

1947

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CANADA  
LAW REPORTS

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Exchequer Court of Canada

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RALPH M. SPANKIE, K.C.  
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1948



**JUDGES**  
OF THE  
**EXCHEQUER COURT OF CANADA**

*During the period of these Reports:*

PRESIDENT:

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

PUISNE JUDGES:

THE HONOURABLE EUGENE REAL ANGERS  
*(Appointed, February 1, 1932)*

THE HONOURABLE C. G. O'CONNOR  
*(Appointed, April 19, 1945)*

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

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DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT  
OF CANADA

DONALD MCKINNON, Esquire, K.C., Prince Edward Island Admiralty District—  
appointed, July 20, 1935.

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

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

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

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

W. ARTHUR I. ANGLIN, Esquire, K.C., New Brunswick Admiralty District—appointed,  
June 9, 1945.

DEPUTY DISTRICT JUDGES:

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

His Honour JOHN A. BARRY—New Brunswick Admiralty District.

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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Honourable JAMES L. ILSLEY, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Honourable JOSEPH JEAN, K.C.



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2. *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. Appeal to the Privy Council allowed.
3. *Fraser & Co. Ltd., D. R. v. Minister of National Revenue* (1946) Ex. C.R. 211. Appeal to the Supreme Court of Canada dismissed (1947) S.C.R. 157. Leave to appeal to the Privy Council granted. Appeal pending.

B. To the Supreme Court of Canada:

1. *Argue, George W. v. Minister of National Revenue* (1947) Ex. C.R. 192. Appeal pending.
2. *Bennett & White Construction Co. Ltd. v. Minister of National Revenue* (1947) Ex. C.R. 474. Appeal pending.
3. *Carroll, Dame Juliette et al v. The King* (1947) Ex. C.R. 410. Appeal pending.
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10. *Johnston, Roderick W. S. v. Minister of National Revenue* (1947) Ex. C.R. 483. Appeal pending.
11. *King, The v. Gas & Oil Products Ltd.* (1947) Ex. C.R. 452. Appeal pending.
12. *King, The v. Richardson, Alfred H. et al* (1947) Ex. C.R. 55. Appeal allowed.

13. *Manischewitz Co., B. v. Gula, Harry et al* (1946) Ex. C.R. 570. Appeal dismissed.
14. *Minerals Separation North American Corporation v. Noranda Mines Ltd.* (1947) Ex. C.R. 306. Appeal pending.
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18. *Western Dominion Coal Mines Ltd. v. The King* (1946) Ex. C.R. 387. Appeal dismissed.
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**CASES**  
 DETERMINED BY THE  
**EXCHEQUER COURT OF CANADA**  
 AT FIRST INSTANCE  
 AND  
 IN THE EXERCISE OF ITS APPELLATE  
 JURISDICTION

1943  
 }  
 Sept. 27, 28  
 Oct. 4, 5.  
 —  
 1946  
 }  
 Dec. 17  
 —

**BETWEEN:**

**J. H. MUNRO LIMITED,..... PLAINTIFF,**

**AND**

**NEAMAN FUR COMPANY LIMITED, . . . DEFENDANT.**

*Trade Marks—“Gold Medal Furs”—Trade Mark and Design Act, R.S.C. 1927, c. 201, ss. 5, 11 (e), 13, 20, Rule X—The Unfair Competition Act, 1932, ss. 4 (4), 19, 23 (1), 26 (1) (c), 29.—Invalid registration a defence in an infringement action—Misrepresentation in application for registration—Non-use of trade mark before registration—Essentials necessary to constitute trade mark—Distinctiveness an essential requirement—Laudatory or commendatory epithets not distinctive—Acquisition of secondary and distinguishing meaning subsequent to registration.*

The plaintiff, a dealer in manufactured furs particularly real Alaska seal fur coats, had the words “Gold Medal Furs” registered as a specific trade mark. In an action for infringement against the defendant who made and sold electric seal fur coats carrying a label containing the words “Gold Medal Seal” the defendant attacked the validity of the registration of the plaintiff’s alleged trade mark.

*Held:* That the plaintiff’s alleged trade mark “Gold Medal Furs” lacked the necessary quality of distinctiveness and did not, therefore, contain the essentials necessary to constitute a trade mark, properly speaking within the meaning of section 11 of the Trade Mark and Design Act and was not validly registered.

2. That if the words “Gold Medal Furs” were not *per se* apt and appropriate for trade mark use at the time of their registration because of their lack of distinctiveness and, therefore, not properly registrable, then any subsequent acquisition of a secondary and distinguishing meaning denoting only the plaintiff’s furs could not for the purpose of supporting an action for infringement give validity to a registration that was invalid when it was made.

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ACTION for infringement of a specific trade mark.

J. H. MUNRO  
LIMITED  
v.  
NEAMAN  
FUR  
COMPANY  
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The action was tried before The Honourable Mr. Justice Thorson, President of the Court, at Vancouver and Winnipeg.

*A. E. Bull K.C., E. A. Burnett and H. G. Harvey Smith* for plaintiff.

*H. A. Bergman K.C. and A. E. Cantor* for defendant.

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

THE PRESIDENT now (Dec. 17, 1946) delivered the following judgment:

The plaintiff seeks an injunction and damages for alleged infringement by the defendant of the alleged trade mark "Gold Medal Furs", registered in the plaintiff's name on May 28, 1932, in The Trade Mark Register No. 252, Folio 54386, under the Trade Mark and Design Act, as a specific trade mark to be used in connection with the sale of furs.

Prior to the incorporation of the plaintiff, J. H. Munro, now its president, had been in the fur business since 1913, first at Revelstoke in British Columbia, then at Westminster and later at Vancouver. He was in the raw fur business until 1923 when he started to deal in manufactured furs. In 1925 he exhibited some furs at the British Empire Exhibition at Wembley, England, and there received a certificate and bronze medal in recognition of his participation. Before he left Wembley he sent an exhibit of furs to the New Zealand and South Seas Exhibition, 1925-6, at Dunedin, New Zealand. There he received a diploma of merit, first class, for general excellence of display, a diploma of first order of merit and gold medal for manufactured fur goods, a diploma of second order of merit and silver medal for dressed fur skins and a diploma of second order of merit and silver medal for fur novelty goods.

At the trial J. H. Munro said that after 1926 he commenced using the words "Gold Medal" in connection with his furs on circular letters, letter heads and newspaper

advertising. About August, 1929, after he had moved to Westminster, he began the use of a label on his fur coats, a sample of which was filed as exhibit 10. This was sewed on the inside of the coats but was not used on any other furs. Its outstanding feature consists of the words "The Munro Fur Store" in red on a blue strip diagonally across it. Above this strip on the left there is a design, said to be a reproduction of the front of the gold medal won at Dunedin, and under it in small print the words "J. H. Munro, Prop." In the upper right corner the words "Canada's Gold Medal Furrier" appear and in the lower right corner the address "Vancouver, B. C." is printed.

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On April 17, 1931, the plaintiff was incorporated under the Companies' Act of British Columbia and took over the business formerly carried on by J. H. Munro, he becoming its president and his wife its secretary treasurer. On April 21, 1932, the plaintiff requested the Commissioner of Patents to register in its name a specific trade mark consisting of the words "Gold Medal Furs" to be used in connection with the sale of furs and the registration was made on May 28, 1932.

The plaintiff continued to use exactly the same label as J. H. Munro had done except for the change of address to "Vancouver, B.C.", after it had moved from New Westminster. It used the words "Gold Medal Furs" in some of its advertising and circulars and in a pamphlet which it distributed, but its greatest use of them was in its slogan "Gold Medal Furs are Better Furs" which it used on its letter heads and in its pamphlet and stressed particularly in its radio broadcasting. But on its letter heads, advertisements, circulars, pamphlet and sales slips, the plaintiff's name or the words "Munro Fur Store" were usually followed by the words "Canada's Gold Medal Furriers". There were also references to "Gold Medal Brand Fur" and to "Gold Medal Quality". Until 1936 or 1937 when it was stolen the gold medal won by the plaintiff was displayed in its store window. The words "Gold Medal Furs" by themselves were never used on any furs by label or otherwise either before or after the registration either by the plaintiff or by J. H. Munro.

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The plaintiff specialized in fur coats of real seal, known as Alaska seal, which sold at from \$200 to \$400 each, or an average of \$280, and developed a considerable business in them.

The facts with regard to the alleged infringement by the defendant are as follows. It is a manufacturing furrier in Winnipeg. Between July, 1938, and December, 1941, it manufactured for and sold to The T. Eaton Company Limited, who were large merchandisers of fur coats, 1463 fur coats on which was sewn a label, a sample of which was filed as Exhibit 3. This carries the words "Gold Medal Seal" in gold letters on a black background; under them in small but legible print the words (Dyed Rabbit) in red appear and above them there are representations of what might be taken for a row of gold medals. The coats were of dyed rabbit fur, known as electric seal. They were sold to The T. Eaton Company Limited at \$60 each and by it to the public at \$98.50 each.

The plaintiff claimed that there had been an infringement of his trade mark by the sale of these coats under the label "Gold Medal Seal" and that his sale of Alaska seal coats had been adversely affected thereby. He brought action against The T. Eaton Company Limited in the Supreme Court of British Columbia and was awarded damages against them. He then brought the present action. The first action contained a claim for passing off but this one contains no such claim.

Many interesting questions were raised by counsel in the course of their careful arguments, but a number of them need not be dealt with in view of the conclusion that the plaintiff's alleged trade mark should not have been registered.

The words "Gold Medal Furs" were registered on May 28, 1932, as a specific trade mark, under the Trade Mark and Design Act, R.S.C. 1927, chap. 201. On September 1, 1932, The Unfair Competition Act, 1932, Statutes of Canada 1932, chap. 38, came into force, by section 23 (1) of which it was provided:

23. (1) The register now existing under the *Trade Mark and Design Act* shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be

governed by the provisions of this Act, but shall not, if properly made under the law in force at the time they were made, be subject to be expunged or amended only because they might not properly have been made hereunder.

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It is a condition precedent to the bringing of proceedings for infringement of a trade mark that it should be registered. Section 4 (4) of The Unfair Competition Act, 1932, provides:

4. (4) No person shall institute any proceedings in any court to prevent the infringement of any trade mark unless such trade mark is recorded in the register maintained pursuant to this Act.

and section 20 of The Trade Mark and Design Act made a similar provision. But it is open to the defendant in such proceedings to attack the validity of the registration and if he does so successfully the infringement action must be dismissed. This result appears clear from section 19 of the new Act and, while there was no corresponding express provision in the old Act, the law was the same. It was held in *Partlo v. Todd* (1) that a defendant in an action for infringement of a trade mark could question the validity of the registration of the mark. There the plaintiff had sued for infringement of his registered trade mark "Gold Leaf" as applied to flour, but it was held in effect that the term was common to the trade and, therefore, not registrable as a trade mark. Consequently, notwithstanding its registration, the plaintiff had no right to its exclusive use. The authority of this decision is not affected by any changes in the law since the Trade Mark and Design Act, 1879: *Provident Chemical Works v. Canada Chemical Co.* (2). The defendant may, therefore, notwithstanding the registration of the words "Gold Medal Furs" as a specific trade mark, go behind such registration and question its validity. This must be determined by the law in force at the time it was made.

Counsel for the defendant made two attacks on the registration; one, that there was a misrepresentation in the application for it, and the other, that the words "Gold Medal" could not properly be the subject of a trade mark registration.

(1) (1888) 17 S.C.R. 196.

(2) (1902) 4 O.L.R. 545.

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The application for the registration contains the following:

J. H. Munro Limited . . . hereby requests you to register in the name of the Company a specific trade mark to be used in connection with the sale of furs which the Company verily believes is the Company's on account of having been the first to make use of the same.

The said Company hereby declares that the said Specific trade mark was not in use to its knowledge by any other person than the company at the time of the Company's adoption thereof. The said specific trade mark consists of the name or words "Gold Medal Furs".

It is said that if the mark was ever used its first use was by J. H. Munro and not by the plaintiff and that the statement "which the Company verily believes is the Company's on account of having been the first to make use of the same" was, therefore, untrue. That, technically, cannot be denied. But it is said in answer that this does not matter since such a statement was not required by section 13 of the Trade Mark and Design Act which sets out how a registration may be effected. The reply to that is that the statement was in accordance with the form of application prescribed under the authority of the Act. It is, of course, true that if a person seeks to take advantage of a statutory right, he must comply with the requirements of the statute but, while the untrue statement is not lightly to be dismissed, I doubt whether by itself it would be a sufficient ground for declaring the registration invalid. Then it is said that the plaintiff never used the words "Gold Medal Furs" as a trade mark at all. Section 5 of the Trade Mark and Design Act setting out what shall be deemed to be trade marks provides as follows:

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

A trade mark is used to distinguish the goods of the proprietor of the mark from those of other persons and it is clearly indicated by section 5 that the manner of its use must be by application of it either to the goods themselves or to their container. If the use of the words "Canada's Gold Medal Furrier" on the plaintiff's label can be said



to be a use of the specific trade mark "Gold Medal Furs" then, of course, there was a use of it within the meaning of section 5, but I am unable to think that these words were used as a trade mark: they were, in my opinion, merely descriptive either of J. H. Munro, or of the plaintiff, or of The Munro Fur Store, and were not used for the purpose of distinguishing the plaintiff's goods. The use of the words "Gold Medal Furs" in the plaintiff's advertising, circulars, pamphlets and radio broadcasting was clearly not a use within the meaning of the section. Of that there can, I think, be no doubt. I am, therefore, of the opinion that the defendant's attacks on the plaintiff's application were well founded. Not only was the plaintiff not the first person to use the alleged specific trade mark, but also the words had not been used by the plaintiff as a trade mark at all. If use of a trade mark was a prerequisite to its valid registration under the Trade Mark and Design Act, as, in my opinion, the weight of authority indicates, although there is some conflict of opinion on the subject, the plaintiff's registration of the words "Gold Medal Furs" as a trade mark was invalid on the ground that they had never been used as such.

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While the registration was invalid on this ground, the other reason for attacking it, namely, that the words "Gold Medal Furs" were not properly the subject of a trade mark registration is a stronger one. Section 11 (e) of the Trade Mark and Design Act provides:

11. The Minister may refuse to register any trade mark . . .

(e) if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking.

While section 11 permits the Minister to refuse to register a trade mark in certain specified cases, I think it is clear that in such cases he ought to refuse the registration, and that if it is made it is invalid. It may, therefore, be implied from section 11 (e) that it is necessary to the validity of the registration of a trade mark that it should contain "the essentials necessary to constitute a trade mark, properly speaking". What are these essentials? In *Fisher v. British Columbia Packers Limited* (1) it was held that distinctiveness is an essential requirement of a trade mark. Resort was there had to the definitions of a trade mark and a word

(1) (1945) Ex. C.R. 128 at 132.

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mark in The Unfair Competition Act, 1932, to support this view. Then, in *Food Machinery Corporation v. Registrar of Trade Marks* (1) the requirements for registrability of a trade mark were discussed and it was stated that, while distinctiveness is an essential requirement it is not the only one for it is also necessary that there should be no prohibition against the registration such as those expressed or implied in section 26 (1). Under the Trade Mark and Design Act there is no provision corresponding to section 26 of The Unfair Competition Act, 1932, and the Act does not define or explain the essentials necessary to constitute a trade mark, but there can be no doubt that distinctiveness is one of them. While this is not stated in the definition of what shall be considered and known as trade marks contained in section 5 of the Act, already cited, it is clearly implied. The marks, etc., there referred to, are those that are adopted for use to distinguish the proprietor's goods. Trade marks are used in association with goods for the purpose of distinguishing them as the goods of the proprietor of the mark from those of other persons. If such purpose is to be accomplished the trade mark must have the quality of distinctiveness. Indeed, it was settled by the Judicial Committee of the Privy Council in *Standard Ideal Company v. Standard Sanitary Manufacturing Company* (2) that "distinctiveness is the very essence of a trade mark."

If, therefore, the words "Gold Medal Furs" did not possess the requisite distinctiveness at the time of their registration on May 28, 1932, they should not have been registered and the registration was invalid. It is not a question whether the words "Gold Medal" are clearly descriptive of character or quality within the prohibition of section 26 (1) (c) of The Unfair Competition Act, 1932, for it does not here apply, but whether at the time of the registration of the words "Gold Medal Furs" they had the distinctiveness that is one of "the essentials necessary to constitute a trade mark". I have come to the conclusion that they did not. The cases indicate, I think, that words of this sort are not apt or appropriate for trade mark use. In *Standard Ideal Company v. Standard Sanitary Manufacturing Company* (*supra*) Lord MacNaghten, delivering

(1) (1946) Ex. C.R. 266 at 270.

(2) (1911) A.C. 78 at 85.

the judgment of the Judicial Committee, said, at page 84, of the word "standard" which had been registered as a trade mark under the Trade Mark and Design Act, 1879:

Now the word "standard" is a common English word. It seems to be used not unfrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning. But obviously it is intended to convey the notion that the goods in connection with which it is used are of high class or superior quality or acknowledged merit. Without attempting to define "the essentials necessary to constitute a trade mark properly speaking" it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade mark. The plaintiff company was therefore not entitled to register the word "standard" as a trade mark. The result is, in accordance with the decision of the Supreme Court in *Partlo v. Todd* (17 Can. S.C.R. 196), that the word though registered is not a valid trade mark. The action so far as it is based on alleged infringement of trade mark must fail.

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In *Joseph Crosfields' & Sons Ltd's Application* (1), known as the *Perfection Case*, the Court held that even under the wide discretion given to the Board of Trade and the Court under section 9 (5) of the Trade Marks Act, 1905, the word "Perfection" ought not to be registered as a trade mark. It was not a distinctive mark and even with its long user by the applicants it was not adapted to distinguish their goods from those of other persons. In that case Lord Moulton dealt with the subject of distinctive and descriptive terms. It was a fallacy to assume that there is a natural and innate antagonism between distinctive and descriptive as applied to words and that if a word is descriptive it cannot be distinctive. There are many words which are originally descriptive and not distinctive that may by long user become distinctive, for distinctiveness is a quality that may be acquired. But it was also held that there are some descriptive words, such as ordinary laudatory epithets, that can never acquire distinctiveness, no matter what length of user may be proved, and the word "Perfection" was considered to be a word of such a nature. In *Henry Thorne and Co. Limited v. Sandow Limited* (2) it was held that the plaintiff's trade mark "Health" as applied to cocoa, notwithstanding its registration, was intended to convey the idea that the cocoa was health giving or that

(1) (1909) 26 R.P.C. 837.

(2) (1912) 106 L.T.R. 926.

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the taking of it would promote health, that it was, therefore, merely a laudatory or commendatory epithet and not distinctive, and that it should be removed from the register. Then in one of the latest cases on the subject, *Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada Ltd. et al* (1), Lord Russell of Killowen, in delivering the judgment of the Judicial Committee of the Privy Council, after saying that the required meaning of distinctiveness of a trade mark "must carry with it the feature that the goods distinguished are the goods manufactured by a particular person, and by no other", laid down the following test of distinctiveness:

A word, or words, to be really distinctive of a person's goods, must, generally speaking, be incapable of application to the goods of any one else.

It is this singleness of applicability only to the goods of the proprietor of the trade mark that is required if it is to have the essential quality of distinctiveness that is so necessary if the purpose of using a trade mark is to be accomplished. In my view, the words "Gold Medal" *per se*, as applied to goods such as furs, do not meet such a stiff requirement.

There are two Canadian cases, other than those brought by the plaintiff, in which the words "Gold Medal" are referred to. In *Dominion Flour Mills Co. v. Morris* (2) the trial judge dismissed the plaintiffs' action seeking to restrain the defendants from passing off their flour as the plaintiffs' by the sale of it in bags impressed with the unregistered trade mark "Gold Medal" which had been used by the plaintiffs for many years and the Divisional Court of Ontario affirmed his judgment. The evidence showed that "Gold Medal" as applied to flour was a synonym for excellence and came to mean an excellent blended flour from a mixture of Ontario and Manitoba wheat and that the words were in common use for flour throughout Ontario. It was held that the onus was on the plaintiffs to show that the defendants had been attempting to sell their flour as the plaintiffs' and that the term "Gold Medal" had acquired, through its use by the plaintiffs, a secondary meaning denoting their flour only, and that they had not satisfied such onus. While the decision was made with regard to the use of the words "Gold Medal"

(1) (1938) 1 All E.R. 619 at 631.

(2) (1912) 25 O.L.R. 561.

as applied to flour and the fact that such use was common in the province, I think it may fairly be inferred that, in the opinion of the Court, the words "Gold Medal" *per se*, without proof of a secondary meaning, were not distinctive. At page 562, Boyd C. said:

The words "Gold Medal" are ordinary words capable of a well understood meaning, and are applicable to articles which have gained a prize at some exhibition or competition.

The other case is *Gold Medal Furniture Mfg. Co., Ltd. v. Gold Medal Camp Furniture Mfg. Co.* (1). There the petitioner sought to expunge the objecting party's specific trade mark "Gold Medal", to be used in connection with the sale of certain specified goods, which had been registered on its application in which its president had stated that it belonged to the applicant "on account of its having been the first to make use of the same". It was held that this statement was untrue, that the petitioner was the first to use the words in Canada upon goods of the same class as those for which registration had been granted to the objecting party, and that the entry of the objecting party's mark should be expunged. The judgment of this Court was affirmed by the Supreme Court of Canada. The reservations made are, I think, significant. In this Court Audette J. said, at page 66:

The question as to whether or not a trade mark consisting of the words "Gold Medal" is good or bad in view of its suggestive character, is one I need not decide as it has not been raised by either party.

It would not be unfair to deduce that there was at least some doubt in his mind as to the aptness of the words for trade mark use. And in the Supreme Court of Canada in written reasons for judgment of Lamont J., in which Anglin C. J. C., and Mignault, Rinfret and Smith JJ. all concurred, the following statement is made:

In affirming the judgment of the Exchequer Court expunging the appellant's entry from the register we do not wish to be understood as impliedly holding that the words "Gold Medal" contain the essentials necessary to constitute a valid trade mark. Both parties carefully abstained from raising that question either in the court below or before us, and the trial judge expressly stated that he was not passing upon it.

If there had been no doubt in the mind of the Court that the words "Gold Medal" were distinctive there would have been no need for such a reservation.

(1) (1928) Ex CR 65;  
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In the present case, the question is squarely raised. In my judgment, the words "Gold Medal Furs" are common English words, connoting the winning of a gold medal or suggesting furs of such high quality as to merit the award of such a medal. The words "Gold Medal" as applied to furs are synonymous of first class quality and clearly suggestive of such a high degree of excellence as to be of gold medal winning quality or of the highest order of merit. In that sense they are in the nature of laudatory or commendatory epithets. The words draw attention to the superior quality of the furs, and do not serve the purpose of distinguishing them as those of the plaintiff and of no one else. They do not meet the requirement of distinctiveness referred to in the cases and are not apt or appropriate for trade mark use. Under the circumstances I have come to the conclusion that the plaintiff's alleged trade mark "Gold Medal Furs" lacked the necessary quality of distinctiveness and did not, therefore, contain the essentials necessary to constitute a trade mark, properly speaking, within the meaning of section 11 of the Trade Mark and Design Act and was not validly registered. I am strengthened in this conclusion by the decision of the New York Court of Appeals in *Taylor v. Gillies et al* (1). There the plaintiff's action seeking to restrain the defendants from using the words "gold medal" as applicable to their manufacture of saleratus on the ground that the plaintiff had an exclusive right to such use as a trade mark was dismissed. It was held that an exclusive right cannot be acquired to the use of the words "gold medal" as a trade mark upon the wrappers of a manufactured article. At page 333, the Court said:

Gold medal is equivalent to prize medal of the highest class. Such is its constant sense as applied to merchandise. It is an affirmation in respect to fact and to quality, comprehending, first, the idea of its having been awarded for excellence in some public competition; and, second, the idea of the affirmation of the possession of the actual excellence thus attested. Taking this to be the just sense of the words, they are not capable of being a trade mark. They do not indicate origin or ownership. Indeed, they cannot do so as long as other gold medals can be awarded in other competitions; for, in respect to any such article, the right of such person to whom a gold medal had been or should be awarded would be equal to announce the fact that his product had been so distinguished.

In the present case, there is evidence that J. H. Munro was not the only person in Canada to win a gold medal for his furs but that there were several others who had done so, and the words "Gold Medal" would be as applicable to their furs as to those of the plaintiff. They would thus not comply with the test of distinctiveness laid down in the *Shredded Wheat* case (*supra*). Neither J. H. Munro nor the plaintiff, in the absence of proof that the words "Gold Medal" had acquired a secondary and distinctive meaning denoting only his or its furs, had any right to appropriate for exclusive use common English words which any winner of a gold medal for his products would be entitled to use.

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In the conclusion I have reached I have been unable to agree with the decision of the Supreme Court of British Columbia in the action which the plaintiff brought successfully against The T. Eaton Company Limited, *J. H. Munro Limited v. The T. Eaton Company Limited et al* (1). I think it may be inferred from the reasons of Farris C. J. S. C. that he had himself a doubt as to the registrability of the words "Gold Medal" *per se*; after referring to *Dominion Flour Mills Co. v. Morris* (*supra*) and *Gold Medal Camp Furniture Mfg. Co., Ltd. v. Gold Medal Furniture Mfg. Co.* (*supra*) and stating that in both cases the Courts had found it unnecessary to determine whether such words are descriptive or not, he stated, at page 201:

Neither is it necessary to do so in this case. I find that there is nothing in the evidence to indicate that prior to use by the plaintiff and its predecessor in business, Munro, the words "Gold Medal" were used in connection with furs and that in British Columbia, at least, the extensive usage by the plaintiff and predecessor in business, Munro, of the words "Gold Medal" was such that if the words are descriptive they acquired a secondary meaning so as to distinguish the goods of the plaintiff, and I find, therefore, that the use of the words "Gold Medal", whether descriptive or not, is not bad in the trade mark registered by the plaintiff, and that the trade mark was properly registered.

On the case before me I am unable to reach a similar conclusion either on the facts or in law. While I do not go so far as to say that the words "Gold Medal" cannot ever by user of them in association with goods acquire a secondary meaning so as to distinguish such goods as those of the user from the goods of other persons and thus acquire the quality of distinctiveness necessary for their use as a trade

(1) (1943) 2 W.W.R. 195.

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mark, which the words *per se* do not possess, I think it is clear that the establishment of such secondary and distinguishing meaning imposes a very heavy onus on the user and requires very convincing evidence. The extreme difficulty of proving that common or descriptive words have acquired such a meaning was strongly emphasized by the House of Lords in *Cellular Clothing Company v. Maxton & Murray* (1). In the *Perfection Case* (*supra*) it was settled that ordinary laudatory epithets can never acquire such meaning, no matter what the extent of their user may have been, but it was also recognized that in the case of other descriptive words there might be varying degrees of difficulty in the proof of acquired distinctiveness. At page 858, Fletcher Moulton L. J. said:

The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself are not very strong it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself was open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a Court to permit the registration of ordinary laudatory epithets, such as "best", "perfect", etc. On the other hand, in the case of a peculiar collocation of words it might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use.

And while it was indicated in *Dominion Flour Mills Co. v. Morris* (*supra*) that the words "Gold Medal" as applied to goods could acquire a secondary and distinguishing meaning, it was made clear that convincing evidence of the acquisition of such meaning was required. At page 563, Boyd C. said:

It lies upon the plaintiffs to prove that these merely descriptive words (implying success at some exhibition) have acquired a technical and superinduced meaning distinct from the natural one and applicable only to this particular flour. That is the proposition to be established, and it must be so by convincing evidence.

Under the circumstances, it is clear that in the present case the onus on the plaintiff of establishing a secondary and distinguishing meaning for the words "Gold Medal Furs" so as to denote only its furs is a very heavy one. The evidence before me, whatever it may have been in the case against The T. Eaton Company Limited, falls very

(1) (1899) A.C. 326.



far short of establishing any such meaning and, if the case depended thereon, I would have no hesitation in finding that the plaintiff had failed to satisfy the onus resting upon it.

Moreover, if the words "Gold Medal Furs" were not *per se* apt and appropriate for trade mark use at the time of their registration because of their lack of distinctiveness and, therefore, not properly registrable, then any subsequent acquisition of a secondary and distinguishing meaning denoting only the plaintiff's furs could not for the purpose of supporting an action for infringement give validity to a registration that was invalid when it was made. In so far as the conclusion reached by Farris C. J. in the British Columbia case depends upon a different view I am respectfully unable to agree with him. If the plaintiff must rely upon a secondary and distinguishing meaning of the words "Gold Medal Furs" as denoting only its furs in order to support the registration of its alleged trade mark, it must show not only that the words had acquired such meaning at the time of the registration, but also that the application for it had been made under the provisions applicable thereto. This the plaintiff cannot do. Rule X under the authority of the Trade Mark and Design Act provides as follows:

X. A Trade Mark consisting either of a surname, a geographical name or adjective, or a word having a direct reference to the character or quality of the goods in connection with which it is used, may be registered as a Specific Trade Mark upon the filing of the prescribed application and payment of the prescribed fee, and upon furnishing the Commissioner with satisfactory evidence, either by statutory declaration or by affidavit, that the mark in question has, through long continued and extensive use thereof in Canada acquired a secondary meaning, and become adapted to distinguish the goods of the applicant.

No application was made under this rule. Indeed, at the time of the registration, the plaintiff could not have complied with its requirements, for there is no proof at all that at such time the words had acquired any secondary or distinguishing meaning, and I do not see how they could have done so. Nor was any application made under section 29 of The Unfair Competition Act, 1932, which makes provision for the registration of a trade mark, even although it is not registrable under any other provision of the Act, on proof to the satisfaction of the Court that it has been used in association with goods so as to distinguish such goods as those of the user of the mark and there are numerous

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cases where word marks which would be refused registration under section 26 (1) (c) as containing descriptive words have been registered pursuant to a declaration of the Court that it is satisfied that proof has been made of the acquisition by user of the necessary secondary and distinguishing meaning. If the plaintiff had made an application under section 29 on the same evidence as that given in the present case the Court would not have been justified, in my opinion, in making the declaration contemplated by the section.

Under the circumstances, I must hold that the registration of the plaintiff's alleged trade mark "Gold Medal Furs" was invalid and cannot support the plaintiff's action with the result that it must be dismissed with costs.

*Judgment accordingly.*

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 Dec. 17

BETWEEN:

SA MAJESTE LE ROI,.....DEMANDEUR,

ET

ARTHUR SAUVAGEAU, JOSEPH SAUVAGEAU, CLEOMEN SAUVAGEAU, THE PRICE NAVIGATION COMPANY LTD., et Dame Veuve MARIE POLIQUIN MALONE, faisant affaires seule sous le nom et la raison sociale de J. C. MALONE AND COMPANY,.....

DÉFENDEURS.

*Practice—Motion to have a third party notice by a defendant to a co-defendant set aside—Lack of jurisdiction of Court in matters arising between subject and subject in which the Crown is not directly interested—Exchequer Court Act, R.S.C. 1927 c. 34, s. 30—Exchequer Court Rule 240.*

Motion under rule 240 of the General Rules and Orders of the Exchequer Court to have set aside a third party notice served on defendant The Price Navigation Company Limited by the defendants Sauvageau for indemnity.

*Held:* That rule 240 of the General Rules and Orders of the Exchequer Court has no application in actions between subject and subject in which the Crown has no interest.

2. That the jurisdiction of the Court is fixed by the Exchequer Court Act R.S.C. 1927, c. 34, s. 30 and cannot be enlarged by Rule 240 of the General Rules and Orders of the Court.
3. That s. 30 of the act limits the jurisdiction of the Court to matters affecting the Crown in the right of the Dominion and to cases relating to the revenue.

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MOTION to set aside third party notice.

The motion was heard before the Honourable Mr. Justice Angers in Chambers, at Ottawa.

*Paul Fontaine, K.C.* for plaintiff.

*C. Russell McKenzie, K.C.* for Price Navigation Co. Ltd.

*J. C. A. Seguin, K.C.* for Arthur Sauvageau, Joseph Sauvageau and Cleomen Sauvageau.

*J. C. Osborne* for Dame Marie Poliquin Malone.

ANGERS J. now (December 17, 1946) delivered the following judgment:

Il s'agit de deux motions: (a) l'une de la part des défendeurs Arthur Sauvageau, Joseph Sauvageau et Cleomen Sauvageau demandant que l'audition de l'action en contribution ou indemnité des dits défendeurs contre la défenderesse The Price Navigation Company Limited en vertu de l'avis à la tierce partie ait lieu en même temps que l'audition sur l'action principale le mardi, 21 janvier 1947; (b) l'autre de la part de la défenderesse The Price Navigation Company Limited demandant que l'avis à la tierce partie produit le 27 février 1943, de la part des défendeurs Arthur Sauvageau, Joseph Sauvageau et Cleomen Sauvageau soit rejeté du dossier comme irrégulier.

L'action est par voie d'information du Procureur-Général du Canada pour et au nom de Sa Majesté et demande qu'il soit déclaré que les défendeurs doivent conjointement et solidairement au demandeur la somme de \$18,168.32, avec intérêt à compter du 14 octobre 1941 et les dépens, la dite somme de \$18,168.32 étant le coût de l'enlèvement de l'épave de la barge "Belœil", qui avait sombré le 25 septembre 1941 dans le fleuve Saint-Laurent, dans le voisinage de la bouée 76, près du Cap Charles, sur le côté nord du chenal, tel que ci-après relaté plus en détail.

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Le Procureur-Général du Canada, pour et au nom de Sa Majesté le Roi, dans son information, allègue en substance ce qui suit:

le 25 septembre 1941 les défendeurs Arthur, Joseph et Cleomen Sauvageau étaient les propriétaires enregistrés des 64 parts de la barge "Belceil", la dite barge enregistrée à Montréal sous le numéro 103,342, d'une longueur de 156.8 pieds, d'une largeur de 25.3 pieds, d'un tonnage brut de 489.94 tonneaux et d'un tonnage enregistré de 261.59 tonneaux;

à la date susdite la dite barge "Belceil" sombra dans le fleuve Saint-Laurent, dans le voisinage de la bouée 76, près du Cap Charles, sur le côté nord du chenal, endroit où le courant est fort et d'une grande vélocité;

au moment où la barge "Belceil" sombra elle était à la remorque du "Chicoutimi", propriété de The Price Navigation Company Limited;

durant le remorquage de la barge "Belceil" par le "Chicoutimi", la navigation d'icelle était sous le contrôle exclusif du dit remorqueur "Chicoutimi";

au moment de son naufrage la dite barge était affrétée par la défenderesse J. C. Malone and Company et elle transportait des marchandises pour le compte de cette dernière;

le chenal où sombra la barge "Belceil" est navigable et fréquenté par des unités navales et marchandes de tout tonnage;

la barge "Belceil" devint un obstacle et un danger constant à la navigation dans les parages où elle avait sombré;

après son naufrage les navigateurs naviguant dans ces parages se plaignirent à l'agent des Transports à Montréal des dangers auxquels les exposait l'épave de la barge "Belceil";

à la suite de ces plaintes, le 9 octobre 1941, les défendeurs furent mis en demeure par télégramme du ministère des Transports d'enlever l'épave de la dite barge;

nonobstant ces mises en demeure les défendeurs négligèrent de se conformer à la demande du ministère et d'enlever la dite épave;

à défaut par les défendeurs d'enlever l'épave de la barge "Belœil", le Ministre des Transports dut, dans l'intérêt de la navigation, faire enlever dans le cours de juin 1942 la dite épave et la faire transporter dans un endroit où elle ne pourra plus constituer un danger pour la navigation;

avant et au moment de l'enlèvement de l'épave, rien de celle-ci aurait été susceptible d'être vendu;

les opérations d'enlèvement de la dite épave durèrent du 6 au 22 juin 1942 et coûtèrent \$18,168.32; la dite somme de \$18,168.32 fut payée à qui de droit à même les deniers publics du Canada;

les défendeurs par lettre du procureur du ministère des Transports, en date du 25 juillet 1942, étaient mis en demeure de payer conjointement et solidairement la dite somme de \$18,168.32;

et le Procureur Général demande qu'il soit déclaré que les défendeurs doivent conjointement et solidairement au demandeur pour et au nom de Sa Majesté la somme de \$18,168.32 avec intérêt sur icelle à compter du 14 octobre 1941 et dépens.

Trois défenses ont été produites, l'une de la part des défendeurs Arthur, Joseph et Cleomen Sauvageau, une autre de la part de J. C. Malone and Company et une troisième de la part de The Price Navigation Company Limited.

Les défendeurs Sauvageau, dans leur défense, admettent que le 25 septembre 1941 ils étaient propriétaires des 64 parts de la barge "Belœil", enregistrée à Montréal sous le numéro 103,342, ayant les dimensions et le tonnage mentionnés dans l'information;

ils déclarent ignorer le naufrage de la dite barge le 25 septembre 1941, l'endroit où il a eu lieu et le fait qu'au moment du naufrage la dite barge était remorquée par le "Chicoutimi", propriété de The Price Navigation Company Limited;

ils admettent que durant le remorquage de la dite barge la navigation d'icelle était sous le contrôle exclusif du remorqueur "Chicoutimi";

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ils déclarent ignorer qu'au moment de son naufrage la barge "Belceil" était affrétée par la défenderesse J. C. Malone and Company et transportait des marchandises pour le compte de celle-ci;

ils déclarent ignorer que le chenal où la barge "Belceil" sombra est navigable et fréquenté par des unités navales et marchandes de tout tonnage et que la barge "Belceil" devint un obstacle et un danger constant à la navigation;

ils déclarent ignorer qu'après le naufrage de la barge "Belceil" les navigateurs engagés dans la navigation dans ces parages se plainquirent à l'agent des Transports à Montréal des dangers auxquels les exposait l'épave de la barge "Belceil";

ils nient qu'à la suite des plaintes des navigateurs à l'agent du ministère des Transports le 9 octobre 1941 ils furent mis en demeure d'enlever l'épave de la barge "Belceil" et qu'ils négligèrent de se conformer à la demande du ministère des Transports et d'enlever l'épave de la dite barge; ils plaident spécialement que le 25 septembre 1941 ils n'étaient pas en charge de la barge "Belceil", n'avaient aucun contrôle sur icelle et les personnes en charge de la dite barge n'étaient ni leurs serviteurs ni leurs préposés;

ils nient les autres allégations de l'information;

dans le cours de juillet 1941, par contrat verbal intervenu entre eux et Sarsfield Malone, arrimeur des Trois-Rivières, ils ont loué leur barge "Belceil" au prix de \$18. par jour, le dit Malone en prenant charge et contrôle absolu;

selon leur information, le dit Malone a sous-loué ou en tout cas transporté la dite barge à la défenderesse Price Navigation Company Limited pour être utilisée au transport du bois de papier de la rivière Chaudière au havre des Trois-Rivières, ce à quoi elle était employée le 25 septembre 1941;

si la dite barge a sombré, tel qu'allégué dans l'information, ce sinistre est dû à la faute et négligence de ceux qui en avaient la charge, ces faute et négligence consistant: (a) dans le fait d'avoir procédé à exécuter le voyage alors que le temps était très mauvais et qu'il aurait été facile de se mettre à l'ancre, surtout avant de procéder avec le convoi dans cette partie du fleuve où le courant est fort et d'une

grande vélocité tel qu'allégué dans l'information; (b) dans le fait que la personne en charge du convoi ou ses préposés, au lieu de surveiller la barge, ont négligé de s'en occuper et même de s'intéresser à des signaux faits par une personne qui se trouvait dans la barge durant au moins une demi-heure avant que ladite barge sombre;

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les dits défendeurs ne peuvent être tenus responsables de ce sinistre en vertu du droit commun, tant pour les raisons mentionnées ci-dessus que parce qu'ils n'étaient pas en charge de la dite barge lorsqu'elle a sombré et qu'une obstruction a pu être causée dans les eaux navigables, ce qu'ils nient;

le 25 septembre 1941, la barge "Belœil" s'est remplie d'eau par la faute de ceux qui en avaient la charge et a coulé par le fond sans se briser et cette barge, qui était en acier, aurait repris toute sa valeur dès qu'elle aurait été renflouée;

le demandeur ou ses préposés n'ont pas renfloué la barge et ne se sont d'ailleurs aucunement conformé aux dispositions de la loi de la protection des eaux navigables et ils n'ont aucun recours en fait ni en droit contre les défendeurs.

En réponse à la défense des défendeurs Arthur, Joseph et Cleomen Sauvageau le demandeur prend acte des admissions y contenues, nie que le 25 septembre 1941 ils n'étaient pas en charge de la barge "Belœil", n'avaient aucun contrôle sur icelle et que les personnes en charge de la dite barge n'étaient ni leurs serviteurs ni leurs préposés, nie que les dits défendeurs ne peuvent être tenus responsables du sinistre en vertu du droit commun, tant pour les raisons mentionnées dans la défense que parce qu'ils n'étaient pas en charge de la barge quand elle a sombré et qu'une obstruction a pu être causée dans les eaux navigables, nie qu'à la date susdite la barge "Belœil" s'est remplie d'eau par la faute de ceux qui en avaient la charge et a coulé par le fond sans se briser et que la dite barge qui était en acier, aurait repris toute sa valeur dès qu'elle aurait été renflouée, nie que le demandeur ou ses préposés n'ont pas renfloué la dite barge et ne se sont aucunement conformé

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aux dispositions de la loi de la protection des eaux navigables et qu'ils n'ont aujourd'hui aucun recours en fait ni en droit contre les défendeurs;

et le demandeur allègue spécifiquement:

le fait qu'en juillet 1941, par contrat intervenu entre les défendeurs et Sarsfield Malone, les défendeurs auraient loué au dit Malone leur barge au prix de \$18. par jour, celui-ci en prenant charge et contrôle absolu et le fait que le dit Malone aurait sous-loué ou en tout cas transporté la dite barge à la défenderesse Price Navigation Company Limited pour être utilisée au transport du bois de papier de la rivière Chaudière au havre des Trois-Rivières, ce à quoi elle était utilisée le 25 septembre 1941, ne sont pas pertinents à l'issue du procès quant au demandeur et ne peuvent exonérer les dits défendeurs de leurs obligations respectives à l'égard de l'épave de la barge "Belceil";

il prend acte particulièrement de l'admission contenue dans le sous-paragraphe (a) du paragraphe 9 de la défense qu'à l'endroit où la barge "Belceil" a sombré le courant est fort et d'une grande vélocité et dit que les autres faits allégués dans les sous-paragraphe (a) et (b) du dit paragraphe 9 ne peuvent exonérer les dits défendeurs de leurs obligations à l'égard de l'épave de la barge "Belceil", dont ils étaient les propriétaires enregistrés au moment du naufrage.

La défenderesse, Marie Poliquin Malone (J. C. Malone & Company), dans sa défense, allègue en substance ce qui suit:

elle déclare ignorer que les défendeurs Arthur, Joseph et Cleomen Sauvageau étaient, le 26 septembre 1941, les propriétaires des 64 parts de la barge "Belceil", enregistrée à Montréal sous le numéro 103,342, qu'au moment où la dite barge sombra elle était à la remorque du "Chicoutimi", propriété de The Price Navigation Company Limited et que durant le remorquage de la dite barge la navigation de celle-ci était sous le contrôle exclusif du "Chicoutimi";

elle déclare ignorer que le chenal où sombra la barge "Belceil" est navigable et fréquenté par des unités navales et marchandes de tout tonnage;

elle déclare ignorer que la barge "Belceil" devint un obstacle et un danger constant à la navigation dans les



parages où elle avait sombré et qu'après le naufrage d'icelle les navigateurs engagés dans la navigation dans ces parages se plaignirent à l'agent des Transports à Montréal des dangers auxquels les exposait l'épave de la dite barge;

elle déclare ignorer qu'à défaut par les dits défendeurs d'enlever la dite épave le Ministre des Transports dut, dans l'intérêt de la navigation, la faire enlever et la faire transporter où elle ne pourrait plus constituer un danger pour la navigation;

elle déclare ignorer si avant et au moment de son enlèvement, ni l'épave ni partie d'icelle n'aurait été susceptible d'être vendue;

elle déclare ignorer que les opérations d'enlèvement de l'épave de la barge "Belœil" durèrent du 6 au 22 juin 1942;

elle déclare ignorer que la somme de \$18,168.32, coût de l'enlèvement de l'épave, fut payée à qui de droit à même les deniers publics du Canada;

elle admet que la barge "Belœil" a coulé dans la rivière Saint-Laurent durant le mois de septembre 1941, mais elle déclare ignorer les circonstances du naufrage;

elle nie que la dite barge "Belœil", au moment de son naufrage, était affrétée par elle comme faisant affaires sous le nom de J. C. Malone & Company. En fait à cette époque Sarsfield Malone faisait affaires sous la raison sociale enregistrée de J. C. Malone & Company et ce n'est qu'au mois de février 1942 que la défenderesse s'est enregistrée comme faisant affaires sous cette raison sociale;

la dite barge ne transportait pas de marchandises pour le compte de la défenderesse; à tout événement ceci est indifférent et étranger au litige;

le télégramme mentionné dans l'information fait foi de son contenu;

elle déclare ignorer l'allégation que nonobstant les mises en demeure mentionnées dans l'information les défendeurs négligèrent de se conformer à la demande du ministère des Transports et d'enlever l'épave de la barge "Belœil"; à tout événement, elle n'était pas obligée en droit ni en fait d'enlever la dite épave;

elle déclare ignorer le coût de l'enlèvement de la dite épave et, sous réserve de sa défense, allègue que, si la dite

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somme de \$18,168.32 a été payée pour le coût de l'enlèvement de la dite épave, la dite somme est exorbitante et au delà du coût raisonnable qui aurait pu être encouru à cette fin ;

au moment du naufrage de la barge "Belœil", ni la défenderesse ni la firme J. C. Malone & Company n'étaient propriétaires ni en charge de la dite barge ;

comme question de fait la dite barge avait été affrétée par la firme J. C. Malone & Company telle qu'alors constituée pour un prix uniforme par jour sur la base d'affrètement à temps et les personnes en charge de la dite barge n'étaient pas les serviteurs ou employés de la défenderesse, mais elles étaient les serviteurs et employés des propriétaires de la dite barge, par qui ils étaient payés ;

le demandeur n'a pas, quant à ce qui concerne la défenderesse, allégué de faits qui constituent une réclamation contre elle en fait ou en droit.

En réponse à la défense de la défenderesse, dame Marie Poliquin Malone (J. C. Malone & Company), le demandeur allègue en substance ;

il prend acte de l'admission que la barge "Belœil" a coulé dans le fleuve Saint-Laurent en septembre 1941 ;

il prend acte de l'admission qu'au moment du naufrage de la dite barge Sarsfield Malone faisait affaires sous la raison sociale J. C. Malone and Company et il ajoute que la défenderesse Dame Marie Poliquin Malone est aux droits et obligations de feu Sarsfield Malone ;

il prend acte de l'admission que la barge "Belœil" avait été affrétée par la firme J. C. Malone and Company à tant par jour ;

il nie les autres allégations de la défense.

Pour défense la défenderesse The Price Navigation Company Limited allègue en substance ce qui suit :

elle admet l'allégation de l'information concernant le droit de propriété des défendeurs Arthur, Joseph et Cleomen Sauvageau dans la barge "Belœil" ;

pour autant que ces allégations la concernent, elle admet :

qu'au moment où elle sombra la dite barge était à la remorque du "Chicoutimi", sa propriété ;

qu'au moment de son naufrage la dite barge était affrétée par la défenderesse J. C. Malone & Company et transportait des marchandises pour le compte de l'affréteur;

que le chenal où sombra la dite barge est entièrement navigable et fréquenté par des unités navales et marchandises de tout tonnage;

que la dite barge devint un obstacle et un danger constant à la navigation dans les parages où elle avait sombré;

qu'après le naufrage de la dite barge les navigateurs engagés dans la navigation dans ces parages se plaignirent à l'agent des Transports à Montréal des dangers auxquels les exposait l'épave de la dite barge;

qu'à la suite de ces plaintes à l'agent du ministère des Transports, le 9 octobre 1941, les défendeurs furent mis en demeure par télégramme du ministère des Transports d'enlever la dite épave;

que, nonobstant les mises en demeure, les défendeurs négligèrent de se conformer à la demande du ministère des Transports et d'enlever la dite épave;

qu'à défaut par les défendeurs d'enlever la dite épave, le Ministre des Transports dut, dans l'intérêt de la navigation, dans le cours de juin 1942, la faire enlever et la faire transporter dans un endroit où elle ne pourrait plus constituer un danger pour la navigation;

qu'avant et au moment de son enlèvement ni l'épave ni aucune partie d'icelle aurait été susceptible d'être vendue;

que les opérations de l'enlèvement de la dite épave durèrent du 6 au 22 juin 1942;

que les défendeurs par lettre du procureur du ministère des Transports, datée le 25 juillet 1942, étaient mis en demeure de payer conjointement et solidairement la dite somme de \$18,168.32, coût de l'enlèvement de la dite épave;

elle nie le paragraphe 2 de l'information relatif au naufrage de la barge "Belœil" pour autant que la date y mentionnée est le 25 septembre 1941;

elle nie que durant le remorquage de la barge "Belœil" par le "Chicoutimi" la navigation de la dite barge était sous le contrôle exclusif du "Chicoutimi"; le contrôle de la dite barge était entre les mains du capitaine et de l'équipage ou de ses propriétaires;

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la dite barge a coulé vers 1 h. 20 du matin le 26 septembre 1941, pendant un gros temps d'une violence telle à constituer un cas de force majeure ou un risque de la mer;

si la somme de \$18,168.32 a été payée comme coût de l'enlèvement de l'épave de la barge "Belœil", cette somme est exorbitante et au delà du coût raisonnable qui aurait pu être encouru à cette fin;

en autant que la défenderesse The Price Navigation Company Limited est concernée le demandeur n'a pas allégué de faits qui constituent une réclamation en droit contre la défenderesse.

En réponse à la défense de la défenderesse, The Price Navigation Company Limited, le demandeur prend acte des admissions y contenues, en nie les autres allégations et plaide spécialement que ce n'est que par suite de la négligence des défendeurs d'enlever l'épave et après avoir demandé des soumissions à des entreprises intéressées dans le renflouement ou le déplacement des épaves que le Ministre des Transports dut dans l'intérêt de la navigation prendre l'initiative de l'enlèvement et du déplacement de l'épave de la barge "Belœil".

Les défendeurs Arthur, Joseph et Cleomen Sauvageau ont produit une réplique dans laquelle il est dit que les faits allégués dans la réponse qui ne sont pas conformes aux allégués de la défense sont faux et mal fondés en fait et en droit.

Le 2 mars 1943 les défendeurs Arthur, Joseph et Cleomen Sauvageau ont fait signifier à la défenderesse The Price Navigation Company Limited un avis conformément à la règle 234 des règles et ordonnances de cette cour. Par cet avis les dits défendeurs notifient la défenderesse The Price Navigation Company Limited que la présente action a été instituée par le demandeur contre eux pour leur réclamer la somme de \$18,168.32, montant qu'il en a coûté pour renflouer la barge "Belœil" qui a sombré dans les circonstances mentionnées dans l'information; que ce sinistre est entièrement dû à la faute et négligence des employés et préposés de la dite défenderesse, ces faute et négligence consistant: (a) dans le fait d'avoir procédé à exécuter le voyage alors que le temps était très mauvais et qu'il aurait

été facile de se mettre à l'ancre; (b) dans le fait que la personne en charge, au lieu de surveiller la barge, a négligé de s'en occuper et même de s'intéresser à des signaux que lui a fait une personne qui se trouvait dans la barge durant au moins une demi-heure avant qu'elle sombre; que les dits défendeurs ont droit d'être indemnisés par la dite défenderesse de tous montants qu'ils peuvent être condamnés à payer au demandeur; que les dits défendeurs ont droit de demander que la dite défenderesse The Price Navigation Company Limited soit tenue d'intervenir dans l'instance principale pour faire cesser la poursuite dirigée contre eux ou à ce qu'à défaut par elle de ce faire elle soit condamnée à garantir, acquitter et indemniser les dits défendeurs de toute condamnation qui pourra être prononcée contre eux en capital, intérêts et frais et enfin aux dépens tant de la demande principale que de cette demande en garantie, y compris les frais de sommation et de dénonciation; que si la dite défenderesse désire contester la réclamation du demandeur contre les dits défendeurs ou sa propre responsabilité envers eux, elle devra comparaître dans les huit jours de la signification de cet avis; que son défaut de comparaître signifiera qu'elle admet le bien-fondé de tout jugement qui pourrait être rendu contre les dits défendeurs et sa propre responsabilité d'indemniser les dits défendeurs jusqu'à concurrence du montant réclamé par les présentes, lequel jugement pourra être exécuté sommairement contre la dite défenderesse en capital, intérêts et frais.

Cet avis, portant à l'endos un procès-verbal de signification, a été produit le 4 mars 1943.

La défenderesse The Price Navigation Company Limited a, le 9 mars 1943, comparu sur cet avis à la tierce partie, la dite défenderesse, produit de la part des défendeurs Arthur, Joseph et Cleomen Sauvageau.

Sur motion du demandeur pour faire fixer l'audition de la cause, présentée le 5 novembre 1946, une ordonnance a été rendue le même jour fixant l'audition de la cause en la cité des Trois-Rivières pour le mardi, 21 janvier 1947, à dix heures et demie du matin. L'ordonnance décrète que l'enquête et audition sur l'avis signifié en vertu de la règle 240

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par les défendeurs Arthur, Joseph et Cleomen Sauvageau n'est pas fixée vu qu'aucune directive n'a été demandée à la Cour conformément à la règle 238.

Par motion, dont une copie paraît avoir été signifiée aux procureurs du demandeur selon procès-verbal de signification inscrit sur le dos de la motion, présentée le 9 décembre 1946, les défendeurs Arthur, Joseph et Cleomen Sauvageau ont demandé que l'audition de leur action en contribution ou indemnité contre la défenderesse The Price Navigation Company Limited ait lieu en même temps que l'audition sur l'action principale, savoir le mardi, 21 janvier 1947, en la cité des Trois-Rivières.

Opposition a été faite à cette motion par les procureurs du demandeur et de la défenderesse The Price Navigation Company Limited.

Par motion, dont une copie a été signifiée à l'agent du procureur des défendeurs Arthur, Joseph et Cleomen Sauvageau, le demandeur demande que l'avis à la tierce partie The Price Navigation Company Limited produit le 27 février 1943 de la part des dits défendeurs soit rejeté du dossier pour cause d'irrégularité.

Le procureur de la défenderesse et tierce partie The Price Navigation Company Limited a soutenu que la Cour n'a pas juridiction pour entendre une cause entre des particuliers, soit en l'espèce entre les défendeurs Arthur, Joseph et Cleomen Sauvageau d'une part et la défenderesse et tierce partie The Price Navigation Company Limited d'autre part, dans laquelle la Couronne n'est aucunement intéressée. A l'appui de sa prétention il a invoqué la décision de la Cour Suprême dans la cause de *The King v. The Bank of Montreal and The Royal Bank of Canada*, tierce partie (1).

Il s'agit d'une action prise devant la Cour de l'Échiquier par Sa Majesté le Roi au moyen d'une information du Procureur-Général du Canada pour recouvrer de la défenderesse, la Banque de Montréal, le montant de certains chèques signés par les fonctionnaires réguliers de la Couronne, payés par la banque et par elle chargés au compte de Sa Majesté. Comme il appert du rapport, les endossements étaient faux. La défenderesse, s'appuyant sur la

(1) (1933) R.C.S. 311.

règle 234 des règles et ordonnances de la Cour de l'Echiquier, a fait signifier à la Banque Royale du Canada un avis demandant de l'indemniser de toute responsabilité pour le paiement des dits chèques, alléguant que ceux-ci censés être endossés par les porteurs avaient été présentés par la tierce partie à la défenderesse et payés par cette dernière à la tierce partie.

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La Banque Royale du Canada a fait motion devant la Cour de l'Echiquier pour rejet de l'avis à elle signifié de la part de la défenderesse. Le président de la Cour, le juge Maclean, a accordé la motion et rejeté l'avis à la tierce partie.

La défenderesse a interjeté appel du jugement de la Cour de l'Echiquier; celui-ci a été confirmé. Le juge en chef, Sir Lyman Duff, qui a rendu le jugement de la Cour, après avoir cité les paragraphes (a), (b) et (c) de l'article 87 et l'article 88 de la Loi de la Cour de l'Echiquier fait les commentaires suivants (*loc. cit.* p. 315):

We have no doubt that, notwithstanding the comprehensive language of these sections, they do not invest the judges of the Exchequer Court with power, by promulgating a rule, to enlarge the scope of the subject matters within the jurisdiction of the Exchequer Court. The question of substance is whether the claim of the appellant set forth in the third party notice under section 50 of the *Bills of Exchange Act* is a claim in respect of which the Exchequer Court has jurisdiction. That jurisdiction is defined by section 30 of the Act..

Il me semble approprié de citer le texte français de la partie de l'article 30 sur lequel le juge en chef s'appuie:

30. La cour de l'Echiquier a juridiction concurrente au Canada, en première instance

a) Dans tous les cas se rattachant au revenu où il s'agit d'appliquer quelque loi fédérale, y compris les actions, poursuites et procédures par voie de dénonciation pour l'application de peines, et les procédures par voie de dénonciation *in rem*, et aussi bien dans les poursuites *qui tam* pour amendes ou confiscations que lorsque la poursuite est intentée au nom de la Couronne seule;

\* \* \* \* \*

d) Dans toutes autres actions et poursuites d'ordre civil, en droit commun ou en équité, dans lesquelles la Couronne est demanderesse ou requérante.

