED IN THE COURSE OF DUTY BY A MEMBER OF THE ARMED FORCES OF CANADA.

See CROWN, No. 1.

COLLISION AT STREET INTERSECTION.

See CROWN, No. 2.

"COMPENSATION" AND "VALUE" DISTINGUISHED.

See APPROPRIATION, No. 1.

COMPENSATION PAYABLE FOR SHIPS APPROPRIATED.

See APPROPRIATION, No. 1.

CONSOLIDATED ORDERS RESPECTING TRADING WITH THE ENEMY, 1916.

See ENEMY PROPERTY, No. 1.

COPYRIGHT.

1. "FAIR DEALING", No. 1.
2. GOOD FAITH, No. 1.
3. INFRINGEMENT, No. 1.
4. INJUNCTION, No. 1.
5. PARTIES, No. 1.
6. REPRODUCTION OF TEXT IN ENTIRETY, No. 1.

COPYRIGHT—*Concluded*

COPYRIGHT—*Parties—Reproduction of text in entirety—"Fair dealing"—Good Faith—Infringement—Injunction.*]—*Held:* That the reproduction by the press of an article on a current economic, political or religious topic is authorized by article of the Berne Convention, unless the reproduction thereof be expressly reserved. 2. That the article given below at length treating of the supposed experiences of animals in war-time, being of a fanciful and whimsical character, is not such as may be reproduced without the permission of the author in virtue of article 9 of the Berne Convention. 3. That the reproduction in a newspaper of the said article in its entirety, with critical comments upon it, is not "fair dealing" with the article, as authorized by 17 (1) of Copyright Act, R.S.C. (1927), c. 32, and constitutes an infringement of the copyright therein. 4. That an agent authorized under an unrevoked power of attorney, given by a foreign society of which plaintiff is a member, may legally bring action in the name of such plaintiff, though it does not clearly appear that the said plaintiff was aware of the action being instituted. 5. That where a defendant, in good faith, believes he was not infringing, plaintiff is not entitled to punitive or exemplary damages. 6. That in the case of a single and isolated act of infringement (such as reproducing an article in one issue of a newspaper) and which is not likely to be repeated, an order for Injunction will not be granted. 7. That where, in an action for infringement of copyright by reproducing an article in a newspaper, it appears that the defendant has in his possession only a few infringing copies of the paper which form part of the archives of the paper and are not for sale the defendant should not be ordered to surrender them to the plaintiff, pursuant to section 21 of the Copyright Act. MIGUEL ZAMACOIS *v.* RAYMOND DOUVILLE ET AL..... **208**

COSTS.

See PRACTICE, No. 1.

CROWN.

1. APPLICABILITY OF PROVINCIAL RULE OF THE ROAD GOVERNING CONDUCT OF DRIVER OF MOTOR VEHICLE AT INTERSECTIONS IN CLAIM AGAINST THE CROWN UNDER S. 19(c) OF EXCHEQUER COURT ACT, No. 2.
2. CLAIM FOR DAMAGES UNDER S. 19(c) OF EXCHEQUER COURT ACT DUE TO COLLISION BETWEEN A VEHICLE OWNED BY SUPPLIANT AND ONE OWNED BY RESPONDENT AND OPERATED IN THE COURSE OF DUTY BY A MEMBER OF THE ARMED FORCES OF CANADA, No. 1.

CROWN—*Continued*

3. COLLISION AT STREET INTERSECTION, No. 2.
4. EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 19(c), No. 2.
5. EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 32, No. 3.
6. LIABILITY OF THE CROWN FOR NEGLIGENCE OF SERVANT IN DRIVING MOTOR VEHICLE TO BE DETERMINED BY LAW OF NEGLIGENCE OF THE PROVINCE, IN WHICH ALLEGED NEGLIGENCE OCCURRED, IN FORCE ON JUNE 24, 1938, No. 2.
7. MAXIM *res ipsa loquitur* DOES NOT APPLY ON MERE PROOF OF THE SKIDDING OF A VEHICLE ON ANY ICY ROAD, No. 1.
8. MOTOR VEHICLES ACT, R.S.Q. 1941, c. 142, s. 53, ss. 2 AND s. 36, ss. 7, No. 2.
9. ONUS OF PROOF IN CLAIMS MADE UNDER S. 19(c) OF EXCHEQUER COURT ACT RESTS UPON THE SUPPLIANT TO SHOW THAT HIS LOSS OR INJURY WAS THE RESULT OF NEGLIGENCE ON THE PART OF AN OFFICER OR SERVANT OF THE CROWN WHILE ACTING WITHIN THE SCOPE OF HIS DUTIES OR EMPLOYMENT, No. 1.
10. ONUS OF PROOF OF NEGLIGENCE IN CLAIMS AGAINST THE CROWN UNDER S. 19(c) OF EXCHEQUER COURT ACT NOT DISPLACED BY PROVINCIAL ENACTMENT, No. 2.
11. PETITION OF RIGHT, NOS. 1, 2 AND 3,
12. PETITION OF RIGHT ACT, R.S.C. 1927, c. 158, s. 8, No. 3.
13. RIGHT OF THE CROWN TO AVAIL ITSELF OF PROVINCIAL LAWS RELATING TO PRESCRIPTION AND LIMITATION OF ACTIONS IN FORCE AT THE TIME THE CROWN IS CALLED UPON TO MAKE ITS DEFENCE, No. 3.
14. SKIDDING OF VEHICLE ON ICY ROAD RAISES NO PRESUMPTION OF NEGLIGENCE ON THE PART OF THE DRIVER OF THE VEHICLE, IS NOT OF ITSELF EVIDENCE OF NEGLIGENCE ON HIS PART AND IS NOT TO BE CONSIDERED APART FROM THE CIRCUMSTANCES THAT CAUSED IT, No. 1.