Le juge Duff dit que la principale prétention de l'appelante, la Banque de Montréal, était que la poursuite en vertu de l'information étant une action ou poursuite "d'ordre civil... dans laquelle la Couronne est demanderesse",

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la Cour a, suivant les termes explicites de l'article "jurisdiction concurrente... en première instance" avec les cours provinciales, en l'espèce avec la Cour Suprême de la province d'Ontario, où la cause d'action a pris naissance.

Je crois opportun de citer ici un autre passage du jugement (p. 315):

In such an action, that court (the Supreme Court of Ontario) would have jurisdiction to try and give judgment upon such a claim as that presented by the third party notice, and it is argued therefore that the Exchequer Court is invested with a like jurisdiction.

We cannot accede to this ingenious argument. The Supreme Court of Ontario has jurisdiction, by virtue of the statutes and rules by which it is governed, to entertain and dispose of claims in what are known as third party proceedings. Claims for indemnity, for example, from a third party, by a defendant in respect of the claim in the principal action against him, can be preferred and dealt with in the principal action. But there can be no doubt that the proceeding against the third party is a substantive proceeding and not a mere incident of the principal action. These rules are in essence rules of practice, not of law, introduced for the purposes of convenience and to prevent circuitry of proceedings. We think, therefore, that section 30, in virtue of the sub-paragraph mentioned, by which the Exchequer Court possesses 'concurrent original jurisdiction ... in... actions... of a civil nature... in which the Crown is plaintiff,' does not make it competent to the Exchequer Court to deal with the claim in question.

Le savant juge passe alors au second point soulevé par l'appelante relatif à la juridiction accordée à la Cour de l'Échiquier par le paragraphe (a) de l'article 30 "dans tous les cas se rattachant au revenu où il s'agit d'appliquer une loi fédérale". Les observations que fait le juge en chef sur ce sujet ne me paraissent point pertinentes en l'espèce et je ne crois pas utile de les reproduire.

Le procureur de la défenderesse et tierce partie, The Price Navigation Company Limited, s'en est aussi rapporté à la décision de la Cour Suprême dans la cause de *The King v. Hume et Consolidated Distilleries Limited v. Consolidated Exporters Corporation Limited* (1). Le sommaire du jugement, assez explicatif et précis, est ainsi conçu:

The Crown took proceedings in the Exchequer Court to recover from defendant upon certain bonds. Defendant, by third party notice, in the form prescribed by Exchequer Court Rule 262, claimed indemnity against the third party under an agreement between defendant and the third party. Upon motion by the third party, Audette J. (1929, Ex.C.R., 101) set aside the third party notice, without prejudice to any existing right of indemnity which defendant might have. Defendant appealed.

(1) (1930) R.C.S. 531.



Held (Newcombe J. dissenting): The third party notice was rightly set aside. It was not authorized by the Exchequer Court Rules, construed with due regard to s. 101 of the *B.N.A. Act*, which authorized the creation of that court, and to the terms in which Parliament has conferred jurisdiction on it (*Exchequer Court Act*, R.S.C., 1927, c. 34; s. 30 particularly dealt with). The words 'the laws of Canada' in said s. 101 mean laws enacted by the Dominion Parliament and within its competence; s. 101 does not enable Parliament to set up a court competent to deal with matters purely of civil right in a province as between subject and subject. Therefore, even if, *ex facie*, said rule 262 might be broad enough to include a third party procedure in a case such as that in question, it cannot have been intended to have any such effect, since so to construe it would be to attribute to the Exchequer Court an intention, by its rules, to confer upon itself a jurisdiction which it would transcend the power of Parliament to give to it. Nor can it be said that it is 'necessarily incidental' (*Montreal v. Montreal Street Ry.*, (1912) A.C., 333, at pp. 344-6) to the exercise by that court of the jurisdiction conferred upon it, that it should possess power to deal with matters such as were here attempted to be introduced by the third party procedure, even where they arise out of the disposition of cases within its jurisdiction.

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Le juge Audette, rendant le jugement de la Cour de l'Échiquier, qui a été confirmé par la Cour Suprême, exprime l'opinion suivante (1):

The action is brought on bonds executed by the defendants in favour of the plaintiff and the defendants aver, by their statement in defence, that they are entitled in any event to indemnity from the third party, by reason of an agreement to that effect entered into by the said defendants and the third party.

This, however, is an issue over which the Exchequer Court has no jurisdiction; it is a separate and distinct controversy from the one raised between the plaintiff and the defendant; it is resting upon a separate cause of action which must be tried and determined in the Provincial Court having jurisdiction over such matters. *The Queen v. Finlayson et al.*, (1897) 5 Ex.C.R. 337; *The King v. The Globe Indemnity Co.*, (1921) 21 Ex. C.R. 34 at 45; Audette's *Exchequer Court Practice*, 2nd ed., p. 504.

The rule of court respecting third parties has its *raison d'être* and was framed to meet a case where it might be in the interest of the Crown to have other parties than itself defendant in an action before the Court. A rule of court, like a statute, must not be presumed to alter the existing state of the law beyond what is necessary for its valid and effective operation. Hence, the rule ought not to be held to apply when the matter involves an issue of indemnity between subject and subject, and one in which the Crown has no concern.

Le jugement de la Cour de l'Échiquier a été confirmé par la Cour Suprême (Anglin, J. en C., Newcombe (dissident), Rinfret, Lamont et Cannon, JJ.).

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Le juge Anglin, qui a rendu le jugement de la Cour, fait, entre autres, les remarques suivantes (p. 534) :

In construing the rules of the Exchequer Court, however, attention must always be paid to s. 101 of the *British North America Act* (1867), which authorized the creation of that Court, and to the terms in which Parliament has conferred jurisdiction on it. It is not conceivable that, by mere rule of court, it should have been intended to enlarge the jurisdiction thus conferred, so as to embrace matters which it would not be otherwise competent for that Court to hear and determine. S. 101 of the *British North America Act* reads as follows:

The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

It is to be observed that the 'additional courts', which Parliament is hereby authorized to establish, are courts 'for the better administration of the laws of Canada'. In the collocation in which they are found, and having regard to the other provisions of the *British North America Act*, the words 'the laws of Canada,' must signify laws enacted by the Dominion Parliament and within its competence.

Le savant juge cite ensuite l'article 30 de la Loi de la Cour de l'Échiquier et ajoute ce commentaire (p. 535) :

It will be noted that in every instance the jurisdiction of the Court is confined to matters directly affecting the Crown in the right of the Dominion and to cases affecting its revenue, 'in which it is sought to enforce any law of Canada'.

Plus loin le juge Anglin déclare :

While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it. The matter is purely one of exclusive provincial jurisdiction, concerning, as it does, a civil right in some one of the provinces (s. 92 (13)).

It would, therefore, in our opinion, be beyond the power of Parliament to legislate directly for the enforcement of such a right in the Exchequer Court of Canada, as between subject and subject, and it seems reasonably clear that Parliament has made no attempt to do so. What Parliament cannot do directly, by way of conferring jurisdiction upon the Exchequer Court, that court cannot itself do by virtue of any rule it may pass. It follows that, even if, *ex facie*, rule 262 of the Exchequer Court might be broad enough to include a third party procedure in a case such as that now before us, it cannot have been intended to have any such effect, since so to construe it would be to attribute to the Exchequer Court an intention, by its rules, to confer upon itself a jurisdiction which it would transcend the power of Parliament to give to it.

Il me semble à propos de noter que la règle 262 à laquelle le juge en chef fait allusion est maintenant la règle 234.

Le procureur des défendeurs Arthur, Joseph et Cleomen Sauvageau, de son côté, a soutenu que la règle 240 des règles et ordonnances de la Cour de l'Échiquier n'a pas pour effet de faire de Price Navigation Company Limited une tierce partie au sens de la règle 234. La règle 240 est ainsi conçue:

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party: but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

Je ne crois pas la prétention du procureur des défendeurs Sauvageau bien fondée. Les règles 234 à 239 s'appliquent à la tierce partie qui n'est point déjà défenderesse dans la cause. La règle 240 concerne la tierce partie qui est défenderesse et contre qui un co-défendeur désire exercer un recours en garantie. La règle 240 assimile, à mon avis, ce défendeur devenu tierce partie à toute autre tierce partie étrangère au litige jusqu'à l'émission de l'avis prévu par la règle 234.

Le procureur desdits défendeurs a fait observer que la cause dont il s'agit est régie par la Loi de la protection des eaux navigables, S.R.C. 1927, chapitre 140, et fait allusion particulièrement aux articles 14, 15, 16 et 17.

L'article 14 traite de l'obligation du propriétaire, capitaine ou personne en charge d'un navire qui a sombré et qui constitue une obstruction à la navigation, de donner un avis de l'existence de cette obstruction au ministre ou au percepteur des douanes et de l'accise du port le plus rapproché et de placer et maintenir, tant que subsiste l'obstruction, un signal ou une lumière, selon le cas, pour en indiquer la situation et du pouvoir du ministre de faire placer et maintenir ce signal à défaut par le propriétaire, le capitaine ou la personne en charge du navire de le faire.

L'article 14 ordonne en outre que le propriétaire du navire doit en commencer aussitôt l'enlèvement et le poursuivre avec diligence jusqu'à ce qu'il soit complet.

L'article 15 stipule entre autre que, si le ministre est d'avis que la navigation est obstruée ou rendue plus difficile ou dangereuse par le fait d'un navire sombré ou de

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ses épaves, il peut, quand l'obstruction subsiste pendant plus de vingt-quatre heures, la faire enlever ou détruire de la manière qu'il croit convenable.

Le premier paragraphe de l'article 16 concernant le transport du navire ou de l'objet de l'obstruction à un endroit convenable et sa vente se lit ainsi:

Le ministre peut ordonner que ce navire, ou sa cargaison, ou les objets qui constituent l'obstruction ou l'obstacle, ou en font partie, soient transportés à l'endroit qu'il juge convenable, pour y être vendus aux enchères ou de toute autre manière qu'il croit plus avantageuse; et il peut en employer le produit à couvrir les dépenses contractées par lui pour faire placer et entretenir un signal ou un feu destiné à indiquer la situation de cette obstruction ou de cet obstacle, ou pour faire enlever, détruire ou vendre ce navire, cette cargaison ou ces objets.

L'article 17 décrète, entre autre, que, lorsque le ministre a fait enlever ou détruire quelque navire ou épave par lequel la navigation était devenue obstruée ou rendue plus difficile ou dangereuse et que les frais de cet enlèvement ou de cette destruction ont été payés à même les deniers publics du Canada et que le produit net de la vente du navire ou de l'épave qui causait l'obstruction ne suffit pas à couvrir les frais ainsi payés, l'excédent des dépenses sur ce produit net, ou le montant total de ces dépenses s'il n'y a rien qui puisse être vendu, est recouvrable, avec dépens, par la Couronne du propriétaire du navire, ou du propriétaire-gérant, ou du capitaine, du patron ou de l'individu en charge du navire lorsque l'obstruction s'est produite, ou de toute personne qui, par son fait ou sa faute ou par le fait et négligence de ses serviteurs, a été cause que cette obstruction s'est produite ou a subsisté. Ces articles pourront servir à décider la cause au mérite mais ils n'ont aucune portée sur les motions sous étude.

Le procureur des défendeurs Arthur, Joseph et Cleomen Sauvageau a soumis que la présente cause n'est pas de la même nature que la cause du *Roi contre la Banque de Montréal et la Banque Royale du Canada*, tierce partie, et ne peut se comparer avec elle. Il est indiscutable que les deux causes diffèrent essentiellement. Ceci ne permet pas de conclure que la décision de la Cour Suprême doit être limitée à des actions de la nature de la cause susdite. A mon avis, la décision en question touche toute action entre particuliers dans laquelle la Couronne n'a pas un intérêt direct.

La cause de *Anderson et le Roi et Nickerson*, tierce partie (1), invoquée par le procureur des dits défendeurs, ne me paraît avoir aucune portée sur la question pendante. Le sommaire du jugement de la Cour Suprême, suffisamment détaillé et au point, se lit ainsi:

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By sec. 16 of the 'Navigable Waters Protection Act,' if navigation is obstructed by a wreck the Minister of Marine may cause same to be destroyed; by sec. 17 he may convey it to a convenient place and sell it at public auction, paying the surplus of proceeds over expenses to the owner who shall be liable for any deficiency. A wreck obstructing navigation was sold by the owner on condition that it be removed. This was not done and the Minister advertised for public tenders, the material after removal to belong to the tenderer. In an action against the original owner for the cost:

Held, per Davies C.J. Brodeur and Mignault JJ. that the owner was liable; that he had received the benefit of the value of the material in the reduced amount of the tender; and that the Minister had exercised a wise discretion.

Per Idington, Duff and Anglin JJ. that as the Minister did not observe the statutory requirement of conveying away the vessel and selling it by public auction the Crown could not recover notwithstanding that the course pursued may have been equally beneficial to the owner.

Les juges de la Cour Suprême s'étant également divisés, le jugement de la Cour de l'Echiquier s'est trouvé confirmé.

Les raisons exprimées par le juge en chef et par les juges Brodeur et Mignault étaient conformes à celles plus brièvement formulées par le juge Cassels à la Cour de l'Echiquier (2).

Comme l'a suggéré le procureur des défendeurs Arthur, Joseph et Cleomen Sauvageau, il pourrait être avantageux que le débat entre le demandeur et lesdits défendeurs et celui entre ces derniers et la défenderesse et tierce partie The Price Navigation Company Limited fussent entendus et décidés en même temps. Cette façon de procéder, généralement suivie devant les cours provinciales, aurait presque toujours pour effet d'épargner du temps et des frais et d'éviter la multiplicité des actions; malheureusement la chose est impossible en l'espèce vu que la juridiction de la Cour de l'Echiquier est strictement limitée et qu'elle n'est pas compétente pour disposer d'un litige entre deux particuliers dans lequel la Couronne n'est pas directement intéressée.

La motion de la défenderesse The Price Navigation Company Limited pour le rejet de l'avis à la tierce partie pro-

(1) (1919) 18 Ex.C.R. 407.

(2) (1920) 59 R.C.S. 379.

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duit le 27 février 1943, de la part des défendeurs Arthur Sauvageau, Joseph Sauvageau et Cleomen Sauvageau est accordée, avec dépens contre les dits défendeurs, lesquels sont par les présentes fixés à \$25. et le dit avis est en conséquence rejeté, sous réserve du droit des dits défendeurs d'exercer leur recours pour contribution ou indemnité contre The Price Navigation Company Limited, si recours il y a, devant le tribunal provincial compétent.

La motion des défendeurs Arthur Sauvageau, Joseph Sauvageau et Cleomen Sauvageau demandant que l'audition de l'action entre les dits défendeurs et la défenderesse The Price Navigation Company Limited à la suite de l'avis à la tierce partie de la part des dits défendeurs ait lieu en même temps et au même endroit que l'audition sur l'action principale, savoir le 21 janvier 1947, motion qui a été signifiée au procureur de la défenderesse The Price Navigation Company Limited le 30 novembre 1946, soit quatre jours avant la rédaction de la motion de la défenderesse The Price Navigation Company Limited pour rejet de l'avis à la tierce partie, est rejetée sans frais.

*Judgment accordingly.*

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BETWEEN:

WINTHROP CHEMICAL COMPANY INCORPORATED..... } APPELLANT,

AND

THE COMMISSIONER OF PATENTS, ..... } RESPONDENT.

(No. 2)

*Patents—The Patent Act, 1935, ss. 40 (1), 40 (4)—Claims for substances prepared or produced by chemical processes and intended for food or medicine—Meaning of word “claimed”—Claim for substance per se not valid—Separate claim for process not required.*

Each of the claims in the appellant's patent specification contained the definition of a substance prepared by a chemical process and intended for medicine together with a definition of the process by which it was prepared so that the claim was for the substance as prepared by the defined process, but the process itself was not claimed. The Commissioner of Patents rejected the claims on the ground that section 40 (1) of The Patent Act, 1935, required that claims for the substances covered by it must be accompanied by claims for the processes by which they were prepared. From such decision an appeal was taken.

*Held:* That section 40 (1) is complied with if in a claim for a substance to which it applies the process of its manufacture is described in the disclosure of the specification and so defined in the claim as to be made an essential element thereof so that the claim is restricted to the substance as produced by the process so defined, even if such process is not a patentable one. There is no need for a separate claim for the process.

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APPEAL from a decision of the Commissioner of Patents under section 40 (1) of the Patent Act, 1935.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*Christopher Robinson* for appellant.

*W. L. Scott K.C.* for respondent.

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

THE PRESIDENT now (Dec. 31, 1946) delivered the following judgment:

This appeal depends on the construction of section 40 (1) of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, which provides:

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

The appellant applied for a patent for an invention relating to basic double ethers of the quinoline series. Four claims were included in the specification. In each claim there was a definition of a substance prepared by a chemical process and intended for medicine together with a definition of the process by which it was prepared so that the claim was for the substance as prepared by the defined process, but the process itself was not claimed. The Commissioner rejected the claims on the ground that section 40 (1) required that claims for substances covered by it must be accompanied by claims for the processes by which they were prepared, and from such decision this appeal was taken under section 40 (4).

The respective contentions may be briefly stated. The Commissioner's view is that there cannot be a valid claim

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for a substance under section 40 (1) unless there is also a separate claim for the process of its manufacture; that a product claim cannot stand without a process claim; and that if the inventor cannot claim the process he has no right to a patent for the substance either *per se* or even as produced by a defined process. According to the Commissioner, the word "claimed" in the section means that the process of manufacture must be made the subject of a separate claim. The appellant's contention is that section 40 (1) does not go so far in its requirements; that its purpose was to prevent, in the case of the substances to which it applied, the issue of patents for such substances *per se* and that such purpose would be fully served by restricting the claim to the substance as produced by the process of manufacture particularly described in the disclosure of the specification and defined in the claim. In this view, the word "claimed" means that the process of manufacture must be defined in the claim so as to be made a constituent element of it.

It was contended for the Commissioner that the meaning of section 40 (1) was too clear to admit of argument; that its purpose was to prevent the patenting of new substances of the kind covered by it unless the process of their manufacture was also patentable; that there cannot be a valid claim for the substance even if new unless the process of its manufacture is also new. If the word "claimed" is capable of only one meaning and such meaning is that the process must be made the subject of a separate claim then, of course, there is no room for further argument and the Commissioner's construction of the section must be accepted. Indeed, that was my first inclination, but further consideration of the argument by counsel for the appellant and the history and purpose of the section has led me to the contrary conclusion.

There is no canon of construction more commonly applied than the rule in *Heydon's Case* (1). The rule there referred to was said to be applicable to a statute effecting a change in the common law, but I see no ground of principle for not extending its application to a statute effecting a change in the previous law whether common or statutory. It is, therefore, necessary to consider the state

(1) (1584) 2 Coke 18.



of the law prior to the statute to be construed, the mischief or defect for which the previous law did not provide and the nature of and reason for the remedy provided by the statute, so that, as Lord Coke put it, such construction of the statute shall be made "as shall suppress the mischief, and advance the remedy."

Section 40 (1) was an amendment of section 17 (1) of the Patent Act, R.S.C. 1927, chap. 150, first enacted in 1923, Statutes of Canada, 1923, chap. 23. This was taken from section 38A.—(1) of the Patents and Designs Acts, 1907 and 1919, of the United Kingdom, as first enacted by section 11 of the Patents and Designs Act, 1919, which read in part as follows:

38A.—(1) In the case of inventions relating to substances prepared or produced by chemical processes or intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the special methods or processes of manufacture described and claimed or by their obvious chemical equivalents:

The Canadian section 17 (1) was in identical terms except that in place of the word "or" before the word "intended" it had the word "and" so that it was more restricted in the scope of the substances to which it applied than the English section was.

There can, I think, be no doubt that the purpose of section 38 A.—(1) was to limit the scope and breadth of product claims in patents in the case of the substances covered by it so that such substances should not be patentable regardless of the process of their manufacture. Before its enactment, while there was no decision on the subject, there was grave doubt as to the validity of a claim for any product *per se* and the weight of opinion of text-book writers was against the validity of such claim: *Vide* 22 Halsbury's Laws of England, page 140, sec. 296: Terrell on Patents, 7th Edition, page 53. Yet, notwithstanding such doubt and opinion, claims were made and granted for substances independently of their process of manufacture. It appeared desirable to prevent such practice in certain cases and the section did so in the case of the substances to which it applied. No claims could validly be made for such substances *per se*.

Soon after its enactment the section was construed by the Solicitor-General, to whom appeals from decisions of

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the Patent Office lay, and the effect of the word "special" was settled. In *In re M's Application* (1) Sir Ernest Pollock, who was then Solicitor-General, said:

In my judgment the word "special" is introduced, in addition to the word "described", in order to connote that the particular method or process set out in the specification must contain the essentials of a valid patent . . . It must be a method, or process, which has such attributes that it is a proper subject of a claim for letters patent, one that has some intrinsic characteristics which are the invention of the inventor and for which a patent may properly and legitimately be claimed and granted.

He expressed a similar view in *In re Applications by W., K.-J., and W. Ld* (2) and also, after he had become Master of the Rolls, in *Sharp & Dohme Inc. v. Boots Pure Drug Company Ld.* (3). It was, therefore, settled that it was not possible to get a patent for a new substance under the section unless the process of its manufacture was also patentable.

But apparently it was felt that the section with this interpretation of the word "special" had gone too far, for when the Act was recast by the Patents and Designs Act, 1932, section 38 A.—(1) was amended in a number of respects; the word "special" was deleted, the word "particularly" inserted before the word "described" and the word "claimed" replaced by the word "ascertained". It was still the purpose of the section as amended to prevent in the case of the substances to which it applied the issue of patents for such substances *per se*, but it did not go so far as it had gone previously. It is now clear in England that a claim for a new substance is valid if restricted to the substance as produced by the process of manufacture defined in the claim as an integral part thereof, even if such process is not a patentable one, and that it is no longer necessary to the validity of the claim that the inventor of the new substance should also be able to claim the process of its manufacture.

The history of the Canadian legislation took a similar course. Just as section 17 (1) of The Patent Act, 1923, was taken from section 38 A.—(1) of The Trade Marks and Designs Acts, 1907 and 1919, so also when the Canadian Act was recast by The Patent Act, 1935, the same amendments were made to section 17 (1) as had been made to the

(1) (1922) 39 R.P.C. 261 at 262.

(2) (1922) 39 R.P.C. 263 at 268.

(3) (1928) 45 R.P.C. 153 at 175.

corresponding section 38 A.—(1) of the English Act in 1932, except that the word “claimed” remained unchanged.

If the effect of the 1935 amendment of the Canadian section is the same as that of the English one by the 1932 amendment, the appellant’s contention as to the construction of section 40 (1) is unanswerable. The Commissioner’s contention must, therefore, hang on the fact that no change was made in the word “claimed”. This brings me back to the question whether that word means “made the subject of a separate claim” and is capable only of such meaning. While the word may be capable of such a meaning, it is not, in my opinion, its only possible one or, indeed, its best one having regard to the context. The word can, I think, properly be used as meaning “defined in the claim” so as to be “made a constituent element of the claim”. It was in a somewhat similar sense that the word was used by Rinfret J., as he then was, in delivering the judgment of the Supreme Court of Canada in *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. et al* (1). There he was dealing with a claim for a slider comprising certain features and in referring to such features said that “all the features claimed herein were old”. It is quite common to speak of the integers of a claimed combination as having been claimed in combination. Similarly, if in a claim for a new substance under section 40 (1) the process of its manufacture is so defined in the claim that the claim is restricted to the substance as produced by such process, then the process, having been made an essential element of the claim, can properly be said to be claimed within the meaning of the section, and need not be made the subject of a separate claim. If such a meaning is taken of the word “claimed” then, of course, the appellant’s construction of the section must be accepted. There are, I think, a number of reasons why this should be done.

The Commissioner’s meaning completely disregards the amendment of 1935 by which the word “special” was deleted from the section. It was the presence of this word in the corresponding English section that led to the decisions that there could not be a valid patent for a substance under the section even if new unless the process of its manufacture was patentable. And it is clear that the deletion of the

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word "special" by the amendment of 1932 was for the very purpose of getting away from the construction which its use had called for. I see no reason for taking a different view of the effect of the deletion of the word from the Canadian section. Moreover, there is no reference in the decisions to the use of the word "claimed" and nothing to indicate that its presence in the section had anything to do with them. And if such word is reasonably capable of the meaning urged on behalf of the appellant, then nothing turns on its retention in the Canadian Act or the substitution in the English one of the word "ascertained", particularly since that word is used in several sections of the English Act which is not the case in the Canadian one.

It was always the purpose of the section to prevent the inventor of a new substance under it from obtaining a patent for such substance *per se* so that he would not have a monopoly of it regardless of the process of its manufacture and thus be able to claim it even when produced by a process quite different from the one which he had used. Such purpose would be served just as fully by restricting the claim to the substance as produced by the process defined in the claim as by requiring that the process should be patentable before allowing a claim for the substance. Both methods would equally suppress the mischief for which the previous law did not provide. Then when Parliament deleted the word "special" from the section, it dropped the requirement that a patentable process was a condition precedent to the validity of a claim for a new substance. In my view, the appellant's construction is more consistent with the history and present purpose of the section than is that of the Commissioner.

Moreover its adoption will lead to a more reasonable and equitable result. It is anomalous to say to the inventor of a new substance under the section, as the Commissioner does, that he is not entitled to a patent for what he has invented because he has not also invented something else, and a construction leading to such a result depriving an inventor of the fruits of his inventive genius ought not to be adopted unless the language of the section clearly so demands. As I see it, there is nothing in the purpose, history or language of the section that makes such a

construction necessary. On the other hand, the appellant's construction gives the inventor the benefit of his invention, namely, the new substance as produced by the process defined in his claim.

For these reasons I think that the remedy contemplated by the section as it now stands would be fully advanced if the appellant's construction of it is adopted. In my opinion, section 40 (1) is complied with if in a claim for a substance to which it applies the process of its manufacture is described in the disclosure of the specification and so defined in the claim as to be made an essential element thereof so that the claim is restricted to the substance as produced by the process so defined, even if such process is not a patentable one. There is no need for a separate claim for the process.

In coming to this conclusion I have not overlooked the decision of this Court in *Winthrop Chemical Co. Inc. v. Commissioner of Patents* (1). In that case there was no definition of the process of manufacture in the claim, as there was in the present case, but merely after the definition of the substance a reference to the process in the following terms, "when produced by the processes of manufacture particularly described or by their obvious chemical equivalents", and it was held by Angers J. that this was not a compliance with the requirements of the section. The question now under consideration was not before the Court in that case at all and any observations in the reasons for judgment relating to it must be regarded as *obiter*.

In my opinion, for the reasons given, the Commissioner should not have rejected the claims on the ground taken by him and the appeal from his decision must be allowed so that if the claims are otherwise unobjectionable they may be granted. The allowance of the appeal will be without costs.

*Judgment accordingly.*

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(1) (1937) Ex. C.R. 137.

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BETWEEN:

THE CREDIT PROTECTORS }  
 (ALBERTA) LIMITED,..... } APPELLANT;

AND

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

*Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, c. 32, s. 7 (a)—The Interpretation Act, R.S.C. 1927, c. 1, s. 31 (j)—Word “shareholders” includes “shareholder”—Onus on appellant to bring itself within exempting provision of statute—Appeal dismissed.*

T. owner of one share of the issued capital of appellant was also its salaried secretary. Appellant was assessed for Excess Profits Tax for 1942 and appealed on the ground that T. was not a shareholder within the meaning of s. 7 (a) of the Excess Profits Tax Act, since payment was made only to one shareholder.

*Held:* That the appeal must be dismissed since words in the singular include the plural and words in the plural include the singular (The Interpretation Act, R.S.C. 1927, c. 1, s. 31 (j)) and appellant had not discharged the onus on it to bring itself clearly within the exemption of s. 7 (a) of the Excess Profits Tax Act.

APPEAL under the provisions of The Excess Profits Tax Act.

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

*C. C. Johnston* for appellant.

*G. J. Bryan, K.C. and E. S. MacLatchy* for respondent.

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

CAMERON J. now (October 7, 1946) delivered the following judgment:

This is an appeal in respect to the assessment under The Excess Profits Tax Act for the taxation year 1942. On June 24, 1943, the appellant filed his income tax return, including his return under The Excess Profits Tax Act. Under date July 6, 1945, notice of assessment was forwarded to the appellant, the latter being assessed in the sum of \$923.64 for excess profits tax instead of the sum of \$253.97, as computed by the appellant at the time of filing its

return. The appellant duly gave notice of appeal from the assessment on August 3, 1945, and on November 26, 1945, the Minister gave his decision affirming the assessment as made. On December 17, 1945, the appellant gave notice of dissatisfaction and by the reply of the Minister, dated May 17, 1946, the assessment was affirmed. The matter now comes before this Court for decision.

No evidence was submitted at the hearing, the parties having agreed on a statement of facts, filed as exhibit 1. From this statement it appears that the appellant is an incorporated company under the provisions of The Companies Act of the Province of Alberta, carrying on business as a collection agency with offices in the City of Edmonton. The share capital at all relevant times consisted of 100 shares, which, in the year 1942, were owned by the following shareholders:—

Harold F. Alby	4 shares
Anna Frances Alby	70 shares
Roy E. Towns	1 share
J. Elva Towns	24 shares
Clifford Jones	1 share
	<hr/> 100 shares

From the statement of facts it appears also that the shareholder Roy E. Towns, the holder of 1 share, was during the year 1942, in the employ of the appellant company and for that year was paid by the appellant corporation the sum of \$2,216.85, in salary and commission, the said R. E. Towns acting as secretary of the appellant. The said R. E. Towns during the said year was exclusively employed by the appellant company and had no other means of livelihood. The said moneys so paid to him by the appellant were paid to him by way of salary for services rendered, and were not paid to him or intended to be a payment to him by virtue of his share-ownership in the company. It was further agreed by paragraph 12 of the statement of facts that the sole question in issue between the parties is whether the said R. E. Towns is a shareholder within the meaning of that term as used in section 7 (a) of The Excess Profits Tax Act, as it was in 1942, so as to disentitle the appellant corporation to exemption from taxation under that section.

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The general charging section under The Excess Profits Tax Act is section 3, and it applied to all persons (including corporations) resident or ordinarily resident in Canada, or who are carrying on business in Canada.

The appellant, therefore, claims to be entitled to exemption under The Excess Profits Tax Act by reason of the provisions of section 7 (a) as it then stood, the said section 7 (a) then reading as follows:—

7 (a) The following profits shall not be liable to taxation under Section Three of this Act in accordance with the rates set out in the First and Second Parts of the Second Schedule to this Act:—

The profits of a corporation or joint stock company which, in the taxation year, do not exceed the sum of five thousand dollars, or, where the taxation year of any corporation or joint stock company is less than twelve months, do not exceed the proportion of five thousand which the number of days in the taxation year of such corporation or joint stock company, bears to three hundred and sixty-five days, before providing for any payments to shareholders by way of salary, interest, dividends or otherwise.

Briefly, the appellant alleges that the payment of salary and commission to its secretary, R. E. Towns, in the year 1942 was not a payment to shareholders by way of salary, interest, dividends or otherwise, and that as its net profits for the year were less than \$5,000, it is entitled to the exemption provided for in section 7 (a).

The respondent, on the other hand, takes the attitude that after including salary and commission paid to the said R. E. Towns in 1942, in the profits of the company, that the said profits for the taxation year exceeded \$5,000, and that, therefore, the appellant is not entitled to the exemption provided for in section 7 (a).

The appellant says that the wording of section 7 (a) must be construed strictly, and that as it is not shown that more than one payment was made to R. E. Towns by way of salary and that the said payment was made to only one shareholder, that therefore there were *no payments to shareholders*, as required by the section. This matter, however, is disposed of by the provisions of The Interpretation Act, chapter 1, R.S.C., 1927, section 31 (j) reading as follows:—

In every Act unless the contrary intention appears words in the singular include the plural and words in the plural include the singular.

Again the appellant takes the position that the general intent of section 7 (a) is that no company whose profits



in a taxation year are less than \$5,000, should be subject to the tax in accordance with the rates set out in the first and second parts of the Second Schedule. With this contention I cannot agree. In my view, the intention of this sub-section is to exempt from certain schedules a particular type of company, namely a corporation or joint stock company whose profits in the taxation year do not exceed \$5,000 "before providing for any payments to shareholders by way of salary, interest, dividends or otherwise." The meaning of the section is, in my view, quite clear and unambiguous, and inasmuch as it has admitted that after adding to the net profits of \$4,198.38, as shown on the appellant's return, and as accepted by the department, the sum of \$2,216.85, being the salary and commission paid to the said R. E. Towns, the profit of the corporation on that basis in the taxation year does exceed \$5,000, and it follows, therefore, that the appellant is not entitled to the exemption.

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Again the appellant urges that the said section should be interpreted in as generous a fashion as possible in order to give the benefit of the exempting section to the appellant. With this contention, I cannot agree. The onus is on the appellant to prove that it clearly comes within the provisions of the exempting section 7 (a). It seeks the benefit of an exceptional provision in the act and must comply with its context. The principles of construction to be applied are well-established. In *Wylie v. City of Montreal* (1), Sir W. J. Ritchie C.J. said:—

I am quite willing to admit that the intention to exempt must be expressed in clear, unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed.

Reference may also be made to *Lumbers v. Minister of National Revenue* (2), where it is stated that the rule to be applied is as follows:—

In respect of what would otherwise be taxable income in his hands, a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act. He must show that every constituent element necessary to the exemption is present in his case, and that every condition required by the exempting section has been complied with.

(1) (1885) 12 S.C.R. 384 at 386.

(2) (1943) Ex. C.R. 202 at 211.

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Reference may also be made to *Trapp v. Minister of National Revenue* (1) and to *City of Montreal v. College St. Marie* (2) where Duff J. said:

Their Lordships are not disposed to differ from the view pressed upon them that an agreement in order to receive effect under the statute must be very clearly made out; such an agreement, if effective, establishes a privilege in respect to taxation, and the principle is not only well settled but rests upon obvious consideration and that those who advance claims to special treatment in such matters must show that the privilege invoked has unquestionably been created.

I must find, therefore, on the agreed statement of facts that the profits of the appellant in the year 1942, before providing for any payment to shareholders by way of salary, interest, dividends or otherwise, did in fact exceed the sum of \$5,000, and that therefore the appellant is not entitled to the exemption provided for in section 7 (a); and that for the year in question the appellant was not such a corporation, exemption for which is provided for in the said section.

It was agreed by counsel that if the contention of the Income Tax Department were correct, and that the appellant was not entitled to the benefit of section 7 (a) that the computation of the Excess Profits Tax as shown in the assessment forwarded to the appellant, was correct.

It follows from what I have said, therefore, that the assessment as made, should be affirmed and the appeal will therefore be dismissed with costs.

*Judgment accordingly.*

BETWEEN:

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ALBERTA PACIFIC CONSOLIDATED OILS LIMITED,..... } APPELLANT,

AND

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

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 4 (k) (i)—“Business operations carried on entirely outside of Canada” —“Assets situated entirely outside of Canada”—Failure of appellant to bring itself within terms of exempting provision of the Act—Appeal dismissed.*

(1) (1946) Ex. C.R. 246 at 263.

(2) (1921) A.C. 288 at 290.

Appellant company during the year 1940 unsuccessfully carried on exploration and drilling operations for oil in the Province of Alberta. It sublet a part of its business offices in Calgary, Alberta, receiving rents therefor, and also owned leases and royalties of a value in excess of \$1,000,000, a warehouse, stocks, loans, credits, accounts receivable and an interest in syndicates, all within Canada. Appellant was assessed for income tax for the year 1940 and appealed from such assessment. It contended that its oil drilling operations did not constitute carrying on business in Canada and that the assets in Alberta were not assets productive of income.

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*Held:* That the appeal must be dismissed as appellant has not brought itself within the terms of s. 4 (k) (i) of the Income War Tax Act to exempt it from taxation.

2. That the appellant is not such a company as is described in s. 4 (k) (i) of the act since the "business operations" and "assets" therein referred to are not to be restricted to those resulting in income or profit.

APPEAL under the provisions of the Income War Tax Act.

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

*L. H. Fenerty, K.C.* for appellant.

*M. J. Edwards and E. S. MacLachy* for respondent.

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

CAMERON J. (October 2, 1946) orally delivered the following judgment:

This is an appeal by the appellant, Alberta Pacific Consolidated Oils Limited, in respect of the assessment for income tax for the year 1940. A return was made on April 17, 1941, and notice of assessment was given on August 31, 1945. Following that the appellant gave notice of appeal on September 20, 1945, and by the decision of the Minister, dated December 14, 1945, the assessment was affirmed. On January 3, 1946, the appellant gave notice of dissatisfaction, and this was followed by the reply of the Minister, dated January 30, 1946, by which he denied the appeal and affirmed the assessment, and the matter now comes before this Court for decision.

No evidence has been given at the hearing, the parties having agreed on a statement of facts which has been filed as exhibit 1.

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The contention of the appellant is that it comes within the exempting section of section 4 of the Income War Tax Act, subsection 1, paragraph (k). The charging section is the general one, section 9, subsection 2. The charging section covers all companies, including the appellant. It is, therefore, the duty of the appellant, and the onus is definitely on the appellant, to show that it comes within the terms of the exempting section. This section referred to as 4-1 (k) has been in effect as it now stands for many years, and was in effect in the taxation year 1940, and reads as follows:—

The income of incorporated companies (except personal corporations), (i) whose business operations are of an industrial, mining, commercial, public utility or public service nature, and are carried on entirely outside of Canada, either directly or through subsidiary or affiliated companies, and whose assets (except securities acquired by the investment of accumulated income and such bank deposits as may be held in Canada) are situate entirely outside of Canada, including wholly owned subsidiary companies which are solely engaged in the prosecution of the business outside of Canada of the parent company.

The opening words of section 4, are as follows:—"The following incomes shall not be liable to taxation hereunder."

In my view, in order to claim the benefit of this exempting section, the appellant must qualify on three points—and I am satisfied, as suggested by counsel for the respondent, that this section, at least the subsection which we now have reference to, is descriptive of those companies alone which are entitled to the exemption. As I have said there are three things required in order to qualify. The company must be of the type whose operations are of the class described, namely, "industrial, mining, commercial, public utility or public service nature."

Secondly, its business operations must be carried on entirely outside of Canada, either directly or through a subsidiary or affiliated company; and finally, the company's assets, except securities acquired by the investment of accumulated income and such bank deposits as may be held in Canada, must be situate entirely outside of Canada. It is admitted by the parties that the appellant company is of a character described in the subsection, namely, that it is either a mining or possibly a commercial company. So no difficulty arises in regard to that point.

The company in question, as shown by the agreed facts, was incorporated in 1914 under the Companies Act of the Province of Alberta for the purpose of exploring for oil and developing oil property. The first question that arises, therefore, for consideration, is whether, on the agreed facts, this company did during the taxation year 1940, carry on business operations entirely outside of Canada, or whether in the alternative, it did carry on some business operations in Canada, and it is clear to me that if it did carry on business operations in Canada in 1940, then it is not such a company as is described in the subsection and is, therefore, not entitled to the exemption provided for in that section.

It is admitted by paragraph 9 of the agreed statement of facts that during the year 1940 the company carried out exploratory and drilling operations in Alberta on the A.P. Consolidated-Shepherd Creek Well No. 1, at a total cost in the sum of \$66,477.30 of which amount the sum of \$35,621.50 was expended in the year 1940. By its charter one of the purposes and objects of the company was to explore for oil, and I am satisfied that this operation carried on in the year 1940, was in accordance with its charter and was therefore a business operation. Counsel for the appellant, however, indicates what is the fact that that operation was totally unsuccessful and that the money expended was completely wasted. Oil was not discovered. The well proved to be a dry hole, and in the year 1940 no production or income was obtained therefrom. Counsel for the appellant suggests that while this might have been a business operation authorized by the charter of the company, and carried out by it in the taxation year 1940, yet that inasmuch as it resulted in no income, much less profit, that therefore it should be considered as not a business operation, as required by subsection (*k*). In other words, I am asked to find that there should be included in the section some limitation on the words "business operations" such as "business operations which result in income" or "business operations which result in profit." I think probably counsel for the appellant confined himself to the first words which I have used "business operations which result in income". To that argument I am afraid I cannot give my approval. In addition to the words "businss operations"

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the word "entirely" is used so that summarizing that portion of the section, the company claiming the exemption must carry on business operations of the type described entirely outside of Canada. Had it been the intention of Parliament to limit the class in such a way as to provide for business operations only of a successful nature, nothing would have been easier than to say so, and in my view to add the words suggested by counsel for the appellant and limit the effect of the words "business operations" to those carried on successfully, would be doing complete violence to the terms of the section which, in this regard, I think I must find to be clear and free of all ambiguity. I find on the facts as admitted, that during the year 1940 the appellant did carry on business operations in the Province of Alberta, and in the Dominion of Canada.

There was also another operation in that same year which I think could be well described as a business operation. On the admitted facts it is shown that in that year the company sublet a portion of its business office to another company, whether a subsidiary or otherwise I am not at the moment clear. But at any rate it received an income from that and it constituted a business operation. But in the main in considering the first part of the section, I paid particular attention to the drilling of an oil well in 1940 which I think unquestionably must be considered as a business operation carried on in a place other than outside of Canada.

Thirdly, there is the question of the location of the assets of the appellant company. The words are "whose assets are situate entirely outside of Canada". I have for the moment omitted reference to that part which appears in brackets (excepting securities acquired by the investment of accumulated income and such bank deposits as may be held in Canada). I have also omitted the last words of the section, commencing with the words "including wholly owned subsidiaries", because it is admitted by counsel that the final words are not here applicable. So that I have to give consideration to the question as to whether the assets of this company are situate entirely outside of Canada, and I exclude from consideration for the moment any reference to securities acquired by the

investment of accumulated income and bank deposits, which, as I recall at the moment, aggregated in 1940 the sum of about \$98,000.

Paragraph 8 of exhibit 1, the statement of facts, states that during the year 1940 the company had *inter alia* the following assets in Alberta. The first item is leases, royalties, surface rights and development to the value of \$1,037,252.88 less an item included therein of \$21,873.51 representing properties situate in Cutbank, Montana. In other words, the book value at any rate of item 1 in paragraph 8, shows conclusively that in Alberta the company had assets of one million dollars and over. The second item in paragraph 8 shows that the company in the year 1940 had a warehouse in Turner Valley, which had been acquired at a cost of \$115 and carried at the depreciated value of \$34.50; and in that warehouse, by item 3, there were items of equipment called warehouse stocks of a value in excess of \$1,000. Item 4 shows that there were accounts receivable, part in Alberta and part in Montana, less reserves, in the sum of \$3,454.94. Item 5 shows that there were loans receivable in Alberta less reserves of \$1,424.75. Item 6 shows that during the year 1940, as the result of drilling operations, the company was entitled to drilling credits with the Government of Alberta in the sum of \$11,032.79, of which amount \$7,529.75 were expended on lease rentals in Alberta, leaving a credit, I take it to be a drilling credit, in the hands of the Government of Alberta at the end of the year 1940 of \$3,503.04. Item 7 shows that in that year the company had a one-fifth interest in a syndicate in Alberta valued at \$11,000 and finally, Item 8, shows the ownership of a Dodge automobile of the sale value of \$535. Admittedly these are assets of the company. They have been shown on their audited returns for the year 1940. But I am invited by counsel for the appellant to again limit the meaning of the word "assets". Counsel for the appellant suggests that there must be some limitation put on the word "assets" in that any company in Canada, which alone of course would be subject to taxation, would be required to have in its possession certain office furniture with which to carry on its business and that the possession of such furniture should not, of itself, exclude the company or any company from the benefit of the exemption. With-

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out deciding the point, I am inclined to agree with counsel for the appellant that that would be a fair interpretation. The whole act, so far as that point is concerned at least, goes on the assumption that the company to be taxed is in Canada and it must of necessity have the essential requirements with which to carry on business. From that argument it is suggested that a much wider interpretation should be given to the words "assets entirely outside of Canada", and that the proper interpretation should be "assets which result in income or productive assets". In other words, the argument is about the same as that used in connection with the words "business operations". With that contention again I cannot agree. The meaning of the section and the interpretation of the words in my mind are clear and do not permit of the interpretation placed on them by counsel for the appellant. The main words are "assets situate entirely outside of Canada", and from the assumption that the words "office furniture" do in a very limited way qualify the meaning of the word "assets", I cannot move to the position taken by Mr. Fenerty that the possession of over a million dollars in assets in Canada—and that is admitted by the statement of facts,—means that all the assets are situate entirely outside of Canada. In my view that would be doing the greatest possible violence to what I consider to be the clear meaning of the section. Not only are there leases and royalties of a value in excess of a million dollars, but the warehouse, stocks, loans, credits, accounts receivable, and an interest in syndicates. In addition there is one other matter which is small but which has been much to the fore, and perhaps while not important in the view that I have taken and the decision which I have arrived at, I think I should mention.

In 1927 the company sold a capital asset, the nature of which appears to have been an oil lease, and received in payment certain shares in the Home Oil Company Limited. Of the shares so received there were held in the taxation year 1940, shares in Home Oil Company Limited to the value of \$100. Those shares admittedly are not within the exception mentioned in section (k) which is as follows:—

Except securities acquired by the investment of accumulated income or such bank deposits as may be held in Canada.



While the amount is small, yet definitely it is an asset in Canada not acquired in the way mentioned in the special exceptions in section (k).

I hold, therefore, the burden being on the appellant company to satisfy me that it is entitled to the exemption, I have reached the conclusion that that burden has not been satisfied. I have reached the conclusion that this company is not such a company as is described in section 4 (k) (i) in that in the taxation year 1940, while it was a mining or a commercial company, its business operations were not carried out entirely outside of Canada, but to a substantial degree in Canada as is evidenced by the amounts disbursed.

Secondly, that it is not such a company as is envisaged in the act by reason of the fact that its assets were not entirely situate outside of Canada, but on the contrary it had in Canada assets of the book value at least of over a million dollars.

In the result therefore, the burden having fallen on the appellant, I must find that the burden has not been satisfied and that the appeal must be dismissed with costs, and the assessment confirmed.

*Judgment accordingly.*

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BETWEEN:

HIS MAJESTY THE KING,..... PLAINTIFF;

AND

ALFRED H. RICHARDSON and }  
 JAMES HAROLD ADAMS,..... } DEFENDANTS.

1946  
 Sept. 10  
 Nov. 28.  
 Dec. 20.

*Crown—Action to recover damages suffered by the Crown through loss of services of a member of the military forces and medical and hospital expenses incurred due to negligence of defendants dismissed—Action by Crown not prescribed by the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, s. 60 (1)—Law of Province of Ontario applicable when accident occurs in that province though negligent parties domiciled in Province of Quebec.*

The action is one to recover from defendants, both of whom are domiciled in the Province of Quebec, damages suffered by the Crown by way of pay and allowances paid to and medical and hospital expenses paid for a member of the military forces of Canada, who was injured and

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rendered temporarily incapable of service while a passenger in a car which was in collision, in the Province of Ontario, with a car driven by the defendant Adams and owned by defendant Richardson.

The Court found that the collision was caused solely by the negligence of the defendant Adams.

*Held:* That the rights and liabilities of the parties are determined by the law of the Province of Ontario.

- 2 That the prescription established by the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, s. 60 (1) is not applicable to the Crown in right of Canada.
3. That the damages suffered by the Crown are not the natural consequence of the negligence which caused the accident and are not damages suffered from the loss of services of a servant.
- 4 That the action per quod servitium amisit does not lie. *Attorney-General v. Valle-Jones* (1935) 2 K.B. 209 not followed; *Admiralty Commissioners v. S.S. Amerika* (1917) A.C. 51 applied.

INFORMATION exhibited by the Attorney-General of Canada to recover from defendants damages suffered by the Crown due to the alleged negligence of defendants.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

*A. Angers, K.C.* for plaintiff.

*J. E. Crankshaw, K.C.* for defendants.

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

O'CONNOR J. now (December 20, 1946) delivered the following judgment:

By an Information dated 28th January, 1943, the Attorney-General on behalf of His Majesty, informed the Court as follows:—

On the 29th day of June, 1941, on No. 2 highway of the Province of Ontario, between Brockville and Prescott, both in the Province of Ontario, a collision took place between a motor vehicle going east on the highway and operated by one Swan, and in which Lieutenant John Howard MacDonald was a passenger, and a motor vehicle going west on the highway driven by the defendant James Harold Adams, and owned by the defendant Alfred H.

Richardson, who was a passenger in the said vehicle, as the result of which Lieutenant MacDonald suffered personal injuries and was confined to hospital. At all times material John Howard MacDonald was a member of the military forces of His Majesty in right of Canada.

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The plaintiff continued to pay Lieutenant MacDonald his pay and allowance, and also paid for the medical and hospital treatment for the said MacDonald.

Paragraph 7 of the Information alleges that, "as a result of the negligence aforesaid of the defendant, His Majesty has sustained damage in respect of pay and allowance and hospital expenses of the said Lieutenant MacDonald as follows . . ." The particulars of the expenses are then set out and show \$767. These particulars show that the medical and hospital services were not rendered by the Royal Canadian Army Medical Corps but by a public hospital and by physicians in private practice. MacDonald was entitled to hospital and medical services under the conditions of his service in the military forces of the plaintiff. It can, therefore, be assumed that when the plaintiff was informed of the position, it authorized the continuance of these services and assumed liability therefor and subsequently paid the accounts. The pay and allowance are also set out at \$613.08, making a total claim of \$1,380.08. Counsel for the plaintiff abandoned the sum of \$40.35 included in the pay and allowance during the trial and this reduced the amount of the claim to \$1,339.73. Counsel for the defendants at the trial agreed that the plaintiff had paid these amounts.

No claim for loss of service is expressly set out in the Information. Section 50A of the Exchequer Court Act deems a member of the military forces of His Majesty to be a servant of the Crown for the purpose of determining liability in an action by the Crown. The Information discloses that Lieutenant MacDonald was a member of the military forces of His Majesty and alleges that by reason of the negligence of the defendants he was injured and confined to hospital for approximately three months and was incapacitated for a further six weeks. The plaintiff would, therefore, lose his services during these periods. Paragraph 7 sets out the particulars of the plaintiff's

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special damages, consisting of wages paid to Lieutenant MacDonald and payment by the plaintiff for his medical and hospital services during such period.

O'Connor J. The evidence shows that he performed no service during that period.

The defendants deny that they were negligent and allege that the collision was caused solely by the negligence of Swan, the driver of the vehicle in which MacDonald was a passenger. The defendants further allege that in any event the plaintiff has no right of action or in the alternative that such action is prescribed and that in any event is not entitled to recover such amounts.

The collision occurred in the Province of Ontario and the defendants are domiciled in the Province of Quebec. Because the action has been taken in the Exchequer Court of Canada, and because the collision took place in the Province of Ontario, I am of the opinion that the rights and liabilities of the parties are to be determined by the laws of the Province of Ontario, and not by the laws of the Province of Quebec.

The evidence of the witnesses called by the plaintiff was that the vehicle driven by Swan going east was well south of the centre line of the highway and that the defendants' car going west crossed the centre line and the front left hand fender came in contact with the left side of the vehicle driven by Swan, just at the left door.

The evidence of the witness called by the defendants was that the impact took place exactly on the white line marking the centre of the highway, and the left front wheels of both cars came into collision at that point.

While there is a conflict in the evidence, it is clear that even on the defendants' evidence the defendant Adams was negligent in driving on the white line when meeting another vehicle going in the opposite direction. But I accept Lieutenant MacDonald's evidence, and I find the point of impact was south of the centre line of the highway and the collision was caused solely by the negligence of the defendant Adams in failing to turn out to the right from the centre of the highway so as to allow to Swan's vehicle one-half the road free in accordance with section 39 of the Ontario Highway Traffic Act, R.S.O. 1937, chap. 288.

The defendant Richardson was the owner of the vehicle, and was riding in it at the time of the accident, and had authorized defendant Adams to operate the vehicle, and is by reason of section 47, subsection (1) of the Ontario Highway Traffic Act (*supra*) liable for such damage.

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The question to be determined is whether the plaintiff can bring an action *per quod servitium amisit* in these circumstances, and whether the plaintiff is entitled to recover the damages claimed, consisting of the pay and allowance and medical and hospital expenses.

In *Attorney-General v. Jackson* (1), it was held that if the servant has no right of action, the master has no right of action. That situation does not arise here because Lieutenant MacDonald had a right of action.

Nor does the fact that Lieutenant MacDonald's action has been barred by section 60 (1) of the Ontario Highway Act (*supra*) bar the plaintiff's action. The bar of the Statute of Limitations against the servant cannot be raised against the master; *Norton v. Jason* (2); and in addition to the well established rule of interpretation that His Majesty is not affected by a statute unless expressly mentioned or referred to by necessary implication; *2nd., Ed., 31 Halsbury, 523*, no provincial enactment can limit the right of the Crown in right of Canada.

The right of action and these damages were considered by MacKinnon, J., in *Attorney-General v. Valle-Jones* (3), in which the same claim was made by the Crown and in which it was held that the Crown was entitled to maintain a claim against the defendant for loss of service of the men by the tortious act of the defendant, and to recover the amount of the wages and rations of the men during their incapacity and of the expenses of their hospital treatment.

This decision was considered by the High Court of Australia in *The Commonwealth v. Quince* (4), and three out of the five members of the Court approved the ruling as to damages of MacKinnon, J. The fourth member of the Court stated that he thought it better to express no opinion as to the correctness of these rulings, and the fifth member did not approve the ruling.

(1) (1946) S.C.R. 489

(2) (1953) 82 E.R. 809.

(3) (1935) 2 K.B.D. 209

(4) (1943) 68 C.L.R. 227.

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In respect to the claim for wages MacKinnon, J., stated page 217:—

There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing.

And as regards medical expenses and hospital treatment:—

As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put on the grounds that the Crown having in fact expended the amount claimed under this head ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary

And at page 220 MacKinnon, J., said:—

These sums of money, unless it can be said that they were unreasonably, because unnecessarily and only voluntarily incurred, are clearly damages to the master in consequence, and only in consequence, of the loss of the services of the servant.

With great respect I am unable to agree with that decision. In my opinion these payments are not the natural consequences of the tort, and the plaintiff is not, therefore, entitled to recover these amounts.

In *Admiralty Commissioners v. SS. Amerika* (1), one of His Majesty's submarines was run into and sunk by the Steamship *Amerika*, and the crew of the submarine was drowned. In an action of damage by collision brought by the Admiralty Commissioners against the owner of the steamship, the plaintiff claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the deceased men. It was held that the claim failed; first, that in a civil court the death of a human being could not be complained of as an injury, and, secondly, on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances. In the judgment of Lord Sumner, page 61, it was stated:—

The collision was the *causa sine qua non*; the consequent drowning of the men was the occasion of the bounty; but the *causa causans* of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages

must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn v. Great Western Ry. Co.* (1874) L.R. 10 Ex. 1), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead.

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The comment on this decision in *Clerk & Lindsell on Torts 9th Ed.*, page 145 is:—

“The defendant's negligence was the occasion, but not the cause of the damage.”

The opinion of MacKinnon, J., in the *Valle-Jones case* (*supra*) clearly runs counter to the opinions expressed in the *Amerika case*.

In *Gahan Law of Damages*, page 94 note (h) states:—

(h) *Att. Gen. v. Valle-Jones*, (1935) 2 K.B. 209. MacKinnon, J., appears to have accepted the argument for the Crown that as the Crown had paid expenses which otherwise the injured men would have borne and which they could have recovered from the defendant, the Crown was entitled to recover them. The general rule of English law is that nobody can make himself the creditor of another by paying that other's debt against his will or without his consent: *Johnston v. R.M.S.P. Co.* (1867), L.R. 3 C.P. 38, 43, where the qualifications on the general rule are set out.

The payment of wages and expenses caused the plaintiff damage but it was not, in my opinion, damage from the loss of the services of the servant.

Actions for loss of service are of great antiquity and had their origin in a state of society when service as a rule was not of contract but of status and the servant was originally at any rate regarded as the chattel of the master. As Lord Sumner pointed out in the *Amerika case* (*supra*) p. 60:—

Indeed what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

In these proceedings the plaintiff seeks to extend the action per quod to the loss of the services, for a short time, of an officer in His Majesty's forces serving his country in time of war.

Under section 50A for the purpose of determining liability in any action by the Crown, a member of the forces is deemed to be a servant of the Crown.

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But that does not alter either the nature or the incidents of the service of the officer.

The services which an officer renders are public services for the defence of his country. They are on an entirely different plane from those that arise under any relationship of master and servant. They are of such a nature that they do not support an action *per quod servitium amisit*.

What the master loses by reason of the tort is the then future services of the servant and that which he must be compensated for is the value of that which he has lost.

In private service the costs of the services, for example pay and free hospital and medical services, could be taken into consideration in estimating the value of the services lost, because in private service the incidents of remuneration are at least *prima facie* evidence of the value of the service. The value of that service, and conversely the loss, can be ascertained in money. That may also be true of civilians in public service.