CROWN—*Petition of Right—Claim for damages under s. 19 (c) of Exchequer Court Act due to collision between a vehicle owned by suppliant and one owned by respondent and operated in the course of duty by a member of the armed forces of Canada—Skidding of vehicle on icy road raises no presumption of negligence on the part of the driver of the vehicle, is not of itself evidence of negligence on his part and is not to be considered apart from the circumstances that caused it—Maxim res ipsa loquitur does not apply on mere proof of the skidding of a vehicle on an icy road—Onus of proof*

CROWN—*Continued*

in claims made under s. 19 (c) of Exchequer Court Act rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment.]—Suppliant claims damages for loss resulting from collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of duty by a member of the armed forces of Canada. The collision occurred on the Montreal Road and was due to the skidding of the carrier, as it was proceeding west, across the road and into the path of the motor ambulance as it was coming from the west. The Court found that the suppliant had not proved that the skidding was the result of negligence on the part of the driver of the carrier and that the suppliant was not entitled to the relief claimed. *Held:* That where there has been a collision between motor vehicles due to the fact that one of them skidded on a slippery or icy road the fact of skidding should not be considered apart from the circumstances that caused it. Proof of the mere fact of such skidding raises no presumption of negligence on the part of the driver of the vehicle and it is not in itself evidence of negligence on his part. The court should look to the surrounding circumstances and draw from them such inference as may be reasonable, but no inference as to presence or absence of negligence is to be drawn from the mere fact of skidding in itself, for that fact is a neutral one. The same view should be taken of the mere fact that a motor car at the time of a collision was on what is commonly called the wrong side of the road. It cannot properly be considered apart from the circumstances that caused it to be there. 2. That the maxim *res ipsa loquitur* does not apply on the mere proof of the skidding of the motor vehicle on a slippery or icy road and, no *prima facie* case of negligence on the part of the driver of the vehicle being established thereby, no onus of proof is cast upon the respondent either to show that the collision was due to inevitable accident or that it was not due to negligence on the part of the driver. 3. That in claims made under section 19 (*c*) of the Exchequer Court Act the onus of proof rests upon the suppliant to show that his loss or injury was the result of negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment. Where the collision was caused by the skidding of the motor vehicle owned by the Crown suppliant must prove negligence in the operation of the vehicle on the part of its driver, that is, some breach of the duty of care, skill and judgment that might reasonably be expected from him. If the Court cannot draw a fair and reasonable inference of negligence from the circumstances surrounding the skidding and consequent collision it should not give effect to the suppliant's claim for damages. GAUTHIER & COMPANY LIMITED *v.* HIS MAJESTY THE KING.. 17

CROWN—*Continued*

2.——*Petition of Right—Exchequer Court Act R.S.C. 1927, c. 34, s. 19 (c)—Collision at street intersection—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53, ss. 2 and s. 36, ss. 7—Onus of proof of negligence in claims against the Crown under s. 19 (c) of Exchequer Court Act not displaced by provincial enactment—Applicability of provincial rule of the road governing conduct of driver of motor vehicle at intersections in claim against the Crown under s. 19 (c) of Exchequer Court Act—Liability of the Crown for negligence of servant in driving motor vehicle to be determined by law of negligence of the province, in which alleged negligence occurred, in force on June 24, 1938.*]—Suppliant seeks to recover damages from the Crown for injuries suffered by his minor son and expenses incurred by himself as the result of a collision at an intersection between a bicycle on which his son was riding and a truck owned by the Crown and driven, within the scope of his duties, by an enlisted soldier of the Royal Canadian Army Service Corps. The Court found that the proximate cause of the collision was the negligence of the driver of the truck and held the Crown responsible for such negligence. *Held:* That under section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended, the onus of proof rests upon the suppliant in a Petition of Right, to show that there was negligence on the part of an officer or servant of the Crown and that Suppliant's loss or injury resulted from such negligence, notwithstanding any provincial enactment to the effect that the onus of proof shall be otherwise and that s. 53, ss. 2, of the Motor Vehicles Act, Revised Statutes of Quebec 1941, c. 142, has no application in such a claim. 2. That the driver of a vehicle on coming to an intersection must give right of way to a driver coming from his right, not only when the two vehicles are coming into the intersection at the same time, but also when the driver sees a vehicle coming towards the intersection from his right, even although he has himself reached the intersection first, where the vehicles are approaching the intersection so nearly at the same time and at such a rate of speed that if both proceed each without regard to the other, a collision