But that cannot be done in the case of an officer in His Majesty's forces. The engagement between an officer and His Majesty is not an economic matter at all. The pay and allowance are not the consideration for the services in any sense. They are granted to assist the member to give the service. If they were not made, the service would be rendered just the same.

The value of the services of an officer in His Majesty's forces serving his country in time of war cannot be ascertained in money and conversely the loss of such services cannot be ascertained in money.

Lord Sumner in the *Amerika case (supra)* said at page 51:—

No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action *per quod servitium amisit* could have been brought at all.

This difficulty was also pointed out by McTiernan, J., in *The Commonwealth v. Quince (supra)*, when he said, page 251:—

The value of the services lost to a master because of injury done to his servant may be measured by the remuneration which is given in return for such services. But a soldier's pay is not a criterion of the



value of his services. This consideration further shows the great difficulty of extending the action per quod servitium amisit to the loss of the services of a member of the defence forces.

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So different both in its nature and its incidents is the service of members of the naval, military and air forces of His Majesty in right of Canada from the service of those who are in private employment, that an action per quod servitium amisit cannot, in my opinion, be brought at all.

For these reasons, the plaintiff's action must, therefore, be dismissed with costs.

*Judgment accordingly.*

BETWEEN:

ANGLIO-CANADIAN OIL COMPANY } LIMITED, ..... }	APPELLANT;	1946 Oct. 7
AND		
THE MINISTER OF NATIONAL } REVENUE, ..... }	RESPONDENT.	1947 Jan. 7

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6 (1) (a), 6 (1) (b) and 90—Deduction from income of money expended in drilling oil well allowed—Travelling and legal expenses incurred in preparation of a brief for submission to the Minister of National Revenue in respect of allocation of proceeds of oil well to capital and income respectively not allowed as deductions from income—“Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.”*

The appeal is from the disallowance of part of a claim under s. 90 of the Income War Tax Act for capital expenditures, made by the appellant in the development of two oil wells. These expenditures consist of (1) amounts laid out to dig the well into which casing was later placed, including the cost of all necessary steps to get the drilling equipment set up, to provide power, supplies and labour therefor, the maintenance and operation thereof, and the cost of removing such plant and equipment after the well was completed; (2) the purchase of the casing and the cost of actually putting it in the well which were admitted by the respondent to be capital expenditures within the meaning of s. 90 of the act. The appellant did not claim allowance for the cost of rental of a drilling rig.

Appellant also appealed from a refusal to allow a claim for deduction from its income of certain costs for travelling expenses and legal expenses incurred in the preparation of a brief for submission to the

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Minister of National Revenue on the matter of determining what proportions of the proceeds of production were properly applicable to capital and income respectively.

- Held:* That the well or hole in the ground is part of the equipment of an oil well and the costs of constructing it as claimed by the appellant are all capital costs within the meaning of s. 90 of the act.
2. That the travelling and legal expenses were incurred in the process of conserving and retaining the profits which had been earned by the appellant and not in the process of profit earning and were "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within s. 6 (1) (a) of the act, and, since they had to do with the preservation or protection of a capital asset, the outlay was a capital outlay and properly disallowed under s. 6 (1) (b) of the act. *Montreal Coke and Manufacturing Company v. Minister of National Revenue* (1944) A.C. 126; *Minister of National Revenue v. Dominion Natural Gas Company Limited* (1941) S.C.R. 19 and *Mahaffy v. Minister of National Revenue* (1946) S.C.R. 450 followed and applied.

APPEAL under the provisions of the Income War Tax Act.

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

*G. H. Steer, K.C.* and *W. G. Egbert, K.C.* for appellant;

*H. W. Riley, E. S. MacLatchy* and *N. D. McDermid* for respondent.

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

CAMERON J. now (January 7, 1947) delivered the following judgment:

This is an Income Tax Appeal in respect of the year 1941. Notice of assessment was forwarded to the appellant on May 11, 1945, and on June 6, 1945, it gave notice of appeal. On September 25, 1945, the Minister gave his decision, varying the assessment in some details and on October 18 gave a supplementary decision. On October 22, 1945, the appellant gave notice of Dissatisfaction, and on March 12, 1946, the Minister made his reply affirming his decisions. By Order of this Court pleadings were directed. The matter came on for trial at Calgary on October 7, 1946, and judgment was reserved.

By its Statement of Claim the appellant claimed relief in respect of three items, but at the trial it abandoned one

of them—a claim for allowance for exhaustion with respect to its income from management fees and special services revenue—and therefore it is not necessary to refer further to that item.

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The first item of the appeal is in respect of disallowance of part of capital expenditures in the period beginning May 1, 1939, and ending April 30, 1940. The sum of \$279,275.25 was claimed as capital expenditures under section 90 of the Income War Tax Act, but of this amount \$96,647.10 was disallowed. The relevant parts of section 90 are as follows:

1. A taxpayer shall be entitled to deduct from the taxes otherwise payable under this Act an amount up to ten per centum of the capital cost hereinafter in this section mentioned in the manner provided.

One-third of the said ten per centum must be taken in each of the first three taxable fiscal periods occurring within the first six fiscal periods of twelve months each ending on or after the 30th April, 1940, provided however that should the said one-third exceed the tax otherwise payable in any one taxable period, the excess may be offset against taxes otherwise payable in the remaining period or periods of the said taxable periods.

Further provided, in any event, that no deductions shall be allowed against any tax payable for periods ending after 29th April, 1946.

2. The capital costs on which the ten per centum shall be calculated are those costs incurred and paid by the taxpayer in the period beginning the first day of May, 1939, and ending the thirtieth day of April, 1940, in respect of work actually done in Canada during the said period, on the construction, manufacture, installation, betterment, replacement, or extension of buildings, machinery or equipment in the said period from the first day of May, 1939, to the thirtieth day of April, 1940, provided such buildings, machinery or equipment are to be used in the earning of the income of the taxpayer. The machinery or equipment referred to herein shall mean only such machinery or equipment as is required to be affixed for a permanency to the business premises of the taxpayer.

For the period in question the appellant expended the sum of \$279,275.25 in the development of two of its oil wells, namely "Anglo 8" and "Anglo-Phillips Petroleum 1." All of these expenditures were allowed as capital expenditures under section 90, except for the sum of \$46,760.39 in respect of "Anglo 8" and \$49,886.71 in respect of "Anglo-Phillips Petroleum 1", particulars of the items disallowed being set out in detail in para. 6 of the Statement of Claim. There is no dispute that the total amounts now claimed as capital expenditures were in fact expended. The respondent contends, however, that the casing was the only item of machinery or equipment required to be affixed for a permanency to the business premises of the taxpayer and

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that while the costs of purchasing and placing the casing itself in the ground are allowable as capital expenditures, the costs preliminary thereto, and as later referred to in greater detail, should not be so allowed.

The appellant company did not itself do the drilling or installing of the casing. It entered into a contract with another company (a subsidiary of the appellant) to perform this work and on completion paid it the amounts now claimed as deductible as well as certain other items not now in dispute. The breakdown of costs, as shown in Ex. 7, is that of the drilling company but the figures are accepted as correct by the appellant. In the case of each well it shows thirty-six items of costs. In my view, however, it is not necessary to deal individually with each item. It is sufficient I think to state that, while all have to do with costs necessarily incurred to bring the well into production, they may, for the purpose of my decision, be divided into two main categories.

(a) Amounts laid out to dig the hole or well into which the casing was later placed, including the cost of all necessary steps to get the drilling equipment set up, to provide power, supplies and labour therefor, the maintenance and operation thereof, and the cost of removing such plant and equipment after the well was completed.

(b) The purchase of the casing and the cost of actually placing it in the well.

The respondent admits the latter group to be capital expenditures within the meaning of section 90, but denies that those in the former group are within the section. He did, however, *ex gratia*, allow the actual labour and supervision costs of digging the well on the ground that it would have been difficult to divide these items correctly between categories (a) and (b).

The procedure followed at each well was briefly as follows:

A road necessary for getting drilling materials to the site was constructed and protected by fences and signs. A cellar, sump, and foundations, all for the use of the derrick, were constructed on the site. Later a derrick was rented, brought in and installed and it is from this derrick that the drilling rig is operated. To supply power for drilling, derrick lighting, etc., a boiler-house was constructed

and necessary wiring installed. A drilling rig was rented (cost of said rental is not here claimed) and transportation costs were incurred in moving it to the site as well as expenses for installing the rig.

The costs of drilling included wages, supervision salary and charges, workmen's compensation, power, oil, water and mud used in drilling, repairs and replacements to rig and pumps, drill pipes, tools and bits. Insurance was carried during the drilling operations and to comply with regulations a hole survey was maintained as drilling progressed to ensure that the maximum permitted deviation was not exceeded. A small expense was incurred for a temporary watchman when the drilling program was temporarily interrupted. Certain drilling materials were bought in the United States and exchange paid thereon. In the preliminary stages of drilling a small length of surface casing was installed to cement off the surface water.

When the drilled hole—or well—reached the surface of the limestone formation where oil was secured, a 7-inch casing was placed in the 9-inch well, extending from the derrick floor to the top of the limestone, a distance in the case of "Anglo 8" well of 7,000 feet. In addition, to prevent the intrusion of water, the casing was cemented in the well from the top of the limestone upward to within 2,000 feet of the derrick floor. This casing, of course, remained permanently in the ground. It was bought in the United States and foreign exchange thereon was allowed as a capital expenditure but disallowed on other items purchased there.

When the drilling and installation of casing were completed, the derrick, rig, boiler-house and other structures used in drilling were removed from the property so that the operator of the well was left with the well and the casing installed therein. The oil itself is later brought to the surface through a pipeline installed within the casing.

The problem for consideration, therefore, is whether the costs of and incidental to the drilling of the well are costs of installing the casing itself. By his allowance of the costs of installing the casing and of the casing itself, the respondent has, I think, admitted that the casing is equipment used in the earning of the appellant's income and that it is affixed for a permanency to the business premises of the

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appellant. It is obvious that the casing could not be installed without the drilling of the well having been first completed.

Section 90 of the Income War Tax Act (called Part XIV) was first enacted by section 17, chap. 46, Statutes of 1939. By chap. 55, section 16, Statutes of 1946, it was entirely repealed. It was manifestly incentive taxation legislation to encourage capital expenditures as a means of helping the general economic condition of the country. It was a clear departure from the general scheme of the act that capital expenditures are not allowed as deductions from income or from tax. It is limited in its operation to costs incurred in the specified twelve months and by subsection 4 certain capital costs are excluded from permissible deductions. From the general tenor of the whole section it seems to have been designed to encourage the outlay of capital to create productive work of one sort and another. The section should, therefore, be interpreted if possible in such a way as to give effect to the intention of Parliament.

The capital costs referred to in sec. 90 (2) are "the capital costs incurred and paid in respect of work actually done in Canada on the construction, manufacture, installation . . . of machinery or equipment to be used in the earning of the income of the taxpayer and required to be affixed for a permanency to the business premises of the taxpayer."

The words costs, installation and equipment are not defined in the act, but in the Shorter Oxford English dictionary there are the following definitions:

*Cost:* That which must be given in order to acquire, produce or effect something. The price paid for a thing.

*Installation:* The action of setting up or fixing in position for service or use (machinery, apparatus, etc.) Spec. used to include all the necessary plant, materials and work required to equip. e.g. a room with electric light.

*Equipment:* Anything used in equipping. To provide with what is requisite for action, as arms, instruments or apparatus.

The cost of installation of equipment would therefore appear to be "that which must be given in order to produce the necessary plant, materials and work required to provide what is needed for action." Here it is sought to limit the meaning of "costs of installation" to those costs incurred in the purchase and actual placing of the steel core or casing in the well, but I cannot find anything in the section which requires such a limitation. Bringing into production

of new oil wells was doubtless in the minds of the legislators for by subsection 4 (ii) the cost of leases and licences to work oil wells is excluded from the allowances. The drilling for oil wells is doubtless a major expense in the bringing in of new oil wells, and had it been the intention of Parliament to exclude the costs nothing would have been easier than to have so indicated.

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The cost of installing equipment is in my view wide enough to include the cost of preparing the place in which the equipment is to be installed—in this case, the well. The casing could not have been effectively used and oil could not have been produced without the preliminary and essential stage of drilling the well.

In the view of the appellant all the capital costs shown on ex. 7 (with the exception of item 32 for each well) are within the provisions of section 90 inasmuch as they are either costs of construction of equipment—the equipment being the well—or, alternatively, that they are costs of installation of equipment—the equipment being either the well, casing or pipeline.

Section 90, so far as I am aware, has not been the subject of judicial interpretation. Counsel for the appellant referred me to the case of *National Petroleum Corporation Limited v. Minister of National Revenue* (1). This case had nothing to do with section 90 of the act but related to questions of deductions for depreciation, development costs and depletion. In the course of his judgment the late President of this Court referred to the reply of the Minister, quoting therefrom as follows:

That the costs of drilling the oil well and the necessary buildings, roads, etc., were expenses incurred in the creation of capital assets or expenses of putting the taxpayer in a position to earn income and not expenses wholly, exclusively and necessarily incurred in the earning of income within the meaning of Section 6 (a) of the said Act.

Counsel for the appellant urges upon me that the above is a finding and statement by the Minister that the costs of drilling the oil well, necessary buildings, roads, etc., were capital costs and that therefore they should be considered as capital costs within the meaning of section 90. But, as I have pointed out, the question in that case was quite different from the one now before me. The problem there was as to whether such costs were capital costs or

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whether they were expenses wholly, exclusively and necessarily incurred in the earning of income within the meaning of section 6 (a). In the instant case there seems to be no doubt that all the expenses incurred were capital costs but it is not all capital costs that are taken into consideration in allowing the deductions under section 90, but only those specifically defined in the section.

Later in his judgment in the same case the late President stated:

The Income War Tax Act provides no rules, in the case of mining and gas or oil producing properties, for ascertaining allowances for depreciation, depletion, or development, and no doubt it was because of a realization of the inevitable difficulties surrounding such matters that this duty was left to the discretion of the Minister. There is no mention of "development costs" in the Act and I assume that in theory and in the strict and proper sense a coal mine shaft, or the shaft of a metalliferous mine, or the hole in the ground through which oil is recovered, is plant and equipment, but it has been found by experience that such development costs had to be treated as a branch or division of the matter of depreciation of plant and equipment, because the problem there cannot be disposed of on the same basis, or with the same approximation to accuracy, as in the case of fixed assets, such as buildings, machinery, etc. . . .

While the President was considering a different section of the act, he did, in fact, give consideration to the problem as to whether development costs included costs of the well and found that the hole in the ground through which oil is recovered was plant and equipment.

The Shorter Oxford English Dictionary has several definitions of the word "construction" including: "The manner in which a thing is constructed or formed". It defines, for example, a construction railway as a "temporary railway for use in the construction of a permanent railway, canal or the like."

Certain regulations were made under section 90, part of them being as follows:

10. "Costs incurred" means those legal obligations for costs within the meaning of Section 90, entered into within the said period of twelve months (Regulation No. 3) which are binding when made between strangers, requiring the one party to perform certain capital works and the other to make payment therefor, and also includes those capital costs incurred by persons using their own employees in the construction of capital properties, provided always that the capital properties are used or intended to be used in the earning of income of the taxpayer.

13. The term "machinery or equipment" includes machinery or equipment purchased within or without Canada but requiring work to be actually done in Canada on their installation in any business activities or enterprises in Canada. The term, however, does not include any machinery or equipment purchased either within or without Canada



which is complete in itself and requires no work to be actually done in Canada on installation in a scheme of equipping a business activity or enterprise in Canada. In particular the term does not include automobiles, trucks, motorcycles, bicycles, aeroplanes and other moveable equipment which is complete in itself and does not become affixed to the premises of the business enterprise and does not require any actual work to be done upon it within the meaning of the statute.

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Taking into consideration the nature of section 90 and the purpose for which it was intended, I am of the opinion that the interpretation placed thereon by the respondent is too narrow. In my view the well or hole in the ground is part of the equipment of the oil well and a very essential part of the equipment. It was necessary to provide (or equip) the property with a well before any productive operations could be commenced. The late President of the Court was of the opinion that an oil well was equipment and I respectfully agree with that finding. And it follows, that if the well is equipment, that the costs of constructing it would include all items in ex. 7 (except items 32) for there is no dispute that they were all essential to the digging of the hole. If one can speak of the "construction" of a canal (as done in the Shorter Oxford English Dictionary to which I have referred) one can also, I think, speak correctly of the "construction" of an oil well. Both are excavations in the ground, one horizontal and the other vertical.

The section also requires that the equipment shall be such as is affixed for a permanency to the business premises of the taxpayer. The oil lands are undoubtedly part of the business premises of the appellant. The emphasis, I think, must be placed on the words "for a permanency" rather than on "affixed". The word "buildings" which is used in the first portion of subsection 2, is omitted from the last sentence because by the very nature of buildings it is assumed that they are affixed for a permanency and if permanency of equipment is the essential requirement, I think the shaft or well is undoubtedly a permanent part of the necessary equipment, being a part of the land itself.

And I think also that the costs of excavating the hole, including all items in ex. 7 (excepting Items 32) are costs of installing the casing and pipeline which are admittedly "equipment". If equipment is to be installed there must be a suitable place in which to install it. In the case of an oil producing company the pipeline and casing must be placed

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in a well and the well must first be dug. In the case of machinery it would no doubt be placed in a factory and the cost of such building and of the permanently affixed machinery installed are within the section. I see no reason for excluding the necessary work of excavation from the benefit of the provisions of section 90.

On this point therefore the appellant must succeed. I find that all the capital costs mentioned in ex. 7 (excepting item 32 for each well—rental of drilling rig—and which were abandoned by the appellant) were capital costs within the meaning of section 90 and should have been allowed by the respondent as deductions from tax to the extent and in the manner mentioned in the section.

The remaining question has to do with an item of \$1,095.25 for travelling expenses and \$4,374 legal expenses paid by the appellant in 1939 and disallowed by the respondent under section 6 (1) (a) of the act which is as follows:

In computing the amount of profits or gains to be assessed deductions shall not be allowed in respect of (a) Expenses not laid out to earn income; disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

In 1939 the oil producing companies of Alberta retained the services of a solicitor to prepare and submit a brief to the Income Tax authorities and the Minister of National Revenue at Ottawa. In its reasons for appeal in regard to this item the appellant stated:

The said sums represent monies paid to the Company's Counsel and Auditor for services in obtaining from the Income Tax Branch of the Department of National Revenue rulings on allowances to be made with respect to the drilling of oil wells. The method of calculation of the amount of allowances of this character, which should have been made in about the year 1940, was uncertain since the decline factor of production for Turner Valley wells was unknown. There was no one in Western Canada with authority to deal with the question which made representations to the Income Tax authorities at Ottawa necessary. The fees and expenses incurred were incurred on behalf of all operators of wells in Turner Valley for the purpose of assembling data to enable the Income Tax authorities and operators of oil wells to determine what proportion of the proceeds of production was properly applicable to capital and income respectively. The determination of such proportions was obviously necessary to ascertain the income of the Appellant and other operators of oil wells. Following the assembly and presentation of the said data the concessions requested by the Operators were granted by the Income Tax Branch and operators were then in a position to and did set up their accounts accordingly so that company officials and shareholders could know the exact position of

their undertaking. The said sums should be allowed to be deducted for the purpose of ascertaining the annual net profit or gain of the Appellant under the provisions of Sections 3 (1).

From a perusal of the brief and the evidence at the trial, I am satisfied that the reasons for appeal, above stated, satisfactorily set out the nature of the work done and what was accomplished thereby, except that at the trial it was pointed out these expenses were confined to legal expenses for fees and travelling and did not include any amount for auditor's services. It is to be noted that the appellant not only produced oil on its own account but managed a number of subsidiary and associated companies. The Turner Valley area in Alberta was a new field of operations and drilling for crude oil was commenced about 1937. Little information was available as to the decline factor for the area. The appellant first got into production in 1939. On their own behalf and as managers of their subsidiary and allied companies, after production had started, they filed tentative income tax returns claiming the same allowances for recovery of capital costs, depreciation and depletion, as requested in the brief; and later when a ruling was obtained following the presentation of the brief the records and income tax forms were adjusted in accordance with the ruling received on or about July 10, 1939 (see ex. 3). Very substantial savings in taxes were made as a result of this ruling which applied to the taxation year 1939 and subsequent years for all crude oil producing wells in Alberta.

In order to ascertain more fully the nature of the representations made in the brief I put certain questions to counsel for the appellant as follows:

THE COURT: Now would it have been possible to have ascertained the profits for the year in question on the basis of the legislation existing and the rules existing before your brief was submitted?

MR. STEER: Not adequately, in my submission.

THE COURT: Was the brief primarily for the purpose of securing further tax relief? I am now asking. I have not seen the brief, so I do not know.

MR. STEER: No, it was not primarily for that, My Lord, so much as it was for the purpose of getting a logical set of rules to be applied by the Minister in his discretion, for the purpose of allocating the receipts of the company as between return of capital and what is properly income.

THE COURT: But there were in existence, prior to the submission of your brief, certain regulations?

MR. STEER: That is right, My Lord.

THE COURT: Which were not satisfactory in the view of your client?

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MR. STEER: That is right, My Lord.

THE COURT: You wanted them changed?

MR. STEER: That is right, My Lord. The rules that were in force, My Lord, are discussed in this National Petroleum Corporation case against the Minister of National Revenue. That is in 1942, 3 D.L.R. 109. Now, those rules had no particular application to this Turner Valley situation which was a new situation which had not been specifically dealt with by the Minister and there was this very important problem of getting the development costs written off during the life of the pool of oil that was being produced from.

THE COURT: I take it in the preparation of this submission you had to get certain evidence as to the probable length of life of that area.

MR. STEER: Yes, My Lord.

THE COURT: And on that basis find out what was the proper method of taxation, spread over the whole life.

MR. STEER: That is right, My Lord.

THE COURT: And that is what you call the declination factor?

For the appellant it is contended that the expense here incurred was a proper one made for the purpose of ascertaining its net profit or gain as provided under section 3 (1) and that it is not barred by either section 6 (a) or (b). For the respondent it is argued that these expenses were not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of section 6 (1) (a) of the act.

Section 6 (1) (a) has been frequently the subject of judicial interpretation. Many of the leading cases are referred to in the Dominion of Canada Taxation Service.

It was laid down by the Privy Council in the case of *Montreal Coke and Manufacturing Co. v. Minister of National Revenue* (1) that expenditures to be deductible must be directly related to the *earning* of income from the trade or business conducted. The section was further considered by the Supreme Court of Canada in the case of the *Minister of National Revenue v. Dominion Natural Gas Co. Ltd.* (2) where Duff, C.J. held that in order to fall within the category: "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning income", expenses must be working expenses—that is to say incurred in the process of earning income.

The above case was referred to and followed in the case of *Mahaffy v. Minister of National Revenue* (3).

In the *Montreal Coke and Manufacturing* case (*supra*) Lord McMillan (page 134) said:

(1) (1944) A.C. 126.  
(2) (1941) S.C.R. 19.

(3) (1946) S.C.R. 450.

In the history of both companies the financial readjustment of their borrowed capital was an isolated episode unconnected with the day to day conduct of their business, and the benefit they derived was not "earned" by them in their business.

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In order to apply the principles and tests set out in the above case, it is necessary to look at the true nature of the expenditure now claimed as deductible and to ascertain whether it is a part of the company's working expense and whether it is expenditure laid out as part of the process of profit earning.

I am of the opinion that it is neither. The business of the company is the production and sale of oil. Depreciation and depletion could have been ascertained under the existing legislation and regulations but what the appellant and its associates wanted to secure was an improvement in their tax position and one that would endure throughout the life of the project. It was for that purpose that they stressed the necessity of ascertaining the special declination factor throughout the area. The expense was not incurred in the process of profit earning, but in the process of conserving and retaining the profits which had been earned and was an expense incurred once for all.

If it be the case, as suggested by counsel for the appellant, that the appellant and others who joined in the brief wanted to ascertain what portion of the sales of the product of the wells could be considered as capital return—as is evidenced by the fact that what was asked for therein was the preservation of capital disbursements and increased depreciation and depletion allowances—then it follows, I think, that the outlay had to do with the preservation or protection of a capital asset, and it would therefore, as a capital outlay, be disallowed under section 6 (1) (b).

Counsel for the appellant referred at length to a recent decision of the English Courts: *Rushden Heel Co. Ltd. v. Keene* (1). Following a decision of the Assessing Commissioners fixing the standard profits at £1,500.0.0 an appeal was taken to the Special Commissioners and in the result the standard profits were increased to £4,500.0.0. The company therefore, benefited to the extent of £3,000.0.0 less what salaries they would have been allowed as an expense and the fund available for and subject to income tax was similarly increased. The legal and auditing

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expenses of this successful appeal were later disallowed as proper deductions and the matter then came before the court. It was held by Atkinson J.:

*Held:* (1) an expense properly and reasonably incurred in the final ascertainment of profits might properly be considered as an outlay in order to earn profits and not an outlay of profits, certainly not of ascertained profits, as the profits were at all times subject to that outstanding expense.

(ii) in this case none of the profits whether profits divisible among the shareholders; profits subject to excess profits tax or profits available for income tax, was ascertainable for a certainty until the appeal had been heard and the final decision given.

(iii) all the expense in dispute was incurred before the final determination of what the profits, in any of those senses, amounted to; consequently the expense was allowable as a deduction for income tax and for excess profits tax purposes.

As stated in the 'Editorial Note' the successive steps in the reasoning upon which the decision was based were as follows:

(1) an admissible deduction must represent an outlay in order to earn profits, as distinct from a disbursement of profits earned; (2) an expense incurred in ascertaining the profits may be said to be an outlay in order to earn profits; (3) in the circumstances under consideration the profits were not ascertained until the appeal to the Special Commissioners had been heard and finally decided; (4) the legal and accountancy expenses of the appeal were, therefore, deductible for both taxes.

The judgment is a lengthy and interesting one and I have been advised that it is now under appeal. I do not propose to take it as a precedent which I should follow. The English Act under which the decision was made is, in several respects, different from the Income War Tax Act. The decisions in the Supreme Court of Canada and the Privy Council to which I have referred must be my guide in reaching a conclusion. I am of the opinion that the principles laid down in those judgments indicate quite clearly that the legal and travelling expenses here in question come within the provisions of section 6 (1) (a) and were therefore properly disallowed; and that they would also be barred under section 6 (1) (b). For these reasons, the appeal as to these items must fail.

In the result, therefore, I would allow the appeal as to the claims made under section 90 of the act and disallow the appeal as to the claims for legal and travelling expenses. The appellant is entitled to costs, such costs, in my view, not having been materially increased by reason of the claim in which the appellant is unsuccessful.

*Judgment accordingly.*

BETWEEN:

CONSOLIDATED TEXTILES LIMITED, .....	}	APPELLANT;
AND		
THE MINISTER OF NATIONAL REVENUE .....	}	RESPONDENT.

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*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a)*  
 —“Disbursements or expenses not wholly, exclusively and necessarily  
 laid out or expended for the purpose of earning the income”—“The  
 annual net profit or gain or gratuity . . . directly or indirectly received”  
 —Deductible expenses must be those laid out or expended in the year  
 income is received—Appeal dismissed.

Appellant, a manufacturer of lingerie fabrics, in making its income tax return for the year 1939, sought to deduct from its 1939 receipts certain operating expenses incurred in 1938. The deduction was disallowed and on appeal to the Minister of National Revenue the assessment was affirmed. From such assessment the appellant brought its appeal to this Court.

*Held:* That the word “annual” in s. 3 of the Income War Tax Act as applied to profit or gain or gratuity does not mean that the profit or gain or gratuity must necessarily be of a recurring nature from year to year, but rather that it is the profit or gain or gratuity of or in or during the year in respect of which the assessment is made.

2. That the “net” profit or gain or gratuity “received” is to be determined by deducting from the gross income received in or during the year the deductible disbursements or expenses laid out or expended in or during the same year; the taxable income of the year is the difference between the incoming receipts and the outgoing deductible expenditures of that year.
3. That s. 6 (a) of the Income War Tax Act excludes the deduction of disbursements or expenses that were not laid out or expended in or during the taxation year in respect of which the assessment is made.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Montreal.

*Joseph Shapiro, K.C.* for appellant;

*J. A. Mathewson, K.C. and Miss M. J. Phillips* for respondent.

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

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THE PRESIDENT now (January 17, 1947) delivered the following judgment:

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In its income tax return for the year ending December 31, 1939, the appellant showed a taxable income of \$9,868.38. When the assessment for such period was finally made a number of deductions which the appellant had claimed were disallowed and their amounts added to the amount of taxable income shown on the return. Included therein was the sum of \$5,380.79 representing the amount of 1938 operating expenses which the appellant sought to deduct from its 1939 receipts. The appeal is restricted to this item the amount of which is reduced by the sum of \$65 representing an expense actually incurred and paid in 1939 but erroneously included in the disallowed amount.

The 1938 expenses sought to be deducted represented 12/14ths of the operating expenses of the appellant during the period between August 27, 1938, and October 14, 1938. The appellant manufactures and sells lingerie fabrics. It was incorporated under the laws of Quebec on August 3, 1938, and organized for business on August 27, 1938, but was not able to go into full production until after it had acquired its plant at Ste. Hyacinthe on October 13, 1938. During the period between August 27 and October 14, 1938, work was done in getting the machinery ready, preparing designs and patterns, weaving samples, arranging for supplies and materials, making sales contracts, generally by way of preparation for production and sale of its products. The operating expenses during this period came to a total of \$6,201.71. They included the salaries of the appellant's superintendent, foreman and operating staff in the weaving of samples and designing of patterns and styles, the salary and travelling expenses of its president while engaged in finding sources of raw materials, the salary of its sales manager while occupied with sales promotion, the salary of its secretary and accountant, rental of premises and overhead expenses such as the cost of telegrams, postage, light and power and other items. The particulars of the expenses are set out in exhibit 1. There was a separate ledger account kept for each item.

The appellant's president gave evidence as to the nature of its business. It deals only in fabrics and does most of



its business with garment manufacturers although it also sells to the retail trade. The business is a seasonal one, there being a spring and fall season. The orders for the 1939 spring season had to be taken between August and October of 1938. If the samples had not then been ready to show to the trade the appellant could not have got the 1939 spring season business. The samples thus served not only for the business of the remaining part of 1938 but also for that of 1939 and to some extent for that of 1940.

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Out of the total expense of \$6,201.71 the sum of \$442.96 was charged as an operating expense in each of the months of November and December, 1938, and the remaining \$5,315.79 carried as a deferred expense charge on the balance sheet as at December 31, 1938. This amount was reflected in the appellant's 1939 statement as absorbed in its 1939 operating expenses account, the deferred amounts of the items shown on exhibit 1 being added to the corresponding items for 1939, item for item, in the ledger account for each. The reasons given for this procedure by the appellant's auditor were that it had not gone into active operation or made any sales up to October 14 and had carried on only a limited business for the balance of the year and that he considered it sound accounting practice to apportion the charges for the period from August 27 to October 14 over a fourteen months period, two in 1938 and the remaining twelve in 1939.

On the appeal to the Minister, the assessment was affirmed on the ground that the expenses sought to be deducted were 1938 expenses and not deductible from 1939 income under section 6 (a) of the Income War Tax Act, R.S.C. 1927, chap. 97, which reads:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of  
 (a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

Being dissatisfied with the Minister's decision the appellant brought its appeal from the assessment to this Court.

There is no doubt that the expenses in question were of such a nature as to be properly deductible; the only question is as to the year of their deductibility. The issue in the appeal is thus a very narrow one. Counsel for the appellant contended that there was nothing in section 6 (a)

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defining the time of the term "laid out or expended"; that if a disbursement or expense was wholly, exclusively and necessarily laid out or expended for the purpose of earning the income it was deductible from such income no matter when it was laid out or expended; that the deduction was allowable by good accounting practice and that since it was not excluded by the section it should be allowed.

There are a number of reasons why the appellant's contention cannot be accepted. I am not at all convinced that the procedure followed by it was wholly in accord with good accounting practice. There might be some justification from an accounting point of view in apportioning the 1938 operating expenses under discussion over the period of the business resulting from their expenditure in order to ascertain the true profit from such business, but if that is so and if the expenditures were made for the purpose of earning the income of 1939 and also of 1940, as the evidence indicates and the appellant claims, then it may be asked why the expenses were not apportioned over a longer period than was the case and a portion dealt with at the end of 1939 as a deferred expense charge and then absorbed in the operating expenses account of 1940. On the appellant's own argument it would not be entitled to the whole amount of the deduction in 1939. Moreover, it is hard to see how the appellant could also be entitled to deduct its 1939 operating expenses for on the basis of its own argument some of such expenses, for example, those made for designing new patterns and styles and weaving new samples, must have been incurred and paid for the purpose of earning the income of 1940 and subsequent years and should have been apportioned accordingly. It is obvious that it would be very difficult, if possible at all, to apportion operating expenses against the income from the business resulting from their expenditure and to allow their deduction only accordingly; at best such apportionment could only be an approximation dependent on the auditor's opinion. I am unable to believe that Parliament could have intended that the deductibility of expenses should depend on such an indefinite factor.

But it is not necessary to settle the question of the soundness of the appellant's accounting practice, for effect

cannot be given to it for income tax purposes, no matter how sound it might be, if the Income War Tax Act provides, as I think it does, a different basis for the computation of income tax liability. Indeed, the very definition of taxable income in section 3 as "the annual net profit or gain or gratuity, . . . directly or indirectly received" is against the appellant's contention. It is settled, I think, that the word "annual" as applied to profit or gain or gratuity does not mean that the profit or gain or gratuity must necessarily be of a recurring nature from year to year, but rather that it is the profit or gain or gratuity of or in or during the year in respect of which the assessment is made. The word may thus include an item of income that may occur only once: *vide Ryall v. Hoare* (1); *Martin v. Lowry* (2). And when the section speaks of the annual "net" profit or gain or gratuity "received", I think it must mean that the net is to be determined by deducting from the gross income received in or during the year the deductible disbursements or expenses laid out or expended in or during the same year. The taxable income of the year is the difference between the incoming receipts and the outgoing deductible expenditures of that year.

Moreover, there is a fallacy inherent in the appellant's contention that because the 1938 expenses were laid out or expended for the purpose of earning the 1939 income they are deductible from it. It is not a condition of the deductibility of a disbursement or expense that it should result in any particular income or that any income should be traceable to it. It is never necessary to show a causal connection between an expenditure and a receipt. An item of expenditure may be deductible in the year in which it is made although no profit results from it in such year: *Vallambrosa Rubber Company, Limited v. Inland Revenue* (3); and even if it is not productive of any profit at all: *Commissioners of Inland Revenue v. The Falkirk Iron Co., Ltd.* (4). The reason for the deduction of an item of expenditure is quite a different one. Under the provision of the United Kingdom Act corresponding to section 6 (a)

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(1) (1923) 2 KB 447 at 455.

(2) (1926) 1 K.B. 550.

(3) (1910) 47 Sc. L.R. 488.

(4) (1933) 17 T.C. 625.

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the test of deductibility was laid down by the Lord President (Clyde) of the Scottish Court of Sessions in *Robert Addie & Sons' Collieries, Limited v. Commissioners of Inland Revenue* (1) as follows:

What is "money wholly and exclusively laid out for the purpose of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

This test was approved by the Judicial Committee of the Privy Council in *Tata Hydro Electric Agencies, Bombay v. Income Tax Commissioner, Bombay Presidency and Aden* (2) and adopted as applicable to section 6 (a) by the Supreme Court of Canada in *Minister of National Revenue v. Dominion Natural Gas Co. Ltd.* (3). It completely disposes of the fallacy in the plaintiff's contention to which I have referred, for it is clear that what makes an expenditure deductible is that it is part of the taxpayer's working expenses and that it is laid out as part of the process of profit earning. In my judgment, the statement goes further and disposes of the question in issue, for it follows that an item of expenditure becomes a deductible one when and as soon as it meets the requirements of the test, that is to say, that it is deductible in the year in which it becomes a working expense and part of the process of profit making. The appellant's 1938 operating expenses became its working expenses and part of the process of profit making or, to use the words of section 6 (a), part of the process of earning the income in 1938, and, therefore, deductible in that year; that being so, they were not deductible in 1939.

In my opinion, section 6 (a) excludes the deduction of disbursements or expenses that were not laid out or expended in or during the taxation year in respect of which the assessment is made. This is, I think, wholly in accord with the general scheme of the Act, dealing as it does with each taxation year from the point of view of the incoming receipts and outgoing expenditures of such year and by the deduction of the latter from the former with a view to

(1) (1924) S.C. 231 at 235.

(3) (1941) S.C.R. 19.

(2) (1937) A.C. 685 at 696.

reaching the net profit or gain or gratuity directly or indirectly received in or during such year as the taxable income of such year. The Minister was, therefore, quite right in disallowing the deduction of the appellant's 1938 expenses from its 1939 income, and no fault can be found with the assessment by reason of his so doing. The appeal from it must be dismissed with costs.

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*Judgment accordingly.*

EXCHEQUER COURT OF CANADA  
BRITISH COLUMBIA ADMIRALTY DISTRICT

1947  
Jan. 7, 8, 9,  
10, 11 & 13  
Jan. 18

BETWEEN:

CANADIAN TRANSPORT COMPANY }  
LIMITED, OWNERS OF THE SCHOONER } PLAINTIFF;  
*City of Alberni* .....

AND

HUNT, LEUCHARS, HEPBURN, }  
LIMITED .....

DEFENDANT.

*The City of Alberni*

*Shipping—Action for general average contribution—Abandonment of ship—Counter claim for loss of cargo—Unseaworthiness—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49—Extent of owner's responsibility—Canada Shipping Act, 1934, 24-25 Geo. V c. 44, s. 649—Limited liability of shipowner—"Actual fault or privity" of owners—Action dismissed—Counterclaim allowed.*

The schooner *City of Alberni*, owned by the plaintiff and carrying a cargo of lumber, owned by the defendant, from Vancouver, B C., to Durban, S.A., was forced to put into San Francisco, California, and later into Valparaiso, Chile, for repairs. At the latter port she was abandoned by her owner and the ship and cargo were sold, causing heavy losses to both owners.

The action is brought by the ship owners to recover a general average contribution from the owners of the cargo who defend on the ground that the ship was unseaworthy at the commencement of the voyage and that the owners failed to use due diligence to make her seaworthy. The cargo owners counterclaim for the loss they sustained.

The Court found that the ship was not seaworthy when she sailed from Vancouver nor when she left San Francisco.

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*Held:* That the carrier's obligation under The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49 to exercise due diligence to see that his vessel is seaworthy is not limited to his personal diligence, his responsibility extends to the acts or defaults of his agents or servants.

2. That the action must be dismissed since the ship was unseaworthy and judgment be given in favour of the defendant on its counterclaim for the amount of limited liability under the Canada Shipping Act, 1939, 24-25 Geo. V, c. 44, s. 649.

Sidney  
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ACTION by plaintiff to recover a general average contribution from defendant.

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

*J. V. Clyne* and *J. I. Bird* for plaintiff.

*C. K. Guild, K.C.* and *F. A. Sheppard* for defendant.

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

SIDNEY SMITH D.J.A. now (January 18, 1947) delivered the following judgment:

The plaintiffs in this case were the owners of the schooner *City of Alberni* and the defendant the owner of a cargo of lumber laden therein at Vancouver, British Columbia, for carriage to Durban in South Africa. I shall call the former the "shipowners" and the latter the "cargo interests".

The *City of Alberni* is a five-masted schooner, built in 1920 of fir at Hoquiam, Washington, U.S.A., length 242 feet; beam 44 feet; loaded draft 23 feet; gross tonnage 1,590 tons; registered (at all material times) at Vancouver, B.C.; official number 172,324; registered owner, Canadian Transport Company Limited. In 1940 she was purchased by the shipowners and in that year made a voyage to Australia with lumber and returned to Vancouver with sugar from the Fiji Islands. In 1941 she made a similar voyage to Australia, arriving back in Vancouver in November, 1941, with hardwood and copra from Sydney, New South Wales, and Samoa, respectively. She was then laid up until the following October, when she was again laden with lumber to the extent of one million feet below decks

and a half million feet on deck, and on 10th November, 1942, with a crew of 18 men all told, sailed upon the voyage with which we are concerned in this action. When four days out of Vancouver the vessel was found to be leaking so badly that the Master decided two days later to put into San Francisco for repairs and did so, arriving in that Port on the 24th November, 1942. There certain repairs were made around the stem, and on 12th December, 1942, she continued upon her voyage. From the 20th to the 24th February, 1943, she encountered heavy weather and again leaked so badly that on the 25th the Master decided to put into Valparaiso for further repairs. The ship arrived there on the 12th March, 1943. After various inspections it was decided by the owners to abandon the voyage and thereupon the ship and cargo parted company. The ship-owners sold the ship and the cargo interests sold the cargo for what they respectively would bring. Heavy losses were incurred by both. Hence this action.

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This action is brought by the shipowners to recover a general average contribution from the cargo interests of some \$55,000. The equity of the underlying principle of general average has been recognized throughout the centuries, and every maritime state has adopted the rule that a loss caused by a sacrifice in time of peril at sea shall not be borne by one but by all interests involved in the adventure. A general average act is defined in the Marine Insurance Act, R.S.B.C. 1936, Ch. 134, sec. 68 (2) (and in Section 66 (2) of the English Marine Insurance Act, 1906) as follows:

There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

Here the loss was not by way of sacrifice but by way of expenditures made by the owners at San Francisco and at Valparaiso and, assuming such expenditures were properly and reasonably made, the shipowners would be entitled to contribution from the cargo interests. But the cargo interests resist the claim upon the footing that the ship was initially unseaworthy, and that the owners failed to use due diligence to make her seaworthy. They say that the legal consequence is that the shipowners cannot

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recover; but that on the other hand they must pay to the cargo interests the amount of their losses, which they (the cargo interests) now make the subject of a counter-claim in this action.

The Bills of Lading contained a clause which is known as the "New Jason Clause", under which it was argued that the onus of proving seaworthiness fell upon the ship-owners if they were to succeed in their claim for a general average contribution. This may or may not be true, but in the view I take of the matter the question of onus is not material.

The Bills of Lading also contained an overriding clause making them subject to all the terms and provisions of and all the exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1936. The relevant parts of this Act are as follows:

Sec. 3. There shall not be implied in any contract for the carriage of goods by sea, to which the rules apply, any absolute undertaking by the carrier of goods to provide a seaworthy ship.

Art. 3 (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to,

(a) Make the ship seaworthy.

Art. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . .

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(p) Latent defects not discoverable by due diligence.

Finally, under the Bills of Lading general average was made payable according to York Antwerp Rules, 1924 or 1890 at the option of Canadian Transport Co. Ltd.

In *Paterson Steamships Ltd. v. Canadian Co-Operative Wheat Producers Ltd.* (1), Lord Wright deals with the shipowner's absolute warranty of seaworthiness which formerly prevailed at common law, and shows how the British Carriage of Goods by Sea Act, 1924, (which is the same as the aforesaid Canadian Act of 1936) and kindred acts, imposed restrictions upon the shipowner's freedom to contract out of his liability as carrier at common law, and at the same time gave him the benefit of certain statutory



provisions in his favour. One such provision was the statutory removal of his absolute warranty of seaworthiness and its replacement by a provision requiring only due diligence on his part to make his ship seaworthy.

In the present case the legal position envisaged in the Bills of Lading is this: The shipowners are entitled to recover provided their vessel was seaworthy; or even if she were not seaworthy, provided they used due diligence to make her so. But if both provisoes are found against them, they fail, the cargo interests succeed on their counterclaim, and the only remaining question is whether the shipowners are entitled to limitation of their liability under sec. 649 of the Canada Shipping Act, 1934.

The issue of seaworthiness and the issue of due (which means "reasonable") diligence are here both questions of fact, depending on the evidence adduced and the proper inferences to be drawn from such evidence. The well known definition of seaworthiness given by Lord Cairns and approved by Lord Herschell, L.C., in *Gilroy Sons & Co. v. Price & Co.* (1) is as follows:

That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic, or in performing whatever is the voyage to be performed.

Measured by this standard, I am of opinion that the *City of Alberni* was not seaworthy when she sailed from Vancouver. These are my reasons for thinking so.

First, the weather: The vessel sailed from Vancouver on November 10, 1942. Her log entries show that she was "making considerable water throughout night" of the 13th and 14th November and at 9.30 a.m. on the 14th a "leak was discovered at stem in vicinity of water-line". This leak was of such gravity that at noon on the 16th the Master, quite rightly, decided to "run for San Francisco for repairs". The weather, up until the morning of the 14th, was not abnormal for a November day in the North Pacific. The Beaufort Scale affords a useful method for recording the velocity of the wind, running as it does from 0, signifying a dead calm, to 12, signifying winds of hurricane force. On this scale, until then, as depicted in the log, there was no wind over force 5, except for two hours from

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(1) (1893) A.C. 56 at 63.

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6 to 8 a.m. on the 14th, when it was logged as being at South-West, force 6. But at 8 a.m. it backed to the South-South-East and moderated to force 2. This was by no means unusual weather for the time and place, and certainly not weather such as *per se* should cause a seaworthy vessel to take water. I adopt as appropriate to the case a passage from the judgment of Lord Loreburn, L.C. in *Lindsay v. Klein, et al (The Tatjana)* (1):

If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference.

and the further passage at p. 205 from the judgment of Lord Shaw:

In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character.

The Master says that the log-book does not show the true nature of the weather—that it was much more severe than the log entries indicate. I am satisfied that the Master is a brave and capable officer, but on this point I think he is mistaken, and that the memory of the Second Mate is also at fault. I have not overlooked the evidence from the United States Weather Bureau as to the winds prevailing at that time along the coast of the State of Washington. But, it does not follow that winds of a similar velocity were also prevailing at a point two hundred miles to the Westward. The Captain himself signed each page of the log-book in the calm of San Francisco harbour, when he had ample time for reflection. In my opinion the log-book correctly reflects the weather experienced at this and other times on the voyage.

Next, the condition of the vessel at San Francisco:

It may first be useful to notice that the stem or stem post is the foremost perpendicular timber of a vessel, and that it is united to the keel inside by the deadwood, and outside by the stem band. while at its head the breast-hook binds the upper strakes (the planking) of the vessel

firmly to it. Behind or abaft the stem another timber is secured called the apron, which gives to it additional support, and which also secures the forward end of the strakes, thus rendering the bow, as it needs to be, a powerful construction. The fore ends of the horizontal outside planking of the vessel (known as the hood ends) are fitted into a groove or channel incised along the after outer edge of the stem post. This groove is known as the rabbet of the stem and is expressly made to receive the edge (ends) of the side planking.

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The Master said there was a leak on each side of the stem between the hood ends of the planking and the rabbet of the stem; that there was a wide seam there but that he could not recall its width. It needed caulking. John Tarabochia, the shipwright foreman, who carried out the repairs, gave evidence before me. He is an Austrian and was at times a little difficult to follow. But I think he spoke the truth, as he saw it, and I accept his evidence. He said the hood ends of the planks had pulled away from the stem, that the spikes had drawn from the stem and apron, and that this was due to dry-rot in both stem and apron. The evidence of Robert Martinolich was taken on commission at San Francisco. He is the Supervisor of Repairs for the Martinolich Shipbuilding Company who executed the repairs. His testimony was substantially the same as that of Tarabochia, and I see no reason to doubt it. These two witnesses were called by the cargo interests. For the shipowners (apart from the Master) evidence was given on commission by Captain Jory at San Francisco. He is a surveyor with the Board of Marine Underwriters of San Francisco and was called in to survey the stowage of the cargo. He said he knew nothing about the conditions of the stem and apron when the vessel arrived, but knew "she was leaking water forward because you could hear the water running in". He gave no opinion in his survey report that the vessel was seaworthy. His report states that the vessel was making about twenty-four inches of water per day while at anchor and that the leaking appeared to be caused by started and opened seams in way of plank ends at stem and apron; that the vessel was raised approximately twenty-six inches at the bow when temporary

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repairs were made by re-fastening the plank ends and caulking the open seams; that shaped steel plates were then fitted to each side of the stem in way of the bow plank ends and secured in place by through bolting; that a diver was employed to caulk the seam below the water-line; that upon completion of repairs the leaking had apparently been reduced to normal.

The only other evidence on this point was a certificate from Edward Hough, surveyor to the Bureau Veritas at San Francisco, and therefore the opposite number of Mr. Louden at Vancouver. It may be well to set out his certificate in full.

THIS IS TO CERTIFY that at the request of the British Ministry of Shipping, Agents for the Wooden Schooner, *City of Alberni*, the undersigned Marine Surveyor to Bureau Veritas, did on November 24, 1942, and subsequent dates, hold survey on the above vessel as she lay afloat in San Francisco Bay for the purpose of determining the extent and nature of a leak reported to have been sustained while the vessel was en route from Vancouver, B.C., to South Africa.

As the vessel was diverted from her voyage she entered San Francisco Bay where repairs were effected and the vessel is now on this date, in my opinion, in fit and seaworthy condition to carry lumber cargos on trans-ocean voyages.

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 By "Edward Hough"

Mr. Hough, although a resident of San Francisco, was not called, and so gave no evidence in support of his certificate. It appeared that the matter was in charge of another surveyor, a Mr. Dixon, now deceased. But it also appeared that Hough had been down at the vessel during repairs and his certificate so states. I did not have the benefit of his opinion on the "extent and nature of a leak" for which he says, he held survey; nor upon what facts he based his opinion that the vessel was "in fit and seaworthy condition"; nor what he means by "trans-ocean voyages"; nor whether that expression includes a voyage around Cape Horn. This was not very satisfactory. But I must take the evidence as I find it and considering it as a whole, with respect to the state of affairs at San Francisco, I find that there was dry-rot in the stem and apron of such a nature and to such an extent as to afford no sufficient fastening for the hood ends of the planking which consequently started and opened in the first moderate weather encountered.

Next, the position at Vancouver: There was much evidence given as to the vessel's condition and as to the surveys she underwent and the repairs that were made. The shipowners were generous with regard to surveys, and as to the general upkeep of the vessel. A survey was held on purchase and another at the end of each voyage. After her return in November, 1941, the vessel was dry-docked and repairs continued afloat, off and on, until February, 1942. She was then laid up till October, 1942, when she loaded the aforesaid cargo. Prior to loading she was dry-docked again for hull painting and examination. But the Master and surveyors all agree that this was merely a superficial examination. They, however, all knew that the pending voyage was one round the Horn, and I think they also knew that it was her first voyage round the Horn. While in her previous ownership she had been employed in the carriage of lumber cargoes to the Hawaiian Islands. The surveyors were Mr. Louden (who succeeded Mr. Lockhart, present at the first survey) of the Bureau Veritas and Captain Clarke of the Board of Marine Underwriters of San Francisco, both of whom are men of experience. After the ship returned from the second voyage she was as already stated dry-docked in November, 1941, and repairs and survey continued afloat. Amongst other matters attended to then were the planks in the way of the hawse-pipes on each bow. These were found decayed. They were removed and replaced. The evidence of Captain Clarke on this repair is as follows:

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Mr. CLYNE: Q. Several planks in way of hawse pipes on both port and starboard sides more or less decayed?

A. That is a different matter.

Q. What is the occasion of that decay?

A. Dry, plain rot.

Q. What was the occasion of the decay?

A. Moisture getting in there through damaged portions of the plank-ing, through the anchor. The bows were sheathed around the hawse pipes with metal and we do find with the anchor—that metal had been punctured. Water had got through the punctured places, and was possibly running through the seams above and down behind; and in the packing around there we found some deterioration with the result we decided to take those off and give it a thorough examination. On pulling this off we found deteriorated planks, just plain rot in pockets and places and I think Mr. Lowden was the chief man who took the matter into his hands

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there—I was in attendance with him and the shipyards cut those planks off. I don't recall how many, but it extended from a position above the flanges of the hawse pipe to a position below the flanges.

Q. How many planks were removed, could you tell, Captain?

A. No, I cannot recall but it was almost to my own depth as I stood on the planking there near the whole aperture on the starboard side. It was pretty near as tall as myself.

Q. What members of the ship were exposed when you removed the planking?

A. The knightheads, a small portion of the apron, the aft part of the stem, about three or four frames and all the filling troughs.

Q. Did you have occasion to observe the work?

A. Yes.

Q. What was the condition of the wood in those members?

A. In the filling troughs they were quite seriously affected by rot, just plain rot. Some of the frames were affected with pockets, with rot adjacent to the filling troughs. It would appear the filling troughs were not of the same wood as the frames had been and they became deteriorated and were cut off, all out. The troughs are not very long. We were able to pull them out in their entirety. The defective portions of the frames were cut off and replaced with new sections.

Q. What was your opinion of that work after it had been completed?

A. I considered it a very satisfactory repair.

I am of opinion that the dry-rot referred to by Captain Clarke had spread, undetected, to the apron and stem; and I find as a fact that the extent of dry-rot existing in that area, when she broke ground at Vancouver on 10th November, 1942, was such as to render insecure the hood end fastenings; and that as a consequence the ship was plainly unseaworthy for the intended voyage. In my view the evidence is quite sufficient for the purpose of this finding, let the onus lie where it may.

I also think that the vessel was unseaworthy when she left San Francisco in that no proper repairs had been effected to the underwater portion of the stem and hood ends of the hull planking; that the caulking of these seams below water by a diver could at best be only considered an improvised repair and totally inadequate for a vessel making a long voyage around Cape Horn; that this caused further leaking whenever the ship met with anything but fine weather, and that in the sequel the initial unseaworthiness was a co-operating cause, if not the main cause, of the vessel having to put into Valparaiso in distress. There can be no doubt that the ship went through a very heavy gale from 20th to 24th February, 1943, when in Lat. 51 S.,

in a position South-East of Pitcairn Island and about 1,000 miles from Cape Horn. But she was then in the region of the Westerlies (as the Captain stated) and such weather is to be expected there. After the gale she was leaking at such an alarming rate that the Master had no recourse but to again seek shelter. He observed on the way, amongst other damage, that the seams in the bows between stem and hood ends worked badly. Captain Pewsey surveyed the vessel at Valparaiso and in his report dated 9th April, 1943, he details the damage as follows:

It was found that, the butts of hull planking at stem rabbet having moved, plank sheer seams on each side of bow opened out, waterway seam on both sides of weather deck opened out and beam across fore part of poop moved, diagonal tie rods, one through each side of hull, leading up to after part of fore-castle head, slackened up. The cause of this is severe racking strain suffered during very bad weather.

In these circumstances I am, on the authorities, unable to find that the shipowner exercised due diligence to make the ship seaworthy at Vancouver, B.C. The Carrier's obligation under The Water Carriage of Goods Act, 1936, to exercise due diligence to see that his vessel is seaworthy, is not limited to his personal diligence and so does not confer upon him as great a benefit as would at first appear; for his responsibility extends to the acts or defaults of his agents or servants.

It is thus expressed in Scrutton on Charter-parties and Bills of Lading (14th Ed.) at page 494:

In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For the dilemma indicated on page 110 *ante* must constantly arise, and the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover.

The dilemma mentioned is concisely stated at page 111, as being this:

In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.

What is meant by due diligence was discussed by Wright, J., (as he then was) in *W. Angliss and Company (Austra-*

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*lia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company* (1). I quote two short passages from page 462.

In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her.

Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

Lord Wright, (as he became) returns to the subject in the House of Lords in *Smith, Hogg & Company, Limited v. Black Sea and Baltic General Insurance Company Limited* (2). Dealing with the facts of that case he says,

The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The over-loading was the result of overt acts.

The case made here was not one of latent defects. It was one of a seaworthy ship damaged by a peril of the sea. The defect here was in truth not a latent one. Dry-rot was known to have existed (and remedied) in different parts of the ship, notably in the area of the hawse-pipes. The only factor that was latent was the extent and nature of its development. But with the details of the vessel before them, her age, her history, her record, that was for the surveyors.

The remaining question is whether the shipowners are entitled to limit their liability under the provisions of Section 649 of the Canada Shipping Act. The limited liability is stated in the pleadings as amounting to \$32,307.52. They are so entitled provided they prove that the loss was occasioned without their actual fault or privity. Mr. H. A. Stevenson was the directing will and mind, the *alter ego* of the plaintiff company. He is a man of very considerable experience and ability. It must be shown that he personally was without fault and privity, for parties who plead the section must bring themselves within its terms. I think that this has been done. Indeed, the defendant did not press the point very strongly. The main

(1) (1927) 2 K.B. 456.

(2) (1940) A.C. 997 at 1001.



contention advanced was as to a peculiar mix-up in the vessel's classification. She was originally classified with the Bureau Veritas, "a well known agency which issues certificates and keeps a list for the purpose of showing the condition of ships" per Lord Haldane in *Lennards Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.* (1). The previous owners dropped the entry but she was restored to classification by Mr. Stevenson when purchased. She was then (as appears from her classification certificate) put under class "A", which in this Agency means that her navigation limits are restricted. Mr. Louden first said that under "A" she was prohibited from going around Cape Horn, but later he was not so sure of this. In any event, "A" means a restriction. The letter "L" is the appropriate one for unrestricted navigation and the vessel appeared under "L" in the official register of the Agency, though the certificate gave "A" only. I think it was suggested that the letter "A" on the certificate, which was always in the keeping of the ship and so of the shipowner, should have put Mr. Stevenson upon inquiry to make sure that she was not thereby prohibited from a round-the-Horn voyage: that there being no evidence of any such inquiry upon his part he was not without "actual fault" as stated in the section and so not protected by its terms. I do not agree. This is only one circumstance among the many comprising his activities regarding this vessel, and viewing the matter as a whole, I think he was entitled to look upon Mr. Louden, the Society's representative at Vancouver, for guidance in this respect. I hold, therefore, that the shipowner has discharged this onus.

It should perhaps be mentioned that the matter of the classification certificate also entered into the issue of "due diligence". But there, too, it was only a circumstance for consideration. A vessel may be seaworthy regardless of whether classified or not; and, if classified, regardless of whether she may be entered in the wrong division. It is seaworthiness that is the paramount consideration, not classification. The important point, as I see it, is that Mr. Louden in his survey report of 24th February, 1942, recommended a lower class because, as he says, "the wood-work generally throughout the hull does not warrant the vessel

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(1) (1915) A.C. 705 at 710.

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to retain her original class". This goes to the general question of seaworthiness, as to which I have found adversely to the ship.

I accordingly dismiss the plaintiff's claim and give judgment in favour of the defendant on its counterclaim for the amount of limited liability under Section 649 of the Canada Shipping Act. I understand the defendant's losses amount to very much more than this and that a reference will not therefore be necessary. But if I am wrong on this point the matter may be spoken to.

The defendant will have its costs.

*Judgment accordingly.*

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BETWEEN :

THE CUSTODIAN, ..... PLAINTIFF;  
 AND  
 PROPELLER WOODWORKING }  
 COMPANY OF CANADA LIMITED } DEFENDANT

*Patent—Invention claimed for new improvements in manufacture of skis—Anticipation—Prior user—Experimental use—Public use—Patent Act 1935, s. 28 (1) (c).*

The action is one for infringement of Letters Patent numbered 344,858. The invention claimed is an improvement to a three layer ski and consists of a centre layer tapered from the middle to both ends and a top layer bent over the thick part of the central layer and extending to both ends of the ski.

The Court found that the invention claimed had been used in Canada on a date more than two years before the application for the patent in question.

*Held:* That use of an invention in such a way that persons under no obligation of secrecy have access to it is not such a use as mere experiment and amounts to prior use.

ACTION by plaintiff herein to have it declared that Canadian Patent No. 344,858 owned by it is valid and has been infringed by defendant.

The action was tried before the Hon. Mr. Justice O'Connor at Ottawa.

*Christopher Robinson and E. L. Medcalf* for plaintiff.

*E. G. Gowling, K.C. and J. C. Osborne* for defendant.

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

O'CONNOR, J. now (Jan. 15, 1947) delivered the following judgment:

This is an action for the infringement of a patent of invention No. 344,858. It is admitted that the plaintiff was vested with all the rights of the patentee, one Bjorn Ullevoldsaeter of Seberg, Norway.

The defendant denies infringement and alleges that the patent is invalid for lack of invention and lack of novelty over the prior art. The main attack is that the alleged invention was in public use and on sale in Canada for more than two years prior to the application for letters patent, as appears from skis made and sold by R. A. Sproule and Sons, Ottawa, between 1919 and 1929, which skis were used publicly in Canada during the said period.

The specifications show the characteristics of the invention and its objects:

It has formerly been proposed to produce a ski of two or more layers of different material, which are glued together in order to make the ski as light as possible, retaining a hard running surface. However, it is found that skis produced in this manner quickly lose their bending or springiness at the same time as they, owing to the interior work in the material in the respective layers, easily become warped.

The present invention, which relates to an improvement in skis produced of three superposed layers, aims to remove the above named drawbacks and is mainly distinguished thereby that the thickness of the intermediate or central layer decreases from the middle of the ski towards both of the ends thereof.

By this arrangement it is shown that the ski does not become warped, at the same time as it always retains its springiness or bending owing to that the upper layer serves as a locking member for the underlying layers in their original bent position and acts as a spring which always brings said layers back into the original position.

The invention is illustrated by way of example in the accompanying drawing in which:

Figure 1, shows a ski seen from the side thereof,

Figure 2, shows the three layers, from which the ski is produced, before the interconnection and bending of the same.

Figure 3, shows a single piece of material constituting the upper and lower layers of the ski, and

Figure 4, shows the central layer composed of a number of pieces or layers.

As shown in the drawing the ski consists of three superposed layers 1, 2 and 3 of which the lower layer or shoeing 1 is produced from a hard wood, the central layer 2 from a light wood and the upper layer 3 preferably from a hard wood corresponding to the wood in the lower layer 1.

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According to the invention the middle or central layer 2, which in the illustrated embodiments is produced somewhat shorter than the two other layers 1 and 3, is given a thickness which decreases towards both of its ends in such a manner that the layers 1 and 3 may be interconnected at a distance at each end of the ski. As will be understood the central layer 2 may, however, be made with a length corresponding to the length of the layers 1 and 3 or only so much shorter than these, that they will be directly connected to each other a distance at one end of the ski only.

By this tapering of the central layer 2 the ski receives the form which now is common at the same time as the layers, when glued together by means of an agglutinant which is not soluble in water during simultaneously pressing against a forming block, are so interconnected that the ski retains the formed bending or springiness S, as the upper layer 3, owing to that the length of the same is greater than that of the underlying layers, will hold or lock the last named layers in the bent position.

As will be understood the ski according to the present invention may be manufactured in different manners. Thus the upper and lower layer 1 and 3 may be made from a single piece of material 4 which is split from one end in such a length that a short entire portion is left at the other end, whereupon the central layer 2 is inserted and secured to the two halves during simultaneously forming or bending as above described. The central layer 2 and preferably also the upper layer 3 may be composed of two or more layers 2', 2'' (fig. 4) which are connected to each other with the desired longitudinal bending, and this ensures still further the retention of the bending or springiness of the ski.

Further the central layers 2 may consist of a hardening composition which is filled into the space between the upper and lower layers 1, 3 after the said layers are interconnected at the end portion thereof in the correct mutual position.

The claims in suit are 1 and 3 which are as follows:

1. Ski produced of three superposed layers characterized in this that the thickness of the central layer decreases from the middle of the ski towards both ends thereof.

3. Ski according to claim 1, in which the central layer and eventually the upper layer are composed of a number of superposed layers.

The invention is an improvement to a three layer ski and consists of a centre layer tapered from the middle to both ends and a top layer bent over the thick part of the central layer and extending to both ends of the ski. The two layers and the bottom layer are then glued together and moulded in a block which forms the arch or camber of the ski. The result is that the top layer in its bent position acts as a spring. If the bottom layer has more moisture than the top layer, as it dries it is pulled down and results in a loss of the arch or camber. The top layer, under this constriction, offsets this pull and holds the underlying layers in their bent position. The centre layer may extend part or the full length of the ski. If it extends the full length the top layer still acts as a spring although not connected directly to the bottom layer. The ski described in the patent is therefore a

three-layer ski in which the centre layer is tapered and which may extend part way or the full length of the ski. If it extends part way only, then the top and bottom layer are connected together at both ends. The top layer extends to both ends.

Evidence was given as to a ski made by R. A. Sproule and Company of Ottawa. This Company made desks and office furniture. A. A. McNaughton said that he had been employed in a clerical position with this company for a number of years. He is now retired and living at St. Margaret's, Quebec. He stated that this company as a side line, made one-piece skis in small quantities from 1912 to the end of the first war, and after the first war entered more extensively into the ski business and commenced making laminated skis in addition to one-piece skis and this was carried on until 1925 or 1926. He said that they made skis during the winter of 1919-1920, the majority of which were one-piece and there were some laminated but "not many of them." He was given a pair of the laminated skis made that year. He said that it had a flat bottom, then a core of balsa wood which was tapered so that the top and bottom layers were glued together to form one piece at the heel and toe. It was a flat top ski, not a dome type.

He used the skis from 1920 on but did not do much skiing during the last ten years until the winter of 1944-45. He gave the skis in 1941 or 1942 to A. Andreef, the President of the defendant company. Andreef confirmed this and said the ski was a three-layer ski with the centre core tapered from the middle to both ends. The top layer was mahogany and the bottom maple, each approximately 5/32" in thickness. Andreef said that he kept the skis for some time but during the war his Company had been engaged in production of skis for aeroplanes and during the process of cleaning up, these skis disappeared. That 200 or 300 pairs of old skis were destroyed at that time.

T. B. Smith was employed by the Sproule Company as a cabinet-maker for 18 years, He said that the company made laminated skis from 1919-1920, for a period of *three or four years*. He said the skis were three layers, the top mahogany and the bottom maple—each about 3/16" and the centre layer 1/2" balsa wood. The centre of the ski so formed was 7/8". The top and bottom layers were glued together "with about 13" or 14" at the ends where it comes

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down to the thin part; the same at both the front and tail end of the ski." He said he had not worked on them himself but saw his fellow workers working on them on the benches.

The evidence of McNaughton and Smith as to the construction of the ski is based on their recollection of events of 1920-1925 and must, therefore, be examined with great care. I accept it because the making of a new type of ski would be of great interest to them both. They would have not only the interest of the average man both in any new type of sporting goods and in any woodworking, but each had in addition a special interest. McNaughton skied and was given a pair of the new skis which he used about ten years. The top layer broke and he repaired it in the Sproule shop. Smith did not ski but he was a cabinet-maker and would have a special interest in any new woodworking done by his fellow workers at their benches in the same shop.

Then their evidence as to the actual construction of the ski is confirmed by the evidence of Andreef who is undoubtedly experienced in ski making, and who is well able to tell the construction of a ski.

All this evidence established that the Sproule Company, commencing in 1919-1920, made for a number of years, a three layer laminated ski in which the top layer extended the full length of the ski and was placed on top of a centre layer which was tapered from the middle to both ends. The top and bottom layers were joined together at both ends. I find that the ski made by the Sproule Company was made in accordance with the invention patented by the patentee.

McNaughton's evidence as to sales of the laminated ski is not entitled to the same weight because the sales would not be of any particular interest to him. In addition he was obviously not certain as to the sales. He ended part of his evidence as to the sales with—"Yes, I think so."

O'Hara's evidence shows that the skis were not sold through the usual channel, the Ketchum Company, because they took the whole output and they never purchased any laminated skis from Sproule.

The evidence before me does not establish sales by Sproule of these laminated skis.

The question is whether or not the Sproule Company were merely experimenting with this type of ski and

whether or not the use by McNaughton was an experimental use. They did not make very many of them and there is no evidence of sales. It would be a very natural thing to give a pair of skis to an employee if they were experimenting in order to get a report of the results. McNaughton said they stopped "experimenting" in skis in 1925.

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All this gives rise to an inference that the making of these laminated skis by Sproule was in the nature of an experiment. And the use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection is not a public use. *Conway v. Ottawa Electric Railway Company.*(1)

O'Connor J.

In my opinion, however, the evidence of McNaughton and Smith rebuts this inference. They clearly did not regard the making of the skis as an experiment. Smith states these skis were made for three or four years. McNaughton was of the opinion that the skis were sold in the usual way. There was no suggestion of anything secret about them or of an experiment. No one appears to have been under any obligation of secrecy. Smith said they were made on the benches of the workmen in the factory. Mr. McNaughton was given a pair but there was no suggestion that he was to report to the Company on the results. He used them for years and this type of ski would be bound to excite interest among all the other skiers who would see them.

If the use of the invention is conducted in such a way that persons under no obligation of secrecy have access to it, the inference is that such use is not a mere experiment and will amount to prior use. Terrell on Patents 8th Ed. Page 90.

I reach the conclusion that the use of the Sproule ski by McNaughton was not a use by way of experiment, but was a public use in Canada more than two years prior to the application of the inventor within the meaning of S.26 (1) (c) of the Patent Act.

In view of this conclusion it is not necessary for me to deal with the other issues. The action must be dismissed with costs.

*Judgment accordingly.*

(1) (1904) 8 Ex. C.R. 432.

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BETWEEN :

GERARD BEAUCHEMIN,.....SUPPLIANT,

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Petition of right—Doctrine res ipsa loquitur applicable where Crown a party—Damage to suppliant's barge caused by respondent's scows breaking their moorings—Negligence of Crown officers in not maintaining watch on respondent's scows—Defence of inevitable accident or superior force—Suppliant entitled to recover.*

Suppliant's barge the *Gerard B*, on November 30, 1944, was securely moored for the winter at a berth ascribed to her by the superintendent of lighthouses and harbour master at Sorel, in the Lanctot basin, part of the harbour of Sorel, Quebec, and on that day was constantly in charge of and under the care of her owner.

Two sounding scows, the property of the Crown, and entirely unattended for the whole day of November 30, 1944, were moored at the same dock some distance away from the *Gerard B*. About eleven o'clock in the morning these scows broke their moorings and struck suppliant's barge. They were hauled back to the place where they had been moored and were again made fast to the dock. In the afternoon they again broke away and collided with suppliant's barge. They were again hauled back to and secured to the dock and one of them broke away a third time. Suppliant's barge was damaged as a result of the collisions.

In an action to recover for such damage the respondent pleaded that the collisions and damage were caused by a storm of extraordinary violence equivalent to inevitable accident and superior force.

*Held:* That respondent was negligent in leaving the scows not securely moored with proper and sufficient lines and without a watchman or other person in charge.

2. That the doctrine *res ipsa loquitur* applies to cases in which the Crown is a party.

PETITION OF RIGHT by suppliant to recover from the Crown for damage caused to suppliant's barge by two scows the property of the Crown.

The action was tried before the Honourable Mr. Justice Angers at Sorel.

*R. C. Holden, K.C. and H. Michaud* for suppliant.

*W. Morin, K.C. and G. Cournoyer* for respondent.



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

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· ANGERS J. now (October 15, 1946) delivered the following judgment:

This is a petition of right by which the suppliant, navigator of the City of Sorel, seeks to recover from His Majesty the King the sum of \$5,150 for damages caused to his barge *Gerard B* in the harbour of Sorel on November 30, 1944, by a sounding scow, property of the Crown in the right of Canada.

The petition alleges in substance:

the suppliant is the owner of the barge *Gerard B*, a wooden barge 120 feet in length and 24.5 feet beam and 197 tons register;

the said barge was built in 1940 and prior to sustaining the damage hereinafter mentioned was in good and seaworthy condition;

on November 30, 1944, the said barge and the barge *Beauchemin* belonging to suppliant's father, Léopold Beauchemin, were lying moored for the winter in the Lanctôt basin in the harbour of Sorel, at a berth allotted to them by an officer or servant of the Crown and for which suppliant and his father had paid to the Crown the usual charges levied for the privilege of so mooring;

the barges *Gerard B* and *Beauchemin* were securely moored and were in charge of competent persons by whom their mooring lines were tended regularly and the said barges remained moored at their allotted berth throughout the occurrences herein referred to;

at about 11.00 a.m. on November 30, 1944, while the said barges were lying moored as aforesaid, *D.P. Sounding Scow No. 1* and *D.P. Sounding Scow No. 2*, property of the Crown in the right of Canada, broke adrift from where they were moored in the basin and came down upon and collided with the barges *Gerard B* and *Beauchemin*, forcing them against the walls of the basin and causing serious damage to them;

the said sounding scows were later removed by officers or servants of the Crown and hauled back to and removed

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at their berth, but the said scows again broke adrift and at about 2.00 p.m. again collided with the barges *Gerard B* and *Beauchemin*, causing additional damage to them;

thereafter the said sounding scows were again removed and remoored at their same berth by officers or servants of the Crown but again broke loose and at about 4.30 p.m. collided for a third time with the said barges, again causing additional damage to them;

after so colliding with and damaging the said barges on three occasions the said sounding scows were again hauled back and this time were moored in a safer manner and with additional or stronger lines with the result that their lines held and that the scows caused no further damage;

at about 3.00 p.m. on the same day the derrick scow *Quebec II*, property of the Crown in the right of Canada, also collided with the barge *Beauchemin*, which was moored outside suppliant's barge *Gerard B*, causing damage to the barge *Beauchemin* and also to the barge *Gerard B* through forcing her against the wall of the basin;

the damage occasioned to the suppliant's barge was caused by the negligence of officers or servants of the Crown while acting within the scope of their duties or employment;

if the officers or servants of the Crown responsible for the sounding scows and derrick scow *Quebec II* and the other government craft at Sorel had performed their duties, the suppliant's barge would not have sustained damage;

the fact that the sounding scows and derrick scow *Quebec II* collided with the barges *Gerard B* and *Beauchemin* while these barges were lying properly moored at the berth which had been allotted to them is of itself evidence of negligence on the part of the said officers or servants of the Crown;

the said collisions and damage were caused by the negligence of the said officers or servants of the Crown in that:

a) the said sounding scows were not moored at a proper place or in a proper manner;

b) the said scows were not moored with proper or sufficient lines and such lines as they had out were not properly placed;

c) the anchors of the said scows were not put out to help hold the scows in position;

d) there was no watchman or other person on board or in charge of the said scows;

e) the lines of the scows were not tended;

f) although a storm had been blowing since about 4.00 a.m., no steps were taken prior to when the said sounding scows broke adrift at about 11.00 a.m., either to slack the lines of the scows to prevent them from being broken or to put out additional or sufficient lines or hawsers or to put out the anchors of the scows or to have the said scows removed to some other position where they would not break adrift;

g) no precautions of any kind were taken to prevent the said sounding scows from breaking adrift and damaging the suppliant's barge;

h) although the Crown had powerful tugs available at Sorel which could have removed the scows to the Richelieu river or another place where they would not have caused damage, they were not so removed;

i) after the sounding scows broke adrift the first time and collided with the said barges, they on two subsequent occasions were removed in an improper manner alongside one another at their original berth with insufficient lines, with the result that they again broke adrift twice and caused further damage to the said barges;

j) at about noon the derrick scow *Quebec II* was improperly anchored out in the basin in such a position that she was subjected to the full force of the wind, with the result that she dragged her anchor or anchors and collided with the barge *Beauchemin* and forced the suppliant's barge against the wall of the basin;

k) the derrick scow should not have been anchored where she was and should have been removed from the basin or placed in a position where she would not cause damage;

l) the derrick scow was anchored in an unsafe manner;

m) the C.G.S. *Berthier*, a powerful twin-screw tug belonging to the Crown which was at Sorel at the time, was not used to remove the said derrick scow or the sounding scows to a place of safety;

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n) the officers or servants of the Crown whose duty it was to see that the said derrick scow and sounding scows did not cause damage to innocent craft lying moored in the basin, improperly failed to take seamanlike or any precautions to prevent the damage caused to the suppliant's barge;

the cost of towing and hauling out and repairing the suppliant's barge will amount to at least \$3,000 and the suppliant is entitled to recover that sum from the Crown;

the suppliant is also entitled to recover from the Crown the sum of \$500 for further or future repairs and for depreciation in value of his barge as a result of the damage she sustained;

the damage caused the barge *Gerard B* to leak badly and from the 30th of November, 1944, until the ice formed and she became frozen in and also after the ice melted in the spring it was necessary to keep the barge pumped out and the suppliant is entitled to recover from the Crown the sum of \$150 for loss sustained in that connection;

the suppliant was unable to haul out his said barge until the spring of 1945 in order to repair her and it was not possible to commence the repair of her hull damage until June when the high water receded and she was left sufficiently dry and as a result the suppliant has been or will be deprived of the use and earnings of his barge for approximately four months;

through being deprived of the use and earnings of his barge the suppliant has suffered or will suffer loss and damage amounting to \$1,500 and is entitled to recover that sum from the Crown;

the sums of \$3,000, \$500, \$150 and \$1,500 form a total of \$5,150, which the suppliant is entitled to recover from the Crown for loss and damage suffered as aforesaid;

due notice was given to the Department of Transport of the damage occasioned to the suppliant's barge *Gerard B* and of his claims against the Crown and the said damage was examined on behalf of the Crown but after prolonged delay the Department of Transport, on or about April 11, 1945, declined liability for the said claims.

In his statement of defence the respondent says as follows:

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he admits that suppliant is the owner of the barge *Gerard B*, ignores when she was built and in what condition she was prior to sustaining the damage complained of, ignores how the barges *Gerard B* and *Beauchemin* were moored and if they were in charge of competent persons by whom their mooring lines were tended and if they remained moored at their allotted berth, admits that at about 11 o'clock a.m. on November 30, 1944, while the barges were lying moored the D.P. sounding scows Nos. 1 and 2, property of the Crown, broke adrift from where they were moored and came down upon and collided with the barges *Gerard B* and *Beauchemin*, forcing them against the wall of the basin and causing serious damage to them, admits that the said scows were removed by officers or servants of the Crown, hauled back to and remoored at their previous berth and that they again broke adrift and at about 2 o'clock p.m. again collided with the said barges causing additional damage to them, admits that the said scows were again removed and remoored at the same berth by officers or servants of the Crown and again broke loose and at about 4.30 o'clock p.m. collided for a third time with the said barges again causing additional damage thereto, admits that after so colliding with and damaging the said barges on these three occasions the sounding scows were again hauled back and this time were secured in a safer manner and with additional or stronger lines, with the result that their lines held and that the scows caused no further damage, admits that at about 3 o'clock p.m. the derrick scow *Quebec II*, property of the Crown, collided with the barge *Beauchemin* (which was moored outside the suppliant's barge), causing damage to the barge *Beauchemin* and also to the suppliant's barge through forcing her against the wall of the basin, admits that notice was given to the Department of Transport of the damage caused to the suppliant's barge and of his claims against the Crown, that the damage was examined on behalf of the Crown and that after prolonged delay the Department of Transport declined liability for the said claims, denies the other allegations of the petition and pleads specifically:

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until such time as the barge *Gerard B* could be moored definitely for the winter, permission had been granted to the suppliant to moor her where she was on November 30, 1944, but at his own risk since navigation was then still active in the basin;

it is exact that the Crown's vessels *D.T. sounding scow No. 1*, *D.T. sounding scow No. 2* and *Quebec II* entered into collision with the suppliant's barge which suffered some damage, but such collision and damage cannot be imputed to the Crown or its officers;

the said collision and damage were caused by a storm of an extraordinary violence, the like never having been experienced in Sorel within the memory of man, equivalent to accident and superior force "cas fortuit et force majeure";

indeed between 11 o'clock a.m. until about 5 o'clock p.m. the wind held an extraordinary velocity, causing waves of about ten feet in height in the basin where the barges were moored, with the result that almost every vessel in the basin broke her moorings and navigation became impossible;

the Crown by its officers committed no fault nor did it become guilty of any negligence, which might make it responsible for the collision and damages;

in particular the barges *D.T. sounding scow No. 1* and *D.T. sounding scow No. 2* and *Quebec II* were moored according to the best marine practice and in such a manner as to withstand any storm which could be humanly anticipated;

during the storm the officers of the Crown did all they could to prevent any damage being caused to the vessels moored in the basin;

although the moorings and cables were multiplied, it was found impossible to make fast the steel vessels in question so long as the wind did not abate, which did not occur until after 5 o'clock p.m.;

in spite of all the efforts made by the officers of the Crown and the crews of the tugs of the Crown, which happened to be on hand, it was found impossible, due to the violence of the storm, to tow the three said steel vessels outside of the basin and the best that could be done was to anchor the *Quebec II* in the centre of the basin and it was done in the best marine practice;

under the circumstances aforesaid neither the Crown nor its officers could be held responsible for any damages suffered by the suppliant;

besides these damages are greatly exaggerated.

In his reply the suppliant says in substance as follows:

he prays acte of the admissions in the statement of defence that he is the owner of the barge *Gerard B*, that permission had been granted to suppliant to moor his barge where it was on the 30th of November and that the Crown's vessels *D.T. sounding scow No. 1*, *D.T. sounding scow No. 2* and *Quebec II* entered into collision with suppliant's barge, which suffered damage;

similar storms have occurred on other occasions and the weather was not such as might not reasonably have been anticipated or which could give rise to a defence of inevitable accident;

he denies the other allegations of the statement of defence.

I deem it expedient to recapitulate the evidence as briefly as possible.

[The learned judge here reviews the evidence and continues]:

There is no serious conflict in the evidence relating to material facts; the testimonies on both sides tally fairly well on the essential points.

It follows from the evidence that on November 30, 1944, the barge of the suppliant, the *Gerard B*, was securely moored in the Lanctôt basin, which forms part of the harbour of Sorel, at a berth situate at the southwest end of the basin, with the permission of the superintendent of lighthouses and harbour master of Sorel. The suppliant paid the usual charge for the privilege of so mooring his barge in the basin for the winter, as appears from the receipt of the Department of Transport filed as exhibit 1.

The evidence discloses that two sounding scows belonging to the Department of Transport were moored alongside the same dock, some distance east of the suppliant's barge. In addition to these vessels, there were in the basin on that day a small boat called the *François* used in connection with the buoys, made fast to the same dock a short distance east of the scows, and the stone lifter (No. 4) moored

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alongside the west wall of another dock adjoining to the east the one already mentioned and barge No. 5 also used in connection with the buoys moored on the north side of this dock. Moreover there were alongside the west wall of an adjoining dock situate further east the barges *Elm Bay* and *Spruce Bay*, opposite shed No. 1. The respective position of these craft is clearly indicated on the sketch exhibit 4.

At five o'clock in the morning on November 30, the wind was blowing from the north-east at a velocity of 21 miles per hour. It increased gradually until, at eleven o'clock, it had reached a velocity of 40 miles per hour. The velocity of the wind started to decrease at about five o'clock in the afternoon; it decreased until seven o'clock when it reached a low for the afternoon of 16 miles per hour according to the Dorval airport records or 24 miles per hour according to the St. Hubert airport records. From that time the wind shifted from northeast to southwest.

On account of the velocity of the wind the suppliant believed that it was safer to put an additional line on his father's barge which was moored alongside his own. This line is shown on the sketch exhibit 4 by the figure 6.

At about eleven o'clock in the morning the respondent's scows broke their moorings and struck the suppliant's barge and that of his father at the rear. The position of the scows, when the collision took place, is indicated on exhibit 4 by red dotted lines. As a result of the collision three lines on his barge, marked 2, 3 and 4 on the sketch exhibit 4, were broken and had to be replaced. Around one o'clock in the afternoon, the Department of Transport sent a tractor which hauled the scows back to the place where they were moored before breaking adrift and they were again made fast at the same place. At about two o'clock, the mooring lines of the scows broke anew and the scows collided with the barges a second time. The evidence shows that the tractor of the Department of Transport came again and hauled the scows back to the dock. This time the scows were hauled back separately, one after the other. When the first scow had been mocrded, the tractor returned to get the other one and, during this operation, the moorings of the first scow broke a third time.



The evidence establishes that the *François*, barge No. 5 and the stone lifter remained in place during the storm. As to the *Elm Bay* and the *Spruce Bay* their lines broke and were replaced and they did not move from where they had been moored.

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Gérard Beauchemin stayed on his barge on November 30 from the time the storm started until it abated. Alcide Beauchemin, his brother, stayed on his father's barge, the *Beauchemin*, during the same period. The proof shows that there was nobody on the scows during the storm.

It was argued on behalf of suppliant that the doctrine *res ipsa loquitur* applies. Its applicability to the Crown was challenged. I have had the occasion to study the question previously and reached the conclusion that the doctrine applies to cases in which the Crown is a party: *Montreal Transportation Company Ltd. v. The King* (1); *Sincennes-McNaughton Lines Ltd. v. The King* (2); *Gauthier & Co. v. The King* (3); *Yukon Southern Air Transport Ltd. et al. v. The King* (4). I see no reason to change my opinion.

The evidence is unanimous that the respondent's scows damaged the barges of the suppliant and of his father. The question to determine is whether the collisions could have been avoided by proper care or whether they were the result of irresistible force (*force majeure*) and were inevitable.

It was submitted by counsel for the respondent, Mr. Cournoyer, that no act of negligence on the part of a servant or officer of the Crown had been established and that the sounding scows had been moored in the usual manner. Counsel noted that no crew or guardian had ever been left on scows since 1908 and suggested that, if there had been men on the scows, the same results would have occurred and the same damages caused. He pointed out that the other vessels in the basin had been made fast at spots which were more protected and that, in spite of this, their mooring lines broke. He observed that, notwithstanding all the precautions taken and the fact that she dropped two anchors, the *Quebec* drifted and struck the barges. He

(1) (1923) Ex. C.R. 139;  
 (1924) 4 D.L.R. 808;  
 (1926) 2 D.L.R. 862.

(2) (1926) Ex. C.R. 150;  
 (1928) S.C.R. 84.  
 (3) (1945) 2 D.L.R. 48, 60.  
 (4) (1942) Ex. C.R. 181.

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submitted that there were eight wire cables on the scows before they first went adrift, all of which broke, and that there were ten wire cables on them after the second collision and that they also broke. He contended that the scows occupied the worst place in the basin and received the whole strength of the wind. He urged that it was not the wind that broke the mooring lines but the high waves caused by a violent wind which lasted during several hours. He remarked that all the witnesses heard on behalf of respondent, Blais, Laforest, Perron, Hector Beauchemin and Vilandr , swore that they had never seen so strong a wind and such high waves in the basin as those which prevailed on November 30.

It was urged by counsel for suppliant that the burden of showing that the accident was inevitable rested on the respondent. In his opinion the accident cannot be considered as the result of irresistible force. He submitted that there was nothing sudden in the wind, that it started in the morning and increased gradually, that at the time of its greater velocity it constituted merely an ordinary fresh gale and that it could and should have been anticipated.

Counsel suggested that the *Spruce Bay* and the *Elm Bay* rode the storm successfully because they had men looking after them. He pointed out that the *Fran ois* was more securely moored than the scows, as appears on exhibit B, and that as a result she did not move. He also observed that the stone lifter and the barge No. 5 had men looking after them and that they stayed stationary.

Counsel pointed out that at eight or nine o'clock in the morning Perron, who was on the *Verch res*, foresaw what was in the offing and consequently doubled his moorings. He intimated that the storm was not a sudden and unexpected event, that everybody knew what was coming and that nevertheless nobody paid the slightest attention to the sounding scows. Counsel drew the attention of the Court to the fact that at eight o'clock in the morning Hector Beauchemin inspected the basin and the boats under his care, viz, the *Fran ois*, the *Verch res* and the barge No. 5, and declared that the other boats in the basin were not under his care. Counsel further pointed out that

at ten o'clock in the morning Hector Beauchemin made another inspection and that there was nobody on board the sounding scows on either occasion.

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Counsel submitted that the three wire cables holding the scows did not break at one and the same time and that it is fair to presume that they broke one after another and that they could have been replaced. He suggested that an additional mooring line should have been fastened to the dock or that the scows could have been moved further east. He noted that Hector Beauchemin declared that it was not the responsibility of the Aid to Navigation Branch of the Department of Transport to look after the scows. He laid stress on the fact that no servant of the Crown took the trouble of finding out whether the moorings should be doubled. He insisted that the three wires holding the scows broke successively and that there was no one on board to replace them.

Counsel pointed out that, after the scows broke adrift the first time, they were made fast to the dock in the same way as they had been the first time. In counsel's opinion the snapping of the lines on the first occasion should have taught the men responsible for the scows to moor them more securely.

It was argued in reply by counsel for the respondent, Mr. Morin, that the suppliant was bound to prove negligence on the part of an officer or servant of the Crown acting within the scope of his duties or employment, under section 19 (c) of the Exchequer Court Act. Reference was made to the decision in *Labelle v. The King* (1). In my opinion, this case is not pertinent. It merely holds that three conditions are required to establish a claim against the Crown: (1) an injury resulting from the negligence of an officer or servant of the Crown, (2) acting within the scope of his duties or employment and (3) upon any public work. The third condition has been set aside by the amendment to clause (c) of paragraph 1 of section 19 of the Exchequer Court Act by 2 George VI, chapter 28, section 1, assented to on June 24, 1938.

It was submitted by counsel that there was nothing in the evidence to link the accident to the negligence of an officer or servant of the Crown acting within the scope of

(1) (1937) Ex. C.R. 170.

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his duties or employment. He contended that Captain Blais, a navigator of great experience, moored the sounding scows and that the mooring lines indicated on exhibit C seemed quite normal. He concluded that Hector Beauchemin cannot be accused of negligence for not having had these lines replaced.

Counsel pointed out that the *Verchères* had to leave the scow *Quebec* to her fate, that the latter was compelled to cast anchor and that in spite of this she drifted against the barges.

Briefs were filed. Several authorities were cited on both sides. It seems to me convenient to review briefly those which are most relevant.

[The learned judge here reviews the following decisions dealing with collisions of vessels, namely, *Bailey v. Cates* (1) *Lowther Castle v. Risaldar* (2), *Stadion v. C. R. Roby (Karpathios)* (3), *The Telesfora de Larrivaga* (4), *Benwood v. Swan, Hunter and Wigham Richardson Ltd. (Titan)* (5), *Falmouth Docks and Engineering Company v. Lieutenant David Pearson, R.N.R. (The Fir)* (6), *The Branksome Hall* (7), and continues]:

In re the *Merchant Prince* (8), the headnote reads thus:

Where the owners of a ship which in consequence of her steam steering gear failing to act runs into and damages a vessel at anchor, her owners to establish the plea of inevitable accident must show that the cause of the accident was one which could not be avoided, and they do not do so by proving that the gear was a good patent in extensive use, that it was properly overhauled from time to time, and that competent persons subsequently to the collision were unable to discover the cause of its failure to act.

It seems to me appropriate to quote a passage from the judgment of Fry, L.J. (p. 211):

In the case of *The Annot Lyle* (55 L.T. Rep. N.S. 576; 11 P. Div. 114; 6 Asp. Mar. Law Cas. 50) it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved it to be so they were liable. The burden rests on the defendants to show inevitable accident. To sustain that the

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| (1) (1904) S.C.R. 293.     | (5) (1922) 13 Lloyd's List |
| (2) (1922) 10 Lloyd's List | Law Reports 428.           |
| Law Reports 235.           | (6) (1943) 76 Lloyd's List |
| (3) 1922 10 Lloyd's List   | Law Reports 77.            |
| Law Reports 14.            | (7) (1934) 43 Lloyd's List |
| (4) (1939) 65 Lloyd's List | Law Reports 43.            |
| Law Reports 95.            | (8) 7 Asp. N.S. 208.       |

defendants must do one or the other of two things: they must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which might produce the effect, and must further show with regard to every one of those possible causes that the result could not have been avoided. Unless they show one or other of these two things, it does not appear to me that they have established the plea of inevitable accident . . . But I go a step further. An inevitable accident is, according to the law laid down in the case of *The Marpesia* (26 L.T. Rep. N.S. 333; 1 Asp. Mar. Law Cas. 261; L. Rep. 4 P.C. 212), that which cannot be avoided by the exercise of ordinary care and caution and maritime skill.

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Reference may also be had beneficially to the following cases: *The Marpesia* (1); *The Neuralia* (2). See also *Marsden's Collisions at Sea*, 9th ed., p. 18.

The only question to determine is whether the collisions which damaged the suppliant's barge, the *Gerard B*, were the result of irresistible force (*force majeure*) or, in other words, constitute an inevitable accident. If so, the respondent must be absolved of responsibility; if not, he must be held liable for the damages caused to the suppliant.

The suppliant's barge, on November 30, 1944, was properly moored for the winter in the Lanctôt basin, in the harbour of Sorel, at a place ascribed to her by the superintendent of lighthouses and harbour master of Sorel. On that day the said barge was constantly in charge and under the care of her owner. I am satisfied that the suppliant and his barge were in no way responsible, wholly or partly, for the collisions.

The storm, blamed by the respondent for the accident, was not unexpected. At one o'clock in the morning, the wind was blowing from the north-east at eleven miles per hour, according to the records kept at the St. Hubert airport, and at fourteen miles per hour, according to the records kept at the Dorval airport. It increased gradually and at nine o'clock it had reached a velocity of twenty-four miles an hour according to the entries made at the St. Hubert airport and of twenty-nine miles an hour according to the entries made at the Dorval airport. At eleven o'clock, when the respondent's sounding scows first broke their moorings and collided with the suppliant's barge and that of his father moored alongside his own, the wind had

(1) (1872) L.R. 4 P.C. 212.

(2) (1946) 79 Lloyd's List  
 Law Reports 50.

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attained a velocity of thirty-nine miles an hour according to the records of the St. Hubert airport and of forty-two miles an hour according to the records of the Dorval airport. At about two o'clock in the afternoon, when the sounding scows again broke their moorings and collided a second time with the *Gerard B*, the wind was still blowing at a velocity of forty miles an hour, as recorded at the St. Hubert airport, and of forty-two miles an hour, as recorded at the Dorval airport. It maintained this velocity until three o'clock in the afternoon when it started to decrease gradually. Between six and seven o'clock the velocity of the wind had gone down to twenty-four miles an hour according to the records of the St. Hubert airport and of sixteen miles an hour according to the records of the Dorval airport.

The evidence discloses positively that no guardian was left on the sounding scows on the day of the accident. There was no one to look after their moorings and replace them if they broke. This, in my opinion, constitutes an element of grave negligence.

It is established, as previously indicated, that there were many other craft, apart from the barges of the suppliant and of his father and the respondent's sounding scows, in the basin on November 30: the *François*, the stone lifter, barge No. 5 and the barges *Elm Bay* and *Spruce Bay*. The moorings of some of them snapped but were promptly replaced; as a result none of these vessels caused damage. The proof shows that all these vessels had one or more watchmen or other men on board during the storm. The contention of counsel for suppliant that all the moorings of the sounding scows did not break at one and the same time but broke separately, one after the other, and that, if there had been a watchman or other person on board, the broken mooring could have been replaced at once seems to me reasonable and logical. The drifting of the sounding scows could thus have been avoided. Why the sounding scows were left totally unattended during the whole storm is for me incomprehensible.

After carefully perusing the evidence, both oral and written, and the able and exhaustive argument of counsel and studying attentively the authorities cited, I have reached the conclusion that the collisions and the damage

resulting therefrom were caused by the negligence of the officers and servants of the Crown who were in charge of and responsible for the sounding scows in question, in that:

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the said sounding scows were not securely moored with proper and sufficient lines;

there was no watchman or other person in charge of the sounding scows to look after their moorings and to replace them if they snapped;

the anchors of the sounding scows were not dropped to help hold the scows in position;

no steps were taken prior to the time the sounding scows broke adrift either to slacken their lines to prevent them from breaking or to put out additional or sufficient lines;

the twin-screw tug *Berthier* belonging to the Crown, which was at Sorel at the time, was not used to remove the sounding scows to the Richelieu River or another place of safety where they would not have caused damage;

total unpreparedness for such an emergency.

There remains the question of the damages. I have estimated them at the sum of \$4,548.54 as follows:

cost of repairs as per exhibit 5	\$2,598.54
cost of pumping the water to empty the barge pending the repairs	150.00
loss of profits from December 1, 1944, to October 1, 1945, date on which the repairs were completed,	1,500.00
depreciation of the barge as a result of the collisions	300.00
	\$4,548.54

There will be judgment against the respondent in favour of the suppliant for the sum of \$4,548.54 with costs.

*Judgment accordingly.*

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IN THE MATTER OF AN AGREEMENT  
 BETWEEN :

HIS MAJESTY THE KING IN THE RIGHT OF CANADA  
 REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

AND

THE CORPORATION OF THE CITY OF OTTAWA

*Crown—Reference under s. 19(g) of The Exchequer Court Act, R.S.C. 1927, c. 34—Answers to hypothetical questions of law concerning liability for taxes to the City of Ottawa of owner of land acquired by the Crown before and after rates levied pursuant to the Municipal Act, R.S.O. 1937, c. 266—The Assessment Act R.S.O. 1937, c. 272.*

*Held:* That if the Crown acquired land in the City of Ottawa in the year 1938 after the 1938 assessment was made pursuant to the Assessment Act, R.S.O. 1937, c. 272, and in 1939 the City passed its by-laws to levy the 1939 rates upon such assessment pursuant to the Municipal Act R.S.O. 1927, c. 266, s. 315, the person who was the owner of the land at the time the assessment was made is not liable to the City for taxes levied upon such assessment.

2. That if the Crown acquired land in the City of Ottawa in 1939 before the City passed the by-laws to levy the 1939 rates upon the assessment made in 1938 pursuant to the Assessment Act, R.S.O. 1937, c. 272, the person who was the owner of the land at the time the assessment was made is liable to the City for taxes levied upon such assessment.

Reference by the Crown and the City of Ottawa under s. 19(g) of the Exchequer Court Act.

Argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*W. R. Jackett* for His Majesty the King.

*Gordon C. Medcalf K.C.* for the City of Ottawa.

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

THE PRESIDENT now (February 24, 1947) delivered the following judgment:

The parties have agreed in writing that certain questions of law should be determined by this Court. The submis-



sions were made under the second part of section 19 (g) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides:

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19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(g) . . . any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

The facts giving rise to the questions of law appear from the recitals of the agreement as follows:

WHEREAS in the City of Ottawa it is not practicable to complete the process of assessment and taxation in one year;

AND WHEREAS in the City of Ottawa the assessment is made in each year under the authority of a by-law pursuant to Section 60 of the Assessment Act (R.S.O. 1937, Chapter 272);

AND WHEREAS the assessment is made in each year on the date the assessment roll is returned by the City Assessor to the City Clerk;

AND WHEREAS it is provided by Subsection 5 of Section 60 of the Assessment Act that the assessment so made shall upon its final revision be the assessment upon which the taxes for the following year shall be levied;

AND WHEREAS Section 315 of the Municipal Act (R.S.O. 1937, Ch. 266) provides in part: "The Council of every municipality shall in each year levy on the whole rateable property according to the last revised assessment roll, a sum sufficient to pay all the debts of the corporation, whether of principal or interest, falling due within the year";

AND WHEREAS during recent years His Majesty has from time to time acquired land in the City of Ottawa;

AND WHEREAS in each year the City has passed by-laws pursuant to Section 315 of the Municipal Act, such as By-laws Numbers 9386, 9387, 9388, 9389, 9390, 9391, 9392 and 9393 hereto annexed, to establish tax rates for the various purposes of the City for the current year, to levy the rates upon the whole rateable property according to the last revised assessment roll, and to authorize the Tax Collector of the City to collect the taxes;

AND WHEREAS Section 318 of the Municipal Act provides that "the rates imposed for any year shall be deemed to have been imposed and to be due on and from the First day of January of such year unless otherwise expressly provided by the by-law by which they are imposed."

AND WHEREAS no by-law of the City imposing rates has provided that the rates should be deemed to have been imposed and to be due on any date other than the First day of January of the year in which such by-laws were passed;

AND WHEREAS in many cases His Majesty has acquired land in the period between the time when the assessment was made pursuant to the provisions of the Assessment Act and the time when the City passed the by-laws pursuant to Section 315 of the Municipal Act to levy the rates upon such assessment;

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AND WHEREAS the Tax Collector of the City has, pursuant to the provisions of the Assessment Act, demanded payment of taxes in such cases from the said assessed former owners;

AND WHEREAS in all such cases the City has taken all steps prescribed by the Municipal Act, the Assessment Act and all other Acts relating to the imposition of municipal taxes to render persons liable for payment of such taxes;

AND WHEREAS questions of law have arisen as to the right of the City to impose, levy or collect taxes from His Majesty's predecessor in title in the said circumstances;

AND WHEREAS it is expedient to determine the said questions of law;

AND WHEREAS where His Majesty and another person have agreed in writing that a question of law shall be determined by the Exchequer Court of Canada the said Court has, under paragraph (g) of Section 19 of the Exchequer Court Act (R.S.C. 1927, Ch. 34), exclusive original jurisdiction to hear and determine such question of law;

And the operative portions of the agreement setting out the questions are as follows:

Now THEREFORE His Majesty and the City hereby agree:

1. That the Exchequer Court of Canada shall determine the said questions of law upon the facts hereinbefore recited by answering the following hypothetical questions.

(a) If His Majesty acquired land in Ottawa in 1938 after the 1938 assessment was made pursuant to the Assessment Act and in 1939 the City passed the by-laws to levy the 1939 rates upon such assessment pursuant to Section 315 of the Municipal Act, is the person who was the owner of the land at the time the assessment was made liable to the City for taxes levied upon such assessment?

(b) If His Majesty acquired land in Ottawa in 1939 before the City passed the by-laws to levy the 1939 rates upon the assessment made in 1938 pursuant to the Assessment Act, is the person who was the owner of the land at the time the assessment was made liable to the City for taxes levied upon such assessment?

2. That the submission of the above questions of law shall be deemed not to raise in any way any question as to the liability direct or indirect, of His Majesty for such taxes.

3. That, notwithstanding any judgment or order which may be made by any court or judicial body respecting costs, His Majesty and the City shall each bear his and its own costs (including all fees and disbursements) of the proceedings launched in the Exchequer Court by the submission of the said question of law, of all proceedings arising out of such proceedings and of all appeals from any decision therein.

It is, of course, obvious that this Court has no jurisdiction to determine the issues of liability raised in the questions as between the City and the person there referred to and that any opinion expressed by it thereon can have no binding effect as between them. Under the circumstances, I had some doubt whether the questions came within the ambit of section 19 (g). I suggested to counsel

that the questions contemplated by it must relate to matters in which the Crown had an interest; that the issues raised were between the City and a third person; and that the interest of the Crown in their determination did not appear from the agreement. Counsel for the parties, however, agreed that both the City and the Crown had an interest in the determination of the questions, since it might decide the course of action of the City against the person referred to in the questions, and his liability or otherwise might be a matter of pecuniary interest to the Crown, or affect its policy, in its acquisition of lands in the City. Under the circumstances, I assume that the questions are of the kind contemplated by section 19 (g) and proceed to deal with them in their order.

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The following statutory provisions are important. Section 60 of the Assessment Act, R.S.O. 1937, chap. 272, after dealing with the alternative manner in which cities may provide for making the assessment by wards or subdivisions and for holding a court of revision for hearing appeals from the assessment and then providing for an appeal from the court of revision to the county judge and requiring that he shall complete his revision by the 20th day of October in each year, then enacts, by subsection (5):

(5) The assessment so made whether or not it is completed by the 20th day of October, shall upon its final revision be the assessment upon which the taxes for the following year shall be levied.

Then section 315 (1) of the Municipal Act, R.S.O. 1937, chap. 266, provides in part:

315. (1) The council of every municipality shall in each year levy on the whole rateable property according to the last revised assessment roll, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, . . .

And section 318 of the Municipal Act provides:

318. The rates imposed for any year shall be deemed to have been imposed and to be due on and from the 1st day of January of such year unless otherwise expressly provided by the by-law by which they are imposed.

In addition, other statutory provisions must also be considered; for example, section 4 (1) of the Assessment Act enacts:

4. All real property in Ontario . . . shall be liable to taxation, subject to the following exemptions:

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1. The interest of the Crown in any property, including property held by any person in trust for the Crown, or . . .

Then Sections 99 and 100 deal with the collection of taxes as follows:

99. The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor . . . and shall be a special lien on the land in priority to every claim, privilege, lien or incumbrance of every person except the Crown, . . .

and

100. The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality, . . .

And, in addition, section 125 of The British North America Act, 1867, provides:

125. No lands or property belonging to Canada or any province shall be liable to taxation.

Section 315 (1) of the Municipal Act is in its present form pursuant to section 12 (1) of the Municipal Amendment Act, 1930, Statutes of Ontario, 1930, chap. 44, by which section 306 (1) of The Municipal Act, R.S.O. 1927, chap. 233, was amended. Prior to such amendment, section 306 (1) read as follows:

306. (1) The council of every municipality shall in each year assess and levy on the whole rateable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, . . .

A number of cases in which section 306 (1) was considered, as it stood prior to its amendment, were referred to by counsel, such as *Sifton v. City of Toronto* (1); *Re Kemp and City of Toronto* (2); *City of Toronto v. Powell* (3); and *City of Ottawa v. Kemp* (4). Without going into the details of these cases, which all deal with municipal income tax assessments and levies, I think I may say that they established that only property which was rateable within the municipality at the time of the levy was subject to it and that if it had ceased to be such between the date of the assessment and the date of the levy, it was not subject to the levy. But counsel for the City pointed out that all the cases referred to dealt with situations prior to the amendment of 1930 and that there was a fundamental change in the Act. By the amendment the assess-

(1) (1929) S.C.R. 484.

(2) (1930) 65 O.L.R. 423.

(3) (1931) O.R. 172 and 495.

(4) (1931) O.R. 753.

ment and levy need no longer be in the same year and the direction to levy is not "on the whole rateable property within the municipality" but "on the whole rateable property according to the last revised assessment roll". The first case to be dealt with under section 306 (1), as amended, was *Re Lyman Bros.* (1). There a company engaged in business upon premises in the City of Toronto was assessed for business tax in 1930. In December of that year it went into liquidation. In 1931 the City sought to levy a tax for business assessment against it, although it had ceased to do business and no longer occupied or used any premises, and to prove for such business tax in the winding-up proceedings. The Master disallowed the City's claim and Grant J. A. dismissed its appeal from the Master's decision. His view was that the expression "rateable property" meant property which the municipality was empowered by law to rate or tax, and that when it was used in conjunction with the expression "the last revised assessment roll" it meant that the property must also appear on such roll, and that merely appearing on the roll, without also being rateable at the time of the levy, was not sufficient. In effect, he held that the 1930 amendment had made no change in the law. Before the Court of Appeal had handed down its judgment on the appeal from his decision, Grant J. A. in *City of Ottawa v. Wilson* (2) adhered to the view he had expressed in *Re Lyman Bros.* (*supra*). But when the Court of Appeal delivered its judgment, *Re Lyman Brothers Ltd.* (3), it unanimously allowed the appeal from his judgment and rejected the view expressed by him. At page 168, Masten J. A. said:

The amendment of sec. 306(1) of the Municipal Act introduced in 1930 whereby the council is directed to levy not on the rateable property which existed in the municipality at the date of the levy, but on the "whole rateable property according to the last revised assessment roll", makes a plain and definite change in the basis of taxation from that which existed at the time of the *Sifton* case, (1929) S.C.R. 484, the *Kemp* case, (1931) O.R. 753, the *Fudger* case, (1931) O.R. 496, and the *Powell* case, (1931) O.R. 172. I think we are bound to give effect to the will of the Legislature as expressed in those words as being so clear and unambiguous that it cannot be disregarded.

On the strength of this decision counsel for the City submitted that under section 315 (1) of the Municipal

(1) (1932) O.R. 419.

(3) (1933) O.R. 159.

(2) (1933) O.R. 21 at 27.

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Act the City must make its levy on all the property which is shown as rateable on the last revised assessment roll whether it exists as rateable property at the date of the levy or not. If the test of whether property is subject to a municipal tax levy is that it is shown as rateable on the last revised assessment roll, then it would seem that counsel's contention should lead him further, namely, that it is so subject regardless of whether it was in fact rateable even at the time of the assessment. But, without carrying the argument that far, it seems clear from the decision that it is no longer necessary that the property should be rateable at the date of the levy if it was such at the date of the last revised assessment roll; there is a presumption of rateability at the date of the levy.

While there can be no doubt that the Legislature may by the creation of such a presumption of rateability cause property to be made subject to a municipal tax levy, notwithstanding lack of rateability as ordinarily understood, it can do so only with respect to property that is within its jurisdiction to tax. The reminder of Masten J. A. in *Re Kemp and City of Toronto* (1) that, while effect must be given to the enactments of the Legislature, there are limits to its legislative powers may well be kept in mind:

No doubt the Legislature is supreme, and if within the ambit of its jurisdiction it declares that, in Ontario, black shall hereafter be white, the courts are bound to adjudicate in accordance with the law so enacted. But, if the statute is capable of a reasonable and fair interpretation which at the same time accords with reality, such an interpretation is naturally to be preferred by the Court.

Counsel for the Crown contended that the land referred to in the first question, having become the property of the Crown, would not be subject to the levy contemplated by section 315 (1) by reason of section 4 (1) of the Assessment Act which exempts from liability to taxation the interest of the Crown in any property. It was not necessary for the Legislature to pass any such enactment, for the interest of the Crown in any property would be exempt from taxation, in any event, by reason of section 125 of The British North America Act. Property belonging to the Crown derives its exemption from this section and not from any provincial legislation. It would, therefore, not

(1) (1930) 65 O.L.R. 423 at 431.

be competent for the Legislature to make property belonging to the Crown rateable or to authorize a municipality to make a levy on it.

Counsel for the City, however, submitted that if the Ontario Legislature chooses to enact that, notwithstanding that at the date of the tax levy the land is owned by the Crown, the levy shall be made in accordance with the state of facts that existed at some prior date and that a person other than the Crown, who was properly assessed with respect to the land, should be liable to taxation, then that taxation is valid and payment of the same may be enforced and that this is what the Legislature has done in apt words by the enactment of section 315 (1). I am unable to agree. A levy cannot be authorized to be made on Crown property as if it were not such property; and the presumption of rateability enacted by section 315 (1), however wide its applicability may be, cannot be made to extend to property which at the effective date of the levy has become property belonging to the Crown within the meaning of section 125 of The British North America Act. The Legislature cannot presume property to be rateable and subject to a municipal tax levy that is beyond the reach of its taxing power.

Counsel for the City contended that taxation can be levied upon persons in respect of land even although it is owned by the Crown and that the cases under section 125 of the British North America Act support his contention. The section has been before the Courts in many cases, for example, *Calgary & Edmonton Land Co. v. Attorney General of Alberta* (1); *Smith v. Rural Municipality of Vermilion Hills* (2); *City of Montreal v. Attorney General for Canada* (3); *North West Lumber Co., Ltd. v. Municipal District of Lockerie No. 580* (4); *City of Halifax v. Fairbanks' Estate* (5); *City of Vancouver v. Attorney General of Canada et al* (6). In all these cases the property held to be subject to taxation was either the interest of some person other than the Crown in property belonging to the Crown or in which it also had an interest, or property belonging to some person other than the

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(1) (1911) 45 Can. S.C.R. 170.

(2) (1914) 49 Can. S.C.R. 563;

(1916) 2 A.C. 569.

(3) (1923) A.C. 136.

(4) (1926) S.C.R. 155.

(5) (1928) A.C. 117.

(6) (1944) S.C.R. 23.

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Crown in which the Crown had an interest. While the cases do, therefore, show that persons have been held liable for taxes imposed in respect of property belonging to the Crown, it is only in respect of the interest such persons have had in such property; there is no case that even suggests that a person may be liable for taxes imposed on property belonging to the Crown in which he had no interest.

Nor am I able to accept the view that, since the taxes imposed under the authority of section 315 (1) have a dual aspect, one real and the other personal, all that happens when property is acquired by the Crown after the date of the assessment and prior to the effective date of the levy is that the City has lost its remedies against the property but retained its right of action against the person appearing as the owner on the assessment roll. The dual aspect of a real property tax as being not only a tax on land but also a tax against the owner was clearly stated by Kerwin J. in *City of Vancouver v. Attorney General of Canada (supra)*. It is also clear that the Legislature may authorize the imposition of taxes on land and continue the personal liability of the owner after he ceases to be such, or make the new owner, or even a stranger, liable for them. So also, the taxes could be imposed on a person with respect to land without creating any lien upon or any remedy against it, and the two aspects of a real property tax could be kept apart. But, we are not concerned with what the Legislature can do, but only with what it has done in the present case. Sections 99 and 100 of the Assessment Act and section 315 (1) of the Municipal Act must be read together. Sections 99 and 100 do not purport to accomplish any personal responsibility for taxes on land without a levy of such taxes on it. Section 315 (1) of the Municipal Act by subjecting the rateable property to the levy authorizes the imposition of taxes on land, and the taxes imposed pursuant to it are taxes on land. Then section 99 makes the taxes due upon the land, and section 100 the taxes payable by any person, recoverable as a debt due to the municipality. It is only in respect of taxes due upon any land or payable by any person that there is any debt due to the municipality, and there cannot be any taxes due or payable unless they have been validly



imposed. The legislative scheme makes the valid imposition of taxes on the land a condition of the personal liability of the owner for them. The debt depends on the levy. The two aspects of the taxes thus co-exist with one another, at least at the outset. If the taxes are levied on land belonging to the Crown in which the former owner had no interest at the effective date of the levy, then no taxes have been lawfully imposed on such land and they can, therefore, never be due or be payable by the former owner or any one else, or be recoverable by the municipality.

These views are in accord with certain statements, admittedly *obiter dicta*, made by members of the Court of Appeal of Ontario in *Montreal Trust Co. v. City of Toronto* (1). There the appellant, the assessed owner of land in Toronto, sold it to the Crown. The assessment roll showing the appellant as owner was completed and returned after the date of the agreement for sale but prior to the completion of the sale. An appeal from the Assessment Commissioner to the Court of Revision was dismissed as was also an appeal from its decision to a county court judge. An appeal by way of a stated case to the Court of Appeal was also dismissed. The only question before it was the correctness of the assessment of the appellant as owner. But counsel for the appellant, in the course of his argument, had expressed fear that in the year following the assessment it might be faced with a tax based upon the assessment complained of. With a view, no doubt, to allaying such fears, Robertson C. J. O., with whom Gillanders J. A. agreed, after holding that the appellant properly appeared as the owner upon the assessment roll when it was returned, added, at page 8:

We are also of the opinion that, the sale having now been completed and the lands vested in the Crown, no taxes can validly be levied upon them in 1944. Not only is the interest of the Crown in any property expressly excepted from the real property in Ontario liable to taxation, by The Assessment Act itself (R.S.O. 1937, c. 272, s. 4, subs. 1), but by s. 125 of The British North America Act no lands or property belonging to Canada or any Province shall be liable to taxation.