CROWN—*Continued*

is reasonably to be apprehended. *Drapeau* v. *Boivin* (1933) 54 B.R. 133; *Anderson* v. *Guardian Insurance Company of Canada* (1933) 54 B.R. 407 at 410, approved. 3. That where a claim is made against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on June 24, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. *The King* v. *Armstrong* (1908) 40 Can. S.C.R. 229 and *Gauthier* v. *The King* (1918) 56 Can. S.C.R. 176 at 180, followed and applied. 4. That the necessity of complying with the Quebec rule of the road governing the conduct of the driver of a vehicle at an intersection gives rise to duties of care on the part of such driver that he shall keep a proper lookout to his right on coming into and passing through the intersection and keep his vehicle under adequate control as to its speed so that he will be able to stop in time to allow a driver coming from his right to pass if his failure to do so would be likely to result in a collision and that these principles are as applicable in a claim against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action. ACHILLE TREMBLAY *v.* HIS MAJESTY THE KING **1**

3.—*Petition of Right—Right of the Crown to avail itself of provincial laws relating to prescription and limitation of actions in force at the time the Crown is called upon to make its defence—Petition of Right Act, R.S.C. 1927, chap. 158, s. 8—Exchequer Court Act, R.S.C. 1927, chap. 140, s. 32.*]—Suppliant's action is for damages resulting from injuries suffered by suppliant allegedly due to the negligence of a servant of the Crown while acting within the scope of his employment. The accident occurred in Winnipeg, Manitoba, on November 12, 1941. Suppliant lodged his Petition of Right with the Secretary of State on November 14, 1942, and the same was filed in the Exchequer Court on January 7, 1943. The respondent pleaded *inter alia* that the suppliant was barred by section 84 (1) of The Highway Traffic Act, R.S.M. 1940,

CROWN—*Concluded*

chap. 93. The question of law whether the suppliant was barred by such statute was heard before the trial of the Petition of Right. *Held:* That the provincial laws relating to prescription and the limitation of actions referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a Petition of Right, are those of the province in which the cause of action arose that are in force in such province at the time the Crown is called upon to make its defence to the Petition of Right. 2. That the respondent may rely upon section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chap. 93. 3. That the suppliant sustained his damages on November 12, 1941, and, since his Petition of Right was not lodged with the Secretary of State until November 14, 1942, two days after the expiration of twelve months from the time when his damages were sustained, he is barred from proceeding with his Petition. PETER ZAKRZEWSKI *v.* HIS MAJESTY THE KING **163**

DEFINITION OF ENEMY.

See ENEMY PROPERTY, No. 1.

DEPARTMENTAL OR OTHER OFFICER OF THE CROWN.

See PRACTICE, No. 2.

DISALLOWANCE OF SEPARATE BILLS OF COSTS TO DEFENDANTS.

See PRACTICE, No. 1.

DOMINION GOVERNMENT SUBSIDY PAID UNDER THE DRY DOCK SUBSIDIES ACT, 1910, 9-10 EDW. VII, C. 17, AS AMENDED, AS AN AID TO THE CONSTRUCTION OF A DRY DOCK.

See REVENUE, No. 2.

ENEMY PROPERTY.

1. CLAIM AGAINST CUSTODIAN OF ENEMY PROPERTY, NOS. 1 & 2.
2. CONSOLIDATED ORDERS RESPECTING TRADING WITH THE ENEMY, 1916, NO. 1.
3. DEFINITION OF ENEMY, No. 1.
4. ORDER 28, No. 1.
5. ORDERS 6(1) AND 28, No. 2.
6. PURPOSE AND EFFECT OF CONSOLIDATED ORDERS RESPECTING TRADING WITH THE ENEMY, 1916, No. 2.
7. SITUS OF COMPANY OBLIGATIONS AND DEBTS, No. 1.
8. SITUS OF COMPANY SHARES FOR PURPOSE OF DETERMINING DISPUTE AS TO OWNERSHIP, No. 2.

ENEMY PROPERTY—*Continued*

9. THE TREATY OF PEACE (GERMANY) ORDER, 1920, SECTIONS 33, 34 AND 41, No. 2.
10. THE TREATY OF PEACE (GERMANY) ORDER, 1920, SECTIONS 32, 33, 34 AND 41, No. 1.
11. TREATY OF PEACE, No. 2.
12. TREATY OF VERSAILLES, PART X, SECTION IV ANNEX PARA. 10, No. 1.

ENEMY PROPERTY—*Claim against Custodian of Enemy Property—Consolidated Orders respecting Trading with the Enemy, 1916—Order 28—Definition of enemy—Situs of company obligations and debts—Treaty of Versailles, Part X, Section IV Annex para. 10—The Treaty of Peace (Germany) Order, 1920, Sections 32, 33, 34 & 41.*]—The action is for the proceeds of note-certificates issued by the Canadian Pacific Railway Company on March 2, 1914, payable on March 2, 1924. The note-certificates were issued from the New York register of the Company and were transferable only on such register until discharged therefrom. They were bought in the name of the Deutsche Bank (Berlin) London Agency for the claimant who then resided in London, England, and remained in the custody of the Bank until after the claimant had left for Germany. On January 4, 1917, the claimant went to Berlin, Germany, where he resided and worked for the head office of the Deutsche Bank until he returned to England in June, 1920. On January 5, 1917, the note-certificates were delivered to the Guaranty Trust Company of New York (London Office) who held them for the claimant subject to the instructions of the Public Trustee of the United Kingdom. They were endorsed by the registered owner to nominees or employees of the Trust Company. On November 6, 1919, the note-certificates were made the subject of a vesting order under the Consolidated Orders respecting Trading with the Enemy, 1916. Possession of them was not obtained by the respondent until November 30, 1925, when they were delivered to the London representative of the respondent by the Guaranty Trust Company of New York (London Office) with a transfer thereof. Payment of the note-certificates and interest was made to the respondent in New York in December, 1925, the note-certificates being payable at Montreal, London or New York. The action is brought by the claimant for the proceeds with the written consent of the Custodian of Enemy Property under section 41 (2) of The Treaty of Peace (Germany) Order, 1920. *Held:* That while the claimant was the real and beneficial owner of the note-certificates on November 6, 1919, he was on that date an enemy within the meaning of the Consolidated Orders respecting Trading with the Enemy, 1916, and on January 10, 1920, he was an enemy within the meaning of The Treaty of Peace (Germany) Order, 1920. 2. That the situs of a simple contract debt is in the country where the debtor resides for that is where the debtor is subject to the jurisdiction of the Court and where the debt is properly recoverable or payment of it can be enforced. 3. That for the purposes of the Treaty of Versailles and as between an "enemy" and the Canadian Custodian of Alien Enemy Property the term "all property, rights and interests in Canada", contained in section 33 of The Treaty of Peace (Germany) Order, 1920, includes any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of Canada. 4. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction on Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. When the vesting order of November 6, 1919, was made, Canada asserted her paramount power over the Canadian Pacific Railway Company which had issued the note-certificates and in effect ordered the Company to pay the obligation or debt represented by them to the Custodian instead of the enemy owner. The obligation or debt was thus, by valid and effective Canadian war legislation, localized in Canada. The assertion by Canada of her paramount power over the company was confirmed by the Treaty of Peace and section 34 of The Treaty of Peace (Germany) Order, 1920. EDWARD BITTER *v.* SECRETARY OF STATE OF CANADA, AS CUSTODIAN OF ALIEN ENEMY PROPERTY 61

2.—*Claim against Custodian of enemy property—Purpose and effect of Consolidated Orders Respecting Trading with the Enemy, 1916—Orders 6 (1) and 28—Situs of company shares for purpose of determining dispute as to ownership—Treaty of Peace—The Treaty of Peace (Germany) Order, 1920, Sections 33, 34 and 41.*]—In October, 1919, Jacob G. Braun, a naturalized citizen of the United States, purchased in Cologne, Germany, share certificates for 470 shares of the common stock of the Canadian Pacific Railway Company. The share certificates stood in the names of alien enemies and were bought on the Berlin Stock Exchange through a German banking house. The shares were on the New York register of the Company and transfers were registrable only in New York. Share certificates had transfers on the back endorsed in

ENEMY PROPERTY—*Continued*

blank by the registered owners. On April 23, 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy, 1916. In November, 1919, Braun presented the certificates for registration in his own name at the New York office of the Company. Registration was refused on the ground that the shares had been vested in the Canadian Custodian by the Order of April 23, 1919. Share certificates were at all relevant times outside of Canada. The claimant as administratrix of the estate of Jacob G. Braun brought action for a declaration of ownership of the shares with the written consent of the Custodian of Enemy Property given under Section 41 (2) of the Treaty of Peace (Germany) Order, 1920. *Held:* That Order 6 (1) of the Consolidated Orders Respecting Trading with the Enemy, 1916, had the effect of nullifying all transfers made, after the publication of the Orders, by or on behalf of an enemy of any securities issued by or on behalf of any government, municipality, or other authority or any corporation or company subject to the legislative authority of Canada, no matter where or to whom the transfer was made or where the security had been issued or where the certificate representing it was physically situate and of preventing the transferee from acquiring any rights or remedies in respect of any such securities. *Arpad Spitz* v. *Secretary of State of Canada* (1939) Ex.C.R. 162 followed. 2. That the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by the court. *Jellenik* v. *Huron Copper Mining Co.*, (1899) 177 U.S. 1, followed. *Disconto-Gesellschaft* v. *U.S. Steel Co.*, (1925) 267 U.S. 22, and *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for United States* (1931) S.C.R. 169 discussed. *Rex* v. *Williams* (1942) A.C. 541 discussed and distinguished. 3. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. The shares in dispute were therefore subject to the jurisdiction of the Court when it made the vesting order of April 23, 1919, were effectively covered by it, and were

ENEMY PROPERTY—*Concluded*

made the property of Canada and vested in the respondent under The Treaty of Peace (Germany), Order, 1920. MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN *v.* THE CUSTODIAN.... **30**

EVIDENCE AS TO LIKELIHOOD OF CONFUSION.