And Kellock J. A., at page 15, also added his opinion:

In my opinion, although the name of the appellant will appear on that roll at the time when the rate is struck in 1944, the appellant will not be liable for any taxes in respect of the lands in question as it

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apparently fears. The sale having now been completed, and the property vested in the Crown, it is exempt from taxation by virtue of s. 125 of The British North America Act, and if anything more be required, by virtue of s. 4 (1) of The Assessment Act itself. While s. 315 (1) of The Municipal Act, R.S.O. 1937, c. 266, authorizes a council to levy on "the whole rateable property according to the last revised assessment roll", "rateable" in this section means "rateable by law": *City of Ottawa v. Wilson*, (1933) O.R. 21 at 27, (1933) 1 D.L.R. 273. No taxes are leviable by law upon these lands, now the property of the Crown, regardless of the fact that they appear upon the assessment roll.

Counsel for the City pointed out that the reference to *City of Ottawa v. Wilson* (*supra*) was to an opinion expressed by Grant J. A. which had been rejected, as already appears, by the Court of Appeal in *Re Lyman Brothers Limited* (*supra*), but this does not affect the weight of the opinions expressed apart therefrom or the conclusion reached. I have arrived at a similar conclusion on the question before me. In my view, section 315 (1) of The Municipal Act, although couched in terms capable of wide application, should be construed as excluding from the ambit of the tax levy authorized by it property that has ceased to be rateable property since the date of the last revised assessment roll but prior to the effective date of the levy by reason of having become property belonging to the Crown; such an interpretation would avoid any suggestion of repugnancy or invalidity. The alternative would be to hold that the section to the extent that it purported to subject property belonging to the Crown to a municipal tax levy as if it continued to be the property of its former owner, being in contravention of section 125 of The British North America Act, would be invalid.

Under the circumstances the answer to the first question submitted to the Court is—No.

The answer to the second question depends on the construction to be given to section 318 of The Municipal Act. In my opinion, it is free from difficulty. Counsel for the City urged that the rates imposed by the levying by-law passed under section 315 (1) must be regarded as though they had been imposed on the 1st day of January. If they had been imposed on that date the taxes levied would have been validly imposed on the land referred to in the question for it would not then have belonged to the Crown, and the taxes, having been validly imposed, would

then be due and the owner of the land, according to the last revised assessment roll, would be liable to the City for them. Counsel for the Crown, on the other hand, contended that the rates must be imposed before the section deeming them to have been imposed on the 1st day of January can take effect at all, and that at the date of their imposition the land belonged to the Crown and could not be subject to them. In my view, this does not give proper effect to the words of the section; the rates imposed are to be looked at not in the light of the date of their imposition at all but only in that of the 1st day of January. Counsel for the City relied upon *Henderson v. Corporation of Stisted* (1), in which the Court had to construe section 364 of the Municipal Act then in force. It was almost identical in terms with section 318 of the present Act. By an amendment of the Assessment Act which came into effect on August 1, 1888, certain property was exempted from taxation. A municipal by-law levying rates was enacted on August 4, 1888, and the question was whether the property referred to in the amendment was subject to the levy. It was held by Galt C. J. that, since the rates were to be considered to have been imposed and to be due on and from the 1st day of January, the property referred to in the amendment was not exempt. This decision is, I think, exactly in point in the present case and fully supports the City's contention. On the 1st day of January the land referred to in the second question was not property belonging to the Crown and the taxes imposed on it were validly imposed.

Under the circumstances the answer to the second question submitted to the Court is—Yes.

Pursuant to the terms of the agreement neither party is entitled to costs against the other.

*Judgment accordingly.*

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(1) (1889) 17 O.R. 673.

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BETWEEN:

THE GOVERNOR AND COMPANY  
 OF ADVENTURERS OF ENGLAND } APPELLANT;  
 TRADING INTO HUDSON'S BAY .. }

AND

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

*Revenue—Income—Income War Tax Act R.S.C. 1927, c. 97, s. 6 (1) (a)—Deductible disbursements—Expenses of litigation incurred to enjoin competitor from using appellant's name are deductible—Disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Appeal allowed.*

Appellant is a corporation incorporated by Royal Charter of May 2, 1670, giving appellant the lands, territories, rights and powers therein set forth. Its head office is in London, England, and its chief office for Canada is in Winnipeg, Manitoba. It has carried on business continuously since its incorporation and has maintained and still maintains many stores and trading posts in Canada. It is the largest dealer in raw furs in the English-speaking world and deals in dressed furs and in fur garments. Its goods are known in Canada and also in the United States and it has acquired a valuable and long established reputation for honest and reliable dealing and has a valuable trade name and good will.

In making its income tax return for the years 1938 and 1939, appellant deducted from income for these years certain disbursements made by it in payment of legal expenses of its attorneys, solicitors and counsel for services in connection with an action brought by the appellant in the United States District Court for the Western District of Washington, ninth circuit, against Hudson Bay Fur Company Inc., a trade competitor, which the appellant alleged had designedly adopted the name used by it, to restrain that company from interfering with the appellant's trade. The action was terminated by the issue of the usual injunction.

In assessing the appellant for the years 1938 and 1939 the Commissioner for Income Tax refused to allow the deductions claimed by the appellant. These accounts were affirmed by the Minister of National Revenue and appellant appealed to this Court.

*Held:* That the costs and expenses laid out by the appellant to prevent the use of a firm name so closely resembling its own as to mislead customers are disbursements or expenses laid out and expended for the purpose of earning the income of appellant within the meaning of s. 6(1) (a) of the Income War Tax Act; they were not laid out with the object of acquiring or bringing into existence an asset but were made in the ordinary course of preserving and maintaining the trade of the appellant and safeguarding it from the diversion thereof by a party misusing the appellant's name.

APPEAL under the provisions of the Income War Tax Act.

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

*F. M. Burbidge, K.C.* for appellant.

*C. R. Smith, K.C.* and *A. A. McGrory* for respondent.

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

ANGERS J. now (February 21, 1947) delivered the following judgment:

This is an appeal, under the provisions of sections 58 and following of the Income War Tax Act, 1917, and the amendments thereto from the assessment of the appellant for the years 1938 and 1939 in respect of disbursements made or expenses laid out by it for the alleged purpose of earning its income, consisting of legal costs and expenses in prosecuting a suit brought by it in the United States District Court, Western District of Washington, against Hudson Bay Fur Company of Seattle, incorporated under a statute of the State of Washington.

On the application of the solicitor for respondent an order was made that formal pleadings be filed. A brief summary of these pleadings seems apposite.

(The learned Judge here refers to the pleadings and continues):

The appellant's income tax returns for the fiscal years ended January 31, 1938, and January 31, 1939, respectively are among the documents filed by the deputy minister (taxation) and form part of the record. The first shows an income subject to tax amounting to \$1,507,334, and the tax of 15 per cent amounting to \$226,100, and the second an income subject to tax of \$1,005,568, and the tax of 15 per cent amounting to \$150,835. The notice of assessment for the year ended January 31, 1938, annexed to the income tax return of the same year, appearing to have been mailed on December 3, 1941, shows a taxable income of \$1,512,874.29 and the tax of 15 per cent amounting to \$226,931.14. The notice of assessment for the year ended

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January 31, 1939, annexed to the income tax return of the same year, appearing to have been mailed on December 3, 1941, shows a taxable income of \$1,030,208.80 and the tax of 15 per cent amounting to \$154,531.32.

Notices of appeal dated December 31, 1941, were given to the Minister of National Revenue by appellant's solicitors from the aforesaid assessments, in compliance with section 58 of the Income War Tax Act. In addition to stating in each of these notices that in declaring its income for the taxation years 1938 and 1939 the appellant deducted as disbursements or expenses laid out for the purpose of earning its income the sum of \$10,377 in 1938 and the sum of \$22,952.80 in 1939, paid as legal costs and expenses in prosecuting a suit brought by it in the United States District Court, Western District of Washington, Northern Division in Equity against Hudson Bay Fur Company of Seattle, incorporated under a statute of the State of Washington, and further stating that in the notices of assessment for the said periods the said deductions have been disallowed and that the appellant appeals from such decisions and claims that the said sums should be allowed as necessary disbursements, and relating the fact that it was incorporated by Royal Charter on May 2, 1670, that it is the oldest corporation carrying on business in the English-speaking world, that it has acquired a high reputation in the business world for honourable and fair dealing and that its name and goodwill are very valuable in regard to business, the appellant goes on to say in brief as follows:

in the early part of the century, Mauritz Gutmann, a fur buyer in the City of Vancouver, British Columbia, who had dealings with appellant, left Canada, established a business in the City of Seattle and incorporated a company under the name Hudson Bay Fur Company;

the appellant, through its officials and public notice, objected to the use of the said name and through its attorneys had prolonged negotiations and correspondence about a change of name;

the Hudson Bay Fur Company, largely because of its name, became known as the largest fur dealer on the Pacific coast and for a time conducted two stores in the City of Seattle;

many of its customers believed that they were dealing with the appellant or a subsidiary thereof and the public was confused by the use of the said name and the appellant was thereby losing business;

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although the Hudson Bay Fur Company led the appellant to believe that it would change its name and promised to do so, yet it failed in this; in 1934 the appellant brought a suit in the said Court for an injunction and damages; the sums deducted as disbursements were expended in the prosecution of the said suit or in negotiations leading to its settlement;

at the trial several witnesses testified that they had dealt with the Hudson Bay Fur Company believing that it was a branch or subsidiary of the appellant and that they would not have dealt with it had they known the facts;

there is a large tourist traffic on the Pacific Coast throughout the year; many tourists visit Canada and the appellant's stores at Vancouver and Victoria and buy goods there; more would have done so had they not believed that Hudson Bay Fur Company was a branch of the appellant;

the discontinuance of this name by Hudson Bay Fur Company should be of substantial benefit to the appellant's business at Victoria and Vancouver; in addition to those large department stores the appellant has smaller department or general stores at the cities of Nelson, Vernon and Kamloops, in British Columbia; letters have been received by the managers of these stores from residents of the United States, indicating that they believed that the Hudson Bay Fur Company's store at Seattle was a branch of appellant;

the appellant has for hundreds of years imported from England blankets known as "Hudson Bay Point Blankets", which are sold largely in the United States through distributors of the appellant there; Hudson Bay Fur Company in Seattle bought such blankets from the distributors in Seattle and showed them in the window of their store with cards indicating that they were Hudson's Bay Blankets, thereby intending to induce the public to believe

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that the entire business was conducted by the appellant or was a branch of it; Hudson Bay Fur Company dealt in such blankets;

Hudson Bay Fur Company not only imitated the appellant's name but adopted other practices, leading the public to believe that it was associated with the appellant; for example, it adopted a picture of the beaver as its coat of arms, when the beaver has for centuries been intimately associated with appellant;

this litigation was incurred to protect the name, reputation and goodwill of appellant and to turn customers from Hudson Bay Fur Company to appellant and to make a profit from the sale of its goods; the suit was not brought to defend its corporate rights, but to protect its trade name and trade;

the appellant also sells liquors, tobacco, tea and coffee through distributors in the United States and it was and is essential to protect its name, reputation and character by preventing others from using its name or imitation thereof;

the appellant for many years carried on business at many places in what was known as Oregon Territory and had an important post known as Fort Vancouver on the Columbia River in what is now the State of Washington and during that period it acquired a valuable reputation;

the said expenses are not a capital expenditure; there are still companies in the United States doing business under the name of "Hudson Bay Fur Company" and others may start at any time.

The decision of the Minister, represented by the Commissioner of Income Tax, who by the way signed the notices of assessment, dated February 5, 1942, included among the documents filed by the Minister and forming part of the record, after referring to the fact that the taxpayer incurred certain legal costs and expenses in the suit brought by it in the United States District Court, Western Division of Washington, against Hudson Bay Fur Company of Seattle and that, in determining its income and making its return, it added back to income for the year 1938 \$10,000 of said costs and expenses and claimed as a



reduction from income the sum of \$377, and for the year 1939 claimed as a deduction the sum of \$22,952.80, contains the following considerations:

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And whereas in assessing the taxpayer for the years 1938 and 1939, the aforesaid legal costs and expenses were disallowed as deductions from income and taxes were assessed by Notices of Assessment dated the 3rd December, 1941.

And whereas Notices of Appeal were received from the solicitors for the taxpayer dated the 31st December, 1941, in which objection is taken to the assessed tax for the reasons therein set forth and in particular for the reason that the litigation was incurred to protect the name, reputation and good will of the taxpayer and to turn customers from Hudson Bay Fur Company to it and to make profit from the sale of its goods; that the suit was not brought to defend its corporate rights but to protect its trade name and trade; that said expense was not a capital expenditure and should be allowed for Income Tax purposes.

The decision then concludes thus:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said Assessments on the ground that the legal costs and expenses in question were expenses of the taxpayer not wholly, exclusively and necessarily laid out or expended for the purpose of earning its income but were in fact expenses incurred in the prosecution of its action to protect its trade name and trade and were the application of profits after they had been earned as profits for the purpose of earning future profits and accordingly were properly disallowed for Income Tax purposes under and by reason of the provisions of Section 6 and other provisions of the Income War Tax Act in that respect made and provided and the assessments are accordingly affirmed as being properly levied.

Notice of this decision was given to appellant and its solicitors in compliance with section 59 of the Income War Tax Act.

Following this decision the appellant supplemented its notice of appeal by a statement of facts, dated March 3, 1942, also attached to the documents filed by the Minister; it contains in short the following averments:

in paragraph 3 of the notice of appeal, M. Gutmann was described as a fur buyer in the "City of Vancouver" when it should read in the "City of Victoria";

the judgment of the Supreme Court of Canada in *The Minister of National Revenue v. The Dominion Natural Gas Company, Limited* (1), does not apply to the present case and it and the reasons therefor are distinguishable; further, a petition for leave to appeal to His Majesty in Council from the judgment of the Supreme Court has

(1) (1941) S.C.R. 19.

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been filed by the said Gas Company and the decision upon the said petition is pending; in any case the said judgment and reasons of the Supreme Court cannot be regarded as final under the circumstances.

On the same day the appellant sent to the Minister a notice of dissatisfaction, which merely expresses the desire that its appeal from the decision of the Minister be set down for trial; this notice, given in accordance with section 60 of the act, is included among the documents filed by the Minister.

Also forming part of the record produced by the Department of National Revenue is the reply of the Minister, in which he denies the allegations contained in the notice of appeal and the notice of dissatisfaction in so far as incompatible with the allegations of his decision and affirms the assessments as levied.

At the opening of the trial counsel for appellant said that, in view of the voluminous nature of the pleadings, he and his opponent had prepared a summary outlining the nature of the case; it was read into the record as follows:

The disbursements in question were made by the appellant, which is commonly known as the Hudson's Bay Company and is a dealer in furs, both raw and dressed, and fur garments, in payment of legal expenses of its attorneys, solicitors and counsel for services in connection with an action brought by the appellant in the United States District Court for the Western District of Washington, ninth circuit, against Hudson's Bay Fur Company Inc., a trade competitor, which the appellant alleged had designedly adopted the name used by it to restrain that company from interfering with the appellant's trade. The said action was terminated by the issue of the usual injunction.

A brief recapitulation of the evidence seems convenient.

Counsel for appellant filed as exhibits the following documents:

*Exhibit 1*—Certified copy of bill of complaint, in the United States District Court, for the Western District of Washington, ninth circuit, in equity No. 1049, *in re* The Governor and Company of Adventurers of England trading into Hudson's Bay (commonly called *The Hudson's Bay Company*) v. *Hudson Bay Fur Company, Inc.*, filed April 6, 1934.

*Exhibit 2*—Certified copy of amended bill of complaint filed on the same day.

*Exhibit 3*—Certified copy of amended bill of complaint, filed October 6, 1936.

*Exhibit 4*—Certified copy of the defendant's answer to the bill of complaint, filed October 23, 1936.

*Exhibit 5*—Bill of particulars by defendant, filed August 2, 1937.

*Exhibit 6*—Certified copy of stipulation, filed January 7, 1941.

In the document called stipulation, a copy whereof was marked as exhibit 6, it is stipulated *inter alia* as follows:

the defendant admits that the allegations in the amended bill of complaint are true;

the plaintiff may cause to be entered herein findings of fact, conclusions of law and/or a final decree in accordance with paragraph 1 of the prayer of the amended bill of complaint;

the plaintiff waives all claims for damages and profits prayed for in paragraph 2 of the prayer of the amended bill of complaint; the parties request that no judgment for costs shall be entered against the plaintiff or the defendant, each paying their own costs;

the defendant requests that the first affirmative defence (sic) and paragraph IV of the fifth affirmative defence of its answer be stricken.

I do not believe that it would serve any useful purpose to quote or even merely sum up the statements contained in the first affirmative defence and in paragraph IV of the fifth affirmative defence. Having been struck from defendant's answer they are totally immaterial and irrelevant.

*Exhibit 7*—Copy of decree dated January 7, 1941, and filed on same day.

I deem it advisable to quote the essential portion of this decree:

it is therefore,

Ordered, adjudged and decreed that a perpetual injunction issue out of and under the seal of this Court directed to the Defendant, its officers, agents, attorneys, clerks, servants, workmen and employees, enjoining and restraining them and each of them from using or employing (a) the name "Hudson Bay Fur Company" and any name having the words "Hudson"

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and "Bay" either jointly or severally, (b) the initials "HB", (c) any colourable imitation of the name "Hudson's Bay" and (d) the representation of a beaver in its crest; or any similar name or symbol calculated to deceive the public and to create the impression that the Defendant is in any manner identified or affiliated with the Plaintiff; and from making any direct or indirect representation, either oral, written or printed, and either publicly or privately to the effect that the Defendant is affiliated or in any maner connected in a business way with the Plaintiff. The foregoing order for a perpetual injunction is subject to the following provisions:—

Provided, first, the Hudson Bay Fur Company shall have the right to use the name "Hudson Bay Fur Company" as at present for a maximum period of two years beginning January 1, 1941, during which period the said Hudson Bay Fur Company shall adopt a new name which does not have the words "Hudson" and/or "Bay", as set forth above.

Provided, second, that the adoption of the said new name the Hudson Bay Fur Company shall have the right for a maximum period ending December 31, 1946, to use and only to use in combination with said new name the clause "Formerly Hudson Bay Fur Company" and where the words "Hudson" and "Bay" of said clause are displayed in extent and prominence no greater than the said new name.

Provided, third, the representation of the beaver imbedded in the terrazzo entrance floor of the store of the Hudson Bay Fur Company may remain until the entrance is reconstructed, at which time it will be removed. In any event the same shall be removed by January 1, 1947.

A letter from the Inspector of Income Tax, at Winnipeg, to appellant, dated October 21, 1941, was filed as exhibit 8; it reads thus:

I wish to advise you that in view of the Dominion Natural Gas Company, Limited, case decision, legal expenses paid in connection with the infringement of the Company name are deemed to be capital and not allowable for Income Tax purposes.

Accordingly, revised assessments will be issued in due course in respect to the 1936 and 1938 fiscal periods of your company.

A notice of assessment dated October 2, 1940, for the year 1938 was filed as exhibit 9. The first page thereof, headed "Dominion of Canada and Province of Manitoba—Notice of Assessment—Dominion and Manitoba Income Tax for 1938," contains the following note: "Your income for the year above mentioned is hereby assessed and approved in the amount declared. All taxes have been paid in accordance with receipt(s) already issued to you. No further payment is required." The second page headed "Adjustment of income declared" includes the following items, leaving aside the figures relating to the Manitoba income tax with which we are not concerned.

Net income declared .....	\$1,507,334 00
Add interest on income tax (Alta.)....	497 69
Cost of new cash registers (F.T.C.O.)	
less Dep'n. ....	4,665 60
	\$1,512,497 29

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These figures disclose the acceptance of the appellant's return without raising the question of the legal costs or expenses, as pointed out by counsel for appellant.

Finally a copy of a notice of assessment, the mailing date whereof appears to be the 16th of January, 1941, was filed as exhibit 10. It shows a taxable income of \$1,512,497.29 and the tax of 15 per cent amounting to \$226,874.59. The summary dealing with the federal income tax discloses the following amounts:

Amount levied .....	\$226,874 59
Amount paid on a/c .....	226,874 59

Norman Wilfred Douglas, assistant store manager of appellant's store in Winnipeg since January, 1939, who had been assistant merchandise manager of its store in Vancouver from September, 1926, to June, 1937, and subsequently store manager of its store in Calgary from June, 1937, to January, 1939, declared that the company's stores at Victoria and Vancouver are largely retail departmental stores.

He testified that as assistant merchandise manager in the Vancouver store he spent at least 75 per cent of his time in and around the store and not in an office and that he could see the customers who come in from time to time.

Asked if he could say if there were customers from the United States, Douglas replied:

Well, having been in the store business for a number of years you sort of have a second sense when you see tourists, you can tell them by their appearance, and Vancouver being more or less a tourist city, and Victoria, there was quite a large amount of business done with our friends from the South.

Speaking of the means of communication between Seattle and Vancouver and Victoria, Douglas stated that one can come from Seattle to Vancouver or Victoria by automobile, bus, plane, train and steamboat. In reply

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to a question by counsel for appellant if he could say the number of tourists in 1938 and 1939 who came from the United States to Canada by motor car, he stated:

As far as the actual figures are concerned I couldn't say whether it was five hundred thousand or five hundred and fifty thousand, but I do know, going back to the time I was in Vancouver, figures could be had through the Vancouver Tourist Bureau, and this is more or less from memory, in the early thirties it would be somewhere between four hundred thousand and five hundred thousand people, and that was for motor car only.

Douglas declared that the tourist season in Vancouver and Victoria runs all through the year, but admitted that the summer months, namely, June, July, August and September, are the largest tourist months.

He asserted that he was aware of a business conducted in Seattle under the name of Hudson's Bay Fur Company and that associated with it was a *chap* by the name of Silver and another one known as "Bronfman, or Gutmann or some such name as that".

He said he saw the original store of Hudson Bay Fur Company in Seattle in the early part of his stay in Vancouver. According to him the company dealt in furs of all kinds. He understood that in the later years the company opened up a curiosity shop having moccasins, bead work, ivory pieces and the like such as the appellant has carried on in its various stores' museums. He added that all the appellant's stores, depending on their size, had historical museum pieces, Indian work, bead work and the like, but that in the later years these were all assembled in the Winnipeg store.

Asked if from his personal experience he had reason to believe that there was misapprehension amongst the American tourists as to the business carried on by the appellant and the one carried on by the Hudson Bay Fur Company at Seattle, Douglas replied:

Particularly in the summer period of June to September when we have the largest number of tourists being continually in the store and up and around the fur department, or in the linen department, and so on, you would have these American customers mention that they had been in our Seattle branch, and they were on their way up to Vancouver and they thought they would stop off and see our larger store. And this did not happen just occasionally, it happened quite frequently. At the same time occasionally also they would say, "When I take this garment home if I don't like it can I get a refund on it in Seattle." Or, in buying a fur coat it is a sort of unwritten law that the supplier takes care of the coat for about a year or a year and a half and often-

times you have to make repairs on the fur or lining, and so on, and they would ask if there is any cause to have this coat repaired, can I have it done in your Seattle store?

Douglas stated that the American tourists know that Canada is not only a producer of furs, but of fur garments, and that certain types of furs are cheaper in Canada than in the United States. He noted that in the thirties tourists were allowed to take from Canada into the United States merchandise to the value of \$100 per person.

According to him there is a good trade with the American tourists in raw and dressed furs and in fur coats. He declared that they were more interested in the better types of furs, such as seals, muskrats, silver foxes, and also in expensive neck pieces and capes.

He asserted that there was an interference with the appellant's trade by reason of the business carried on by the Hudson Bay Fur Company of Seattle and that it would run into thousands of dollars over a period of years.

Douglas specified that tourists come from the States of California and Oregon and stop over in Seattle for a day or two on their way to Vancouver, Seattle being the usual stopover for tourists en route.

Replying to a question as to whether the misapprehension previously referred to arose not only in connection with tourists from Seattle but also with tourists from all along the coast, Douglas said:

I think I can explain that all that is necessary is to be in the Vancouver store for a while and carry on conversations with tourists whom you meet in the store, and you naturally find out where they all come from, and folks living in Seattle would be a small portion of those coming up through Seattle. There would be as many or more from California as there would be from Seattle coming through there.

In cross-examination, Douglas admitted that the tourist business done by the appellant's stores in Vancouver and Victoria varies from year to year. He agreed that from 1926 to 1929, the period of boom days, there was an increase in the tourist trade and that in the years following, during the depression, there was considerably less business, until the tariff in the United States was changed so as to allow tourists to take more Canadian merchandise into the United States free of duty. According to him this happened sometime in the thirties.

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He stated that occasionally tourists purchasing furs in Vancouver or Victoria would ask if they could get service and alterations in the Seattle store and that they were disappointed when they learned that it was not a store of the appellant, as they had been given to understand, when in Seattle, that it was a store of the Hudson's Bay Company.

In re-examination, Douglas pointed out that American tourists coming into Canada would benefit by the exchange on the currency.

James G. Mundie, chartered accountant, of Winnipeg, since 1911, associated with the firm of Riddell, Stead, Graham & Hutchison, former president of the Manitoba Institute and of the Dominion Association, admitted that, in dealing with expenditures made by a company, they fall either into expenditures attributable to revenue or expenditures attributable to capital. He was then asked by counsel for appellant a question which I think I ought to quote verbatim:

I am going to put to you a test which has been suggested in a decided case, and ask your opinion as to that test. Is it a part of the company's working expenses; is it expenditure laid out as part of the process of profit earning? Or, on the other hand, is it a capital outlay; is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

An objection was entered by counsel for respondent on the ground that this is a question of law, in the present case, and that it is the issue raised before the Court.

Counsel for appellant agreed that it is largely a question of law, but he said that he will be referring to cases in which the evidence of a chartered accountant was admitted and that he thought it prudent in the circumstances to submit the opinion of a chartered accountant. He summed up his question as follows:

Would you say according to commercial principles of commercial accounting the principles laid down in that test would be true?

Mundie answered in the affirmative.

He supplemented his answer by stating that they were the principles which he would follow and that they would be applicable to legal expenses, to wit expenses in con-



nection with the organization of a company, or a bond issue, or the refunding of a bond issue or the acquisition of fixed assets.

Mr. Burbidge read to Mundie the statement agreed upon by counsel hereinabove reproduced and asked him if those litigation expenses were attributable to working expenses or to capital according to commercial accounting principles and got this reply:

I would say to working expenses in my opinion.

Asked in cross-examination what he would say about expenses to protect or improve capital assets, Mundie stated that it depends on the nature of the improvement, but he specified that an expense made to protect a capital asset would unquestionably be a revenue charge. He agreed that if it did actually improve the value it is definitely capital.

To a question by counsel for appellant as to whether expenses to protect a capital asset, like repairs to a building, would be ordinary revenue expenses, Mundie replied in the affirmative.

David Henry Laird, barrister, of Winnipeg, declared that the firm with which he has been associated have been solicitors for the appellant for some twenty odd years and that he personally has had charge of the appellant's general business to a large extent.

Required to let the Court know the nature of the appellant's business, Laird made the following detailed statement which I think I had better quote:

It is a matter of history the Company was incorporated in 1670, to trade into Hudson Bay, and I think the primary business was dealing in raw furs, chiefly beaver. As the business has developed over the last one hundred years or more, they have gone largely into the retail trade, and have large departmental stores in Victoria, Vancouver, Edmonton, Calgary, Saskatoon, and Winnipeg, and smaller stores in half a dozen other smaller towns.

The raw furs were largely accumulated at Trading Posts, as they were called, or forts, in the north from the native Indians or Esquimeaux, in exchange for goods chiefly, or sometimes for money. Of recent years the raw fur business has grown extensively by the purchase for cash of raw furs from various centres, for example, Vancouver, Winnipeg, Regina, Prince Albert, and they have what they call raw purchasing, by buying furs from largely white trappers rather than from the native Indians or Esquimeaux. Actually I don't know, but I expect the retail business

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has become the largest end of the business rather than the fur trade, which was the original business, but the fur trade is still a substantial part of the business, that is, the raw fur business.

Laird declared that the litigation in the State of Washington regarding Hudson Bay Fur Company was conducted under his direction as solicitor for the Winnipeg office of appellant. He said he visited Seattle in the fall of 1937 with a view to preparing for the trial. He was present at the hearing in May or June, 1938, at Tacoma. He stated that he was present throughout the hearing of the evidence.

He asserted that there have been six or seven similar actions in the United States about which he was consulted and he thought that there were others about which he learned but in which he did not do any active work. He added that apart from actual suits there were a number of instances where the appellant sought to have the name of the firm carrying on business under a name akin to that of Hudson's Bay Company dropped. Asked if the appellant had the experience, common to other companies enjoying a good trade, of having people copy their names, Laird answered that it is accentuated in the present case because of the long history of the company and of its good reputation. He stated that the Hudson Bay Fur Company of Seattle, basing his opinion on the company's advertisements in the Seattle papers, on the city directories, which he personally checked, and on the evidence given in Court in the present case, was founded by the late Mauritz Gutmann, about 1902 or 1903. He said that Gutmann had been in business dealing in raw furs in Victoria, that he checked the city directory and found that Gutmann was in business there in 1902. According to him, Gutmann, after his wife died in 1902, went down to Seattle. Laird asserted that he advertised for a while as Hudson's Bay Company, successor to M. Windmiller, who, he believed, had been a fur trade dealer.

Laird declared that Gutmann then incorporated the Hudson Bay Fur Company in the State of Washington in July, 1904, and that after Gutmann's death his son, Addis, became president. He stated that he met him

several times, as he was present practically every day at the trial. He said he then met Max Silver, the manager, who was a son-in-law of the late Mr. Gutmann.

He stated that there was a museum of curios in the new store of Hudson Bay Fur Company in Seattle in 1937, situated on Fifth Avenue, the chief shopping district in Seattle. He gave a description of the store and of its curios department, of which it may be convenient to quote a passage:

It was a fine looking store from the outside. I have photographs there in Court if my friends are interested. Some were taken under my direction, and others taken at other times. The store on the ground floor had a frontage of fifty to sixty feet, an entrance in the centre, and the entrance recessed back. And upstairs on the first floor was this curio establishment which extended over buildings on both sides, north and south. The curio part of the business upstairs had probably a frontage of well over one hundred feet, and ran back, I suppose, fifty feet. I went through that, was shown by Mr. Silver through the premises. They had the usual Totem pole and curios, a lot of stuffed animals and skins; all sorts of Indian and Esquimo work. They advertised it very extensively as the largest curio establishment on the Pacific Coast.

Laird declared that the appellant did not deal only in fur garments but that it also dealt largely in raw furs. He said that he himself searched the Exchange records and that he talked in Vancouver to the representative who bought furs for them. He specified that some of these furs were dyed and dressed and that many were made into fur garments; others, he believed, were sold in their raw state.

He asserted that the appellant had considerable mail order business, that he was shown the shipping room and that he saw a large number of parcels ready to be shipped on the Pacific Coast.

Asked if prior to the present suit there had been negotiations with the Seattle firm, Laird replied that there were prolonged negotiations, that as far back as 1904 the appellant protested, that he saw a notice put by the company in the Seattle paper and that, when his firm became solicitors for the appellant, the question of this Seattle concern was one of the problems.

Laird believed that there were understandings given by the Hudson Bay Fur Company with respect to carrying on business under that name. I think I had better quote an extract from the deposition:

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Mr. Gutmann came to Winnipeg about the subject, and I did not interview him personally, but he interviewed officials of the Company. I saw correspondence and telegrams from their attorneys that they fully expected the name to be changed. Shareholders meetings were called, and matters of that sort, and I believe Mr. Mauritz Gutmann definitely said he would change the name, but he died and his son and son-in-law were not so willing to carry out his promises.

Laird said that the action was brought in April or May, 1934. He added that he was consulted as to whether or not interviews should be had and that he recommended to the appellant's general manager to see Mr. Silver. He believed that interviews took place at Vancouver towards the end of 1933 or the beginning of 1934.

He stated that the suit started in the spring of 1934 and was not brought on to trial until the spring of 1938 and that there was evidence taken under Commission in Washington, New York and Chicago during the first part of 1938. He pointed out that this added to the costs of litigation, but that it was deemed necessary.

According to him part of the evidence was that the United States Navy Department dealt with Hudson Bay Fur Company of Seattle and bought supplies from them, believing that they were the Hudson's Bay Company or a subsidiary thereof.

He asserted that he was present at the trial and heard the evidence which was given. He stated that Mr. Justice Cushman became ill and could not continue with the case and that subsequently he retired and died, which explains the long delay between the hearing in May, 1938, and the decree in January, 1941.

Laird felt that evidence had been adduced at the trial which established the appellant's case. He declared that witness after witness were called to prove that they had bought goods in the store of Hudson Bay Fur Company in Seattle, believing that they were dealing with Hudson's Bay Company or a subsidiary or affiliated company. Referring to the document Exhibit 6 termed a stipulation, counsel for appellant asked the witness if from this stipulation it appears that the defendant was willing to submit to an injunction and decree; Laird answered affirmatively and added:

A. Yes, and they withdrew the original defence. They made some very grave charges against the Hudson's Bay Company, and in the stipula-

tion they withdrew those charges entirely. I insisted upon that, for we could not accept any decree by consent unless those charges were withdrawn, and they were withdrawn and struck out.

Q. And from the point of view of the Hudson's Bay Company, the appellant here, it was wise to accept what the defendants were willing to do rather than incur very heavy expenses of continued litigation?

A. I recommended that.

Laird declared that before the war raw furs were shipped to London and sold on the market there and that the Hudson's Bay fur auction sales were held originally twice but latterly three times a year and advertised all over the world. He said that since the war that market has been closed and that to collect and buy raw furs in Canada the Company has posts in the Northern country where the furs are to be found, in all the Provinces except the Maritime Provinces, and many of them in the Northwest Territories. He said that the appellant has these posts where it can acquire furs from the natives or white trappers and ship them to London.

He stated that Hudson Bay Fur Company of Seattle was also engaged in the raw fur business, that it advertised as having a branch in Alaska where the appellant had been buying furs and that it bought on the Vancouver Exchange as well.

He noted that not only was there a sale of dressed furs interfering with the appellant's trade but that the raw fur business was also an interference with it by the use of the name.

In cross-examination, Laird acknowledged that in the pleadings in the Seattle case there is a reference to a subsidiary of the appellant Company incorporated in the State of New York. Asked if he was familiar with the income tax returns of Hudson Bay Company, he replied that he has been consulted about various items but was not prepared to say that he was familiar with it. These subjects do not appear to me to have any relevance to the matter at issue.

Counsel for appellant stated that there are profits earned in Great Britain, which are segregated and do not appear in the Canadian balance sheet. He further stated that the Canadian balance sheet contains the Canadian business and the Newfoundland business, but that the profits of the latter are segregated from the earnings of the Cana-

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dian business. He also declared that the proportion of the income earned by the appellant which came from the Canadian business amounted to 95 per cent in 1937, 97 per cent in 1938 and 92 per cent in 1939. He said that the income earned in Great Britain and in Newfoundland is not included in the appellant's income tax returns involved herein and is accordingly not charged any taxes in Canada.

This closed the appellant's case. Counsel for respondent did not call any witnesses.

It is perhaps convenient to quote the definition of income contained in section 3 of the Income War Tax Act, although the case rests principally, nay exclusively, on the determination of what incomes are not liable to taxation. The definition reads thus:

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

Section 6, under the heading "deductions from income not allowed", enacts *inter alia*:

(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,

(b) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

Can the expenses or costs paid out by the appellant in the circumstances hereinabove related be considered as disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"? This is the question which I have to solve.

Counsel for the appellant in his argument pointed out that the Minister, assisted by a very able staff, did not think at first that there was any objection to the legal costs and expenses in issue being deducted from the income

and the return was accepted. He submitted that it was only when the decision of the Supreme Court in the case of *The Minister of National Revenue v. Dominion Natural Gas Company Limited* (1), was rendered that the Minister changed his mind, reopened the assessment and disallowed the deduction of the said costs and expenses.

Counsel intimated that the reassessment was made on an erroneous view of what was decided in the *Minister of National Revenue v. Dominion Natural Gas Company Limited* case and that, if the case of *Income Tax Commissioner v. Singh* (2) had been decided before the *Minister of National Revenue v. Dominion Natural Gas Company Limited* case, the decision of the Supreme Court in the latter case might have been different. Counsel suggested that the Supreme Court thought that they were compelled to give judgment against their own opinions possibly, because they considered themselves bound by some remarks of the Privy Council. He drew the conclusion that it is clear, according to the judgment in the case of *Income Tax Commissioner v. Singh*, that the Privy Council did not intend to lay down any such rule as that suggested in the Supreme Court judgment.

Council for respondent on the other hand relied on the case of *Minister of National Revenue v. Dominion Natural Gas Company Limited*, among several others, and it seems convenient to analyze it first.

The respondent company since 1904 had supplied natural gas to the inhabitants of the Township of Barton under a by-law granting rights for that purpose and before and after that date has been developing gas fields and supplying gas to the inhabitants of other municipalities. Since 1904 parts of the township were at different times annexed to the City of Hamilton. The respondent continued to supply the annexed territory with natural gas as before annexation. The United Gas and Fuel Company of Hamilton Limited, hereinafter called The United Company, had since 1904 been supplying the City of Hamilton, as it was before the annexations, and its inhabitants with manufactured gas under authority granted by by-laws of the City. About 1930 the United Company made a claim under these by-laws that it had the exclusive right to sell

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(1) (1941) S.C.R. 19.

(2) (1942) 1 A.E.R. 262.

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gas in the City of Hamilton, including the annexed districts, and that the respondent had no competing rights.

Under authority conferred by an agreement between the City of Hamilton and the United Company dated March 24, 1931, confirmed by statute of the Province of Ontario (21 Geo. V, chap. 100), the United Company in 1931 took action in its own name and in the name of the City of Hamilton, in the Supreme Court of Ontario, against respondent claiming:

a declaration that the respondent was wrongfully maintaining its mains in the streets, public squares and lanes in the City of Hamilton and supplying gas to the inhabitants thereof;

an injunction restraining the respondent from continuing so to do;

a mandatory order requiring respondent to remove its mains and other property from the streets, public squares, lanes and other places of the City of Hamilton;

damages.

The respondent company defended the action, which in due course came on for trial and was dismissed. Appeals by the United Company to the Court of Appeal of Ontario and to the Privy Council were dismissed. The costs of this litigation paid by the respondent amounted to \$48,560.94 after crediting all sums recovered from the United Company as taxable costs.

In its Income Tax return for 1934 the respondent company deducted from its taxable income this sum of \$48,560.94. This deduction was disallowed and the respondent company's assessment increased accordingly. The company appealed to the Minister of National Revenue, who dismissed the appeal. The company thereupon appealed to the Exchequer Court of Canada and this appeal was allowed. The Minister appealed to the Supreme Court and the latter reversed the judgment of the Exchequer Court, holding unanimously that the legal expenses in question were not deductible.

The judgment of the Chief Justice, Sir Lyman Duff, and of Davis J. was delivered by the former. At page 22 of the report we find the following observations:

There are two broad grounds upon which I think the Minister is entitled to succeed. First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended



for the purpose of earning the income," expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income". The judgment of Lord Clyde in *Lothian Chemical Co. Ltd. v. Rogers* ((1926) 11 Tax Cases 508, at 521) seems to point to the material distinction. The passage is pertinent, because the words Lord Clyde is applying are more comprehensive than those of sec. 6(a).

The Chief Justice then quotes an extract from the notes of Lord Clyde, which have some pertinence, although not exactly in point. Reference thereto may be useful but they are too extensive to reproduce herein.

Duff C.J. then continues as follows (p. 23):

Similar language is used by Lord Clyde in *Addie's case* (*Robert Addie & Sons' Collieries Ltd. v. Inland Revenue Commissioners*, (1924) S.C. 231, at 235) and was approved and applied by Lord Macmillan in delivering the judgment of the Judicial Committee in *Tata v. Income Tax Commissioner* ((1937) A.C. 685). Under s. 10, sub-s. 2, of the Indian Income Tax Act, the profits or gains of any business carried on by the assessee are to be computed after making allowance for "(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

There follows a passage from the reasons of Lord Macmillan which are interesting and of which it may be expedient to reproduce an extract (p. 23):

Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. \* \* \* In the case of *Robert Addie & Sons' Collieries, Ltd. v. Commissioners of Inland Revenue* ((1924) S.C. 231, at 235), the Lord President (Clyde), dealing with corresponding words in the British Income Tax Act, says: "What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?" Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

Duff C. J. notes that the distinction is also explained in the judgment of the Court of Appeal for New Zealand in a passage approved by the Judicial Committee of the Privy Council in *Ward & Co. Ltd. v. Commissioner of Taxes* (1).

Further on the learned Judge adds (p. 24):

Again, in my view, the expenditure is a capital expenditure. It satisfies, I think, the criterion laid down by Lord Cave in *British Insulated v. Atherton* ((1926) A.C. 205 at 213). The expenditure was incurred "once

(1) (1923) A.C. 145, at 149.

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and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit." The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language.

The Chief Justice then refers to the observations of Lord Macmillan in *Van den Berghs Ltd. v. Clark* (1) reading as follows (p. 24):

Lord Atkinson indicated that the word "asset" ought not to be confined to "something material" and, in further elucidation of the principle, Romer L.J. has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character: *Anglo-Persian Oil Co. v. Dale* ((1932) 1 K.B. 146).

The Chief Justice then points out what the character of the expenditure is in the following words (p. 24):

The character of the expenditure is for our present purposes, I think, analogous to that of the expenditure in question in *Moore v. Hare* (1914-1915 S.C. 91), where promotion expenses incurred by coalmasters in connection with two parliamentary bills giving authority to construct a line to serve the coalfield were held to be capital expenditures.

The Chief Justice concludes thus (p. 25):

I do not perceive any distinction between expenditures incurred in procuring the company's by-laws authorizing the undertaking and the expenses incurred in their litigation with the City of Hamilton.

In the ordinary course, it is true, legal expenses are simply current expenditure and deductible as such; but that is not necessarily so. The legal expenses incurred, for example, in procuring authority for reduction of capital were held by the Court of Sessions not to be deductible in *Thomson v. Batty* ((1919) S.C. 289).

Mr. Justice Crocket expressed the following opinion (p. 26):

If we were free to decide this appeal on considerations of practical business sense and equity, or to deduce from decided cases the governing rule, which should be applied in determining whether the respondent was or was not entitled, under the formula prescribed by s. 6 of the Canadian *Income War Tax Act*, to the deduction claimed in computing its assessable profits or gains for the year 1934, I should have no hesitation in adopting the conclusion at which the learned President of the Exchequer Court arrived and the reasons he has given therefor. We are confronted, however, with a recent judgment of the Judicial Committee of the Privy Council in the case of the appeal of *TaTa Hydro-Electric Agencies, Ltd., Bombay, v. Commissioner of Income Tax, Bombay Presidency and Aden* ((1937) A.C. 685) in which a test, formulated in 1924 by Lord President Clyde of the Scottish Court of Session in the case of *Robert Addie & Sons Collieries, Ltd. v. Commissioners of Inland Revenue* ((1924) S.C. 231), for determining whether a deduction is allowable under practically

identical provisions of the English *Income Tax Act*, 1918, is expressly adopted and applied. The English Act of 1918, ch. 40, 8 & 9 Geo. V, by rule 3 of Schedule "D", prohibits deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation," or in respect of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade," etc, as well as other specified capital expenditures for improvements and the like, the effect of which, as regards this case, it seems to be impossible to distinguish from the prohibitions (a) and (b) of s. 6 of the Canadian Act. I apprehend, therefore, that the test so distinctly adopted by the Judicial Committee in the *Tata* case ((1937) A.C. 685) is binding upon us

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After making some comments on the judgment of the House of Lords in *Strong & Co. Ltd. v. Woodfield* (1), and especially to the notes of Lord Davey, Crocket, J. made the following observations (p. 29):

Singularly enough, it was apparently upon this dictum of Lord Davey, and not that of the Lord Chancellor, concurred in by Lords Macnaghten and Atkinson, that Lord President Clyde of the Court of Session in the *Addie* case ((1924) S.C. 231), formulated the test, which the Judicial Committee adopted 13 years later in the *Tata* case ((1937) A.C. 685). See Lord Clyde's judgment in the Court of Session, Session Cases (1924), at the bottom of p. 235.

In any event, we must now recognize the rule as expressly affirmed by the Judicial Committee of the Privy Council, and determine whether the expenditure in question in this appeal was wholly and exclusively made by the respondent as part of the process of profit earning. Being unable to convince myself that the expenditure falls within this strict formula, I have reluctantly concluded that the appeal must be allowed.

The late President of the Exchequer Court, Maclean J., after summarizing the facts and commenting on certain decisions, among which we find *Anglo-Persian Oil Company Limited v. Dale* (2); *Ward & Company Limited v. Commissioner of Taxes* (3), made in his judgment (4), the following observations which seem to me pertinent (p. 19):

It seems to me that if legal expenses are incurred in successfully defending an action in which one's title to existing assets, rights or facilities are put in serious question, such expenses should normally be admissible as deductions, and particularly would this be so in the case where the earning of profits are directly dependent upon and require the utilization of such assets, rights or facilities, as was the case here. If the action is unsuccessfully defended the revenue authorities might contend that there was no asset, right or facility to defend, and that therefore such expenses should not be allowed as a deduction in computing net taxable income, but that is not this case. If such expenses arose out of the promotion or acquisition of additional assets, rights or facilities, it is

(1) (1906) A.C. 448;

(3) (1923) A.C. 145.

5 Rep. of Tax Cases, 215.

(4) (1940) Ex. C.R. 9.

(2) (1932) 1 K.B. 124.

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probable no deduction would be permissible. It was imperative here that the Dominion Company defend the action and the failure of its directors to do so would probably have rendered themselves liable in damages to the shareholders of that company. The action threatened the earnings of the Dominion Company, wholly or partially, and had the action succeeded it would have been unable to sell gas, at least in some sections of the City of Hamilton; the company's capacity to earn revenue was put in jeopardy and, I think, it is immaterial that its capital assets, or some of them, were incidentally threatened with extinction or depreciation. It was because the Dominion Company was producing and selling gas that it had to defend the action and thus protect and preserve its credit and its revenue. The United Company sought an injunction restraining the Dominion Company from continuing to supply gas to the inhabitants of the City of Hamilton, which, had the United Company been successful, would have prevented the Dominion Company from earning its usual revenue.

Like Mr. Justice Crocket in his reasons (p. 27) I may note that the attention of the late President apparently was not called to the decision in *Tata Hydro-Electric Agencies Limited v. Commissioner of Income Tax* as he made no reference to it. The judgment of Mr. Justice Crocket adds that no mention of it was made either in appellant's or in respondent's factum, although Mr. Varcoe cited it in his argument. It is comprehensible in the circumstances that the late President may not have been aware of it. Whether the perusal of this decision would have modified his opinion is a matter of mere supposition which I do not feel disposed to adopt.

It was urged by counsel for appellant that the Supreme Court reversed the decision of the late President of the Exchequer Court because they felt bound by the decisions in the cases of *Robert Addie and Sons' Collieries Ltd. v. Inland Revenue Commissioners* (1); *The Lothian Chemical Co. Ltd. v. Rogers* (2); *Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income Tax* (3); *British Insulated and Helsby Cables Ltd. v. Atherton* (4). A few brief observations about these decisions may be apposite.

In the *Robert Addie and Sons' Collieries Ltd. v. Inland Revenue Commissioners* case it will suffice to quote the head-note which is fully comprehensive (p. 671):

Under the terms of a mineral lease, a colliery company was obliged to restore to an arable state all ground occupied by it or damaged by its workings, or, at its option, to pay the lessor for all such ground not

(1) (1924) 8 Rep Tax Cases, 671. (3) (1937) A C. 685.  
 (2) (1926) 11 Rep Tax Cases, 509. (4) (1926) A C 205

so restored, at the rate of thirty years' purchase of the agricultural value thereof. In the exercise of its option, the company paid the lessor a sum of £6,104, as representing the value of the damaged lands.

Held, that such payment was in the nature of capital expenditure, and was not therefore a proper deduction in computing the company's liability to Income Tax.

I do not think that this case offers any similarity with the present one, and that it has any pertinence.

In *The Lothian Chemical Co. Ltd. v. Rogers* the facts were as follows. During the war the appellant company manufactured explosives for the Minister of Munitions, but owing to the dangerous situation of the works this was discontinued and in October, 1917, an arrangement was entered into with the Minister, ultimately embodied in an agreement dated April 22, 1918, under which the company agreed to convert its plant and works into a plant suitable for the manufacture of calcium nitrate to be sold to the Minister on stated terms. The Minister undertook to recoup to the company the cost of conversion up to a maximum of £15,000, which was the company's estimate of the cost. The converted works, except any existing plant and buildings and the land, were to be the property of the Minister, with an option to the company within three months from the determination of the agreement to purchase the works at a valuation and, if such option was not exercised, an option to the Minister within twelve months to remove the buildings, plant and machinery, so far as his property, or to purchase the company's interest in the land and buildings, etc., not his property. None of the options in the agreement was exercised at its termination and eventually the works and plant belonging to the Minister, of little value to the company, were taken over by the latter for £400. Owing to rises in wages and cost of materials during the progress of the work the cost of conversion exceeded the £15,000 paid by the Minister by £4,044, of which a sum of £1,879 was recovered from the Minister in settlement of an action which had been commenced against him, and the net deficiency of £2,165 was claimed by the company as a deduction in arriving at its profits for the purposes of Income Tax and Excess Profits Duty.

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It was held that the loss in question was a loss of capital and was not admissible as a deduction from the company's profits.

This decision does not seem to me to be more pertinent than the previous one. It unquestionably deals with a loss of capital.

The following case, *Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income Tax*, differs in nature from the two previously referred to where the Court of Session (Scotland) held, in the first, that the payment of a sum representing the value of damaged lands and, in the second, that the loss in the cost of conversion of a plant and works were a loss of capital. In this case the appellant was a private limited company carrying on the business of managing agents of Tata Power Co. Ltd. and other hydro-electric companies. The company acquired this agency business from Tata Sons Ltd. under an assignment whereby the latter transferred to the appellant their rights and interest as agents of the hydro-electric companies under their subsisting agreement with them, but subject, as to their rights and interest under their agreement with Tata Power Co. Ltd., to their obligations under two agreements with F. E. Dinshaw Ltd. and Richard T. Smith. The assignment declared that the appellant should thenceforth be and act as the agents of the hydro-electric companies and be entitled to all benefits conferred by the agreement between Tata Sons Ltd. and these companies and should perform all the obligations thereby imposed and that the appellant should receive all the commissions to which Tata Sons Ltd. were entitled thereunder. The appellant agreed to carry out the conditions of the agreements with F. E. Dinshaw Ltd. and Richard T. Smith and to indemnify Tata Sons Ltd. against any consequences of the non-observance thereof. Under the agency agreement between Tata Sons Ltd. and Tata Power Co. Ltd., the benefit whereof the appellant acquired, the remuneration of Tata Sons Ltd. for their services consisted of a commission of 10 per cent on the annual net profits of Tata Power Co. Ltd., with a minimum of Rs.50,000 whether the company should make any profits or not, and they were entitled to have their expenses reimbursed. In return,

Tata Sons Ltd. undertook to endeavour to promote the interests of Tata Power Co. Ltd. The agreement was declared assignable and Tata Power Co. Ltd. undertook to recognize any assignees as its agents and, if required, to enter into an identical agreement with such assignees. In 1926, Tata Power Co. Ltd., being in need of financial assistance, Tata Sons Ltd., its then managing agents, approached F. E. Dinshaw Ltd. and Richard T. Smith, who agreed to provide the necessary funds. One of the conditions on which they agreed to do so was that in addition to the interest payable by Tata Power Co. Ltd. for the loan, they should each receive from Tata Sons Ltd. two annas in the rupee or  $12\frac{1}{2}$  per cent of the commission earned by Tata Sons Ltd. under their agreement with Tata Power Co. Ltd. Agreements were entered into between Tata Sons Ltd. and F. E. Dinshaw Ltd. and between Tata Sons Ltd. and Richard T. Smith dated October 15 and 19, 1926, respectively. After the acquisition of the agency business by the appellant the Tata Power Co. Ltd., in fulfilment of its obligation under the agreement with Tata Sons Ltd., entered into a new agency agreement with the appellant in terms identical with those of its previous agreement with Tata Sons Ltd. and the appellant also entered into agreements with F. E. Dinshaw Ltd. and the administrator of the estate of Richard T. Smith, who had died in the meantime, in terms identical with those of the previous agreements between Tata Sons Ltd. and these parties. By these transactions the appellant came in the place and stead of Tata Sons Ltd., both as regards the right to receive from Tata Power Co. Ltd. the agency remuneration and as regards the obligation to pay out of its remuneration  $12\frac{1}{2}$  per cent to F. E. Dinshaw Ltd. and  $12\frac{1}{2}$  per cent to the administrator of Richard T. Smith's estate. The assessment of appellant's income for the fiscal year to March 31, 1934, is based on its income, profits and gains for the year 1932 and the question is whether in the computation for tax purposes of its income, profits and gains for that year it is entitled to deduct a sum representing the 25 per cent of the commission earned and received from Tata Power Co. Ltd. which it paid to F. E. Dinshaw Ltd. and Richard T. Smith's administrator.

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It was held that in computing its income, profits and gains, the appellant was not entitled to deduct the 25 per cent in question; that this percentage of the commission paid to F. E. Dinshaw Ltd. and the administrator of Richard T. Smith's estate was not expenditure incurred by appellant "solely for the purpose of earning \* \* \* profits or gains" of its business; that the obligation to make the payments was undertaken by appellant in consideration of its acquisition of the right and opportunity to earn profits, i.e. of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

This decision, to my mind, has very little, if any, weight in the present instance.

In the case of *British Insulated and Helsby Cables Ltd. v. Atherton*, the appellant, a company carrying on the business of manufacturers of insulated cables, established a pension fund for its clerical and technical salaried staff. The fund was constituted by a trust deed which provided that members should contribute a percentage of their salaries to the fund and that the company should contribute an amount equal to half the contributions of the members; and further that the company should contribute a sum of 31,784*l* to form the nucleus of the fund and provide the amount necessary in order that past years of service of the then existing staff should rank for pension.

This sum was arrived at by an actuarial calculation on the basis that the sum would ultimately be exhausted when the object for which it was paid was attained. On the winding up of the fund the whole amount was to be distributed among the members. The company, having paid the sum of 31,784*l* out of current profits, claimed that it was an admissible deduction in computing its profits. It was held by Viscount Cave, L.C., Lord Atkinson and Lord Buckmaster, Lord Carson and Lord Blanesburgh dissenting, that this payment was in the nature of capital expenditure and accordingly not an admissible deduction.

I may note that the House of Lords in this case affirmed by a majority of three against two the order of the Court of Appeal (Pollock M.R., Warrington L.J. and Scrutton L.J.), which had reversed an order of Rowlatt J. of the



Court of King's Bench. Opinions diverged widely, as is often the case; I may say with all due deference, that the reasons of Lord Blanesburgh, who dissented, elaborate and careful, steadily support the view contrary to that adopted by the majority of the Court. At all events I am satisfied, after a careful perusal of it, that this case has no bearing on the one now pending, as the facts differ materially.

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In the case of *Ward and Company Limited v. Commissioner of Taxes* (1) it appears from the report that a poll of the voters in New Zealand being about to be held on the question whether or not prohibition of intoxicants should be introduced, a brewery company expended money in printing and distributing anti-prohibition literature. The poll resulted in a small majority against prohibition and the company sought to deduct the expenditure from the income derived from its business for the purposes of the Land and Income Tax Act, 1916, of New Zealand. Under section 86, subsection 1(a), of the Act no deduction is allowed in respect of expenditure "not exclusively incurred in the production of the assessable income". It was held by the Privy Council that the company was not entitled to make the said deduction having regard to the provision of said section 86, subsection 1(a).

Viscount Cave, L.C., who delivered the judgment of the Court, expressed the following opinion (p. 149):

The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86, sub-s. 1 (a), of the Act. For that purpose it must have been incurred for the direct purpose of producing profits.

Dealing with this case Kerwin J. in *re Minister of National Revenue v. Dominion Natural Gas Company Limited* made the following comments (p. 30):

The cases referred to on the argument deal with expressions used in other statutes and certainly, so far as clause (a) is concerned, I have been unable to derive any assistance from them. *Ward and Company, Limited v. Commissioner of Taxes*, (1923) A.C. 145, was determined on the wording of the New Zealand Act there in question "in the production of the assessable income." In view of the fact that that wording is less liberal

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and comprehensive than the wording in our statute "laid out or expended for the purpose of earning the income," the decision is, I think, inapplicable.

In his judgment in *Dominion Natural Gas Company Limited v. Minister of National Revenue* (1), Maclean J., after stating that considerable reliance has been placed by counsel for the Minister of National Revenue on the case of *Ward and Company Limited v. Commissioner of Taxes (ubi supra)* and after relating the facts as hereinabove set forth, added (p. 17):

It was held by the New Zealand Court of Appeal that no deduction was allowable in respect of such an expenditure because it was "not exclusively incurred in the production of the assessable income \* \* \*", which decision was, on appeal to the Judicial Committee of the Privy Council, sustained, their Lordships holding that the expenditure was a voluntary expense incurred with a view to influencing public opinion, and not one necessary for the production of profit, and that it was not in fact incurred for that purpose. I should not have thought myself that any other conclusion was possible, but at any rate it is not, in my opinion, an authority applicable to the state of facts here.