See TRADE MARKS, No. 1.

EXAMINATION FOR DISCOVERY.

See PRACTICE, No. 2.

EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 19(C).

See CROWN, No. 2.

EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 32.

See CROWN, No. 3.

"FAIR DEALING".

See COPYRIGHT, No. 1.

GENERAL RULES AND ORDERS 130 AND 138.

See PRACTICE, No. 2.

GOOD FAITH.

See COPYRIGHT, No. 1.

INCOME TAX.

See REVENUE, NOS. 1 & 2.

INCOME TAXABLE IN YEAR IN WHICH RECEIVED.

See REVENUE, No. 1.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SECTS. 3, 6 SS. 1(D), 9.

See REVENUE, No. 1.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SEC. 3.

See REVENUE, No. 2.

INFRINGEMENT.

See COPYRIGHT, No. 1.

INJUNCTION.

See COPYRIGHT, No. 1.

LIABILTY OF THE CROWN FOR NEGLIGENCE OF SERVANT IN DRIVING MOTOR VEHICLE TO BE DETERMINED BY LAW OF NEGLIGENCE OF THE PROVINCE, IN WHICH ALLEGED NEGLIGENCE OCCURRED, IN FORCE ON JUNE 24, 1938.

See CROWN, No. 2.

MAINTENANCE OF THE PURITY OF THE REGISTER IN THE PUBLIC INTEREST.
See TRADE MARKS, No. 1.

MARKS NOT TO BE BROKEN UP INTO ELEMENTS BUT TO BE CONSIDERED IN THEIR TOTALITY.
See TRADE MARKS, No. 1.

MARKS NOT TO BE COMPARED SIDE BY SIDE.
See TRADE MARKS, No. 1.

MAXIM *RES IPSA LOQUITUR* DOES NOT APPLY ON MERE PROOF OF THE SKIDDING OF A VEHICLE ON AN ICY ROAD.
See CROWN, No. 1.

MOTOR VEHICLES ACT, R.S.Q. 1941, C. 142, S. 53, SS. 2 AND S. 36, SS. 7.
See CROWN, No. 2.

ONUS OF PROOF IN CLAIMS MADE UNDER S. 19(C) OF EXCHEQUER COURT ACT RESTS UPON THE SUPPLIANT TO SHOW THAT HIS LOSS OR INJURY WAS THE RESULT OF NEGLIGENCE ON THE PART OF AN OFFICER OR SERVANT OF THE CROWN WHILE ACTING WITHIN THE SCOPE OF HIS DUTIES OR EMPLOYMENT.
See CROWN, No. 1.

ONUS OF PROOF OF NEGLIGENCE IN CLAIMS AGAINST THE CROWN UNDER S. 19(C) OF EXCHEQUER COURT ACT NOT DISPLACED BY PROVINCIAL ENACTMENT.
See CROWN, No. 2.

ORDER 28.
See ENEMY PROPERTY, No. 1.

ORDERS 6 (1) AND 28.
See ENEMY PROPERTY, No. 2.

PARTIES.
See COPYRIGHT, No. 1.

PETITION OF RIGHT.
See CROWN, Nos. 1, 2 & 3.

PETITION OF RIGHT ACT, R.S.C. 1927, C. 158, S. 8.
See CROWN, No. 3.

PLAINTIFF CONTENDING FOR ALLOWANCE OF ONLY ONE SET OF COSTS.
See PRACTICE, No. 1.

PRACTICE.
1. ALLOWANCE OF SEPARATE BILLS OF COSTS TO DEFENDANTS WHERE ONE DEFENDANT ADDED AT TRIAL ON PLAINTIFF'S MOTION, No. 1.
2. COSTS, No. 1.
3. DEPARTMENTAL OR OTHER OFFICER OF THE CROWN, No. 2.
4. DISALLOWANCE OF SEPARATE BILLS OF COSTS TO DEFENDANTS, No. 1.
5. EXAMINATION FOR DISCOVERY, No. 2.
6. GENERAL RULES AND ORDERS 130 AND 138, No. 2.
7. PLAINTIFF CONTENDING FOR ALLOWANCE OF ONLY ONE SET OF COSTS, No. 1.

PRACTICE—*Costs—Disallowance of separate bills of costs to defendants—Plaintiff contending for allowance of only one set of costs—Allowance of separate bills of costs to defendants where one defendant added at trial on plaintiff's motion.*]—*Held:* That defendants having identical interests who severed in their defence are entitled to only one set of costs. 2. That a defendant added at trial on plaintiff's motion is entitled to a separate bill of costs. HIS MAJESTY THE KING *v.* MARION BARROWS FRASER ET AL..... **97**

2.——*Examination for discovery—General Rules and Orders 130 and 138—Departmental or other officer of the Crown.*]—*Held:* That Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts within the knowledge of the Crown and make such admissions on its behalf as may properly be made. 2. That the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130. SAM YARMOLINSKY *v.* HIS MAJESTY THE KING **85**

PURPOSE AND EFFECT OF CONSOLIDATED ORDERS RESPECTING TRADING WITH THE ENEMY, 1916.
See ENEMY PROPERTY, No. 2.

PURPOSE OF ACT MAY DETERMINE NON-TAXABLE CHARACTER OF PAYMENT AUTHORIZED BY IT.
See REVENUE, No. 2.

QUALITY OF INCOME.
See REVENUE, No. 1.

REPRODUCTION OF TEXT IN ENTIRETY.
See COPYRIGHT, No. 1.

RESERVE AGAINST CONTINGENCIES.
See REVENUE, No. 1.

REVENUE.

1. AMOUNTS HELD AS DEPOSITS, No. 1.
2. DOMINION GOVERNMENT SUBSIDY PAID UNDER THE DRY DOCK SUBSIDIES ACT, 1910, 9-10 EDW. VII, C. 17, AS AMENDED, AS AN AID TO THE CONSTRUCTION OF A DRY DOCK, No. 2.
3. INCOME TAX, Nos. 1 & 2.
4. INCOME TAXABLE IN YEAR IN WHICH RECEIVED, No. 1.
5. INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SEC. 3, No. 2.
6. INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SECTS. 3, 6, SS. 1(*d*), 9, No. 1.
7. PURPOSE OF ACT MAY DETERMINE NON-TAXABLE CHARACTER OF PAYMENT AUTHORIZED BY IT, No. 2.
8. QUALITY OF INCOME, No. 1.
9. RESERVE AGAINST CONTINGENCIES, No. 1.

REVENUE—*Income Tax—Income War Tax Act, R.S.C. 1927, Chap. 97, sects. 3, 6 ss. 1 (d), 9—Reserve against contingencies—Income taxable in year in which received—Amounts held as deposits—Quality of income.*]—Appellant was agent for certain underwriting members of Lloyd's of London, England, in the writing of Workmen's Compensation, Employer's Liability and Occupational Disease insurance. It dealt exclusively with insurance brokers in the United States who acted for employers there and placed insurances with the underwriters through the appellant. Under such policies of insurance the underwriters undertook to indemnify the insured employers in respect of losses in excess of a specified percentage. The full amount of the premium payable by the insured employer was based upon the entire remuneration earned by all employees of the employer during the whole period of the contract and could not be ascertained until its expiry. The employer paid an advance fee at the time the contract took effect. This was based upon an estimate made by the employer as to what he thought his payroll for the year would be. The advance fee was to be held as a deposit by the underwriters and to be applied or refunded as specified in the contract when the amount of the earned fee based upon total payroll could be ascertained. The policies also provided for a minimum fee which was the amount to be accepted and retained by the underwriters regardless of the earned fee developed after audit of the payroll. They also provided for refunds in the event of cancellations. The appellant's fee for its services was a per-

REVENUE—*Continued*

centage of the amount which the insured employer had to pay. At the end of each of the years in question in the appeal there were policies in force in respect of which refunds might have to be made either in the event of cancellations or because the estimate on which the advance fee had been based exceeded the total payroll of the employer during the policy year. The appellant set up in its books a "reserve for unearned commissions" which was really provided to enable the appellant to distribute the amounts received by it during the year into the amounts that had been earned in such year and those which had not yet been earned, in the sense that refunds might have to be made either due to cancellations or because of over-estimating of total payroll. The so-called reserve being disallowed, an appeal was taken. The appeal was allowed in part. *Held:* That every reserve set up out of profits or gains of whatever kind, which seeks to provide against the happening of unascertained future events is excluded as a deduction except in so far as the Act permits. *Western Vinegars Limited* v. *Minister of National Revenue* (1938) Ex. C.R. 39, commented upon. *Brown* v. *Helvering*, 291 U.S. 193, approved. 2. That the test of taxability of the income of a taxpayer in any year is not whether he earned or became entitled to such income in that year, but whether he received it in such year and the taxpayer has no right to have income received by him during a taxation year distributed for taxation purposes over the years in respect of which he may have earned or become entitled to such income. *Capital Trust Corporation Limited et al.* v. *Minister of National Revenue* (1936) Ex. C.R. 163; (1937) S.C.R. 192, followed and commented upon. 3. That where an amount is paid as a deposit by way of security for the performance of a contract and held as such, it cannot be regarded as profit or gain to the holder until the circumstances under which it may be retained by him to his own use have arisen and, until such time, it is not taxable income in his hands, for it lacks the essential quality of income, namely, that the recipient should have an absolute right to it and be under no restriction, contractual or otherwise, as to its disposition, use or enjoyment. KENNETH B. S. ROBERTSON LIMITED *v.* MINISTER OF NATIONAL REVENUE **170**

2.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sec. 3—Dominion Government subsidy paid under The Dry Dock Subsidies Act, 1910, 9-10 Edw. VII, c. 17, as amended, as an aid to the construction of a dry dock—Purpose of Act may determine non-taxable character of payment*