The learned judge then made the following remarks of a broader character which seem to me apposite (*ibid*):

No distinction is to be drawn between legal expenses and other business expenses. The question always is whether the expense was a necessary one for the purpose of earning the annual net profit or gain of the taxpayer. In the well known case of *Usher's Wiltshire Brewery Ltd. v. Bruce* ((1915) A.C. 433 at 437) legal expenses were allowed as a deduction. In that case these expenses consisted of "solicitors costs and disbursements in respect of the renewal of publicans' licences or tenancy agreements, the assessments of tied houses, obtaining a full licence, complaints against tenants, and advising as to thefts of beer." There is little discussion in the speeches of their Lordships concerning the particular deduction claimed for legal expenses, and, in fact, it would appear that no objection was taken by the Attorney-General against their allowance. The legal expenses were held to be a proper debit in ascertaining the balance of profit and loss in the taxpayer's trade.

The last five cases, on which counsel for respondent placed so much reliance, being set aside, we remain with the decision of the Supreme Court, which is certainly more in point.

Another case which also has some pertinence is that of *Anglo-Persian Oil Company Limited v. Dale* (2) in which the King's Bench Division of the High Court of Justice (Lord Hanworth M.R., Lawrence and Romer L.J.) confirmed the judgment of Rowlatt J. who had reversed

(1) (1940) Ex.C.R. 9.

(2) (1932) 1 K.B. 124.

the decision of the Commissioners of Income Tax. I may note that Mr. Justice Crocket and the late President of the Exchequer Court, in the case of the *Minister of National Revenue v. Dominion Natural Gas Company Limited*, made some appropriate and interesting remarks relating thereto.

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The facts were briefly as follows:

The Anglo-Persian Oil Company Limited, incorporated in 1909 with the object of raising, refining, selling and otherwise dealing with crude oil and its products in Persia and elsewhere, entered into an agreement in May, 1914, with Strick, Scott and Company Limited under which the latter were appointed agents of the company to manage its business in Persia and the East and carry out the sale of petroleum and other products thereof for a term of ten years. The remuneration under the agreement having proved to be more onerous than anticipated, the company decided to bring the agency to an end and thenceforth to do its own agency work. Accordingly in 1922 the company entered into an agreement with Strick, Scott and Company Limited by which it was agreed that the agency should be terminated, that the latter should go into liquidation and should not act in or about any business connected with petroleum at Mohammerah in Persia, while in return the company should pay Strick, Scott and Company Limited 300,000*l.* The 300,000*l.* was paid and the agency terminated. This sum was treated in the company's accounts as a revenue payment and charged to revenue in instalments of 60,000*l.* for five years. The company claimed that this course was correct and justified, the deduction of the 300,000*l.* from its annual expenses in seeking the profits and gains. The inspector of taxes disputed this course and claimed that the 300,000*l.* ought to be treated as an expenditure on capital account, an expenditure which brought to an end an onerous contract and secured to the company a freedom from charges which would have continued for some years. The Commissioners accepted the inspector's argument and held that the sum of 300,000*l.* was not an admissible deduction in computing the profits and gains of the company for the year ending

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March 31, 1923, and adjusted the figures of assessments for the years ending April 5, 1923, 1924, 1925 and 1926, accordingly.

Rowlatt J. held that the sum was an admissible deduction. His judgment was affirmed. The headnote of the King's Bench Division, precise and comprehensive, sums up the decision thus (p. 124):

On appeal—

Held, applying the test laid down by Lord Cave LC in *British Insulated and Helsby Cables v Atherton* (1926) A.C. 205, 213, that the payment in question did not bring any asset into existence and could not properly be said to have brought into existence an advantage for the benefit of the Company's trade within the meaning of that expression as used by Lord Cave.

Held, therefore, that the payment was a revenue payment and was deductible by the company in ascertaining its net profits.

Test of whether the money was provided from fixed or circulating capital adopted in *Hancock v. General Reversionary and Investment Co.* (1919) 1 KB 25; *Mitchell v. B. W. Noble, Ltd.* (1927) 1 KB. 719; and *Mallett v Staveley Coal & Iron Co.* (1928) 2 KB 405 apphed.

Decision of Rowlatt J. affirmed.

Lord Hanworth, after stating that it was argued that the finding of the Commissioners ought to be accepted as one of fact within their own sphere and so not the subject of appeal as a question of law, that this argument is not, to his mind, well founded, that the cases upon the point of what is attributable to revenue and what to capital account run upon fine lines of distinction, that the Commissioners have to direct themselves correctly upon the questions of law involved, that the deductions that are permissible must be examined from the point of view of law, that they cannot be said to be simply questions of fact irrespective of the principles of law and that it is accordingly necessary to consider the principles upon which items have been held to belong to capital or revenue and the characteristics which have been held to turn a particular item into one category or the other and that certain illustrations can be given of items that have been held to fall on one side of the line or the other, made a brief but fairly exhaustive review of a number of cases in which the question had been determined and concluded thus (p. 139):

Upon this survey of the cases I have come to the conclusion that the Commissioners have not asked themselves the right question, and

have not directed themselves aright on this difficult point of law. The consequent result is that I think it is open for the Court to express its opinion in law.

Then, as Rowlatt J. points out, there is no evidence of the purchase of the goodwill of some business, nor is there any trace of a payment to start a business. The payment is to put an end to an expensive method of carrying on the business which remains the same whether the distributive side is in the hands of the respondents themselves, or of their agents.

Romer L.J., who concurred with his colleagues in the affirmation of the judgment of Rowlatt J., dealing with the deductions permissible under the law, made the following observations (p. 144):

Towards the solution of this problem little, if any, assistance is afforded by the Income Tax Act. It is, indeed, provided by s. 209 that in arriving at the amount of profits or gains for the purpose of income tax, no other deductions are to be made than such as are expressly enumerated in the Act. But, as has often been pointed out, the Act nowhere enumerates the deductions that may be made. It merely prohibits the making of certain specified deductions. Nor is it to be taken that any deduction may legitimately be made that is not expressly prohibited by r. 3 to Cases I and II under Sch. D, or that deductions are to be limited to those expressly excepted from the prohibitions in that rule.

Further on the learned judge added (p. 145):

So far as the Act itself is concerned, one is, therefore, left without guidance as to the deductions that are permissible, but with the mind somewhat unsettled by reason of the list of prohibited deductions as to what, in the view of the Legislature, is to be considered for the purposes of income tax the balance of the profits or gains.

After stating that in the circumstances it is not surprising that the cases in which the Court has been called upon to say whether some particular deduction is or is not permissible should have been numerous and not always easy to reconcile with others wherein the facts were similar and then passing to the year 1925 when all these authorities were considered by the House of Lords in *re British Insulated and Helsby Cables v. Atherton* and the law applicable to such cases placed beyond the realms of controversy, Romer L.J. observed that the boundary line between deductions that were permissible and those that were not had previously been uncertain and difficult to follow, that as regards the large majority of deductions there could be no conceivable doubt, they being clearly on one side of the line or the other but, as regards a comparatively small number, it was difficult to say on which

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side of the line they fell. He pointed out that this is particularly the case where an expenditure is not a recurring one but is made once and for all. I believe I had better quote a passage from the reasons of Romer L.J. (p. 145):

It was pointed out by Lord Cave in *Atherton's* case. (1926) A.C. 205, 213, that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made "with a view" to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the "enduring" benefit of the trade. I agree with Rowlatt J. that by "enduring" is meant "enduring in the way that fixed capital endures." An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in *Mallett v. Staveley Coal & Iron Co.*, (1928) 2 K. B. 405.

In the case of *Mitchell v. B. W. Noble Limited* (1) it was held by the Court of Appeal, affirming the judgment of Rowlatt J., that the payment of a sum of money to get rid of a director in order to save the company from scandal must be regarded as money "wholly and exclusively laid out and expended for the purposes of the trade" of the company. It was also held that as the payment was not made to secure an actual asset so as to increase the capital of the company but was made in order to enable the directors to carry on the business of the company as they had done in the past, unfettered by the presence of the retiring director, which might have a bad effect on the credit of the company, it must be treated as an income and not as a capital expenditure and was accordingly deductible for income tax purposes.

We find at page 737 of the report the following comments by Lord Hanworth M.R.:

I do not in the least wish to go back upon anything I said myself in the *British Insulated and Helsby Cables* case, (1926) A.C. 205, but it

(1) (1927) 1 K.B. 719.

appears to me, upon the facts of this case, that this payment should be treated as a revenue item and not as a capital item. It seems to attain more closely to the payments in Hancock's case, (1919) 1 K.B. 25, and Smith's case, (1914) 3 K.B. 674, than to those in the other cases such as *Ounsworth v. Vickers, Ltd.*, (1915) 3 K.B. 267, and the *British Insulated and Helsby Cables case*, (1926) A.C. 205, itself. It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business, unfettered and unimpered by the presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once.

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In the case of *Rhodesia Railways, Limited v. Collector of Income Tax* (1) the report discloses that the company had in one year expended a large sum of money in replacing rails and sleepers or ties. In making its income return the appellant debited a sum of 252,174*l* under the heading "renewals of permanent way" and showed a loss for the year over all of 97,445*l*. In the notice of assessment the Income Tax Collector wrote back the item of 252,174*l* deducted by the appellant, thereby converting the loss of 97,445*l* into a profit of 154,729*l*. The appellant objected to the assessment in respect of the disallowance of the deduction of 252,174*l* for renewals of permanent way. The respondent having overruled the objection the company appealed. It was held by the Judicial Committee of the Privy Council, reversing the judgment of the Special Court of the Bechuanaland Protectorate, that the appellant company was entitled to the deductions claimed because the sum expended was an outgoing "not of a capital nature" and was "expended for repairs of property occupied for the purpose of trade or in respect of which income is receivable".

Lord Macmillan, who delivered the judgment of the Privy Council, stated (p. 374):

The periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration. The fact that the wear, although continuous, is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduc-

(1) (1933) A.C. 368.

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tion in respect of such wear, and represented the cost of restoring them to a state in which they could continue to earn income. It did not result in the creation of any new asset; it was incurred to maintain the appellants' existing line in a state to earn revenue.

The decision of the House of Lords in the case of *Usher's Wiltshire Brewery, Limited v. Bruce* (1), although perhaps not so apposite as the preceding ones, may be consulted with advantage. It will suffice to quote an extract of the headnote which is fairly accurate and complete:

A brewery company, as a necessary incident of the profitable working of their brewery business, acquired and owned licensed houses which they let to tied tenants, who, in consideration of the tie, paid a rent less than the full annual value. The tenants were under an agreement to repair and to pay rates and taxes, but the company in fact did the repairs and paid the rates and taxes in order to avoid loss of tenants. The company also in respect of these houses paid premiums on insurances against fire and loss of licences and incurred legal expenses in connection with the renewal of the licences and otherwise. All these sums were solely and exclusively expended or allowed by the brewery company for the purposes of their business:

Held that, in estimating the balance of the profits of their business for the purposes of assessment to income tax, the brewery company were entitled to deduct all these sums as expenses necessarily incurred for the purpose of earning the profits. *Brickwood & Co. v. Reynolds* (1898) 1 Q.B. 95 overruled.

Decision of the Court of Appeal (1914) 2 K.B. 891 reversed.

There are two cases in which the judgments were delivered subsequently to the hearing by the Supreme Court of the case of the Minister of National Revenue and Dominion Natural Gas Company. These cases, in my opinion, offer as much relevancy to the problem at issue herein as those previously referred to and they certainly deserve being noted.

The first of these cases is that of *Southern v. Borax Consolidated, Ltd.* (2).

The respondent purchased certain property for the purposes of its business. Subsequently an action was taken against the company claiming that its title was invalid. The company defended the action and incurred legal expenses amounting to 6,249*l*, which it claimed to be entitled to deduct as business expenses in computing its profits for the purposes of assessment to income tax.

(1) (1915) A.C. 433.

(2) (1940) 4 A.E.R. 412.



The Crown contended that the action concerned the capital assets of the company and was contested in order to preserve the existence of those assets and that the sum of 6,249*l* was a capital expense.

The King's Bench Division (Lawrence, J.) held that the expense had been incurred, not in creating any new asset, but in maintaining the title to the company's property and was, therefore, an expense wholly and exclusively incurred for the purposes of the company's trade and, as such, properly deductible.

Lawrence J., after reviewing the precedents cited by counsel, concluded as follows (p. 419):

It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title, and not the value, of the company's business does not make it any different.

The second case is *Income Tax Commissioner v. Singh* (exactly Maharajadhiraj Sir Rameshwar Singh of Darbhanga) (1).

In this case the Judicial Committee of the Privy Council affirmed the judgment of the High Court of Judicature at Patna, India, which had decided a reference made to it, at the request of the respondent, in favour of the latter.

The summary of the judgment, fairly comprehensive and exact, may advantageously be quoted:

The respondent's father made a loan of 10 lakhs of rupees to a company in which he was a shareholder, and recovered this loan in an action, the costs of which were allowed as an expense incurred in his moneylending business in the assessment of his income tax. Certain shareholders in the company brought an action against the respondent's father and others for conspiracy, collusion, misrepresentation, and breach of contract. The basis of this action was an alleged transaction, of which the loan was part, whereby the respondent's father agreed to finance and manage the company. The action was dismissed, the version of what took place relied upon by the plaintiffs being found to be completely false. The respondent's father died before the conclusion of the suit, and the respondent who continued his business claimed to deduct the costs in arriving at the assessment of profits. The appellant contended that there was no connection between the loan and the alleged transaction which was the basis of the action against the respondent's father, the action being of a personal character and unrelated to his business as a moneylender:

(1) (1942) 1 A.E.R. 362.

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Held: the respondent was entitled to make the deduction claimed. The allegations against the respondent's father were built up upon the transaction in which the loan was made, and the defence of the action was necessary for the protection of his rights as the creditor in the loan.

Lord Thankerton, who delivered the judgment of the Court, stated (p. 365, *in fine*):

Their Lordships are, therefore, of opinion that the facts stated by the commissioner cannot justify the opinion expressed by him, but that the expenditure in question was incurred solely for the purpose of earning the profits or gains of the moneylending business, and that the High Court are right in holding the respondent entitled to the deduction claimed and in answering the question of law asked by the commissioner in favour of the respondent.

The jurisprudence in the United States holds the same views: *Citron-Byer Co. v. Commissioner of Internal Revenue* (1); *Kornhauser v. United States* (2); *National Outdoor Advertising Bureau, Inc. v. Helvering* (3).

In the cases of *Montreal Coke and Manufacturing Company and Montreal Light Heat and Power Cons. v. Minister of National Revenue* (4) in which the Privy Council affirmed the judgment of the Supreme Court, which by a majority had affirmed the judgment of Maclean J., disallowing deductions for expenditure made by appellants in connection with the redemption of existing bonds before maturity and the reborrowing of the sums paid out at lower rates on less onerous conditions as to repayment, with a view to reducing their interest charges, alluded to by counsel but without insistence, differ materially with the present case and have practically no bearing on it. Nevertheless a passage from the notes of Lord Macmillan, who delivered the judgment of the Privy Council, may be useful (p. 100):

It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining annual net profit or gain. The statutory criterion is a much narrower one. Expenditure to be deductible must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts \* \* \* It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to these businesses that they look for their earnings. Of course, like other business

(1) (1930) 21 B.T.A. 308

(2) (1928) 276 U.S.R. 145.

(3) (1937) 89 Fed. Rep. (2d)

878.

(4) (1944) Canada Tax Cases

94.

people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income.

Further on Lord Macmillan added:

It was conceded in the Courts in Canada, and in any event it is clear, that the expenses incurred by the appellants in originally borrowing the money represented by the bonds subsequently redeemed were properly chargeable to capital and so were not incurred in earning income. If the bonds had subsisted to maturity the premiums and expenses then payable on redemption would plainly also have been on capital account. Why then should the outlays in connection with the present transactions, compendiously described as "refunding operations" not also fall within the same category? Their Lordships are unable to discern any tenable distinction.

The various Income Tax Acts considered in the aforesaid cases, apart from that of *Minister of National Revenue v. Dominion Natural Gas Company Ltd.*, based on the Canadian Income War Tax Act, contain provisions fundamentally similar, regarding deductions not allowable, to the Canadian Act. A difference, however, between the foreign acts referred to in the decisions pre-cited and our own is that in paragraph (a) of section 6 of the Canadian Income War Tax Act the adverb "necessarily" has been added to the adverbs "wholly" and "exclusively" which are also found in the other acts. This adverb "necessarily" was inserted in the statute by 13-14 Geo. V, chap. 52, section 3. I do not believe that it adds any strength to the paragraph.

I do not know if the intimation by counsel for appellant that the Supreme Court in the case of the *Minister of National Revenue v. Dominion Natural Gas Company Ltd.* reversed the judgment of the Exchequer Court, feeling that it was bound to do so by the decisions in the cases of *The Lothian Chemical Co. Ltd. v. Rogers, Robert Addie & Sons' Collieries Ltd. v. Inland Revenue Commissioners, Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income Tax, British Insulated and Heisby Cables Ltd. v. Atherton and Ward and Company Ltd. v. Commissioner of Taxes* is justified. It appears from the report that these cases were fully considered, commented on and accepted by the Court as authorities. I may note that the doctrine has evolved appreciably since these judgments were rendered. Having previously reviewed them, I shall only make now a few brief remarks.

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Now in the two first ones it was held, on facts widely different from those forming the basis of the case in appeal, that the expenses and costs incurred were in the nature of capital expenditure or loss of capital. These cases do not seem to me to have any relevance to the matter in issue.

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In the third case, *Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income Tax*, the Privy Council held that in computing its income for tax purposes the appellant was not entitled to deduct the 25 per cent of the commission received from Tata Power Co. Ltd. and paid over to F. E. Dinshaw Ltd. and Richard T. Smith under certain agreements, as this percentage of the commission so paid was not expenditure incurred by appellant "solely for the purpose of earning \* \* \* profits or gains" of its business, and that the obligation to make the payments was undertaken by appellant in consideration of its acquisition of the right and opportunity to make profits, that was, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. This case differs substantially from the present one and I do not think that it has any application.

The fourth case relied upon by the Supreme Court is *British Insulated and Helsby Cables Ltd. v. Atherton*, in which there was, as already stated, a considerable difference of opinion. The House of Lords maintained, by a majority of three to two, the judgment of the Court of Appeal which had unanimously reversed the judgment of Rowlatt J. in the King's Bench Division. I have previously reviewed the decision of the Privy Council and I do not deem it useful to deal with it anew, except perhaps to point out briefly that the Court held that, when an expenditure is incurred "once and for all" with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, there is very good reason for treating such an expenditure as properly attributable not to revenue but to capital. We are not faced with this problem in the present case. What we are concerned with is not an expenditure laid out for the creation or acquisition of an asset but one made to protect and safeguard an asset already in existence.

The last case referred to by the Supreme Court is *Ward and Company Ltd. v. Commissioner of Taxes* in which the Judicial Committee of the Privy Council affirmed the judgment of the Court of Appeal of New Zealand holding that a sum expended by appellant, a brewery company, in printing and distributing anti-prohibition literature in connection with a poll of voters being about to be held on the question as to whether or not prohibition of intoxicants should be introduced is not an expenditure which may be deducted from the company's income derived from its business, as not being an expenditure exclusively incurred in the production of the assessable income, as enacted by section 86, subsection 1(a) of the Land and Income Tax Act, 1916, of New Zealand. This decision is, in my judgment, irrelevant and inapplicable.

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At the outset of his argument counsel for respondent reiterated his admission that Hudson's Bay Company did a substantial business with American tourists and said he was also prepared to admit that the company took proceedings, incurred the costs in question herein and paid them.

It was submitted on behalf of respondent that the fact of the Commissioner having twice accepted and verified the appellant's return, including the deduction of said costs, did not prevent him from reassessing if he thought fit. This power is given him by section 55 of the Act, which reads thus:

Notwithstanding any prior assessment, \* \* \* the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

I may note incidentally that this section was repealed and another one substituted therefor by 8-9 George VI, chapter 43, section 15, which limited, rightly so in my opinion, the time for reassessment, save in the case of misrepresentation or fraud when it is left indefinite, to six years. This seems sufficiently long for the Minister to become aware of the taxpayer's financial status. On the other hand, in all fairness and equity the uncertainty of the taxpayer regarding his indebtedness to the Treasury should not be unduly prolonged.

I agree with counsel for respondent's statement that the Minister, notwithstanding any previous assessments,

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may reassess as often as he wishes, subject, however, I may add, to the right of the Court to affirm, vary or disallow the final assessment.

Replying to counsel for appellant's submission that the defence as set forth in the statement of defence is too wide, counsel for respondent, referring to the portion of the Minister's decision in which he affirms the assessments "on the ground that the legal costs and the expenses in question were expenses of the taxpayer not wholly, exclusively and necessarily laid out or expended for the purpose of earning its income", pointed out that this is the exact language of Section 6(a) which is pleaded in the statement of defence. Counsel then dealing with the following declaration of the decision: "but were in fact expenses incurred in the prosecution of its action to protect its trade name and trade and were the application of profits after they had been earned as profits for the purpose of earning future profits and accordingly were properly disallowed for income tax purposes under and by reason of the provisions of section 6 and other provisions of the Income War Tax Act in that respect" stated that, while the exact language of subsection (b) of section 6 is not used, the effect of the language that is used is to bring it into operation. He concluded that the statement of defence is not too wide when one has in mind the decision of the Minister. I must say that this seems to me a mere technicality without any importance.

Counsel for respondent stressed the point that appellant is an English company incorporated by Royal Charter in England, having its head office in that country, but operating in Great Britain, Canada, Newfoundland and other countries. He submitted that, if it were a Canadian company, all its earnings, wheresoever they might be obtained, would be income for taxation purposes in Canada and that there might be some deduction for tax purposes in other countries but that they would be taken into account in determining the tax payable in Canada and that all of its disbursements properly attributable to income would be deducted no matter where they might have been incurred. Reasserting that the appellant is an English company doing business in Great Britain, in Canada,

Newfoundland and various other countries, Mr. Smith declared that it is not taxed in Canada in respect to its profits on the English business or the Newfoundland business and that those profits are kept separate and distinct. He added that they are not brought into charge for the determination of the Canadian income tax and that likewise its expenses in earning the income in Britain, Newfoundland or other countries are not deductible from its Canadian earnings. This seems manifest. Counsel nevertheless insisted by stating that the costs of an action brought by appellant in England similar to the one instituted by it in the United States could not be deducted from the Canadian earnings of the company for income tax purposes in Canada. He observed that it is clear from appellant's statement, as filed in the Income Tax office, that the Canadian earnings and expenses are separated, for Canadian income tax purposes, from its earnings and expenses in Great Britain, Newfoundland and other places where a separate business is carried on.

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Counsel pointed out that the proceedings in the State of Washington against Hudson Bay Fur Company Inc. were brought and the expenses in connection therewith incurred in a foreign country. He further pointed out that a subsidiary company of appellant has been incorporated in the state of New York under the name of Hudson's Bay Company Inc. He intimated that, if the appellant has earnings in the United States and if it incurs expenses in connection therewith, these earnings and expenses should be attributable to the appellant's American subsidiary rather than to the Canadian aspects of the appellant's business. He specified particularly that, if the appellant, which is an English company, deems it necessary to take proceedings in the United States against an American company in respect of its trade name, reputation and goodwill, the costs of such proceedings should be charged to the American subsidiary of appellant or at least against the United States business of the appellant. He wondered why these costs, incurred in a foreign country, should be charged against the Canadian earnings of appellant rather than against its earnings in England where its head office is situate. He asked himself where the line

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is to be drawn between Canadian and other business if the costs of proceedings instituted in the United States are to be charged against the appellant's Canadian income. He observed that the appellant claims a universal reputation as the greatest fur producing and trading establishment in the world and, supposing that the appellant should bring an action, similar in scope and object to the one whose costs are now in question, in Australia, China or Brazil, asked himself if it would be proper to deduct the costs of such action from the appellant's Canadian income. His contention was that the question put in that form answers itself. He said that the head office of the appellant being in Great Britain it would not be proper to deduct the said costs from the Canadian income of the company. He saw no reason why the costs of an action taken in the United States should differ from costs of actions taken in other parts of the world, bearing in mind that the appellant is an English company, that it segregates its British and Newfoundland business from its Canadian business.

Counsel submitted that the costs of legal proceedings instituted in defence of reputation, trade name or goodwill should be chargeable against the appellant's business in the country where the costs are incurred and, if it is not possible to do so, that they should be charged against the business in the country where the appellant has its head office, to wit, in the present instance, in England. He urged that the trade name, reputation and goodwill are assets of the corporation as a whole and not of its Canadian business alone and that it is difficult to see how expenses made in a foreign country in connection with these assets can properly be charged against the appellant's Canadian business alone.

It was argued on behalf of appellant that, as there is no suggestion in the pleadings nor in the Minister's decision that the costs and expenses in question ought not to be charged to the Canadian business of appellant, but ought to be charged to its business in the United States or, if that cannot be done, to its business in England, where the company has its head office, this omission disposes of this aspect of the defence and that the respondent cannot now



raise that point. I am inclined to adopt that view. However that may be, the evidence discloses that it was the appellant's Canadian business which was being interfered with by Hudson Bay Fur Company Inc. of Seattle and that the action taken in the United States to check that interference was legitimate. I believe that the costs incurred in connection with this action were properly chargeable against the Canadian income.

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Counsel for respondent submitted that, in dealing with English cases, it is necessary to remember that the English rule corresponding to section 6(a) of the Income War Tax Act is broader. Rule 3 of rules applicable to cases I and II, schedule D, under the English act, reads thus:

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation.

Counsel for respondent drew the attention of the Court to the difference between the text of paragraph (a) of section 6 of the Canadian act and of paragraph (a) of rule 3 of the English act, the first one mentioning "for the purpose of earning the income" and the second one using the words "for the purposes of the trade," etc. He concluded that the language of the Canadian sections is narrower and therefore less favourable to the taxpayer. There is evidently a difference in the phraseology of the two provisions, but I do not think that it has the importance which counsel attempted to attach to it. The question has been considered from a broad point of view of commercial accountancy, as to what are proper charges against revenue and what are proper charges against capital. In the case of *Strong and Company of Romsey, Ltd. v. Woodifield* (1), Lord Davey stated (p. 220):

It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

In the case of *Robert Addie and Sons' Collieries Ltd. v. Commissioner of Inland Revenue* (2), Lord Clyde adopted the same opinion: see page 676.

(1) 5 Rep. of Tax Cases, 215; (1906) A.C. 448.  
 (2) (1924) 8 Rep. of Tax Cases, 671.

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The legal expenses and costs laid out by the appellant to protect its trade name, business and reputation were not incurred with the object of creating or acquiring any new asset but were incurred in the ordinary course of protecting and maintaining its already existing assets. On the other hand, I do not believe that these expenses and costs can be considered as being a capital outlay or loss.

Counsel for respondent submitted that the appellant, by means of the proceedings instituted in the United States, had obtained an enduring asset. I cannot agree with this proposition. There was no new asset brought into existence by these proceedings. The expenses were incurred in the ordinary course of maintaining the already existing assets of the company.

Reverting to the distinction between revenue and capital, I may note that in the case of *Southern v. Borax Consolidated Limited (ubi supra)* Lawrence J., in addition to making the statement hereinabove quoted, expressed the following opinion, which, as I think, is applicable to the present case (p. 417):

\* \* \* The only way in which it can be said that there was here any alteration in the capital assets of the respondent company was that the city of Los Angeles had been removed from the category of possible litigants who might challenge the company's title. I cannot think that that makes the payment a capital payment.

The respondent, in *re Southern v. Borax Consolidated Limited*, obtained a decision maintaining the title to its property. In the case of *Hudson's Bay Company v. The Hudson Bay Fur Company, Inc.*, the plaintiff merely got a decision in a passing off action enjoining the defendant (*inter alia*) from using or employing, after a certain period, the name "Hudson Bay Fur Company" and any name having the words "Hudson" and "Bay" either jointly or severally, the initials "HB" or any colourable imitation of the name "Hudson's Bay".

As suggested by counsel for appellant, the latter might face at any time the obligation of instituting other proceedings against Hudson Bay Fur Company, Inc., or start an action against someone else using the name "Hudson Bay" or a colourable imitation thereof.

In the case of *Kellogg Company of Canada Limited and the Minister of National Revenue* (1), referred to by Mr. Burbidge, the appellant, a manufacturer of cereal products, and one of its customers were made defendants in an action brought by Canadian Shredded Wheat Company which claimed infringement by both defendants of certain trade mark rights and asked for an injunction restraining them from using the words "Shredded Wheat" or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit" or any words only colourably differing therefrom and damages. The appellant successfully defended the action on behalf of both defendants. In computing its income for 1936 and 1937 the appellant deducted the sums of money paid out for legal expenses on account of said action. These deductions were disallowed by the Commissioner of Income Tax. The latter's disallowance was naturally affirmed by the Minister of National Revenue, from whose decision an appeal was taken to the Court. It was held that the payments were made involuntarily in the course of business to enable the appellant to continue the sales of its products as before action was taken against it and not to secure or preserve an actual asset or enduring advantage to appellant.

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A brief extract from the judgment of Maclean J. may be convenient (p. 43):

The broad principle laid down by Lord Cave in *British Insulated v Atherton*, (1926) A.C. 205 at 213, is not, in my opinion, of any assistance in the present case. Applying that test to the present case, the payment here made was not, I think, an expenditure incurred or made "once and for all", with a view of bringing a new asset into existence, nor can it, in my opinion, properly be said that it brought into existence an advantage for the enduring benefit of Kellogg's trade within the meaning of the well known language used by Lord Cave in a certain passage of his speech in that case. What the House of Lords was considering in that case was a sum irrevocably set aside as a nucleus of a pension fund established by a trust deed for the benefit of the company's clerical staff, and, as was said by Lawrence L.J. in the *Anglo Persian Oil* case, *supra*, I have no doubt that Lord Cave had that fact in mind when he spoke of an advantage for the enduring benefit of the company's trade. Such an expenditure differs fundamentally from the expenditure with which we are concerned in the present case. Here, the expenditure brought no such permanent advantage into existence for the taxpayer's trade. I do not think it can be said that the expenditure in question here brought into existence any asset that could possibly appear as such

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in any balance sheet, or that it procured an enduring advantage for the taxpayer's trade which must pre-suppose that something was acquired which had no prior existence.

After stating that the case of *Kellogg and the Minister of National Revenue* closely resembles that of *Noble v. Mitchell (ubi supra)*, in which a large sum of money was expended by a company to get rid of a managing director, and quoting passages from the reasons of the Master of the Rolls and of Lord Justice Sargent, which I do not deem necessary to transcribe here and which may be easily referred to, Maclean J. declared that these remarks would appear to be applicable and added (p. 45):

Here, Kellogg had encountered a business difficulty, one associated directly with the sales branch of its business, which it had to get rid of, if possible, in order to continue the sales of its products as it had in the past.

An appeal was taken by the Minister of National Revenue and the same was dismissed (1): Sir Lyman Duff, who delivered the judgment of the Court, after referring to the case of the *Minister of National Revenue v. The Dominion Natural Gas Company, Limited*, made, among others, the following statements (p. 60):

The present appeal concerns expenditures made by the respondent company in payment of the costs of litigation between that company and the Canadian Shredded Wheat Company.

\* \* \*

As regards this payment, the question in issue was whether or not the registered trade marks of the plaintiffs in the action were valid trade marks, or, in other words, whether or not the present respondents, the Kellogg Company, and all other members of the public were excluded from the use of the words in respect of which the complaint was made. The right upon which the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

The comments contained in paragraph 316 of Halsbury's *Laws of England*, 2nd edition, volume 17, are pertinent and illustrative:

316. Though it is clear that the expenses allowable are such as are necessary to earn the receipts of the trade, this proposition must be applied in a reasonable way, and must not be construed so as to preclude the deduction of those expenses as a result of which receipts or profits may accrue in the future. For example, the cost of a reasonable amount of advertising is usually admitted as a business expense, although the result of a particular advertisement might not be reflected in an increase

in trade receipts in the year in which the cost was incurred. The principle is that expenses to earn future profits are allowable deductions, and this principle has been extended to include expenditure to avoid future expense which does not bring into being a tangible asset.

The cases mentioned in notes (i) and (k) at the bottom of page 155 deserve attention and may be usefully consulted.

The costs and expenses laid out by the appellant to prevent the Hudson Bay Fur Company, of Seattle, from using a firm name so closely resembling its own that it misled many American tourists and induced them to believe that Hudson Bay Fur Company was a branch or subsidiary of the appellant and to thereby turn to the appellant company the profits or gains derived by Hudson Bay Fur Company from sales made to purchasers believing that they were dealing with the appellant must, in my judgment, be considered as disbursements or expenses laid out and expended for the purpose of earning the income as prescribed in paragraph (a) of subsection 1 of section 6 of the Income War Tax Act. These costs and expenses were not laid out with the object of acquiring or bringing into existence an asset; they were made in the ordinary course of preserving and maintaining the trade of the appellant and safeguarding it from the diversion thereof by a party misusing the appellant's name. I do not believe that these costs and expenses can be considered as a capital outlay.

I do not think that the assertion set forth by counsel for respondent that the costs and expenses in question constitute an expenditure made once and for all for the enduring benefit of the trade is founded.

The argument made on behalf of respondent that the appellant in taking proceedings against Hudson Bay Fur Company Inc. had acquired part of the latter's goodwill, since it had been in business for approximately thirty years, apart from the fact that it is not mentioned in the pleadings, is not, to my mind, serious. The action was taken after long and protracted negotiations had been carried on, when it was seen that no solution could be obtained otherwise.

I have already stated that the respondent's contention that the costs and expenses in question, if deductible from

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the profits and gains of the appellant, must be deducted from the profits and gains of the American subsidiary, viz. Hudson's Bay Company Inc., of New York, or, if it cannot be done, from those of the appellant's business in Great Britain, is, to my mind, ill-founded, seeing that the business of appellant which was affected by the illegal trade of Hudson Bay Fur Company was the Canadian section thereof.

After a careful perusal of the evidence and of the able and comprehensive argument of counsel and an elaborate study of the precedents, I have reached the conclusion that the legal costs and expenses in question amounting to \$10,377 and \$22,952.80 paid by the appellant in its fiscal years ending January 31, 1938, and January 31, 1939, respectively, must be considered as disbursements or expenses wholly, exclusively and necessarily laid out for the purpose of earning its income and that they are not an outlay, loss or replacement of capital.

There will accordingly be judgment in favour of the appellant maintaining the appeal, setting aside the decision of the Minister and the notices of assessment for the years 1938 and 1939 and declaring that the sums of \$10,377 and \$22,952.80 must be deducted from the income of the appellant for its fiscal years ending January 31, 1938, and January 31, 1939, respectively.

The appellant will be entitled to its costs against respondent.

*Judgment accordingly.*

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BETWEEN:  
 LIME COLA COMPANY . . . . . PETITIONER;  
 AND  
 THE COCA-COLA COMPANY OF  
 CANADA LIMITED . . . . . OBJECTING PARTY.

*Trade Marks—"Lime Cola"—The Unfair Competition Act, 1932, secs. 2(a), 2(b), 2(m), 3, 4, 6, 26(1)(c), 28(1)(d), 29—Use of trade mark required to be proved in an application under s. 29 of The Unfair Competition Act, 1932, is a use in Canada.*

*Held:* That for the purpose of a declaration under s. 29 of The Unfair Competition Act, 1932, the use of the trade mark required to be proved must be a use in Canada.

ARGUMENT on question of law.

The argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*Gordon Henderson* for petitioner.

*Christopher Robinson* for objecting party.

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

THE PRESIDENT now (March 4, 1947) delivered the following judgment:

The Petitioner is incorporated under the laws of Georgia and has its head office in Montgomery, Alabama. It seeks registration under The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, of the words "Lime Cola" as a word mark for use in association with the sale of non-alcoholic beverages and syrups for the manufacture thereof. The application is by way of a petition for the necessary declaration of the Court under section 29 of the Act for the reason that the words are not registrable in the ordinary way because they are descriptive within the meaning of section 26(1)(c). The petition alleges, *inter alia*, that the word trade mark, "Lime Cola", was first used during September, 1915, in the United States of America, by the petitioner's predecessor in title and has been continuously used there since that date by the petitioner and its predecessors in title; that the petitioner first made it known in Canada on or before January 1, 1940, and has continuously made it known in Canada since that date; that it has also been used by the petitioner and/or its predecessors in title in other countries; that the petitioner and its predecessors in title have spent considerable money in making it known to the purchasing public in such countries and have advertised it extensively throughout Canada; and that it has been used across Canada and will be used in each Province in Canada. Then there are other allegations that the requirements for a declaration under section 29 have been complied with.

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The objecting party is incorporated under the laws of Canada and has its head office in Toronto, Ontario. It is the owner of the registered trade marks, "Coca-Cola" and "Coke", each applied to beverages and syrups for manufacturing the same. It objects to the registration sought by the petitioner on the grounds set out in its statement of objections. We are not, for the moment, concerned with these objections except the statement "that the said words "Lime Cola" have not been so used in Canada as to become generally recognized by dealers in or users of non-alcoholic beverages and syrups for the manufacture thereof as indicating that the petitioner assumes responsibility for their character or quality" and the allegation that the facts recited in the petition do not establish the jurisdiction of this Court under section 29.

Under these circumstances, counsel for the parties, under Rule 150 of the General Rules and Orders of this Court, concurred in stating a question of law for the opinion of the Court and it was ordered that the following question be settled prior to the hearing of the action:

Whether for the purpose of a declaration under Section 29 of The Unfair Competition Act, 1932, the use of the trade mark required to be proved must be a use in Canada.

Section 29 of The Unfair Competition Act, 1932, provides as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

(3) No declaration under this section shall authorize the registration pursuant thereto of any mark identical with or similar to a mark already registered for use in association with similar wares by any person who was not a party to the action or proceeding in which the declaration was made.



The section is an exceptional one; it provides for the registration of certain trade marks that would otherwise remain unregistrable under the Act; trade marks that can be registered under some other section fall outside its ambit. The first thing to be noted is that to be registrable under the section the proposed mark must be a "trade mark" within the definition in section 2(m) as a "symbol which has become adapted to distinguish" the wares of one person from the similar wares of another person, that is to say, it must be distinctive, for distinctiveness is an essential requirement of every trade mark: *Fisher v. British Columbia Packers Ltd.* (1). But distinctiveness is not necessarily innate in a mark; it is a quality that may be acquired by it. This is implied in the definition of a trade mark as a symbol which has "become" adapted to distinguish. The next important thing to note is that the distinctiveness of a trade mark does not *per se* make it registrable. Distinctiveness and registrability are not the same. The right to registration is not inherent in a trade mark. Distinctiveness is necessary to its existence, but its registrability depends on the terms of the registration Act. Section 26 is an illustration of what is meant. Subject as otherwise provided, it provides for the registrability of a word mark if it falls outside the prohibitions of the paragraphs of subsection (1) and, by implication, it bars its registration if it falls within any such prohibitions. For example, a word mark is not registrable if it is descriptive of the character or quality of the wares in connection with which it is proposed to be used, within the meaning of section 26(1)(c). It is not because of its lack of distinctiveness that its registration is barred, for it may possess that attribute in full measure, but because of its descriptiveness. Distinctiveness and descriptiveness as applied to words are not mutually exclusive terms. This was fully dealt with by Fletcher Moulton L.J. in *Joseph Crosfield's & Sons Ltd's Application* (2). Words originally only descriptive, and not distinctive may acquire through their use in association with wares a secondary meaning that is distinctive, and thus "become" adapted to distinguish such wares as those of a particular person and of no one else and qualify

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(1) (1945) Ex. C.R. 128 at 132. (2) (1909) 26 R.P.C. 837.

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as trade marks. Yet, notwithstanding the acquisition of such secondary and distinctive meaning through use, the words have not lost their descriptive character and section 26(1)(c) still stands in the way of their registrability as a word mark. This is an illustration of the kind of trade mark for which section 29 was designed. It provides for a declaration of the Court, upon proper proof before it, pursuant to which such a trade mark may be lifted out of the class of non-registrable trade marks in which, but for the section, it would continue to remain. There is no need to determine the whole class of trade marks that might come within the scope of registrability pursuant to a declaration of the Court under the section, for we are here concerned only with those which by reason of their descriptiveness are not registrable because of section 26(1)(c). According to the petition itself the words "Lime Cola" came within that class.

In order that the petitioner may obtain the declaration of the Court pursuant to which the words "Lime Cola" may be registered as a word mark, notwithstanding their descriptiveness, it must comply with the requirements of the section. It must prove to the satisfaction of the Court that there is a general recognition by dealers in and/or users of non-alcoholic beverages and the syrups for the manufacture thereof that the words "Lime Cola" when used in association with such wares indicate that the petitioner assumes responsibility for them, that is to say, for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin; in other words, it must be shown that in the minds of such dealers and/or users the words have acquired a secondary meaning and, therefore, a distinctive one, distinguishing the wares as those of the petitioner and of no one else. Unless the proof goes thus far, there is no justification for according the words the exceptional treatment provided by section 29. But it is not enough for the petitioner to show merely that there is a general recognition of such secondary and distinctive meaning in the minds of dealers in and/or users of the wares; it must also show that such general recognition is the result of the use of the words in association with the

wares by the petitioner or his predecessors in title. This follows from the requirement of the section that proof must be given that "the mark has been so used \* \* \* as to have become generally recognized by dealers in and/or users of the class of wares \* \* \* as indicating \* \* \*". The general recognition of the acquisition by the words of a secondary and distinctive meaning, as indicating the petitioner's wares, must be the result of their use in association with such wares. And the question of law before the Court is whether the use required to be proved must be use in Canada.

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The question is a novel one. Section 29 does not specify where the trade mark must be used and counsel for the petitioner contended that evidence of use in any Convention country might be given and that it was not limited to evidence of use in Canada. Counsel for the objecting party, on the other hand, took the position that the use that must be proved is use in Canada.

I have come to the conclusion that the more reasonable construction of section 29 is that the use of the trade mark there referred to means use in Canada. There is strong support for this view in subsection (2). It requires the Court to specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or be limited to a defined territorial area in Canada. The evidence adduced must relate to the recognition by dealers in and/or users of the wares of a secondary and distinctive meaning of the words resulting from their use in association with wares. If such recognition is throughout Canada, then the registration should extend to the whole of Canada, but if not, then it should be limited to the territorial area in Canada in which the recognition exists. The section thus contemplates the possibility of the acquisition of a secondary and distinctive meaning in only an area in Canada. When section 29 requires proof to be made of a general recognition by dealers in and/or users of the class of wares in association with which the trade mark has been used that it has acquired a secondary and distinctive meaning, this must, I think, mean a general recognition by dealers and/or users in Canada, for otherwise there would be no rational basis for subsection (2),

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and since the recognition must flow from use, I think it follows that the use must be in Canada. It is difficult to see how there could be a recognition in the minds of persons in Canada of the acquisition by words of a secondary and distinctive meaning resulting from their use in association with wares, and not otherwise, if such use were not in Canada. The Court must, I think, deal with the matter from the point of view of the situation as it exists in Canada, and ascertain the meaning which the trade mark has acquired in the minds of dealers and/or users in Canada as a result of its use in Canada. If the recognition of the secondary and distinctive meaning of the trade mark must be in the minds of persons in Canada, and such recognition must flow from its use in association with wares, then it must follow that such use must be use in Canada. This view is in accord with the decision on a somewhat similar question in *F. Reddaway & Co. Ltd's Application* (1). There the Court had to consider the meaning of the words "adapted to distinguish" in section 9(5) of the Trade Mark Act, 1905, of the United Kingdom, and the acquisition of distinctiveness through user. Viscount Dunedin, speaking for the House of Lords, which reversed the judgment of the Court of Appeal and restored that of Tomlin J. and the decision of the Registrar, said, at page 37:

I think Mr. Justice Tomlin was right when he said: "I think, first, that 'adapted to distinguish' means 'adapted to distinguish in this country' having regard to the practice and conditions of the trade here"

and later:

I agree with Mr. Justice Tomlin, who said "Though evidence of user in another country may be some evidence of an inherent quality of distinctiveness, it cannot be evidence that the mark is adapted to distinguish in the market of this country."

While the judgment is not a direct authority on the question before the Court, I think a similar view would be reasonably applicable to it, particularly since the purpose of the section under review in that case was in many respects similar to that of section 29. The conclusion that the use required to be proved must be use in Canada is a reasonable and normal one; it is consistent with the purpose of the section and meets the needs of the situation in

Canada; moreover, it gives full effect to subsection (2) and, in addition, it does not lead to any anomalous or absurd results.

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This cannot be said of the construction advanced on behalf of the petitioner. If it were sufficient to prove the acquisition by descriptive words of a secondary and distinctive meaning as a result of their use in association with wares in a country other than Canada and on the strength thereof the registration of such words as a trade mark could be obtained in Canada, that might lead to the result that words which have a secondary and distinctive meaning in the country in which they have been so used would be registrable in Canada, even although in Canada such words had only a descriptive character and had no secondary or distinctive meaning at all; that would mean the registration in Canada as a trade mark of words that have not the essential requirement of a trade mark within the meaning of the definition in section 2 (*m*). Such an anomalous result could not, in my opinion, have been intended by Parliament. It would be unreasonable and counter to the purpose of the section. Moreover, it would render subsection (2) meaningless, for the evidence of use elsewhere than in Canada could not afford the Court any basis for deciding whether there should be a territorial limitation to the registration or not. A construction leading to such consequences ought to be rejected unless there are other circumstances compelling its adoption.

Counsel for the petitioner sought support for his contention in a number of other sections of the Act. He urged that the Act gave wider protection to the proprietors of trade marks in use in any country of the Union other than Canada, such Union being the Union for the Protection of Industrial Property as defined in section 2(*b*), than it did to the proprietors of trade marks in use in Canada; that all he had to do was to show that the words "Lime Cola" were in use as a trade mark in the United States, one of the countries of the Union; that distinctiveness in the country of origin was sufficient for the purposes of the Act; and that if distinctiveness was acquired by the words by their use in the United States, the petitioner would be entitled to the benefit of such distinctiveness in

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an application under section 29. I am unable to accept these views. I do not think that the reference to other sections of the Act or to any preferential treatment given to the proprietors of trade marks in countries of the Union other than Canada can affect the particular and exceptional place of section 29 in the scheme of the Act.

Section 3 was one of the sections referred to. It is true that the section gives greater protection in the case of a trade mark in use in a country of the Union other than Canada than it does in the case of a trade mark in use in Canada, in that the prohibition against the knowing adoption for use in Canada of a mark already in use in a country of the Union other than Canada applies even when it is not used or registered in Canada, if it is known there in the manner indicated, whereas in the case of a trade mark in use in Canada there must be both use and registration before the prohibition applies. But it does not follow from the fact that there is a prohibition against the knowing adoption of a trade mark in use in a country other than Canada, that there is also entitlement to registration of such a mark under the exceptional provisions of section 29 without proof of use in Canada. Section 3 does not touch the question of the registration or registrability of a trade mark in Canada at all.

Nor am I able to see what bearing section 4, with its reference to the rights of the person who, in association with wares, "first uses or makes known in Canada" a trade mark, can have on the construction of section 29. It requires proof that the trade mark has been so "used" as to have resulted in the recognition of its secondary and distinctive meaning. There is no mention of making the trade mark known in Canada. The recognition of a secondary and distinctive meaning in the minds of the dealers and/or users must flow from the use of the trade mark, not from the making of it known. Proof of making the trade mark known in Canada, by advertisement or the like without proof of its use in Canada, within the meaning of section 6, would not, in my judgment, warrant the making of a favourable declaration under section 29.

Reference was also made to section 28 (1) (d) and the fact that under it a foreign trade mark may be registered

in Canada without any requirement of use of it in Canada. The reason is plain. Section 28 (1) (*d*) carries out the intent of article 6 of the convention of the Union of Paris for the Protection of Industrial Property, as defined in section 2 (*a*), which provided that every trade mark duly registered in the country of origin should be admitted for registration and protected in the form originally registered in other countries of the Union under the reservations indicated. The entitlement to registration of the foreign trade mark under section 28 (1) (*d*) is because of its due and valid registration in the country of origin of such registration and it would not have been in accord with the intent of article 6 if, in addition to its registration in the country of its origin, use of it in Canada had also been required as a condition of its registration. But the petitioner's application for registration of the words "Lime Cola" as a trade mark is not based upon registration in the United States, and there is no allegation of any such registration; if it were then it might be made under section 28 (1) (*d*), in which case use of the words in Canada would not have to be proved; but in such event, the application would fall outside the scope of section 29 altogether. Here the application is made on the basis of the use of the words as a trade mark and it is sought to rely upon use in the United States as proof of entitlement to registration in Canada under section 29, because it is admittedly not otherwise registrable because of section 6 (1) (*c*). What counsel for the petitioner seeks, in effect, to do is to extend the obligation of Article 6 of the Convention, as implemented by section 28 (1) (*d*), of granting registration to a foreign trade mark in Canada because of its due and valid registration in the country of its origin to granting registration to such a trade mark because of its use without registration in the country of its origin. There is no warrant or justification for any such extension, and it ought not to be granted. If it were granted, the result might follow that a trade mark would be registrable in Canada because of its use in another country, even although it was not registrable in such other country. It was certainly never the intention of Parliament that such a result would be possible under section 29.

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Section 29 deals with a subject matter not affected by any convention obligation and should be construed independently of the article of the Convention or the other sections of the Act; it is designed to meet the needs of exceptional situations as they may arise in Canada, so that where trade marks in use in Canada have acquired a secondary and distinctive meaning in Canada they may, under the supervision of the Court, be granted registration, notwithstanding their non-registrability under any other section of the Act.

Under the circumstances, I am clearly of the opinion that the use required to be proved in an application under section 29 of The Unfair Competition Act must be use in Canada. The question of law is therefore answered in the affirmative. The costs will be costs in the cause.

*Judgment accordingly.*

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BETWEEN :

THE B. MANISCHEWITZ COMPANY... PLAINTIFF;

AND

HARRY GULA, TRADING UNDER THE FIRM NAME AND STYLE OF HARRY GULA'S TASTY MATZO BAKERY AND THE SAID HARRY GULA.....	}	DEFENDANTS.
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*Practice—Costs—General Rules and Orders of the Exchequer Court—  
 Item 58 of Tariff A.*

*Held:* That Item 58 of Tariff "A" in the appendix to the General Rules and Orders of the Exchequer Court is applicable only to actions in which the sole relief given is the payment of a stated sum by way of damages or otherwise, and not when the relief given is other than, or in addition to, such payment.

MOTION to have a taxation of costs by the Registrar reviewed by the Court.

The motion was heard before the Honourable Mr. Justice O'Connor in chambers.

*Jack Rudner and A. H. Lieff* for the motion;

*C. F. Scott contra.*



O'CONNOR J. now (February 28, 1947) delivered the following judgment:

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This was an action for infringement of a word mark and passing off in which the Court found that the defendants had infringed the word mark of the plaintiff and had passed off their goods as the goods of the plaintiff. The usual injunction was granted and damages in the form of \$200 awarded the plaintiff.

In taxing the costs the Registrar deducted one-third of the amount of the fees under Item 58 of Tariff "A" in the appendix to the General Rules and Orders of the Exchequer Court, which is as follows:

"Item 58. In actions in which the amount recovered is under \$500, a deduction of one-third of the amount of the fees (other than disbursements) shall be made by the taxing officer, unless otherwise ordered by the Court or a Judge."

The plaintiff applies to review the taxation in respect of this item. The question is whether the item is applicable in view of the fact that the plaintiff has recovered relief other than, or in addition to, the damages of \$200.

The item applies to actions in contract and tort where the sole relief given is the payment of a stated sum of money by way of damages or otherwise.

It is equally clear, however, that the item does not apply to an action in which the relief given is other than the payment of a sum of money by way of damages or otherwise. In an action for an infringement of a trade mark where no damages were awarded, the item could have no application.

The question is, therefore, whether or not the item is applicable to an action in which relief is given in addition to the payment of a stated sum of money by way of damages.

The purpose of the rule is clear. It is to reduce the costs in those actions which are not of sufficient size and importance to justify full costs according to the tariff.

In actions in contract and tort what is recovered is the payment of a stated sum of money by way of damages or otherwise, and the amount of such sum in such cases is a fair criterion of the size and importance of the case.

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That is not a proper criterion in actions relating to patent and trade mark matters. The chief issue in these actions is whether or not there has been an infringement and what the plaintiff recovers or fails to recover is a declaration of an infringement and an injunction. The question of damages is distinctly a secondary matter and the amount of the damages awarded is not the slightest criterion as to the size or importance of the action. Damages are awarded on factors such as the length of time of the infringement, volume, etc., and the amount of damages therefore, does not indicate the value of the patent or trade mark rights established in the action.

To determine the importance of an action relating to trade marks or patents by the amount of damages awarded would be unreasonable.

I come to the conclusion that the item is applicable only to actions in which the sole relief given is the payment of a stated sum by way of damages or otherwise, and that the item is not applicable where the relief given is other than, or in addition to, such payment.

The plaintiff is, therefore, entitled to the amount of fees taxed by the Registrar at \$670 without the deduction of one-third.

There will be no costs of the application.

*Judgment accordingly.*

BETWEEN:

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 March 6  
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GEORGE W. ARGUE ..... APPELLANT;

AND

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

*Revenue—Income—Excess Profits Tax Act 1940—Profits of a trade or accretions of capital—Carrying on a business—Appellant buying and selling securities—Appeal dismissed.*

Appellant, manager of a loan company, gave practically all his time for the period material to this appeal, to its business. He carried on in a small way an insurance business mostly in respect of the affairs of the loan company and drew an income from shares of the company

but principally from mortgages and agreements of sale purchased as investments and, to a small extent, from loans and notes to shareholders of the company. He had a secretary who attended to his insurance business and investments. He paid her salary, owned the desk, typewriter and equipment used by her, and paid for a telephone and also contributed a share of the office rent. Appellant filed his income tax return for the year 1940 and was assessed by the Commissioner of Income Tax for excess profits tax. Appellant appealed to this Court.

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*Held:* That the appellant was carrying on a business within the meaning of s. 2(1)(g) of the Excess Profits Tax Act 1940 and the appeal must be dismissed.

APPEAL under the provisions of the Income War Tax Act.

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

*G. V. Thorvaldson, K.C.* and *Owen E. Bryan* for appellant.

*Ward Hollands, K.C.* and *A. A. McGrory* for respondent.

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

ANGERS J. now (March 6, 1947) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act made applicable to matters arising under the provisions of the Excess Profits Tax Act in virtue of section 14 of the latter which enacts:

Without limiting any of the provisions contained in this Act, sections forty to eighty-seven both inclusive of the Income War Tax Act, excepting subsection three of the first paragraph of subsection five of section forty-eight, Part VIII A and section seventy-six A thereof, shall, *mutatis mutandis* apply to matters arising under the provisions of this Act to the same extent and as fully and effectively as they apply under the provisions of the Income War Tax Act, and notwithstanding anything contained in that Act the provisions of Part VIII are applicable under this Act in respect of assessments of the nineteen hundred and forty-six and subsequent taxation years.

The appellant, at a date which is not indicated in the copy of the appellant's return for the year ended December 31, 1940, forming part of the record of the Department

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of National Revenue produced, but at all events sometime in 1941, delivered to the Inspector of Income Tax at Winnipeg, province of Manitoba, his income tax return for the year ended December 31, 1940, showing a total income of \$13,748.47 and deductions for donations to charitable and patriotic organizations amounting to \$1,190 and for an exemption of \$1,500, leaving a net taxable income of \$11,058.47 and showing a general tax of \$2,827.80, a surtax of \$131.25 and a National Defence tax of \$140.48, making a grand total of \$3,099.53.

On June 10, 1941, the appellant transmitted to the said Inspector of Income Tax his excess profits tax return, showing a profit for the fiscal year ended December 31, 1940, of \$903.94 and a tax at 12 per cent of \$108.48, net taxable profits including the taxpayer's salary under the Income War Tax Act for the fiscal periods ending December 31, 1936, 1937, 1938 and 1939, totalling \$3,564.36 and "standard profits" for such years divided by four, i.e. the duration of said periods, amounting to \$891.09 and showing further a profit for the year 1940 in excess of the standard profits of \$12.85 and the excess profits tax (75 per cent) payable thereon, amounting to \$9.64.

A notice of assessment concerning the excess profits tax appears to have been mailed to the appellant on August 9, 1943. It shows a net taxable income in the sum of \$7,366.95, an amount levied at 12 per cent amounting to \$834.03 plus \$29.58 for interest, an amount paid on account of capital of \$633.32, leaving a balance of \$250.71 on the tax levied and an amount of \$29.58 for interest, making a total of \$280.29, payable as at September 9, 1943.

A notice of appeal from the notice of assessment in connection with the Excess Profits Tax was served upon the Minister on or about September 7, 1943. On March 8, 1944, the Minister, acting and represented by the Income Tax Commissioner, affirmed the assessment and notified the appellant of his decision. On April 5, 1944, the appellant mailed to the Minister a notice of dissatisfaction accompanied by a statement of facts, in accordance with section 60 of the Income War Tax Act. On May 16, 1944, the Minister replied to the notice of dissatisfaction by

denying the allegations contained in the notice of appeal and the notice of dissatisfaction as far as incompatible with his decision and affirmed the assessment as levied.

Pleadings were filed by consent of the parties.

The statement of claim alleges in substance:

the appellant is and was in 1940 the manager of International Loan Company, whose head office is in the city of Winnipeg, province of Manitoba, and he resides in the said city;

the appellant was also in the said year owner of certain real estate mortgages and agreements from which he derived an income by way of interest thereon;

the appellant's taxable income for 1940 amounted to \$12,666.95, being made up of salary received from International Loan Company, insurance commissions, dividends and interest earned on his real estate mortgages and agreements;

the appellant was assessed for the year 1940 under the Excess Profits Tax Act according to the following tabulation:

net income (including mortgage interest (\$6,078.59) and dividend (\$300), totaling \$6,378.59) .....	\$13,856 95
less donations .....	1,190 00
taxable income .....	<u>\$12,666 95</u>
less dividend from International Loan Company, not deemed to be income from "being in business" .....	300 00
	<u>\$12,366 95</u>
less salary allowed .....	5,000 00
leaving .....	<u>\$ 7,366 95</u>
subject to 12 per cent excess profits tax—	\$884.03;

no part of appellant's income is derived from "being in business" or from a "business" or "one or more businesses" as defined in paragraph 2(g) of the Excess Profits Tax Act and the appellant is not taxable under the said Act;

in the alternative, the appellant's net income of \$12,666.95 includes the sum of \$6,078.59, which is the amount of interest earned on the appellant's real estate mortgage investments and agreements and such real estate

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mortgage investments are not a "business" or "one or more businesses" as defined in paragraph 2(g) of the Excess Profits Tax Act and consequently the said sum of \$6,078.59 is not taxable under the said Act;

the appellant therefore claims:

a declaration that no part of his income is taxable under the Excess Profits Tax Act;

in the alternative, a declaration that the amount of his income from personal mortgage investments and agreements is not taxable under the said Act;

costs.

In his statement of defence the respondent pleads in substance:

he admits that the appellant is and was in 1940 the manager of International Loan Company and the owner of real estate mortgages and agreements from which he derived an income by way of interest thereon;

he admits that the appellant's taxable income for 1940 amounted to \$12,666.95 made up of salary received from International Loan Company, insurance commissions, dividends and interest earned on real estate mortgages and agreements;

he admits that the appellant was assessed for the year 1940 under the Excess Profits Tax Act according to the tabulation set forth in the statement of claim;

he denies the other allegations of the statement of claim; and adds:

the profits assessed for excess profits tax constitute the income derived by the appellant from the carrying on of one or more businesses within the meaning of paragraph (g) of section 2 of the Excess Profits Tax Act and the appellant was properly assessed under the provisions of section 3 of the said Act.

The only oral evidence adduced was the testimony of the appellant, which I believe appropriate to summarize briefly.

Argue testified that he is the manager of International Loan Company, which has its head office in the city of Winnipeg, and that he has a large number of shares therein and a considerable number of mortgages and agreements. He thought that the amount of these mortgages and

agreements was something over \$100,000, and said that what is shown in his income tax return is correct. According to him the largest number of mortgages were on city homes but there were some on farms.

Asked if he could state how many mortgages and clear title agreements he had in 1940, Argue replied that he did not know exactly but that the number was between 60 and 70. He said that these mortgages ran from five to sometimes ten and fifteen years, but that some of the five-year mortgages were not paid off as the debtors were unable to pay. He added that some had been carried since 1929.

He stated that he had no short term mortgages and that some of his mortgages had run for some seventeen years.

He declared that he does not have to look after the interest and receipts on his mortgages, as he has a secretary who does that for him. Asked how much time he devotes personally to his mortgages, Argue gave the following information (p. 8):

A. I think about half an hour a day, and lots of days I do not devote any time. If my secretary tells me everything is up to date, I do not bother with it at all, it is only when a mortgage falls in arrears I have to pay any attention to it.

Q. As a matter of fact, are you in Winnipeg all the time or are you away?

A. No, I have to travel for the Company a great deal. We have clients and mortgage loans as far as Alberta, and I cover almost all these territories.

Q. At times you are away for weeks and months?

A. Yes, sir, sometimes two months at a time.

Q. During that time do you pay any attention to your own personal investment?

A. No, I can't do that.

Q. So they are looked after by your secretary?

A. That is correct.

Argue declared that the International Loan Company operates only a mortgage loan business and that the total amount of its loans at the beginning of 1944 was about \$1,125,000.

He stated that his relations with the company were covered by an agreement dated May 31, 1921, and that he was acting as manager under this agreement in 1940. The agreement was filed as exhibit 1. He asserted that

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this agreement fully sets out all his relations with the company. According to him this agreement, which was for a period of twenty years and expired on May 31, 1941, has since been renewed.

Argue declared that he devotes all his time to International Loan Company and that he has no outside business whatever. He added that all the business of the company is carried on and that all the agreements are made in its name and that all the mortgages are in its favour.

He stated that the funds of the company are deposited in a bank designated by the Board of Directors, that he does not sign the cheques for the company alone but that there must be two signatures, viz., that of the secretary-treasurer and himself or, in case of his absence, by another director authorized to sign.

He said that International Loan Company owns the furniture, books supplies and goodwill of the company and that under the agreement (exhibit 1) he pays the rent, telephone and salaries.

He said that he became agent of an insurance company for the writing of fire insurance policies for the reason that the mortgages and securities of the company require fire insurance and, as the company did not wish to attend to that itself, it appointed him as agent. He stated that he does not carry on any other insurance business to any extent except in cases where mortgagors pay off their mortgages and wish the company to rewrite the insurance. He asserted that the revenue from his insurance activities scarcely pays the operating expenses.

He declared that the item of \$15,182.72 appearing in the financial statement as "property account—personal", filed with the Inspector of Income Tax, for 1940 represents the value of his home at Winnipeg and his summer home at Matlock Beach, both of which he occupies himself and from which he draws no revenue.

Shown a financial statement as at December 31, 1940, dated April 21, 1941, signed by David Cooper and Company, accountants and auditors of Winnipeg, Argue said that it is his auditor's report of his affairs during the year 1940. This statement was filed as exhibit 2.



He stated that he made five new mortgage loans in 1940, seven in 1939 and seven in 1941. Asked by counsel for respondent if these five loans were large or small, Argue mentioned the following:

- loan of \$1,777.34 to W. J. Watson,
- loan of \$1,000 to Joseph O. Bélanger, part of which was a re-loan as the borrower already had a loan of about \$500, which he discharged,
- loan of \$1,675.90 to Ethel E. Thorogood,
- loan of \$750 to Ida Higgins,
- loan of \$600 to Walter S. McGibbon,
- loan of \$335 to John Carsone.

Argue added that there is a sale of a house taken over on a mortgage from George F. Poulter, which he had to rebuild at a cost of \$4,500. He said he had the title to the property and had sold it to Poulter on the instalment plan.

Argue stated that some of these loans were re-loans and that, if he were to give the figures exactly, he would have to have his secretary.

Counsel for respondent told Argue that he was informed that there are sixteen loans which do not appear in his income tax return of 1940. The witness replied that he does not know anything about it, that the auditor makes his report and that he signs it.

Referring to a loan, set forth in the witness' return for 1940, to one F. L. Young for \$1,777.34, counsel told Argue that this loan must have been on his books at that time and that it did not appear in 1939. Argue replied that if the loans had been paid off they would not appear in the ledger at all.

Counsel intimated that he could give the witness the names of sixteen loans which did not appear as loans in 1939 but did appear in 1940. Argue admitted that he never checked this up, that he just took his secretary's statement and that it may be wrong. He stated that possibly some of these loans had been paid off since and that accordingly they would not appear in the ledger. He repeated that there were five loans placed in 1940 shown in the ledger.

Argue declared that the International Loan Company carries on the business of loaning money on mortgages and that besides it holds some government bonds.

He denied that he deals pretty much in his personal capacity as the company does in its corporate capacity.

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adding that all he has consists of a few savings put into these securities. He pointed out that his savings are not always put into the same securities on which the company loans money and that many times he has accommodated clients of the company with a larger percentage loan than the one to which the company is limited by law, viz., 60 per cent. He said he first started to loan his personal funds in this manner around 1925 or 1926. He added that he kept money on hand "all through the panic" and loaned to any shareholder whose shares were fully paid, who came to the office to borrow on his shares, as the company was not allowed to do this. He added that he sometimes loaned on agreements for sale, in which case the person making the loans paid the inspection fee which was added to the loan. He stated, however, that the person making the inspection is appointed by him and is under his supervision.

He declared that he loans practically nothing on notes, that he has a few old notes, which are "secured by people's shares" and that this was done just to accommodate clients. He admitted that he received interest on them, but added that they were not the class of investment that he would be looking to at all. He asserted that they were only done to accommodate clients.

He said he did not get a commission when he secured or placed a loan for the company.

Asked by counsel if, supposing he came to him to borrow \$2,000, and if the witness turned it over to the company, he would get a commission, Argue replied in the negative and added (p. 22):

A. \* \* \* if some other agent brought their loan to the Company, that agent would get a commission of one per cent, but I do not get a commission.

Q. You merely get a commission—

A. According to the contract.

Q. It is a percentage on the amount earned by the Company or something of that kind?

A. That is right.

Argue admitted that most of the mortgages include the following clause (p. 22):

And I further agree forthwith on the happening of such loss or damage by fire to furnish at my expense all the necessary proofs and do all the necessary acts to enable the mortgagee to obtain payment of the insurance moneys. Provided always that such insurance must be in a company

selected by the mortgagee, and that the mortgagee may effect same without reference to the mortgagor and charge any moneys paid by him in respect thereof upon the said lands.

He acknowledged that as a result, in addition to the interest he receives on the mortgage, he gets a commission on the insurance policies he places.

He stated that the fees which he may make out of his insurance business is his personal income and that it has nothing to do with the company. He added that he pays the expenses of attending to the insurance.

He declared that he pays his secretary himself, that he contributes a share of the office rent for the space which she occupies, that he owns the desk and all the equipment which she uses, that he pays for a telephone so that people can call up about insurance and not disturb the company. He summed up by saying (p. 24): "It is only a matter to help the company that we do this."

He admitted that sometimes the company is obliged to take back certain properties on which payments have not been made, that he has then a real estate man to look after the rental and a man to attend to the repairs. He said that he does not do that work himself.

At the request of counsel the Court adjourned at 12.05 p.m. until 2.15 p.m. in order to allow them and the witness to look into the question of the sixteen loans alluded to by Mr. Hollands. After recess counsel continued the cross-examination of appellant; a brief recital of the facts disclosed is expedient.

To the question as to whether he wished to make some explanation of his evidence at the morning session, Argue replied affirmatively and added (p. 28):

A. \* \* \* we find that there are fourteen new mortgages instead of five.

Q. That were placed in 1940, the year in question?

A. Yes, the year 1940. Do you wish me to make an explanation.

To this question of the witness, Mr. Hollands replied (p. 28):

No, I accept the witness's statement. I don't think there was any intention to mislead the Court.

I am satisfied that the witness was in good faith. Unfortunately he was almost totally unacquainted with his business.

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Counsel for respondent observed that Argue had stated that there were only 60 or 70 mortgages outstanding in 1940 and that by checking his returns he noticed that there were 78. To this observation, Argue offered the following explanation (p. 28):

Well, we took off the ledger a number, and evidently the ones in the discharged ledger were not included.

Asked if it would be correct to say instead of 60 or 70 there are 78 mortgages outstanding representing his personal funds, as set forth in his return, Argue answered that he did not know.

Mr. Thorvaldson here interjected the remark that the number of mortgages are in evidence by virtue of being listed in a schedule included in the statement exhibit 2. In fact the number is 78. Counsel for respondent suggested that it is not exact to say seventy-eight mortgages, as there are, besides mortgages, agreements for sale and securities on the advance of moneys whereby witness purchased an agreement for sale or possibly sold it.

Asked if each one of these investments "require a considerable amount of looking after", Argue supplied the following information (p. 29):

A. If I was spending a lot of time looking after them I would have known this morning this statement was wrong, the fact is I don't pay much attention to them at all.

Q. Amongst other things you have to find out each year is whether the taxes are paid on each individual property?

A. The secretary does that.

Q. And she is the secretary, you have already explained, that you pay to look after that part of your affairs?

A. Along with the fire insurance.

The agreement entered into on May 31, 1921, between International Loan Company and the appellant, a duplicate whereof was filed as exhibit 1, stipulates *inter alia* that:

the agreement is entered into for a period of twenty years reckoning from June 1, 1921;

during the continuance of the agreement, the manager shall act as general agent and manager of the company;

the manager shall have the exclusive right of selling the company's shares and properties and of *acting as rental and insurance agent for the company*;

the manager shall look after the investment of the company's funds, the collection of all moneys owing to it on shares, investments, rentals or otherwise, with full power to give receipts, releases and quittances, provided that the investment of the company's funds shall be subject to the control of the Board of Directors;

the manager shall, at his own expense, provide adequate office accommodation and such clerical or other assistance, as shall be necessary to carry on the company's business;

the remuneration payable by the company to the manager for selling its shares shall be a commission of 5 per cent of the price at which the same are sold, including premiums, if any (the agreement here sets forth the conditions of payment of this commission, which have no materiality herein);

the remuneration to be paid by the company to the manager for the selling of properties shall be the usual commission paid to real estate agents in Winnipeg and the remuneration for acting as rental agent for the company shall be the usual commission charged by rental agents in Winnipeg;

for all services rendered by the manager other than the sale of shares and properties and acting as rental agent, the manager's remuneration shall be a commission of 2½ per cent per annum on the amount of the invested funds of the company up to the sum of \$250,000, and 1½ per cent per annum on all invested funds over and above the said sum of \$250,000 (there follows a proviso which is immaterial);

in addition to the remuneration to be paid to the manager as hereinabove provided, the company agrees to supply the necessary office furniture, stationery and advertising and to pay all business taxes or assessments, auditor's fees, legal fees, remuneration to directors, commission to brokers or sub-agents for procuring loans, the expense of calling meetings of shareholders, the cost of any bond or bonds which the company may require from the manager or any person employed by him or by the company in the conduct of its business and also any expense

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which may be incurred by reason of the company taking deposits under section 65 of the Loan Companies Act 1914;

all outlays and expenses in connection with the carrying on of the company's business, other than those previously mentioned, shall be paid by the manager;

all moneys received by the manager on account of sale of stock, investments, sale of properties, rentals or otherwise shall be deposited to the credit of the company in a chartered bank, as provided by the company's by-laws, and all sums owing by the company to the manager under this agreement shall be payable by cheque on the company's account on the last day of each month;

the manager covenants to faithfully perform the services required by the contract and that he will not, during the currency thereof, engage in the promotion of any other company doing business along the same lines as this company and that he will not engage in any business of any kind whatsoever which will conflict with the company's business;

the company assumes responsibility for the payment of all commissions unpaid on the sale of stock in International Loan Company and covenants that it will pay to the manager all moneys coming to him for the sale of such stock upon the terms heretofore agreed upon between the parties.

It was submitted on behalf of appellant that he is foremostly the manager of International Loan Company, whose business is the making of loans on city and farm properties and that he devotes substantially all his time to the company's business, that he has a very small insurance business operated largely in respect of the company's business and that he has an income which he derives from investments in securities.

The evidence discloses that the appellant practically gave all his time, during the period material herein, to the business of International Loan Company, that he carried on in a small way an insurance business, mostly in respect of the affairs of International Loan Company and that he drew an income from shares of the company but principally from mortgages and agreements for sale purchased

as investments and also, to a small extent, from loans on notes to shareholders of the company holding fully paid shares thereof.

Argue had a secretary who looked after his insurance business and his investments; to this part of his work Argue devoted little time. On the other hand, the proof shows that he paid his secretary's salary himself, that he contributed a share of the office rent, that he owned the desk, the typewriter and the equipment used by his secretary and that he paid for the telephone so that, according to his story, people could inquire about insurance without disturbing the company. One must not overlook the fact that this secretary not only looked after the appellant's personal business but spent a great deal of her time on the business of the company. The evidence does not reveal what portion of the time of the secretary is used on the appellant's personal business, but I think it may be inferred that it is less considerable than that devoted to the company's affairs.

Clause 4 of the agreement, hereinabove referred to, stipulates, as we have seen, that the manager shall look after the investment of the company's funds, the collection of moneys due to the company on shares, investments, rentals or otherwise, give receipts, releases, quittances for moneys so received. This work, according to Argue's uncontradicted testimony, takes up all his time and he has very little opportunity to look after his personal business. Can it be said that the appellant in investing his money in mortgages, agreements for sale, drawing the interest thereon when it became exigible, receiving the capital of his investments when they came to maturity, reinvesting his capital in mortgages or agreements for sale constitute a business? If the appellant's activities were limited to that, I would feel inclined to answer the question negatively. Were they so limited? The problem we have to solve narrows down to this question, as I think.

It was submitted on behalf of respondent that the appellant is liable to the excess profits tax under paragraph (g) of subsection 1 of section 2 of the Excess Profits Tax Act 1940, which reads thus:

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(g) "Profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the Income War Tax Act, and before any deductions are made therefrom under any other provisions of the said Income War Tax Act;

Counsel for respondent contended that Argue carried on the business of (a) manager of a loan company, (b) an insurance agent and (c) an investor in securities in general. We are only concerned with the last one.

The evidence is unfortunately limited to the holdings of the appellant in 1940, which is the taxation year in question herein. It is incomplete and consequently unsatisfactory. Argue was generally ignorant of his personal affairs. His secretary, who looked after them, would likely have been able to give the Court more information on the subject. Why she was not called as witness is beyond my comprehension. Be that as it may, the evidence discloses that in 1940 eighteen mortgages or agreements for sale having matured, they had to be replaced or renewed, in 1939 seven and in 1941 seven. There is no evidence regarding the value of the eighteen securities renewed or replaced in 1940. In the circumstances, we do not know what proportion of the amount of \$102,379.24, shown in the schedule of "clear title agreements and first mortgages" forming part of the financial statement exhibit 2, these eighteen securities represent. The total value of the seven investments mentioned by Argue in his testimony is \$10,782.26, according to the figures contained in the aforesaid schedule. This amount divided by seven gives an average of \$1,540.32. Now if we multiply this quotient by eighteen we get a total of \$27,725.76. This sum represents a little more than one-fourth of the value of the appellant's clear title agreements and first mortgages as at December 31, 1940, which appears in the said schedule to have been \$102,379.24. It seems a strange coincidence that so high a proportion of the appellant's securities should have come to maturity in the same year. Needless to say, if evidence had been adduced regarding the quantity and the value of the securities required in say the two or three years preceding and the two or three years following 1940, the Court would have been in a better position to deter-



mine whether the appellant was merely reinvesting his capital as its investments were naturally realized on their respective dates of maturity or whether he was carrying on an investment business, selling securities at a profit and replacing them by others at lower prices in the hope of disposing of them later at increased prices and drawing a benefit therefrom. Perhaps the figures for the years immediately preceding and following 1940 were not favourable to appellant's contention; that may be the reason why no evidence was adduced in relation thereto. In the circumstances, I must rely on the figures for the year 1940 only.

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In practice it may often be difficult to draw the line between the cases in which the buying and selling of securities merely constitute a change of investments or amount to the carrying on of an investment business. Each case must be determined according to its own facts. Nevertheless, the following decisions may help in reaching a conclusion.

*Smith v. Anderson* (1), in which Jessel, M.R., at page 260, expressed the following opinion:

When you come to an association or company formed for a purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to do that and nothing else, and, therefore, at once you would say that the company carried on a business. So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life to buy and sell securities—he is called a stock-jobber or share-jobber, and nobody doubts for a moment that he is carrying on business.

In the case of *Californian Copper Syndicate (Limited and Reduced) v. Harris* (2) Clerk, L.J. made the following observations (p. 165):

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The

(1) (1880) L.R. 15 Ch D. 247.

(2) (1904) 5 Tax Cases 159.

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simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits.

\* \* \* \*

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

In the case of *Cooper v. Stubbs* (1) the appellant Stubbs appealed against assessments made under Sch. D to the Income Tax Act, 1918, in various sums for the years ended April 5, 1921, 1922 and 1923. Stubbs was a member of a firm of cotton brokers and merchants. It was the practice for such firms to protect themselves against fluctuations in the market by buying cotton for future delivery against sales made and vice versa. These contracts for future purchase or delivery of cotton were made through the exchanges in Liverpool, New York or New Orleans. Dealings of this kind were known as dealings in “futures”. The assessments in question were made upon the appellant in respect of profits made in such dealings. These dealings were private speculations of the appellant in which his firm had no interest. It was held that these transactions constituted a trade within the meaning of Sch. D, para. 1(a)(ii), of the Income Tax Act, 1918, and that the profits arising from such transactions were annual profits and gains chargeable with the tax.

In *Martin v. Lowry* (2) the headnote, fully comprehensive, reads thus:

The appellant, who was an agricultural machinery merchant, bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity for that purpose. He was assessed to income tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connection with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income tax.

Held, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year

(1) (1925) 2 K.B. 753.

(2) (1926) 43 T.L.R. 116.

of assessment was enough to make the profits "annual" within Case VI of Schedule D, and the decision of the Special Commissioners must be affirmed.

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In the case of *Pickford v. Quirke* (1) it appears that during the "boom" in the Lancashire cotton trade in 1919 the appellant, in company with other persons, engaged in the operation known as "turning over" a cotton mill, i.e., acquiring a controlling interest in the mill, organizing its administration and finances and reselling it to a new company. The operation was successful and the appellant was asked to join other syndicates, composed partly of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923, notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923. It was held, *inter alia*, that: though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts, and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income tax and excess profits duty on the profits.

Reference may also be had with profit to the following cases: *T. Beylon and Company Limited v. Ogg* (2); *Gloucester Railway Carriage and Waggon Company Limited v. Commissioners of Inland Revenue* (3).

*Konstam*, in *The Law of Income Tax*, 10th ed., says (p. 104):

Controversy often arises as to whether the net proceeds of sales of investments in securities, landed property and so on are profits of a trade or accretions of capital. The test is, whether or not a trade is carried on in the buying and selling of the investments. Thus, a man who possesses a collection of pictures for his own enjoyment, and who sells one of them to meet his pecuniary necessities—or even because a tempting offer happens to be made to him—is not taxable for the proceeds of the sale (*Stevens v. Hudson's Bay Co.* (1909), 5 Tax C. 424. Cf. *Jones*

(1) (1927) 44 T.L.R. 15.

(3) (1925) A.C. 469.

(2) (1918) 7 Tax Cases 125.

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v. *Leeming* (1930) A.C. 415; *Hudson v. Wrightson* (1934), 26 Tax C. 55); but a picture dealer who has bought to sell again is liable on his net profits.

“Where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D \* \* \* But enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association \* \* \* buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by realization, the gain they make is liable to be assessed for income tax.” (*Californian Copper Syndicate v. Harris* (1904), 6 F. 894; 5 Tax C. 159; approved in *Commissioners of Taxes v. Melbourne Trust, Ltd.*, (1914) A.C. 1001, 1010, and *Ducker v. Rees Roturbo Syndicate* (1928) A.C. 140.

See also *Dowell’s Income Tax Laws*, 9th ed., p. 546, under the heading “Sales of investments”.

With only the figures of 1940, I do not see that I can reach any other conclusion than that the appellant was carrying on a business and that he is accordingly liable to the tax provided for by paragraph (g) of subsection 1 of section 2 of the Excess Profits Tax Act.

For the reasons aforesaid I am satisfied that the assessment and the decision of the Minister affirming it must be maintained and the appeal dismissed. The respondent will be entitled to his costs against the appellant.

*Judgment accordingly.*

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BETWEEN:  
 GILLIES BROS. LIMITED ..... SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING ..... RESPONDENT.

*Crown—Petition of Right—Expropriation—Action to recover value of an alleged interest in lands the property of the Crown—Suppliant a mere licensee with no property in the land—No basis for estoppel—Action dismissed.*

Suppliant, pursuant to a call for tenders by the Deputy Minister of the Department of Mines and Resources of the Government of Canada under the authority of Order in Council P.C. 3102, December 14,

1938, entered into an agreement with that department whereby suppliant was granted the right to enter on certain lands in the Petawawa Forest Reserve, Ontario, and cut timber thereon. Subsequently the respondent initiated expropriation proceedings to enter and cut timber on the said land.

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Respondent did not proceed by way of information in this Court to ascertain the value, if any, of suppliant's rights and suppliant now brings this action by way of petition of right, the action being one for compensation following an alleged expropriation and not for damages. The fee in the lands in question is and always has been in the Crown in the right of the Dominion of Canada.

*Held:* That Order in Council P.C. No. 3102 did not authorize a grant or lease of the lands in question and that there was no grant or lease thereof to the suppliant; the suppliant was a mere licensee and no interest in the land passed to it.

- 2. That the sale to the suppliant was of logs and in addition the suppliant was permitted or licensed to go upon the property only for the express purpose of cutting designated trees and removing them in the ordinary way as provided by the conditions of sale.
- 3. That there is no basis for estoppel since any representation concerning suppliant's interest in the land was a mere misrepresentation of a matter of legal inference from facts known to both parties or of which both parties could be presumed to have equal knowledge.
- 4. That since no interest in the land passed to suppliant and the expropriation was of no effect as the Crown took from the suppliant no interest in the land, this action must be dismissed.

PETITION OF RIGHT by suppliant to recover from the Crown the value of an alleged interest in certain lands the property of the Crown.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

*D. K. MacTavish, K.C.* and *G. F. Henderson* for suppliant.

*Lee A. Kelley, K.C.* and *W. R. Jackett* for respondent.

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

CAMERON J. now (March 5, 1947) delivered the following judgment:

This is a claim by Petition of Right for the value of the right to enter and cut timber on certain lands in the Petawawa Forest Reserve, County of Renfrew, Ontario.

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The suppliant alleges that by virtue of an agreement made in July, 1942, with the Department of Mines and Resources, it had the right to so enter on and cut timber thereon on October 8, 1942, when the respondent caused an expropriation plan to be filed in the Registry Office of the County of Renfrew, thereby depriving the suppliant of its alleged rights. The respondent took no steps by way of exhibiting an information to this Court to ascertain the value, if any, of such rights and the suppliant has proceeded under sec. 37, Exchequer Court Act, R.S.C. 1927, Chap. 34, by petition of right.

The facts leading up to these proceedings are not in dispute.

Ex. 4 is a copy of P.C. 3102, approved on December 14, 1938, and is as follows:

The Committee of the Privy Council have had before them a report, dated 23rd November, 1938, from the Minister of Mines and Resources, stating that the Dominion Forest Service of the Lands, Parks and Forests Branch, operates forest experiment stations for experimental and demonstration purposes, timber resources of said stations being managed under working plans for continuous production; and

That proper management involves the *removal of mature timber*, dead or diseased trees, and excess growing stock for purposes of stand improvements such as thinnings, release cuttings, etc.

The Minister, therefore, recommends that *authority be hereby granted for the disposal of forest products* from forest experiment stations by *permit or sale*; the rates for standing timber to be not less than those charged for provincial timber of the same kinds and classes by the province in which the forest experiment station is situated; the rates for material cut by the department in improvement operations to be on the above basis plus a charge against cutting or preparation costs as approved by the Minister of Mines and Resources.

The Committee concur in the foregoing recommendations and submit the same for approval.

In 1942, the Deputy Minister of Mines and Resources called for tenders in respect of Timber Sale No. 26 for the right to cut jackpine on the lands described. The notice calling for tenders is part of Ex. 5. It estimated that there were 6,000,000 ft. B.M. (Scribner rule) of timber 8" D.B.H. and over. It stated that the upset dues were \$4.00 per M. ft. B.M. and were payable on the scale of measurement as made by the Forest Officer. Tenders were based on the upset price, plus whatever bonus would be offered. It required each tender to be accompanied by a deposit of

\$4,800. In the case of the successful tenderer the deposit would be retained as a guarantee that the contract would be fulfilled. The notice contained the following clauses:

The successful tenderer will be required to enter into a contract for the carrying out of the operation in accordance with the terms and conditions embodied therein.

Full particulars, including detailed conditions governing the sale, may be obtained from the Superintendent, Petawawa Forest Experiment Station, Chalk River, Ontario.

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The suppliant, having received a copy of the notice, made its tender on or about July 18, 1942, its bid being \$5.26 per M. ft. B.M. or a bonus of \$1.26 over and above the upset price. The suppliant also signed the Conditions of Sale and forwarded its deposit of \$4,800. On July 22, 1942, the suppliant was advised by letter from the Dominion Forester at Petawawa that its tender had been accepted. An interim receipt (Ex. 6) for the deposit of \$4,800 was enclosed with an intimation that the official Treasury receipt would follow in due course. Two copies of the Conditions of Sale (part of Ex. 5) were enclosed with a request that they be completed and one returned to the Superintendent and the other retained. These Conditions of Sale were duly signed by the suppliant and on July 24, 1942, it wrote to the Dominion Forester as follows:

We have your letter of July 22 advising us that we are successful tenders on the above mentioned timber sale and that our accepted cheque for \$4,800 is being held as a guarantee of the fulfilment of the sale conditions.

We also acknowledge receipt No. 12259 covering the deposit.

As requested by you we are signing and forwarding copy of sale conditions to the Superintendent at Petawawa for his records.

We understood from conversation with you that a formal contract will be forwarded to us in due course. Are we right in this or does the signing of conditions of sale constitute a contract?

On July 28, 1942, the Acting Dominion Forester replied as follows:

I note from your letter of July 24, that a signed copy of the "Conditions of Sale" for T.S. 26 has been sent to the superintendent at Chalk River. We have on file here the copy you submitted with your tender. *Nothing further by way of contract is required.*

If you will advise Mr. Morison, the Superintendent, when you would like to commence operations he will issue you a permit as specified in the conditions. We do not want operations to start during the fire season, however.

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On July 30, 1942, the suppliant replied as follows (Ex. 5a):

We thank you for your letter of July 28 and note from it that nothing further in the way of contract is required.

We do not expect to have our plans completed *re* this area for some weeks, but when we do we will get in touch with Mr. Morison, Superintendent at Chalk River.

In the meantime the Timber Controller had written the suppliant on July 25, 1942 (Ex. 7) as follows:

Regarding the Department of Mines and Resources timber sale, Petawawa No. 26 for 6,000,000 feet of jackpine on the Petawawa Forest Experiment Station, I have been tentatively notified that claim to this timber may be filed by another firm, in which case it may be necessary for me to decide under powers contained in P.C. 2716 who should get possession of this timber.

In case formal claim is made you, of course, will have equal opportunity to make claim.

This letter, therefore, is merely to notify you of the circumstances and ask you in the meantime to not take any action that would incur any expenditure towards the cutting of this timber, and should it be necessary for you to proceed before the matter is settled one way or the other, would you please notify me so that it could be cleared up at that time.

By letter of July 30, 1942 (Ex. 8) the Timber Controller again wrote the suppliant stating that the Pembroke Shook Mills Ltd. had submitted a brief in support of its contention that it should have the timber on Timber Sale No. 26, and requested the suppliant to do likewise. An assurance was given that if the suppliant did so no action would be taken until there was opportunity for further discussion. This was followed by a further letter of August 5, 1942, enclosing a copy of a letter from the Pembroke Shook Mills Ltd. and suggesting that after consideration a reply should be given by the suppliant. Again on August 19, 1942, the Timber Controller wrote the suppliant, intimating that he did not feel justified in reaching a decision from the correspondence and information on hand and would, therefore, ask for a report from an independent person to aid in reaching a conclusion. Part of this letter (Ex. 11) is as follows:

I think we should all admit that there is no question of equity involved and that the only justification there could be for attempting to interfere with the sale could be satisfactory proof that the Government of Canada would benefit by such interference. I am, therefore, approaching it in this way and no other.



On September 10, 1942, the suppliant wrote the Minister of Mines and Resources, who replied on September 15, 1942 (Ex. 9) as follows:

I have your letter of the 10th instant, about Timber Sale No. 26, Petawawa Forest Experiment Station. The departmental officers have reported on the sale which was awarded to you as the highest tenderer. I am writing to my colleague, the Minister of Munitions and Supply.

On October 15, 1942, the suppliant was informed by letter written by Col. F. F. Clarke, Land Expropriations, Department of Munitions and Supply (Ex. 12) as follows:

This is to inform you that His Majesty the King in the Right of the Dominion of Canada caused an Expropriation Plan to be filed on the 8th day of October, 1942, taking the right to enter and cut timber on certain lands in Petawawa Forest Reserve, Township of Wylie, County of Renfrew, Province of Ontario.

The portion affected by the expropriation forms part of Compartment "C" in the Montgomery Block and takes in all the bush lands between Base Line "C" and Base Line "B" between Montgomery Lake and the Westerly Boundary of the Forest Reserve, about 1,300 acres in all.

I am prepared to consider any claims which might be made by private interests against this expropriation. My office is located at Room 340, West Block, Parliament Buildings, Ottawa, Ont.

In the result, and doubtless due to the exigencies of war and that the Pembroke Shook Mills Ltd. was engaged in essential war work in manufacturing boxes for shells and was in great need of the lumber for such purpose, the right to enter and cut timber on the lands covered in Timber Sale No. 26 was awarded to the nominee of that company at the same price as bid by the suppliant, namely, \$5.26 per M., B.M.

Immediately upon being advised that its bid had been accepted, the suppliant made plans to log the area in order to get cutting operations in progress before October 1, 1942, as required by the Conditions of Sale, and to implement its contract. Certain executives of the suppliant visited the area. A sum estimated at \$200-\$300 was so spent after receiving notice of acceptance of its offer and prior to expropriation proceedings. No actual logging operations were commenced by the suppliant. The deposit of \$4,800 was returned to the suppliant.

Ex. 3 is a certified copy of the plan and description filed in the expropriation proceedings taken by the Secretary of the Department of Munitions and Supply, pursuant to the provisions of sec. 8 of the Expropriation Act. The usual

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certificate was given and the land identified, followed by the words:

\* \* \* over which the exclusive right to enter and cut timber is taken by His Majesty the King in the right of the Dominion of Canada under the provisions of subsection (2) of Section 9 of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927

The description of the land is prefaced by:

Description of land over which His Majesty the King in the right of the Dominion of Canada has taken the exclusive right to enter and cut timber being part of the Montgomery Block \* \* \*

It is admitted that the fee in the lands in question is in the Crown in the right of the Dominion.

It is to be noted particularly that this is not an action for damages, but one for compensation following an alleged expropriation. Counsel are in agreement on this point.

The respondent takes the position that, while for the purpose of this action it is not contesting the validity of the sale of timber made by the Department of Mines and Resources to the suppliant, there was no sale of an interest in land itself and that, therefore, there could be no valid proceedings under the Expropriation Act which relates solely to the taking of land or an interest in land. It is urged that the only manner in which an interest in this land could have been conveyed was under the Public Lands Grants Act (R.S.C. 1927, Chap. 114); that no grant or lease was made to the suppliant and that, while the respondent did institute proceedings under the Expropriation Act, that such proceedings were of no effect whatever, in that, as the respondent had never parted with any interest in land, the expropriation proceedings merely related to what the Crown had always had—the full interest in the land. The respondent states that the expropriation proceedings were erroneously taken, due to the “hurly-burly” of wartime conditions and that such proceedings were of no assistance to the suppliant. The respondent argues also that the Crown is not estopped by its conduct from alleging that these expropriation proceedings were invalid.

The authority under which the Department of Mines and Resources proceeded to advertise Timber Sale No. 26 was Order in Council P.C. 3102 (*supra*). So far as I am

aware, it had no authority to deal with the matter other than under the powers thereby conferred, and counsel for the suppliant does not urge that it had any other authority. By it, authority was granted for the disposal of forest products from Forest Experiment Stations by *permit or sale*. Then follow two provisions as to the rates to be charged. One rate is that to be charged for standing timber, which, of course, would be cut by the successful tenderer. I think that rate is the one intended to apply when the forest products were disposed of by *permit*—that is the right to enter and cut timber. The other rate is that provided for a *sale* of timber which has been cut by the Department. That rate, I think, is applicable to the disposal of the forest products by the second method—that is by *sale*. The Order in Council confers no authority on the Minister to enter into any lease of the lands.

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Tenders were called “*for the right to cut jackpine on the lands described*” by the Conditions of Sale, and although the word “purchaser” is used throughout it is provided:

The purchaser is granted the *right to cut timber* on the Petawawa Military Reserve, subject to the following conditions:

(1) The lands covered by this sale and on which *cutting* will be permitted are as follows \* \* \*

(2) Before cutting is commenced a *permit* to cut until the 30th day of April, 1943, must be secured from the superintendent of the Petawawa Forest Experiment Station, Chalk River. This permit may be renewed for two years on condition of satisfactory fulfilment of the terms of the contract.

I think it is clear from the above that the Department proceeded to dispose of its forest products by permit, by which I think is meant the right to enter on the lands, to cut the designated timber and remove such timber after scaling, and with the duty of paying for the timber at the rate provided for in its tender and on the amount of timber ascertained after scaling.

For the suppliant it is urged that the parties hereto were in the relevant position of lessor and lessee, but I cannot find that such is the case. The authorities indicate that to constitute a lease (rather than a licence) there must be an intention to give exclusive possession of the land. This problem was before me in the case of

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*D. R. Fraser & Company Limited v. The Minister of National Revenue*, (1) and many of the authorities are therein cited. It is apparent to me that in the instant case there was never any intention on the part of the Crown to give exclusive possession to the suppliant. Only designated and particular sizes of one kind of timber were to be sold, the Crown retaining all others. There is nothing in the Order in Council, Notice of Tender, or Conditions of Sale which would in any respect restrict the right of the Crown to the use, control and possession of the property, save to such very limited extent as might be necessary to enable the suppliant to go upon the property, fell and remove such designated timber.

Reference may be made to: 6 *C.E.D.*, 583; 30 *E. & E. Digest* 511; Vol. 25 *Canadian Abridgement*, 259; 29th ed. *Woodfall on Landlord and Tenant*, P. 6; *Wells v. Kingston-upon-Hull* (2); *N. B. Land Company v. Kirk* (3).

Moreover, the only authority I can find as to leasing of the lands here in question is that contained in the Public Lands Grants Act (R.S.C. 1927, Chap. 114). Sec. 4 gives authority to the Governor in Council to authorize the sale or lease of any public lands not required for public purposes and for the sale or lease of which there is no other provision in the law.

So far as I am aware there is no other provision in the law relevant to the lands in question. They do not come within the lands mentioned in the Dominion Lands Act (R.S.C. 1927, Chap. 113). Sec. 49 of that Act authorizes the Governor in Council to make regulations for the disposal by public competition of the right to cut timber, and the following sections provide for the issue of licences and for wide powers of possession and vesting of ownership in the licensee. Such provisions, however, have no application to the lands here in question.

Sec. 5 of the Public Lands Grants Act authorizes the Minister having control and management of the lands, to execute leases authorized by the Governor in Council or pursuant to any regulations of the Governor in Council. I was not referred to any such regulations.

(1) (1946) Ex. C.R. 211.

(3) (1849) 6 N.B.R., 443 (C.A.).

(2) (1875) 44 L.J.C.P., 257.

Nor have I been referred to any authority which would indicate that the Crown (other than by statutory authority) can convey lands by any means other than by a grant under the Great Seal—i.e., by Letters Patent (*Mersereau v. Swim* (1)). No such grant was here made and the only statutory authority to which I have been referred is that contained in sections 4 and 5 of the Public Lands Grants Act. Even if the Order in Council P.C. 3102 had authorized a lease of the lands in question, the Minister of Mines and Resources did not execute a lease pursuant to section 5 of the Act. I do not consider that his letter of September 15, 1942, to the suppliant was sufficient compliance with the provisions of section 5 to constitute the execution of a lease, or that it was ever intended to do so.

Nor did the passing of P.C. 3102 constitute a contract between the suppliant and the Crown. Reference may be made to *Bulmer v. The Queen* (2) where, at p. 491, Strong C.J. said:

The orders in council authorizing the Minister of the Interior to grant licences to cut timber on the timber berths in question did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the Crown and the proposed licensee. These orders in council, as similar administrative orders in the case of sales of crown lands in the provinces of Ontario and Quebec have always been held to be, were revocable by the crown until acted upon by the granting of licences under them. They embodied no agreement of which specific performance could be enforced. They were mere authorities by the Governor in Council to the minister upon which the latter was not bound to act but might act in his discretion. This is apparent from the statutory enactment applicable to these orders in council and the licences to be issued under them.

I have reached the conclusion, therefore, that Order in Council P.C. 3102 did not authorize a grant or lease of lands and that there was no grant or lease thereof to the suppliant.

Counsel argues that the suppliant had an interest in the land in the nature of a profit a prendre—a form of servitude—and that as the definition of “land” in the Expropriation Act (R.S.C. 1927, Chap. 143) includes servitudes, such interest was, therefore, subject to proceedings under the Expropriation Act. A profit a prendre is a right to enter the land of another person and take some profit of the soil or a portion of the soil itself for the use of the

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(1) (1914) 42 N.B.R., 497.

(2) (1894) 23 S.C.R., 488 at 491

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owner of the right. Profits a prendre, though sometimes called licences, must be carefully distinguished from mere licences which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful. (11 Halsbury 340).

In *Marshall v. Green* (1), Brett J. said:

Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract as the interest in the land, and the case is within the section.

The timber in this case is not fructus industriales but fructus naturales. Perusal of the Order in Council, the Notice of Tender and the Conditions of Sale seems to indicate that there was no intention that the timber was to remain on the land for the benefit of the suppliant or to derive benefit from so remaining. The whole object of the Order in Council was the removal of designated timber; by the Conditions of Sale penalties were provided for non-removal, cutting was to commence by October 1, 1942, and all such designated trees were to be removed by April 30, 1945. Reference may be made to the cases mentioned in *D. R. Fraser Company Limited v. The Minister of National Revenue* (*supra*).

In my opinion the suppliant was a mere licensee with no interest in the land itself. P.C. 3102 was the governing provision and it deals with the disposal of "forest products" by permit or sale. "Forest products" were defined by Mr. Noakes, Forestry Officer, as "any material *taken* from a forest that has a use value", and that definition was accepted by counsel for the suppliant. Payment was provided for on the basis of the ascertained board measure (that is scaling) after the timber was cut, and only when the scaling was completed and the timber stamped or marked by the Forestry Officer was the suppliant free to deal with the timber in any way. No assignment of its

interest could be made by the suppliant without the approval of an official of the Crown. In my view, the sale to the suppliant was of logs, and in addition the suppliant was permitted or licensed to go upon the property only for the express purpose of cutting designated trees and removing them in the ordinary way as provided by the Conditions of Sale. If the contract is merely for the use of the property in a certain way and on certain terms, while it remains in possession and control of the owner, it is a licence. (*Halsbury*, Vol. 18, p. 337).

There are many cases where, under the particular conditions therein referred to, it was found that in the granting of timber licences or leases there has been given an interest in the land also. Reference may be made to the case of *Laidlaw v. Vaughan-Rhys* (1). That case had to do with timber licences on lands in British Columbia, but the report does not give any information as to the details of the terms and conditions of the licences. The Court there found that the interest granted by the instruments transferred from the vendor to the purchaser were interests in land. Idington J., however, at p. 463, indicated the difference that existed between the type of instrument there before the Court and others, and stated:

In some cases the bargain may be relevant to the price of timber when cut, and hence have no relation to the land. I think confusion apt to arise and has in some cases arisen out of a non-observance of this distinction.

The distinction there pointed out by Idington J. seems to me an important one and to be the proper test to apply in this case. I have already found that the whole intent of the arrangements entered into between the parties was for a sale of cut timber with a purely ancillary right to enter on the land for the purpose of felling and removing such timber. It is clear also the sale here was relevant to the price of the timber when cut and it was not a sale of a block of standing timber, the price being referable to the volume as ascertained after scaling, felling and cutting. I find, therefore, that no interest in land passed to the suppliant.

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It would follow, therefore, that, as the suppliant at no time had an interest in the land, the expropriation proceedings taken by the Department of Munitions and Supply were of no effect so far as the land was concerned, the Crown, by such proceedings, taking nothing more than it had always had.

It is urged for the suppliant that the respondent, having initiated expropriation proceedings, has thereby represented to the suppliant that the latter had in fact a sufficient interest in the land to make it the subject of expropriation and that the Crown is now estopped from denying that the suppliant had such an interest. Counsel for the Crown argues that there is no estoppel as against the Crown and, alternatively, that there is here no basis for raising the question of estoppel.

Decisions as to estoppel against the Crown are somewhat conflicting. In the Supreme Court of Canada in the *Bank of Montreal v. The King* (1), three of the judges held that estoppel could not be invoked against the Crown. Reference also may be made to *The King v. Capital Breweries Company Ltd.* (2); Everest & Strode, "Law of Estoppel" 3rd ed. 8; Robertson on *Civil Proceedings By and Against the Crown*, p. 576; *Rex v. Victoria Lumber Company* (3).

In the case of *Rex v. Royal Bank* (4) Cameron J. said at p. 304:

It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them. This rule has been frequently applied in Canada and I am not aware that it has ever been rescinded or relaxed.

On the other hand there are cases which would seem to indicate that, while the doctrine of estoppel by deed does not apply as against the Crown, yet estoppel in pais does so operate. Reference may be made to the *Attorney General to the Prince of Wales v. Collom* (5); *Attorney General for Trinidad and Tobago v. Bourne* (6); *Plimmer v. Mayor of Wellington* (7); *Rex v. Gooderham & Worts* (8).

(1) (1907) 38 S.C.R. 258.

(2) (1932) Ex. C.R. 171 at 182.

(3) (1895) 5 B.C.R., 288 (C.A.).

(4) (1920) 50 D.L.R. 293 (C.A.).

(5) (1916) 2 K.B. 193 at 204.

(6) (1895) A.C. 83.

(7) (1884) 9 A.C., 699.

(8) (1928) 3 D.L.R. 109.



While the trend of judicial authority in Canada seems to be that the doctrine of estoppel cannot be raised as against the Crown, yet I am of the opinion that I do not need to determine that point. Under the circumstances existing here, I do not think that the suppliant is entitled to invoke estoppel. If there was here any representation as to the interest which the suppliant had in the land, then it would seem that it was nothing more than a mere misrepresentation of a matter of legal inference from facts which were known to both parties or of which both parties could be presumed to have equal knowledge.

In Halsbury's Laws of England, 1st Ed. Vol. 13, p. 379, it is stated:

A mere misrepresentation of a matter of legal inference from facts which are known to both parties cannot, it is submitted, be a ground of estoppel.

Moreover it seems to me that the Minister of Mines and Resources had no authority whatever in the case of these lands to convey any interest in lands.

At paragraph 537 of Vol. 13 of Halsbury's Laws of England, it is stated:

A party cannot by representation any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating. Thus, a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make. No corporate body can be bound by estoppel to do something beyond its powers or to refrain from doing what it is its duty to do; and the same principle applies to individuals. No person can by his conduct or otherwise waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so.

See also Phipson on Evidence, 8th ed. 667, where it is stated that:

Estoppels of all kinds, however, are subject to one general rule; they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

*Hunt v. Wimbledon* (1); *Canterbury v. Cooper* (2).

My finding, therefore, is that in this case the doctrine of estoppel cannot be raised so as to prevent the Crown from proving the true nature of the transaction between the parties.

My conclusion, therefore, is that nothing that took place between the parties transferred any interest in the land to

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the suppliant and that the expropriation proceedings, so far as the land was concerned, were of no effect whatever. It may be that the suppliant has rights in an action otherwise framed, but as to that I shall, of course, make no comment. The action will, therefore, be dismissed with costs.

Some consideration should, however, be given to the question of quantum in the event of the above conclusion being found erroneous. By its petition the suppliant claimed \$60,000 for loss sustained by reason of the expropriation of its rights, interest to date of \$3,750 and interest on the total sum of \$63,750 from the date of the Petition of Right. The claim for interest on interest, cannot, of course, be upheld. At the trial the suppliant amended its claim to one of \$80,000 for loss sustained by the expropriation and interest thereon at 5 per cent from the date of the alleged expropriation.

The evidence establishes that this timber area gave the suppliant what is known to the industry as a good "logging chance", due not only to the nature of the stand of timber, its location, land features and accessibility, but due also to its proximity to other timber areas operated by the suppliant. The logs would have been brought down by water to the mill of the suppliant at Braeside, and the floatability of jackpine is such that the sinkage loss would have been small. There is no question also that had the suppliant been allowed to take out the logs and convert them into timber, the entire product could have been disposed of at the ceiling price during the years 1943-44. It was its intention to take out one-half of the cut in the winter of 1942-43 and the balance in 1943-44. Its mill was equipped to handle the additional amount without difficulty. If sold as logs, the cut could also have been disposed of without great difficulty.

The suppliant says that the value to it of that which it alleges was expropriated by the respondent is equivalent to the profit which it would have made had no expropriation taken place. It estimates its loss of profit in three alternative ways: (1) The profit it would have made had it been allowed to cut and convert all the jackpine into lumber and sell it at ceiling price. Ex. 14A is its amended

estimate of its loss of profits in the sum of \$72,424. (The suppliant also gave evidence that to this amount should be added \$3,000-\$4,000, the estimated sale of by-products such as fuel wood and lath.) This estimated loss of profits is determined by calculating the cost of stumpage, cutting, brush burning, driving, towing, sawing and placing on cars at Braeside. Of these amounts stumpage is, of course, actually ascertained; brush burning and driving to the Ottawa River are estimated and the remaining items are based on the actual average cost per M. B.M. for 1943-44 of other logs actually handled by the suppliant. These costs aggregate \$36.02 per M. B.M. and deducting that amount from the average sale price f.o.b. Braeside of \$43.04 per M. B.M., there is an estimated net profit of \$7.02 per M. B.M. To this item is added 49 cents, said to be the estimated saving in overhead had an additional 4,000,000 feet been sawn in each of the two years—a total net profit of \$7.51 per M. B.M., or for 8,000,000 feet a profit of \$60,080. Allowing for overrun of 5 per cent less sawing costs thereon, there would be an additional \$12,344, making a total of \$72,424.

(2) Alternatively the suppliant estimates the profit it would have made had it cut and sold as logs in the river without converting into lumber. Again this is entirely a mathematical calculation. It is arrived at by deducting from the average sale price f.o.b. cars Braeside (\$43.04) the estimated cost of sawing, towing and driving (all of which would have been unnecessary had the suppliant sold as logs) (\$13.48), leaving \$29.56 per M. B.M. as the suppliant's estimate of what it would have got for the sale of logs in the river. Deducting from that amount the cost of putting them on the river, stumpage, logging and brush burning, \$20.26, it was estimated that there would have been a profit on the sale of logs of \$9.30 per M. B.M. or on 8,000,000 feet a total of \$70,400.

Mr. Gillies, President of the suppliant company, says that he thinks that he would have been prepared to pay \$29.56 per M. B.M. on the river, as he would have made a profit in the sawing (presumably from the over-run of 4,000,000 feet, and the by-products). But it is also clear that purchasing cut logs on the river was not normal for

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the suppliant company. There is no evidence that I can recall of any actual sale in that area of logs lying in the river. I doubt very much whether a careful operator, knowing the costs incidental to stumpage and logging, would have paid a price which would have given his vendor a profit of \$70,400 and would leave the purchaser to complete the floating of the logs to and down the Ottawa River, with all its attendant risks, when at best he could have hoped to make a profit on an estimated over-run of about \$12,000, plus a possible additional amount of \$3,000-\$4,000 for by-products. (3) As a further alternative, the suppliant estimates the loss of profit had the logs been sold on the skidways by eliminating the cost of moving the logs from the skidways to the river.

It has to be kept in mind that if anything was taken by the expropriation procedure it was "the right to enter and cut timber". What was the value of that right?

These values advanced by the suppliant and based entirely on the loss of profits computed in various ways, do not constitute a proper approach to the problem. In expropriation proceedings the owner is entitled to receive compensation for the value of the land to him. The suitability of the land for the special purposes of the owner and the prospective profits which it could be shown would probably attend the use of the land in the owner's business would doubtless furnish material for estimating what was the real value to him. But the owner is not entitled to recover compensation for the savings or profits which he expected to receive from the use of the land. The owner is entitled only to have those savings and profits taken into consideration in so far as they might fairly be said to increase the value of the land. 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.

The principles on which compensation is based where land is taken under compulsory powers have been established in many cases. In *Cedar Rapids Manufacturing and Power Company v. Lacoste and others* (1), Lord Dunedin said, at page 576:

(1) (1914) A.C. 569.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* where Vaughan Williams and Fletcher Moulton L.J.J. deal with the whole subject exhaustively and accurately.

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.

*In Postoral Finance Association Limited v. The Minister* (1), Lord Moulton stated at p. 1088:

That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profit which it could be shown would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for the land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

Reference may also be made to *Malone v. The King* (2). In that case where the nature of the contract was quite

(1) (1914) A.C. 1083.

(2) (1918) 18 Ex. C.R. 1.

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different from that in the instant case, Audette J. held that there was a sufficient interest in the limits to entitle the suppliant to claim compensation for the taking of timber by the Crown. He held that the measure of damage was the *value of the timber as a whole as it stood at the time of the taking*. At page 17 he said:

The suppliant, while not having a fee in the land upon which the timber was so cut, had an estate and interest in it, and he is entitled to compensation. He has a possessory right in the limits and a right of ownership in the timber cut thereon.

To arrive at the amount claimed, the suppliant taking the alleged area upon which the timber was cut, makes an estimate of the quantity, in board measure, which was growing upon that area and claims \$6 per 1,000 ft. B.M. of that timber, after it would have passed through the mill \* \* \*

However, this mode of assessing the compensation cannot be accepted. I have already said, in the case of *The King v. The New Brunswick Railway Co.*, wherein a claim was made in respect of the passage of the Transcontinental through their limits, that the value of the estate or interest of the suppliant in such timber lands must be arrived at by looking at the property as it stood at the time of the taking by the Crown. What is sought here is to compensate the suppliant for the timber so cut, as a whole, at the time of the taking, and to arrive at the value one is not to take each tree so felled, calculate the board measure feet that could be made out of it and the profits derived therefrom when placed on the market for sale. A somewhat crude but true illustration may be used. If, through negligence, while driving an automobile, a steer were killed, the measure of damages would be the value of the steer as it stood at the time of the accident and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

In the case of the *King v. Crosby* (1) the head note is:

An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property, but which in fact had never been undertaken.

In the *King v. Kendall* (2) (Affirmed in the Supreme Court of Canada 8 D.L.R. 900) the head note is:

In assessing compensation for the expropriation of lands for the purposes of a public work, damages must be measured by the market value of the lands as a whole at the time of expropriation.

2. While certain material in the soil of the lands expropriated may largely increase the potential value of such lands, the Court will not go into abstract calculations with respect to the quantity of such material *in situ*, but will treat the lands as possessing a value that is entire and indivisible.

In the case of *Jalbert v. King* (1), Davis J. referred to the *Lake Erie and Northern Railway Company v. Schooley* (2) where it is said that the proper compensation is the amount which a prudent man in the position of the owner would be willing to pay.

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The true contractual relationship of the parties, namely, that of purchaser and vendor, should be kept in mind and is not to be obstructed by endeavouring to construe it as another contractual relationship altogether—that of indemnifier and indemnified.

In the case of the *King v. Northumberland Ferries Ltd.* (3), Rand J. said:

That the value is to be the value to the owner is, I think, incontestable, but what is that value? With special adaptability realized in the ownership from which it is expropriated, that value is the amount which a prudent man in the position of the owner would be willing to give for the property sooner than fail to obtain it. (*Pastoral Finance Assoc. Ltd. v. The Minister* (*supra*)). Without realized special adaptability, it is market value—theoretical, if need be—which is the present value of all possible utility reached in a competitive field.

Later in the same judgment he said at p. 505:

Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assoc. Ltd. v. The Minister*, the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

In the *King v. McLaughlan* (4), Audette J., in dealing with a somewhat similar matter, said, at p. 425:

Coming to the valuation of the woodlots, it must be stated that much of the evidence in this respect, in fact, all of the defendant's evidence, as will more particularly appear by Exhibits "B", "C", "D" and "E", has been adduced upon a wrong basis, upon a wrong principle. As was said in the Woodlock case, it is useless to juggle with figures, and to measure every stick of wood upon a lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of that lot to fix its value according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay his vendor of limits, as the value thereof, the value of the land together with all the foreseen profits he could realize out of the timber upon the limits. In the result, leaving to the purchaser all the labour

(1) (1937) S.C.R. 51 at 70.

(3) (1945) S.C.R., 458 at 504.

(2) (1916) 53 S.C.R., 416.

(4) (1915) 15 Ex. C.R., 417.

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and giving to the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it; because it is against common sense, and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

In the present case tenders for "the right to enter and cut timber" on the lands were publicly advertised in local post offices, and copies sent to lumber dealers in the district. Only two bids were received, that of the suppliant for \$5.26 M. B.M. and that of the nominee of the Pembroke Shook Mills Limited at \$4.00—the upset price. It seems to me that a public sale made in this manner in July, 1942, clearly establishes the market value of the rights here said to have been expropriated. There can be no doubt that the suppliant when making its tender took into consideration the advantage which would accrue to it from a tender so made, including any special advantages by reason of its proximity to its other operations in the area. Within one or two days of being notified of the acceptance of its tender it was advised that there was a possibility that the timber might be diverted elsewhere; and there is no evidence that between the date when its tender was made and the date on which the alleged expropriation proceedings took place, there was any increase in the market value of the limits either to the public generally or to the suppliant in particular.