REVENUE—*Continued*

authorized by it.]—The Dry Dock Subsidies Act, 1910, 9-10 Edw. VII, c. 17, as amended, now R.S.C. 1927, c. 191, authorized the payment of a subsidy "as an aid to the construction of any dry dock" when the Governor in Council was satisfied that such a dry dock was needed in the public interest. On July 18, 1918, a subsidy agreement was entered into between the appellant and His Majesty the King, under which the appellant agreed to build a dry dock of the first class which had to be large enough to receive and repair therein with ease and safety the largest ships or vessels of the British Navy then existing, and His Majesty agreed on completion of the dry dock to pay the subsidy authorized by the Act. The subsidy was based on the cost of construction of the dry dock which was fixed by the Governor in Council at $5,500,000. The subsidy payable under the Act was described as a sum not exceeding 4½ per cent of the cost of the work as fixed by the Governor in Council half yearly during a period not exceeding thirty-five years. Bonds could not be issued by the appellant without the consent of the Minister of Public Works. The Act, however, authorized payments on account of the subsidy during construction and as such payments were approved bonds were issued with the consent of the Minister and the subsidy payments were assigned to the trustee of the bondholders as security for the bonds issued. The dock was completed by the appellant on June 30, 1924, and the final payments on account of the subsidy were approved. The appellant thereupon became entitled to subsidy payments of $247,500 per year for a period of thirty-five years, payable in semi-annual instalments. The subsidy payments were all assigned to the trustee for the bondholders as security for the bonds issued. The semi-annual instalments of subsidy were each exactly equal to the aggregate of the interest and principal that fell due on the bonds in each half year. Up to 1939 the appellant carried the amount of the two semi-annual instalments of subsidy into its profit and loss account and charged against it the amount applied by the trustee in payment of interest on the bonds, but paid income tax on the amount applied in payment of the instalments of principal. Having been advised by a firm of accountants that it had been in error in this practice, it appealed against the 1939 assessment on the grounds that the subsidy payments were capital payments and did not constitute taxable income, and that, in any event, it had never received them. The decision of the respondent was that the subsidy payments were directly or indirectly received by the appellant and

REVENUE—*Concluded*

subject to tax under the Income War Tax Act. From this decision the appellant appealed. *Held:* That the appellant did not receive the subsidy in the course of its trade or business operations or because of them. It was not a trade or business receipt or revenue or an item of trade or business profit or gain and had nothing to do with the trade or business operations of the appellant. The subsidy was given as an aid to the construction of the dry dock, and not as an aid to its operation. 2. That the appellant did not receive the subsidy as interest or as a return on its capital. It was a construction subsidy payable in respect of a capital expenditure of the appellant. It was a fixed sum payable by instalments, calculated on the cost of the dock as fixed by the Governor in Council, and was paid and received in respect of its construction and as an aid to its construction. *Blake* v. *Imperial Brazilian Railway* (1884) 2 T.C. 58 and *H.R.H. The Nizam State Railway Co.* v. *Wyatt* (1890) 24 Q.B.D. 548, distinguished. 3. That when a payment is made under the authority of an Act of Parliament, the statutory purpose for which such payment is authorized may be considered in determining whether the payment is to be regarded as an item of annual net profit or gain or gratuity and taxable income in the hands of the recipient, within the meaning of section 3 of The Income War Tax Act. Parliament can so fix the character of a payment authorized by it that it cannot properly be regarded as taxable income in the hands of the recipient within the meaning of the Income War Tax Act. 4. That the purpose of The Dry Dock Subsidies Act, 1910, as amended, and the agreements and Orders in Council made under its authority was to secure the construction of a dry dock of the first class on the Atlantic Coast and the subsidy payments were made as an aid to such construction in order to accomplish the purpose of the Act. That purpose was a special one, in the public interest, quite apart from the trade and business operations of the appellant and had nothing whatever to do with its trade or business profits or gains. The subsidy was paid and received for the purpose which the Act was designed to achieve and the statutory purpose stamps the subsidy as an amount that should not be regarded as an item of annual net profit or gain or gratuity to the appellant or taken into computation for income tax purposes. *The Seaham Harbour Dock Co.* v. *Crook* (1931) 16 T.C. 333, followed and applied.

ST. JOHN DRY DOCK & SHIPBUILDING COMPANY LIMITED *v.* MINISTER OF NATIONAL REVENUE..... **186**

RIGHT OF THE CROWN TO AVAIL ITSELF OF PROVINCIAL LAWS RELATING TO PRESCRIPTION AND LIMITATION OF ACTIONS IN FORCE AT THE TIME THE CROWN IS CALLED UPON TO MAKE ITS DEFENCE.

See CROWN, No. 3.

SIMILAR MARKS.

See TRADE MARKS, No. 1.

SIMILAR WARES.

See TRADE MARKS, No. 1.

SITUS OF COMPANY OBLIGATIONS AND DEBTS.

See ENEMY PROPERTY, No. 1.

SITUS OF COMPANY SHARES FOR PURPOSE OF DETERMINING DISPUTE AS TO OWNERSHIP.

See ENEMY PROPERTY, No. 2.

SKIDDING OF VEHICLE ON ICY ROAD RAISES NO PRESUMPTION OF NEGLIGENCE ON THE PART OF THE DRIVER OF THE VEHICLE, IS NOT OF ITSELF EVIDENCE OF NEGLIGENCE ON HIS PART AND IS NOT TO BE CONSIDERED APART FROM THE CIRCUMSTANCES THAT CAUSED IT.

See CROWN, No. 1.

TESTS OF SIMILARITY OF TRADE MARKS.

See TRADE MARKS, No. 1.

THE COMPENSATION (DEFENCE) ACT, 1940, 4 GEO. VI, C. 28.

See APPROPRIATION, No. 1.

THE DOCTRINE OF REINSTATEMENT DISCUSSED.

See APPROPRIATION, No. 1.

THE TREATY OF PEACE (GERMANY) ORDER, 1920, SECTS. 32, 33, 34 & 41.

See ENEMY PROPERTY, No. 1.

THE TREATY OF PEACE (GERMANY) ORDER, 1920, SECTS. 33, 34 AND 41.

See ENEMY PROPERTY, No. 2.

"THE VALUE OF THE VESSEL . . ., NO ACCOUNT BEING TAKEN OF ANY APPRECIATION DUE TO THE WAR".

See APPROPRIATION, No. 1.

TRADE MARKS.

1. EVIDENCE AS TO LIKELIHOOD OF CONFUSION, No. 1.
2. MAINTENANCE OF THE PURITY OF THE REGISTER IN THE PUBLIC INTEREST, No. 1.
3. MARKS NOT TO BE BROKEN UP INTO ELEMENTS BUT TO BE CONSIDERED IN THEIR TOTALITY, No. 1.
4. MARKS NOT TO BE COMPARED SIDE BY SIDE, No. 1.
5. SIMILAR MARKS, No. 1.
6. SIMILAR WARES, No. 1.
7. TESTS OF SIMILARITY OF TRADE MARKS, No. 1.
8. THE UNFAIR COMPETITION ACT, 1932, S. 2, PARS. (*k*) AND (*l*), 26 SS. (1) PAR. (*f*), No. 1.

TRADE MARKS—*The Unfair Competition Act, 1932, Sec. 2, pars. (k) and (l), 26 ss. (1) par. (f)—Similar wares—Similar marks—Evidence as to likelihood of confusion—Maintenance of the purity of the register in the public interest—Tests of similarity of trade marks—Marks not to be compared side by side—Marks not to be broken up into elements but to be considered in their totality.*]—The petitioner registered the word mark "Multivite" in March, 1926, for use in association with a preparation for medicinal use of the vitamins A, D, C and the "B" complex. In May, 1943, the respondent obtained the registration of a word mark "Multivims" for use in association with a multiple vitamin and mineral tablet. The petitioner moved for an order expunging the registration of the respondent's mark on the ground that it was similar within the meaning of The Unfair Competition Act, 1932, to the petitioner's mark already registered. *Held:* That the wares of the parties are similar within the meaning of the Act. 2. That in a dispute as to whether two trade marks are similar within the meaning of The Unfair Competition Act, 1932, while a witness may give evidence as to the effect the use of the mark in dispute would have on his own mind, he may not state his opinion of the effect it would have or be likely to have on the mind of some one else. Such evidence should be rejected as inadmissible, for whether there is a likelihood of confusion in the minds of dealers or users as a result of the use of the mark is a matter upon which the opinion of the Court is required. 3. That in determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them

TRADE MARKS—*Continued*

with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar. *Sandow Ld's Application*, (1914) 31 R.P.C. 196, followed. 4. That when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. *Re Christiansen's Trade Mark*, (1886) 3 R.P.C. 54, followed. 5 That the respondent's trade mark "Multivims" is similar within the meaning of The Unfair Competition Act, 1932, to the registered trade mark "Multivite" and its registration must be expunged. THE BRITISH DRUG HOUSES, LIMITED *v.* BATTLE PHARMACEUTICALS..... **240**

TRADE MARKS—*Concluded*

TREATY OF PEACE.

See ENEMY PROPERTY, No. 2.

TREATY OF VERSAILLES, PART X, SECTION IV ANNEX PARA. 10.

See ENEMY PROPERTY, No. 1.

UNFAIR COMPETITION ACT, 1932, SEC. 2, PARS. (K) AND (L), 26 SS. (1) PAR. (F).

See TRADE MARKS, No. 1.

WAR MEASURES ACT, R.S.C. 1927, C. 206.

See APPROPRIATION, No. 1.

WORDS AND PHRASES.

"Compensation" and "value" distinguished. See NORTHUMBERLAND FERRIES LIMITED *v.* HIS MAJESTY THE KING.. **123**

"Fair dealing." See MIGUEL ZAMACOIS *v.* RAYMOND DOUVILLE **208**

"The value of the vessel . . ., no account being taken of any appreciation due to the war". See NORTHUMBERLAND FERRIES LIMITED *v.* HIS MAJESTY THE KING.. **123**