The President of the suppliant company stated in evidence that in making the tender of \$5.26 per M. B.M. "I figured what we could log it for." Evidence was given by Mr. Plaunt, a witness for the suppliant, that in his opinion the tender of \$5.26 per M. B.M. was about right; a representative of the Pembroke Shook Mills Limited, whose nominee also tendered, said that in his opinion \$5.26 per M. B.M. was excessive.

If, therefore, the value of "the right to enter and cut timber" was established at \$5.26 per M. B.M. (and I can recall no evidence to indicate that it was any greater amount) and had the expropriation proceedings been valid, it would follow that the suppliant had sustained no loss. There is nothing to indicate that anyone immediately before the expropriation proceedings would have paid the



suppliant any greater amount for this right than \$5.26 per M. B.M., all of which would have been payable to the Crown as dues.

I think it advisable to make no findings as to any loss of profits sustained by the suppliant and to make no comment as to the evidence adduced to establish such loss of profits. In view of my conclusion that, as an expropriation proceeding, the claim of the suppliant cannot be sustained, such findings are unnecessary. And, should any other proceedings be instituted by the suppliant, such proceedings should not be hampered by any conclusions of mine as to what damages or loss of profits the suppliant may have sustained.

I find, therefore, that the suppliant is not entitled to any of the relief claimed in the Petition of Right and its claim therefore will be dismissed with costs.

*Judgment accordingly.*

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BETWEEN:

EDMONTON NATIONAL SYSTEM } APPELLANT;  
OF BAKING, LIMITED .....

AND

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

1944  
Sept. 20  
1947  
Apr. 3

*Revenue—Income—Excess Profits Tax Act 1940, secs. 3, 7(c), 14—“Any payments to proprietors, part owners or shareholders by way of salary, interest or otherwise”—Reimbursement by appellant to one of its shareholders for money spent on management services for appellant—Appeal allowed.*

The majority of appellant’s shares are owned by the National System of Baking of Alberta, Limited. That company in the year 1940 performed certain services for appellant in the way of management, supervision, purchase and delivery of commodities, bookkeeping and other services, receiving therefor the sum of \$6,359.50 paid to it by appellant. After the payment of such sum the income of appellant was reduced to less than \$5,000.

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Appellant was assessed for excess profits tax by respondent who contended that the payment of the sum of \$6,359 50 was a payment by appellant to a shareholder of appellant by way of salary, interest or otherwise.

On appeal the Court found that the payment by appellant to National System of Baking of Alberta, Limited is a reimbursement to the latter of moneys disbursed by it for services performed for the appellant.

Angers J.

*Held:* That the payment of appellant to National System of Baking of Alberta, Limited, was not by way of salary or interest and that the words "or otherwise" in s. 7(c) of the Excess Profits Tax Act, must be interpreted strictly and do not apply to payments made to a shareholder as reimbursement for expenses incurred and services performed, but must be restricted to cover only salaries and interest payments or payments of a similar nature.

APPEAL under the provisions of the Excess Profits Tax Act, 1940.

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

*H. S. Patterson K.C.* and *A. W. Hobbs* for appellant;

*Harold W. Riley* and *A. A. McGrory* for respondent.

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

ANGERS J. now (April 3, 1947) delivered the following judgment:

This is an appeal under section 58 and following of the Income War Tax Act, made applicable to matters arising under the provisions of the Excess Profits Tax Act, 1940, in virtue of section 14 of the latter, by Edmonton National System of Baking Limited, of the city of Calgary, province of Alberta, against the decision of the Minister of National Revenue affirming the assessment for the year 1940, which appears from a copy of the notice of assessment forming part of the record of the Department of National Revenue to have been mailed on August 20, 1942.

In its notice of appeal, dated September 19, 1942, a copy whereof is also included in the record of the Department, the appellant states that its taxable income amounts to \$4,586.14 and that, as this sum is under \$5,000, it is

not subject to excess profits tax. The notice of appeal adds that the National System of Baking of Alberta Limited, which is a shareholder of Edmonton National System of Baking Limited, has received nothing by way of salary, interest or otherwise from appellant, that all it receives is recoupment of its expenses and that for this reason the Department of National Revenue should not assess the appellant for excess profits tax of \$412.

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The decision of the Minister, dated January 16, 1943, signed by the Minister of National Revenue per the Commissioner of Income Tax, also part of the record of the Department, sets forth *inter alia*:

WHEREAS the taxpayer duly filed an Income and Excess Profits Tax return, showing its income for the year ending 30th September, 1940.

AND WHEREAS in filing its said return the taxpayer claimed exemption from Excess Profits Tax under the provisions of Section 7(c) of the Act because its income was not in excess of \$5,000, being in fact \$4,586.14.

AND WHEREAS all the shares of the taxpayer are owned by the parent company, National System of Baking of Alberta Limited.

AND WHEREAS during the year 1940 the taxpayer paid or credited to the account of the parent company, management expenses totalling \$6,359.50.

AND WHEREAS in assessing the taxpayer the provisions of the said Section 7(c) of the Excess Profits Tax Act were not considered applicable for the reason that the said profit of \$4,586.14 was arrived at after payment of management expenses of \$6,359.50 and an Excess Profits Tax Assessment was assessed by Notice of Assessment dated the 20th August, 1942.

The decision of the Minister then refers to the notice of appeal, summing up briefly its contents, and concludes:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said assessment on the ground that paragraph (c) of Section 7 of the Act provides for exemption from tax under the Act if the profits of the taxpayer are not in excess of \$5,000 in the taxation year before providing for any payments to shareholders by way of salary, interest or otherwise; that as the taxpayer's profits exceeded \$5,000 before providing for payment to its shareholder, the taxpayer is not entitled to the exemption provided by the said paragraph and therefore by reason of the said Section 7(c) and other provisions of the Act in that respect made and provided the assessment is affirmed as being properly levied.

On February 13, 1943, the appellant, in compliance with section 60 of the Income War Tax Act, sent to the Minister a notice of dissatisfaction in which it merely says that it desires its appeal to be set down for trial.

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The reply of the Minister, as usual, denies the allegations contained in the notice of appeal and the notice of dissatisfaction in so far as incompatible with the allegations of his decision and affirms the assessment as levied.

Formal pleadings were filed by consent.

In its statement of claim the appellant alleges in substance:

in the 1940 assessment year of appellant, the National System of Baking of Alberta Limited, which is a shareholder of the appellant, performed certain services for the appellant by way of supervision, purchase and delivery of commodities and bookkeeping, for which the appellant paid or credited to the said company the sum of \$6,359.50 and the appellant in its income tax return claimed a deduction of the said sum;

the respondent alleges that a portion of the moneys so paid were paid by National System of Baking of Alberta Limited by way of salary, wages or remuneration to certain of its officers or employees who were then shareholders of the appellant;

the income of the appellant, after providing for the deduction of the sum of \$6,359.50, was \$4,586.14, and the appellant claimed to be exempt from any tax under the Excess Profits Tax Act, 1940, by virtue of section 7(c) thereof;

the respondent has refused to allow the said deduction, alleging:

(a) that the whole of the sum of \$6,359.50 is a payment to a shareholder of the appellant by way of salary, interest or otherwise within the provisions of section 7(c) of the said Act and is therefore not deductible;

(b) that the portion of the said sum alleged to have been paid by National System of Baking of Alberta Limited to officers or employees, who it is alleged were shareholders of the appellant, is a payment by the appellant to shareholders of the appellant by way of salary, interest or otherwise and is not deductible under the provisions of said section 7(c):

the appellant says:

(a) the sum of \$6,359.50 paid by appellant to National System of Baking of Alberta Limited is not a payment to a shareholder by way of salary, interest or otherwise within the meaning of the Excess Profits Tax Act, 1940, but is a payment made by appellant to National System of Baking of Alberta Limited by way of reimbursement to the latter

of expenses incurred by the said company for services performed by it for the appellant; it is not in any event a payment by way of salary, interest or otherwise;

(b) if any portions of the said sum were paid by National System of Baking of Alberta Limited to shareholders of the appellant by way of salary, interest or otherwise, which is denied, such payments were not payments by the appellant to its shareholders, but payments by National System of Baking of Alberta Limited to shareholders of the appellant and are therefore not precluded from deduction under the provisions of said section 7(c).

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In his statement of defence the respondent admits that the appellant is an incorporated company with its head office at the city of Calgary, province of Alberta, denies the other allegations of the statement of claim and pleads specifically:

the appellant is not exempt from tax under the provision of paragraph (c) of section 7 of the Excess Profits Tax Act, 1940, because its profits in the taxation year 1940 were in excess of \$5,000 before providing for any payments to proprietors, part owners or shareholders by way of salary, interest or otherwise within the meaning of the said paragraph.

A statement of facts agreed upon by counsel and signed by them was filed as exhibit 1. It reads thus:

1. The Appellant is a Company incorporated under the Companies Act of the Province of Alberta, with Head Office at the City of Calgary. In the taxation year 1940, it operated a retail baking business in the City of Edmonton, in the said Province.

2. The Appellant's shareholders in the year 1940 were the following:

P. A. Carson .....	1 share
F. J. Heagle .....	1 share
National System of Baking of Alberta Limited	148 shares

3. In the year 1940, the Appellant had an income of \$4,536.14 as assessed under the Income War Tax Act.

4. National System of Baking of Alberta Limited performed certain services for the Appellant in the way of management, supervision, purchase and delivery of commodities, bookkeeping and other services for which the Appellant paid said National System of Baking of Alberta Limited, the sum of \$6,359.50.

5. National System of Baking of Alberta Limited performs similar services for seven other companies, namely:

- Lethbridge National System of Baking Limited.
- Medicine Hat National System of Baking Limited.
- Regina National System of Baking Limited.
- Ontario National System of Baking Limited.
- Drumheller National System of Baking Limited.
- National System of Baking (Ottawa) Limited.
- National System of Baking Limited.

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6. National System of Baking of Alberta Limited set up in its books a total charge of \$48,860.60, made up of the following items:

Executive salaries—		
E. A. Heagle .....	\$7,500.00	
H. A. Heagle .....	7,000.00	
W. D. Heagle .....	7,000.00	
F. J. Heagle .....	6,100.00	
E. E. Heagle .....	4,800.00	
P. A. Carson .....	2,100.00	
		\$34,500.00
Executive travelling expenses .....	4,512.51	
Office salaries and Eastern office expense .....	4,762.44	
Audit fees .....	1,200.00	
Office rent .....	600.00	
Office supplies and printing for stores .....	1,701.38	
Telegrams and telephones .....	169.38	
Postage and excise .....	510.00	
Business tax .....	45.60	
Travelling expenses, etc., of employees .....	234.46	
Insurance, fire .....	5.80	
Workmen's Compensation Board .....	90.00	
Corporation tax—proportion .....	60.00	
Depreciation of furniture and fixtures .....	31.65	
Interest on bank loans .....	32.19	
Bank charges for exchange on remittances, etc. ....	405.27	
		\$48,860.68

7. The said total charge was allocated to the various companies on the basis of the net operating profit of each company before allowing for depreciation, the said allocation being as follows:

Lethbridge National System of Baking Limited .....	\$ 1,884.34
Medicine Hat National System of Baking Limited .....	1,111.27
Regina National System of Baking Limited .....	3,720.27
Ontario National System of Baking Limited .....	3,142.69
Drumheller National System of Baking Limited .....	3,450.55
National System of Baking (Ottawa) Limited .....	11,118.36
National System of Baking Limited .....	11,549.74
National System of Baking of Alberta Limited .....	6,523.96
Edmonton National System of Baking Limited .....	6,359.50
	\$48,860.68

8. National System of Baking of Alberta Limited absorbed \$6,523.96 by reason of the fact that it operates two stores of its own in the City of Calgary, and this amount was arrived at by the method set out in paragraph 7.

9. In the year 1940 the common shareholders of National System of Baking of Alberta Limited were the following:

P. A. Carson .....	36 shares
Mrs. J. Carson .....	30 shares
E. A. Heagle .....	38 shares
H. A. Heagle .....	39 shares
W. D. Heagle .....	9 shares
	152 shares

10. The Respondent's position is that paragraphs 5 to 9 inclusive hereof are irrelevant, immaterial and inadmissible.

11. The Appellant filed its return showing income of \$4,586.14, which amount is not in dispute, and claimed it was not liable to excess profits tax by virtue of Section 7(c) of the Act, its income being less than \$5,000. The Minister in his decision recited that the said profit of \$4,586.14 was arrived at after payment of management expenses of \$6,359.50 and affirmed the assessment on the ground that Section 7(c) "provides for exemption from tax under the Act if the profits of the taxpayer are not in excess of \$5,000 in the taxation year before providing for any payments to shareholders by way of salary, interest or otherwise; that as the taxpayer's profits exceed \$5,000 before providing for payment to its shareholders the taxpayer is not entitled to the exemption provided by the said paragraph and therefore, by reason of the said Section 7(c) and other provisions of the Act in that respect made and provided the assessment is affirmed as being properly levied".

I think that the facts stated in paragraphs 5 to 9 are admissible in evidence as they are not extraneous but give a full account of the relations existing in 1940 between National System of Baking of Alberta Limited and the various National System of Baking companies and are liable to help the Court to ascertain what were then the business connections between them.

A brief resume of the evidence seems expedient.

John David Williams, chartered accountant, of Calgary, connected with the firm of Williams and Williams since 1926 and a member thereof since 1932, testified that since 1932 the firm acted as auditors for the appellant and that he prepared the income tax return of appellant for the year 1940.

He declared that an arrangement between National System of Baking of Alberta Limited and the various National System of Baking companies has existed since 1923, that it has not always been on the same basis, but has varied from year to year with a different method of distributing office and management expense and that a final arrangement was effected in 1934 which prevailed in 1940.

Williams stated that the charge made by National System of Baking of Alberta Limited was forty-eight thousand and some odd dollars in 1940, \$48,751 in 1939 and \$46,991 in 1938. He asserted that the company made no profits on its dealings with the various National System of Baking companies but merely got back its expenses.

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He said that National System of Baking of Alberta Limited operates two stores in Calgary and that in 1940 it also managed all the National System of Baking companies, kept their books, bought supplies, generally supervised the operation of the stores and made the expenditures indicated in the statement (exhibit 1).

Speaking of the practice followed in connection with the purchase of commodities, he declared that flour was purchased in carload lots in order to supply the various stores at one time and, for that reason, they got a better price.

According to him the books of all the companies in 1940 were kept in Calgary by National System of Baking of Alberta Limited, which was part of its services to the companies.

He stated that the appellant ran its retail store in Edmonton, hired clerks, paid for its flour and other supplies and looked after its taxes and all its own direct expenses. He added that the same arrangement applied to the other companies.

He said that the appellant pays dividends to National System of Baking of Alberta Limited which, except for the qualification shares, is practically the only shareholder.

In cross-examination, Williams declared that there is no management contract between appellant and National System of Baking of Alberta Limited, that the system aforesaid has been carried on since 1923 and that the shareholders of all the companies have approved the balance sheets each year.

He stated that the appellant does not pay executive salaries to individuals but pays certain management expenses which are distributed through the different companies. He specified that the appellant pays a management charge to National System of Baking of Alberta Limited and that the latter acts as the manager and supervisor of the accounts.

Frank James Heagle, who, in 1940 was the western manager for National System of Baking of Alberta Limited, testified that he was familiar with the arrangement mentioned by Williams. He stated that the appellant bought from 100 to 125 barrels of flour a month and that the object



of the arrangement between National System of Baking of Alberta Limited and appellant was to save money on the purchase of flour. According to him the buying of flour in large quantity meant a saving of from 40c. to 50c. a barrel. He estimated that the annual saving, as far as the appellant is concerned, would run into a very substantial amount and said that the same remark applied to all the companies.

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He declared that bakers are trained by National System of Baking of Alberta Limited and supplied to the various stores. He said that a supervisor visits these stores every two or three weeks and that, if a store needs more help, he might spend some time there.

No evidence was adduced on behalf of respondent.

The charging provisions of the Excess Profits Tax Act, 1940, as they stood in 1940, which is the material time herein, being section 3 of the Act, read thus:

In addition to any other tax or duty payable under any other Act, there shall be assessed, levied and paid upon the annual profits or upon the annual excess profits, as the case may be, of every person residing or ordinarily resident in Canada, or who is carrying on business in Canada, a tax as provided for in the First Part of the Second Schedule to this Act, or a tax as provided for in the Second Part of the said Schedule, whichever tax is the greater.

The second schedule mentioned in this section is worded as follows:

FIRST PART—

Twelve per centum of the profits of taxpayers before deduction therefrom of any tax paid thereon under the Income War Tax Act.

SECOND PART—

Seventy-five per centum of the excess profits.

Section 7, dealing with the exemptions, contains *inter alia* the following relevant provisions:

The following profits shall not be liable to taxation under this Act:—

(c) The profits of taxpayers who in the taxation year do not earn profits in excess of five thousand dollars before providing for any payments to proprietors, part owners or shareholders by way of salary, interest or otherwise;

It was urged on behalf of respondent that taxation is the rule and exemption from taxation the exception. Counsel submitted that a statute in order to create an exemption must be clear and explicit and that its language is to be strictly construed. He added that, if its meaning

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is doubtful, the decision of the Courts must be against the exemption. Counsel relied upon the following decisions, which it seems apposite to review succinctly.

In the case of *The Catholic Corporation of Antigonish v. The Municipality of Richmond* (1) it was held that The Assessment Act, R.S.N.S. (1900), chap. 73, s. 4, which exempts from taxation "every church and place of worship and the land used in connection therewith, and every churchyard and burial ground", does not extend to lands and buildings not being churches or places of worship, such as glebe houses and lands, rectories, parsonages, etc., occupied and used by the pastors in actual charge of the churches, and not rented to third persons or used otherwise than as a means of aiding in the support of such pastors.

Sir Charles Townshend, C. J., expressed the following opinion (p. 327):

In *Dillon* on Municipal Corporations, at p. 952, the rule as to exemptions is stated as follows:

"As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist, unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption."

These are of course the rules which must be applied here, and it is not possible to construe this section, and hold that the lands in question were clearly intended by the legislature to be exempt from taxation.

In the case of *Les Commissaires d'Ecoles pour la Municipalite du Village de St-Gabriel and Les Soeurs de la Congregation de Notre Dame de Montreal* (2), referred to by Sir Charles Townshend, the appellants brought action against the respondents to recover three years' school taxes imposed on property occupied by the latter as a farm situated in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the Mother House situated in another municipality. It was held (*inter alia*) "that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by sec. 13 of ch. 16, 32 Vic. (P.Q.)."

(1) (1910-12) 45 N.S.R. 320.

(2) (1885) 12 S.C.R. 45.

At page 54 of the report we find these remarks by Taschereau, J.:

With the evidence on the record, and bearing in mind that exemptions are to be strictly construed and embrace only what is within their terms, I am of opinion that this property is not held by the respondents for the purposes for which they were instituted, but is held by them as a source of revenue or income.

In the case of *The King v. The Trustees of School District No. 1, in the Parish of Madawaska and the Town of Edmundston, ex parte Fraser Companies, Limited* (1) the facts were briefly as follows:

School District No. 1, in the Parish of Madawaska, was established under the provisions of the Schools Act before the incorporation of the town of Edmundston. The school district, when established, included the land covered by the town of Edmundston. Since its incorporation the town had not come under the provisions of section 105 of the Schools Act, which provides for the management of schools in the towns of Saint John and Fredericton, provision being made in section 108 for the application of its provisions to any town thereafter incorporated, provided that the town council determines in favour of the adoption of such provisions and certifies the same to the Lieutenant-Governor in Council. The school district in question was therefore a separate corporation from the town, embracing the territory covered by the town within its jurisdiction. The affairs of the schools under the Schools Act are managed by a board of trustees, selected by the people in the ordinary way, and the school taxes are collected and handled by the school trustees apart from the taxes levied for town purposes and collected through the officers of the Town Council.

Some time previous to 1912 and during that year the Fraser Companies, then known as Fraser, Limited, contemplated the erection of a pulp and paper mill, involving the expenditure on capital account of a large sum of money in the town of Edmundston. An application was made to the Legislature for the fixing of a maximum valuation upon its property in the said town for taxation purposes for a period of 25 years. By chapter 104 of 2 George V, 1912, it was provided that the valuation of the real and

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(1) (1918-19) 46 N.B.R. 506.

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personal property of Fraser, Limited, or its assigns, situate or to become situate within the town of Edmundston, legally liable or to become liable for assessment for rates or taxes within the said town, including any additions thereto, should not exceed the sum of \$200,000, nor be less than \$55,000, for the purpose of assessment for rates and taxes within the said town for a period of 25 years from the ordering of the next annual assessment. Another section of the Act authorized the Town Council to order that the valuation of the property aforesaid for the purpose of assessment for rates and taxes within the said town should be fixed for a definite amount during the said period of 25 years, such amount not to exceed \$200,000 or be less than \$55,000 and, upon such order being made by the Town Council, it was provided that it should be the duty of the Town Clerk to notify the assessors of the town of such order and enter the valuation in the assessment book and assess said Fraser, Limited, or its assigns, upon the same. There was also a provision that in any valuation for *county purposes* to be made during the period in which the Act was made to apply the total valuation should not exceed the sum mentioned in paragraph 1 of the Act until fixed by the Town Council under paragraph 2 of the Act, after which time the valuation should be the amount so fixed by the Town Council. There were also provisions to the effect that the Act should not apply to dwelling houses afterwards erected or acquired or any land appurtenant thereto.

As may be seen, the Act makes reference to assessments for rates and taxes within the town and to taxes for county purposes, but makes no mention of taxes for school purposes.

In December, 1916, an agreement was entered into between Fraser, Limited, and the town of Edmundston and an Act confirming said agreement was passed by the Legislature at its session of 1917 (8 George V, chap. 65). The agreement provided that the valuation for assessment purposes should be fixed at \$100,000, with the exception of dwelling houses and lands appurtenant thereto, and that in the case of such, while owned by Fraser, Limited, the valuation of said dwelling houses and lands appurtenant

thereto during the period of 25 years should not exceed sixty per cent of the cost thereof. Under the legislation and the agreement entered into by the town and Fraser, Limited, the latter was liable for a period of 25 years for assessment in the town of Edmundston on a valuation of \$100,000 and in addition to sixty per cent of the value of the dwelling houses and lands apurtenant thereto. The question arose as to the valuation of these properties for assessment purposes in School District No. 1, in the parish of Madawaska, and the question which the Court was asked to determine was as to whether or not for school purposes the property of Fraser, Limited, was to be assessed on the same valuation as it was assessed for municipal purposes or, in other words, if the property which, according to the assessors, was worth more than \$1,000,000 was to be assessed for school purposes on a valuation of \$100,000, plus whatever the sixty per cent for the dwellings will amount to, and the schools of the town shall be thus deprived of the taxes which would be available for these purposes if no such exemption had been granted by the Legislature.

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Sir J. D. Hazen, C.J., who delivered the judgment of the Court, made the following observations (p. 511):

It is laid down very clearly in the text-books and in cases that have been decided on the question that as taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms, and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Taxation, it is said, is an act of sovereignty to be performed as far as it conveniently can be with justice and equity to all, and exemptions no matter how meritorious are of grace and must be strictly construed. In *Cooley on Taxation*, 2nd ed., p. 205, it is stated that it is a very just rule that when an exemption is found to exist it shall not be enlarged by construction. On the contrary it ought to receive a strict construction for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favour will be extended beyond what is meant.

After referring to *Matter of Mayor, etc., of New York* (1) and quoting an extract from the judgment and reproducing a passage in *Maxwell on Statutes*, 5th edition, which is quite pertinent, the learned judge concludes (p. 513):

Even if such statutes were not regarded in the light of contracts, they would seem to be subject to strict construction on the same ground

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as grants from the Crown, to which they are analogous, are subject to it. As the latter are construed strictly against the grantee on the ground that prerogatives, rights and emoluments are conferred on the Crown for great purposes and for the public use, and are therefore not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction, so the Legislature in granting away in effect the ordinary rights of the subject shall be understood as granting no more than passes by necessary and unavoidable construction.

Reference was made to *Rex and Provincial Treasurer of Alberta v. Canadian Northern Railway Company et al.* (1), an action for the recovery of taxes and penalties. We find in the reasons of Harvey, C.J. who delivered the judgment of the Appellate Division of the Supreme Court of Alberta (Harvey, Stuart and Beck, JJ., the latter dissenting in part), which reversed the judgment of Hyndman, J., the following statement, which is in the nature of an *obiter dictum* (p. 1183):

Then I think the rule of construction of taxing statutes is scarcely applicable in the sense applied because what we are construing is not a provision imposing a tax but one exempting from the general imposition and the rule in that case would be rather against the one claiming the exemption. See *Rex v. S. D. of Madawaska; Ex parte Fraser Co.*, 49 D.L.R. 371.

In the case of *George Hope v. Minister of National Revenue* (2), Mr. Justice Audette made the following comments (p. 162):

Then in 1920, by 10-11 Geo. V, ch. 49, sec. 3, it was enacted that:

Dividends declared or shareholders' bonuses voted after the 31st December, 1919, shall be taxable income of the taxpayer *in the year in which they are paid or distributed.*

\* \* \* \*

The plain intention of this section 5, subsec. 9 (14-15 Geo. V, ch. 46) is that dividends made up of undistributed profits and paid or payable after 1921 as under the circumstances of the case, are liable to tax. The Act primarily imposes a tax upon all incomes made up of profits and gain and that is intended to be taxed in this case. And failing to come within any of the statutory exemptions, the appellant must pay. The wording of subsec. 9 of sec. 5 is clear and unambiguous in its grammatical meaning and that should be adhered to. Clear language would have to be found to support the contention that, notwithstanding the dividend is paid in 1926 when the section is in full force and effect, the section would not apply because some of the moneys forming part of that dividend were earned before that date and should be exempted. In so finding one would have to add to or to distort the plain meaning of the section. There is no reason and no right to assume that there

(1) (1921) 1 W.W.R. 1178.

(2) (1929) Ex. C.R. 158.

is any governing object which the taxing Act is intended to attain other than that which it has expressed. *Tennant v. Smith*, (1892) A.C. 150, at p. 154.

In the matter of *Ville de Montreal-Nord and La Commission Metropolitaine de Montreal, intervenant, appellants v. Muncipalite Scolaire de St-Charles* (1) it was held by the Court of King's Bench, Appeal side, affirming the judgment of the Circuit Court of the District of Montreal, that exemptions of taxes must be interpreted strictly in the absence of clear and precise terms. The reasons of Surveyer, J., sitting *ad hoc* (p. 455), are directly to the point and are worth consulting.

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In the case of the *City of Halifax v. Sisters of Charity* (2), an action brought to recover a sum claimed to be due by the defendant corporation for taxes on real and personal property, the headnote, fairly accurate and complete, reads thus:

Although the general rule is that statutes of exemption should be strictly construed, the rule is not applicable where the work performed is charity and involves the assumption of a portion of the burden that would otherwise fall upon the public.

Where the purpose of a statute is to exempt educational and charitable institutions, the statute should not be strictly construed, but should be interpreted in such manner as to exempt all institutions of this nature that can fairly be brought within its language.

Russell, J. expressed the following opinion (p. 485):

In the case of the *Association for the Benefit of Coloured Orphans v. Mayor, Aldermen and Commonalty of New York*, 104 N. Y. 586, Peckham, J., referring to the rule that statutes of exemption should be strictly construed, said the court believed in adhering to that principle,

"But such a case as this we do not regard as coming within the principle. The plaintiff is performing a work of pure charity, and is taking upon its shoulders a portion of the burden that would otherwise fall upon the public. It is doing this good work by the express permission of the Legislature, and through its aid, by reason of its incorporation, and, in the language of Mr. Justice Davis, in the case of the Swiss Benevolent Society, above cited, the Legislature cannot intend to tax the means by which the relator performs the duty for which it was incorporated, that of taking a portion of a public burden upon its own shoulders".

This eminently reasonable language of Peckham, J., who is now an Associate Justice of the Supreme Court of the United States, and was then speaking for the Court of Appeals in New York, seems to warrant me in taking a liberal rather than a restricted view of the statute under consideration.

(1) (1927) Q.R. 43 K.B. 453.

(2) (1884-1907) 40 N.S.R. 481.

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See also *Rex v. Assessors of Bathurst-Ex parte Bathurst Company* (1).

In *Maxwell, Interpretation of Statutes*, seventh edition, we find the following relevant observations (p. 252):

Acts which establish monopolies (*Reed v. Ingram*, 3 E. & B. 899; *Direct U. S. Cable Co. v. Anglo-American Co.*, 2 App. Cas. 394), or confer exceptional exemptions and privileges, correlatively trenching on general rights, are subject to the same principle of strict construction (See ex. gr. *R. v. Hull Dock Co.*, 3 B. & C. 516; *Brunskill v. Watson*, L. R. 3 Q.B. 418).

Further on the author states (p. 257):

Enactments of a local or personal character which confer any exceptional exemption from a common burden (*Williams v. Pritchard* (1790), 2 R. R. 4 Term Repts. 310; *Perchard v. Heywood* (1800), 53 R. R. 128; 8 Term Repts. 468; *Sion College v. London (Mayor)*, (1901) 1 K. B. 617; 70 L.J.K.B. 369, distinguished in *Netherlands Steamboat Co. v. London Corp.* (1904), (68 J.P. 377, C. A.), or invest private persons or bodies, for their own benefit and profit with privileges and powers interfering with the property or rights of others, are construed against those persons or bodies more strictly, perhaps, than any other kind of enactment.

After declaring that the Courts take notice that statutory powers are obtained on petitions framed by their promoters and, in construing them, regard them as contracts between those persons, or those whom they represent, and the Legislature on behalf of the public and for the public good, Maxwell continues thus (p. 258):

Even if such statutes were not regarded in the light of contracts (See *R. v. York & N. Midland Ry. Co.*, 22 L.J.Q.B. 41), they would seem to be subject to strict construction on the same ground as grants from the Crown, to which they are analogous, are subject to it. As the latter are construed strictly against the grantee on the ground that prerogatives, rights, and emoluments are conferred on the Crown for great purposes and for the public use and are, therefore, not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction (per Lord Stowell, *The Rebeckah*, 1 Rob. c. 230), so the Legislature, in granting away, in effect, the ordinary rights of the subject, should be understood as granting no more than actually passes by necessary and unavoidable construction.

In *Craies' Treatise on Statute Law*, fourth edition, at page 107 we read:

Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes: (1) Imposing a tax or charge;

Note (n) at the bottom of page 107 broadens the scope of paragraph (1) by adding thereto the words "also exempting from a tax or rate". The note then contains a brief



excerpt from Lord Selborne's judgment in *Mersey Docks v. Lucas* and refers to three other cases. I deem it convenient to recite this note verbatim:

(n) Also exempting from a tax or rate. "Duties given to the Crown", said Lord Selborne in *Mersey Docks v. Lucas* (1833), 8 App. Cas. 891, 902, "taxes imposed by the authority of the Legislature, by public Acts for public purposes, cannot be taken away by general words in a local and personal Act \* \* \*" As to whether the exemption is limited to taxes existing at the date of the Act, see *Stewart v. Thames Conservancy*, (1908) 1 K.B. 893. As to exemption from rates, see *Sion College Case*, (1901) 1 K.B. 617; *Mayor, etc., of London v. Netherlands Steamboat Co.*, (1906) A.C. 262, 268.

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It was urged on behalf of respondent that the appellant cannot bring itself within the exemption provided by section 7(c) of the Act because it paid to its shareholder, National System of Baking of Alberta Limited, the sum of \$6,359.50, the whole, or alternatively the principal part, of which was a payment of salary. Counsel for respondent pointed out that "salary" is an elastic term and that it has been defined as a certain annual stipend payable to an official for the performance of his duty. In support of his contention counsel relied on *Corpus Juris*, vol 54, pages 1120-1125, where we find (*inter alia*) the following statements:

*On page 1121*—"Salary" has been defined as an agreed compensation for services, payable at regular intervals; annual compensation for services rendered; annual or periodical wages or pay; compensation for services rendered by one to another; compensation paid for a particular service, or stipulated to be paid for services; fixed and periodical remuneration for services; fixed, annual, or periodical payment for services, depending upon the time and not upon the amount of services rendered; fixed regular wages, as by the year, quarter, or month; fixed sum paid to a person for his services, yearly, half-yearly, or quarterly; hire; payment or recompense for services; periodical allowance made as compensation to a person for his official or professional services or for his regular work; periodical compensation due to men in official and other situations; periodical payment made for regular employment; periodical payment of a certain value, in money, for work and labour done; recompense or consideration, made to a person for his pains and industry in another man's business, or stipulated to be paid to a person periodically for services, recompense, reward, or compensation for services performed or rendered; remuneration for services rendered in the course of employment; reward or recompense paid for personal services; stipend; stipulated periodical recompense; sum of money periodically paid for services rendered; wages. Perhaps "salary" is more frequently applied to annual employment than to any other.

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References are noted after each definition; they are interesting but they add little, if anything, to the definitions.

*On page 1124*—The term “salary” implied a contract of employment. It imports a specific contract for a specific sum for a certain period of time; and hence its use may import a factor of permanency, or permanency of employment. It is said to contain three elements, all required to round out and complete the thought, namely, the dignity in popular estimation of the duty involved, a fixed term, and compensation by contract. Further, it is said to have four characteristics—first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time. Examples are given in the subjoined notes of what the term has been held to include and not to include.

Here again there are several references which may be consulted with benefit but which in fact merely confirm the author’s statements.

“Salary” is also defined in Wharton’s *Law Lexicon*, 14th ed., p. 896. The definition therein reads as follows:

Salary, a recompense or consideration generally periodically made to a person for his service in another person’s business; also wages, stipend, or annual allowance.

Definitions are also found in American cases reported in *Pope, Legal Definitions*, volume 2, under the word “salary” and in *Words and Phrases*, volume 38, page 38.

All these definitions are fundamentally equivalent to the ones previously quoted.

A definition of the word “salaire”, substantially similar, is contained in *Capitant, Vocabulaire Juridique*, volume 6, page 440.

It was submitted by counsel that the Wartime Salaries Order (P.C. 9298 and amendments thereto) defines “salary” in part as follows:

Salary shall include wages, salaries, bonuses, gratuities, emoluments, or other remuneration including any share of profits or bonuses dependent upon the profits of the employer \* \* \*

Counsel concluded that it is clear from the statement of facts agreed upon, as clarified by the cross-examination of Williams and Heagle, that the sum of \$6,359.50, or alternatively the major portion thereof, was a payment by appellant to its shareholder by way of salary.

If the respondent’s contention is to be maintained, the payment made by appellant to National System of Baking of Alberta Limited must either fall under “salary” or come

within the scope of the words "or otherwise". The payment in question cannot, in my opinion, be considered as "interest".

After due consideration of the facts and the law I am satisfied that the payment by appellant to National System of Baking of Alberta Limited is merely a reimbursement to the latter of moneys disbursed by it for services performed for the appellant. As intimated by counsel for appellant, if the Crown's contention is correct, any payment made by a taxpayer to a shareholder for reimbursement of expenditures incurred by the shareholder would fall within the purview of subsection (c) of section 7. It seems clear, however, that such expenditures would not be profit within the meaning of subsection (f) of section 2 of the Act and that, if a tax was imposed on such a payment, it would be a tax not on a profit but on an expense.

Counsel for appellant submitted that, according to respondent's argument, a company would not be in a position to pay to a shareholder any sum expended by him for any of the objects of the company. He declared that such an interpretation would imply: (a) that a company taxpayer would lose its exemption by paying to a shareholder money legitimately spent by the latter for the benefit of the company; (b) that the words "salary, interest or otherwise" would be interpreted in the broadest possible sense to include a payment of any nature whatever made to a shareholder. He added that this interpretation would fail to explain the apparent intention of Parliament to restrict the meaning of subsection (c) by the use of the words "salary" and "interest". Counsel suggested that the intention of the Act was to prevent a company taxpayer from converting money in its hands, which might be profit and therefore taxable, into money in the hands of a shareholder which would not be subject to the 12 per cent tax provided for in the second schedule of the Act.

The problem with which we are faced narrows down to the interpretation of the expression "any payments to proprietors, part owners or shareholders *by way of salary, interest or otherwise*" contained in subsection (c) of section 7. The amount paid by appellant to National System of

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Baking of Alberta Limited is obviously not, in my judgment, a salary. According to the evidence adduced on behalf of appellant, which is unchallenged, it seems clear that the said payment is nothing more than the reimbursement by appellant to National System of Baking of Alberta Limited of moneys paid by the latter for services rendered by it to the appellant. The payment in question is certainly not interest. Does it come within the scope of the very general and indefinite words "or otherwise", too often used in statutes by legislators who have not a clear and precise notion of the subject treated? However that may be, the Courts must interpret the statutes as drawn and attribute to them a reasonable as well as a legal meaning.

The interpretation of the words "or otherwise" brings up the rule *ejusdem generis*. The effect of this rule has been expounded in *Price Brothers and Company and the Board of Commerce of Canada* (1) and in *Hirsch et al. and Protestant Board of School Commissioners of Montreal et al.* (2).

In the first case, Price Brothers and Company appealed from an order of the Board of Commerce of Canada, dated February 6, 1920, purporting to have been made by the Board in the exercise of jurisdiction conferred on it by The Board of Commerce Act and The Combines and Fair Prices Act and of jurisdiction formerly exercised by one R. A. Pringle, K.C., as Paper Controller, which the Governor in Council purported to vest, in a modified form, in the Board of Commerce.

The Board, after declaring newsprint to be a "necessary of life", (a) by clause 1 of its order prohibited the appellant from taking any price exceeding \$80 per ton for newsprint and declared that any price in excess thereof would be deemed to include unfair profit, (b) by clause 2 forbade the appellant accumulating and withholding from sale any quantity of newsprint beyond an amount reasonably required for the ordinary purposes of its business, (c) by clause 4 required the appellant to furnish at certain times and at fixed prices defined quantities of newsprint to designated purchasers.

(1) (1920) 60 S.C.R. 265.

(2) (1926) S.C.R. 246.

Dealing with the *ejusdem generis* rule, Anglin J. expressed the following opinion (p. 283):

On the other hand, general words must be restricted to the fitness of the subject matter (*Bacon's Maxims*, No. 10) and to the actual apparent objects of the Act (*River Wear Commissioners v. Adamson*, Q.B.D. 546; 2 App. Cas. 743, at pp. 750-1, 757-8), following the intent of the Legislature to be "gathered from the necessity of the matter and according to that which is consonant to reason and good discretion". *Stradling v. Morgan* (Plowden 199); *Cox v. Hakes* (15 App. Cas. 506, at pp. 517-8).

Where general words are found, especially in a statute, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category (*Reg. v. Edmundston*, 28 L.J.M.C. 213), unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification.

Recent applications of the rule last stated, and usually known as the *ejusdem generis* rule, are to be found in the judgments in the House of Lords in *Stott (Baltic Steamers, Ltd., v. Marten*, (1916) 1 A.C. 304, and the judgment of Sankey J. in *Attorney General v. Brown* (36) Times L.R. 165).

The case of *Hirsch et al. and Protestant Board of School Commissioners of Montreal et al.* concerned an appeal from a decision of the Court of King's Bench, appeal side, province of Quebec, to which had been referred for hearing and decision a series of questions relating to the educational system in Montreal. In 1903 the Quebec legislature passed an Act (3 Ed. VII, chap. 16) entitled "Act to amend the law concerning education with respect to persons professing the Jewish religion". The occasion for this legislation was the refusal of the Protestant Board of School Commissioners of the city of Montreal to recognize the right claimed by persons professing the Jewish religion to have their children educated at the schools under the control of school corporations established by law, to which Jewish parents had theretofore sent their children. Section 1 of the said Act provides that "in all the municipalities of the province, \* \* \* persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter". Sections 2, 3, 4 and 5 deal with school revenues and taxation and provide that such taxation payable by persons professing the Jewish religion and revenue for school purposes derived from them or from

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their properties shall go to the support of the Protestant schools, where they exist. Section 6, so far as material, reads as follows: " \* \* \* children of persons professing the Jewish faith shall have the same right to be educated in the public schools of the province as Protestant children and shall be treated in the same manner as Protestants for all school purposes".

Anglin, C.J.C., who delivered the judgment of the Supreme Court, made the following observations (p. 264):

Section 1 of the Act of 1903 is, no doubt, expressed in the most general terms. It was admitted on all sides at the hearing that the statute was intended to establish the right of Jewish children to be admitted to the Protestant schools, but it was argued that s. 1 went so far as also to sanction the eligibility of persons professing the Jewish religion for appointment to the Boards of Protestant School Commissioners, and therefore to declare that Jews should be considered as Protestants for the purposes of s. 130 of the Consolidated Act of 1861; the argument is founded upon the words:

persons professing the Jewish religion shall for school purposes be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter.

But, assuming that these words by themselves might be interpreted to authorize the admission of Jews to representation upon the Protestant School Board, that interpretation must, we think, be rejected, when, applying the principles enunciated by Lord Blackburn in *River Wear Commissioners v. Adamson*, (1877) 2 A.C. 43, at pp. 763-765, the statute is considered as a whole. The provisions of the Act following upon s. 1, and already adverted to, are special or particular enactments, providing for and defining obligations, rights and privileges which seem to be generally comprehended under s. 1. Now by the tenth rule of *Bacon's Maxims* "*verba generalia restringuntur ad habilitatem rei vel personae*"; and he says

all words, whether they be in deeds or statutes or, otherwise, if they be general, and not express or precise, shall be restrained unto the fitness of the matter or person.

Referring then to *Earl of Kintore v. Lord Inverury* (1), *Gunnestad v. Price* (2), *Cox v. Hakes* (3), *Stradling v. Morgan* (4) and *Banbury v. Bank of Montreal* (5) and quoting a few extracts from the judgments therein, the learned judge stated (p. 265):

The rule is thus well established, and this seems to be a case where nothing is lacking to justify its application; and when the preamble of the statute is considered, it becomes reasonably certain that the school

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| (1) (1865) 4 Macq. 520, 522.   | (4) (1560) 1 Plowd. 199.  |
| (2) (1875) L.R. 10 Ex. 65, 69. | (5) (1918) A.C. 626, 691. |
| (3) (1890) 15 A.C. 506, 517.   |                           |

purposes referred to in the general provision of s. 1 were not intended to include purposes other than those which are the subject of, or ancillary to, the particular sections which follow.

In the case of *Sandiman against Breach* (1) it was an assumpsit to recover the expense of hiring a post-chaise to convey the plaintiff from Clapton to London, the defendant, who had contracted to take him in his stage-coach, having neglected to do so. At the trial it appeared that on a Sunday the plaintiff sent to a booking-office kept by the defendant, who was proprietor of a stage-coach travelling from Clapton to London, booked himself to be carried to London on that evening and paid half the fare. The defendant afterwards, not having any passenger except the plaintiff, refused to go to London and the plaintiff hired a post-chaise. For the defendant it was contended that the contract was illegal, being in contravention of the statutes, 3 Car. 1. c. 1. and 29 Car. 2. c. 7., and that the defendant was not bound to perform it. The Lord Chief Justice gave the defendant leave to move to enter a non-suit and the plaintiff had a verdict for 13s. In Hilary term a rule for entering a nonsuit was obtained.

Lord Tenterden, C.J., who delivered the judgment of the Court, stated that it was objected that the plaintiff could not recover because the contract, for the breach of which the action was brought, was to have been performed on the Sabbath day. He declared that upon looking into the statutes 3 Car. 1. c. 1. and 29 Car. 2. c. 7. he was of opinion that the case did not come within them. He pointed out that there had been subsequent statutes containing regulations as to hackney coaches, but that they were too ambiguous to be taken as legislative expositions of the former acts. He said that by the first of these, 3 Car. 1. c. 1., it was enacted that "no carrier with any horse, nor waggon-man with any waggon, nor carman with any cart, nor wain-man with any wain, nor drover with any cattle, shall by themselves, or any other, travel on the Lord's day" and that by 29 Car. 2. c. 7. "no tradesman, artificer, workman, labourer, or other person or persons, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day".

(1) (1827) 7 B. & C. 96.

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The learned judge then made the following comments (p. 100):

It was contended, that under the words "other person or persons" the drivers of stage-coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. Considering, then, that in the 3 Car. 1. c. 1. carriers of a certain description are mentioned, and that in the 29 Car. 2 c. 7, drovers, horse-courers, waggons, and travellers of certain descriptions, are specifically mentioned, we think that the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage-coach.

In *Palmer v. Snow* (1) it was held:

A barber who shaves customers on Sunday is not a "tradesman, artificer, workman, or labourer, or other person whatsoever" within the meaning of 29 Car. 2, c. 7, s. 1, which prohibits those persons from exercising any worldly labour, business, or work of their ordinary callings upon the Lord's Day (works of necessity and charity only excepted).

The facts in *Larsen and Sylvester & Co.* (2) were briefly as follows: In July 1907 a steamship of the appellant was chartered by the respondents to proceed to Grimsby and there load a cargo of coal. A clause in the charterparty ran thus: "The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of workmen, disputes between masters and men and any other unavoidable accidents or hindrances of what kind soever beyond their control either preventing or delaying the working, loading or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading."

The ship arrived at Grimsby, but owing to the block of vessels in the harbour was delayed in reaching the loading places. The appellant having sued the respondents for demurrage, the trial judge gave judgment for the plaintiff for the amount claimed. The King's Bench Division reversed that decision and entered judgment for the defendants and their decision was affirmed by the Court of Appeal. The appellant thereupon appealed to the House of Lords. The Order of the Court of Appeal was affirmed and the appeal dismissed.

Lord Loreburn, L.C., dealing with the *ejusdem generis* rule, made the following observations (p. 296):

Then Mr. Hamilton argued that this hindrance was not within the words of the charter, and invoked the doctrine of *ejusdem generis*. The language used is "any other unavoidable accidents or hindrances of what

(1) (1900) 1 Q.B. 725.

(2) (1908) A.C. 295.



kind soever beyond their control." Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus. In *Earl of Jersey v. Neath Poor Law Union*, (1889) 22 Q.B.D. 555, 566, Fry L.J. referred to words of a similar kind, and indicated that you have to regard the intention of the parties as expressed in their language, and that words such as these, "hindrances of what kind soever," are often intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible to lay down any exhaustive rules for the application of the doctrine of *ejusdem generis*, but I agree with Fry L.J. that there may be great danger in loosely applying it. It may result, as he says, in "giving not the true effect to the contracts of parties but a narrower effect than they were intended to have".

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In *S.S. Knutsford, Limited and Tillmanns & Co.* (1) the summary of the judgment, fairly complete and comprehensive, reads thus:

Goods were shipped on board a steamship for a foreign port under bills of lading providing that if a port should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at a port should be deemed by the master unsafe in consequence of war, disturbance or any other cause, it should be competent for the master to discharge the goods on the ice or at some other safe port or place:

Held that, upon the true construction of the bills of lading, "inaccessible" and "unsafe" must be read reasonably and with a view to all the circumstances; that the words "or any other cause" must be read as being *ejusdem generis* with war or disturbance; and that as a matter of fact the master was not justified under all the circumstances in this case in failing to deliver the goods at the port for which they were shipped merely because that port was at the moment of their arrival inaccessible on account of ice for three days only.

Decision of the Court of Appeal, (1908) 2 K.B. 385, affirmed.

In the case of *Stott (Baltic) Steamers, Limited and Marten and others* (2) the report discloses that whilst a boiler was being lowered by a steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke, causing the boiler to fall into the hold of the ship and thereby damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached. The perils insured against were "of the seas \* \* \* and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said \* \* \* ship, etc., or any part thereof". The policy included the conditions of the Institute Time Clauses, which provide (p. 304):

3. In port and at sea, in docks and graving docks, and on ways, girders and pontoons, at all times, in all places, and on all occasions,

(1) (1908) A.C. 406.

(2) (1916) 1 A.C. 304.

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services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

7. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

It was held by the House of Lords, affirming the decision of the Court of Appeal (1), "that the loss was not recoverable under the policy, as it was not caused by a peril of the sea or a peril *ejusdem generis* therewith, and that it was not within clause 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the character of the risks insured against by the policy, and the risks specifically mentioned in clause 7 were not extended to matters *ejusdem generis* by the general words in the body of the policy."

In *Attorney General v. Brown* (2), a case dealing with the interpretation of section 43 of the Customs Consolidation Act, 1876 (39 and 40 Vict., c. 38) and particularly with the meaning of the words "any other goods" therein contained, Mr. Justice Sankey made the following statements (p. 169):

I approach the question whether the doctrine of *ejusdem generis* should be applied to section 43 of the Customs Consolidation Act of 1876.

By this it is meant that general words coming after particular words are restricted to and controlled by the meaning of the particular words.

The simplest statement of this doctrine is to be found in a judgment of Lord Campbell, *Reg. v. Edmundson* (28 L.J., M.C., 213), where he says: "I accede to the principle laid down in all the cases which have been cited, that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." The doctrine has been frequently applied to deeds, to charterparties, and to Acts of Parliament. It was recently applied in *In re Stockport Ragged, etc., Schools* (*supra*) to section 62 of the Charitable Trusts Act, 1853, and the words "or other schools" were restricted to the meaning of the particular schools which were named immediately before them, and the Master of the Rolls, Sir N. Lindley, says: "I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to show the type of school to which they were referring to, and in my opinion 'other schools' must be taken to mean other schools of that type."

(1) (1914) 3 K.B. 1262.

(2) (1919) 36 T.L.R. 165.

It is quite unnecessary, and indeed it would be unprofitable, to go through all the cases on this subject—their name is legion—and they will be found conveniently collected in Craies' Statute Law, 2nd edn. (1911) (which is the 5th edn. of Hardcastle on Statutory Law), at p. 182 and onwards.

*In re Ellwood* (1) it was held that a land drainage rate levied by the River Dee Drainage Board, constituted under the provisions of the Land Drainage Acts, 1861 and 1918, upon an occupier of land within the district of the Board, having become payable within twelve months next before the making of a receiving order against him and still due at that date, is a local rate entitled to preferential payment within the meaning of section 33, subsection 1(a) of the Bankruptcy Act, 1914.

Astbury, J., speaking of the application of the *ejusdem generis* rule, made the following observations (p. 461):

The matter, in my opinion, lies within an extremely small compass. I do not propose to discuss the various reasons stated by the learned judge in the Court below for applying the *ejusdem generis* rule. Some of those reasons may be right in themselves, although some I think are not; but they are really not relevant to the matter which, in my opinion, has now to be decided. The words are "All parochial or other local rates". It is not denied that this drainage rate is a local rate and that it has been levied by an authority having statutory power to levy such rates in this particular district, but what is contended is that, in some way or another, which I confess I do not understand, the words "other local rates" must be construed *ejusdem generis* with "parochial rates" in such a manner as to include certain local rates other than parochial rates and yet to exclude other local rates. It is difficult to apply the *ejusdem generis* rule to a sentence or expression having only two limbs. If there is a category followed by general words, it is the common experience of us all that the general words may be construed *ejusdem generis* with the particular category preceding them.

The learned judge then referred to the judgment of Rigby, L.J., in *Anderson v. Anderson* (2), citing passages therefrom. The notes of Astbury, J. on this case of *Anderson v. Anderson* are interesting and may be consulted with advantage.

Reference may also be made beneficially to the following cases: *Regina v. Cleworth* (3); *Fish v. Jesson et ux.* (4); *Stradling v. Morgan* (5); *Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted* (6); *Parker v. Marchant* (7); *Re Morlock and Cline Limited* (8).

(1) (1927) 1 Ch. 455

(2) (1895) 1 Q.B. 749, 755

(3) (1863-64) 4 B. & S. 927.

(4) (1686-1719) 2 Vernon's Ch.

(5) (1560) Plowden 199.

(6) (1907) A.C. 264, 268.

(7) (1842) 62 E.R. 893.

(8) (1911) 23 O.L.R. 165.

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See also *Maxwell on Interpretation of Statutes*, 9th ed., pp. 336 et seq.; *Craies, A Treatise on Statute Law*, 4th ed., pp. 165 et seq.; *Bacon's Law Tracts (Maxims of the Law)*, p. 70, reg. 10.

It was argued on behalf of respondent that "salary" and "interest" are so different that no category or genus exists and that, if there is no category or genus, there can be no application of the "*ejusdem generis*" rule. In support of his contention, counsel for respondent relied on the decisions in *Tillmanns & Co. v. SS. Knutsford, Limited* (1), affirmed (2), and *Anderson v. Anderson* (3).

In the first case, Farwell, L.J., of the King's Bench Division of the High Court of Justice, in his reasons for judgment, expressed the following opinion (p. 402):

Now there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category—perhaps category is the better word, as "class gift" has a technical meaning in wills, and its employment might lead to confusion. Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine, and in *Anderson v. Anderson*, (1895) 1 Q.B. 749, there really was no category at all.

In *Anderson v. Anderson*, Lord Esher, M.R., in his notes made the following comments (p. 753):

Nothing can well be plainer than that to shew that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before.

Further on Lord Esher declared (p. 754):

I entirely adopt the canon of construction which was laid down by Knight Bruce V.C. in *Parker v. Marchant*, (1 Y. & C. Ch. 290), and I reject the supposed rule that general words are *primâ facie* to be taken in a restricted sense. The appeal must be dismissed.

Rigby, L.J., in the same case, made these remarks (p. 755):

The main principle upon which you must proceed is, to give to all the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to shew that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough. One need not travel beyond the case of *Parker v. Marchant* (1 Y. & C. Ch. 290) to find great authority for that proposition—I mean not only the authority of the case itself, which is deservedly high, but other authorities which are cited in it. Lord Eldon, Lord Cottenham, Sir William Grant, Sir John Leach, and Knight Bruce

(1) (1908) 2 K.B. 385.

(2) (1908) A.C. 406.

(3) (1895) 1 Q.B. 749.

V.C. himself, all lay down the rule to the effect which I have stated—you must give the words which you find in the instrument their general meaning, unless you can see with reasonable plainness that that was not the intention of the testator or settler.

It was submitted on behalf of appellant that the following features are common to salary and interest: (a) in each case the amount paid is a profit in the hands of the shareholder; (b) salaries and interest payments are fixed in amount and do not depend on costs; (c) payments of salary and interest are periodical; (d) the amounts are easily subject to agreement between the taxpayer and the shareholder. Counsel concluded therefrom that the words “or otherwise” should be restricted to cover only payments similar in nature to salary and interest.

Referring to these four features allegedly common to salary and interest, counsel for respondent put forward the following alternative proposals.

Salary and interest in the hands of a shareholder may or may not be a profit. This, to all appearances, is a truism. Counsel, however, added that the sum paid by appellant to National System of Baking of Alberta Limited would undoubtedly be profit in the hands of the latter, assuming it was not offset by deductible expenses. Counsel claimed that, if the management charge or fee, as it has been called, had been paid to an individual person, the payment would clearly come within the ambit of subsection (c) of section 7 and this whether or not the payment was a profit to such person. According to him the ultimate destination of the salary or interest payment is immaterial and, although salary and interest may be profit in the hands of the recipient, it all depends upon the deductible expenses which the latter has to meet. Likewise a management charge or fee, which the payment in question is admitted to be, would generally be a profit in the hands of the shareholder and the fact that the shareholder has offsetting expenses cannot be said to be relevant. Counsel concluded that hence it is self-evident that it is folly to attempt to make a category out of two heads, viz., “Salary” and “interest”, on the assumption that each is a profit.

Dealing then with the second feature, to wit that salary and interest payments are fixed in amount and do not depend on costs, counsel for respondent submitted that

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this may or may not be true. He suggested that interest may depend upon profits and that the rate need not be fixed. Counsel averred that if this feature were chosen as the test of whether or not the words "salary, interest or otherwise" make a genus, it would exclude such things as director's fees, which often vary from time to time, payments by way of commission and like payments.

Referring to the third feature, that salary and interest payments are made periodically, counsel for respondent observed that the payment involved in the present appeal was made yearly and that it would therefore qualify under this test.

Speaking of the fourth feature, namely, that the amounts are easily subject to agreement between the taxpayer and the shareholder, counsel declared that the payment in question herein meets this fourth test.

It was suggested on behalf of appellant that some light on the intention of the legislators is supplied by the amendment made to the Excess Profits Tax Act, 1940 by 6 Geo. VI, chap. 26, by the addition of section 7(a) reading thus:

7A. The following profits shall not be liable to taxation under section three of this Act in accordance with the rates set out in the First and Second Parts of the Second Schedule to this Act:

The profits of a corporation or joint stock company which, in the taxation year, do not exceed the sum of five thousand dollars, or, where the taxation year of any corporation or joint stock company is less than twelve months, do not exceed the proportion of five thousand dollars which the number of days in the taxation year of such corporation or joint stock company, bears to three hundred and sixty-five days, before providing for any payments to shareholders by way of salary, interest, dividends or otherwise.

Appellant's suggestion seems sensible and judicious.

It may be pointed out incidentally that by the same statute subsection (c) of section 7 was repealed and the following substituted therefor:

(c) the profits of taxpayers other than corporations or joint stock companies, if such profits do not in the taxation period exceed five thousand dollars before providing for any payment therefrom to proprietors or partners by way of salary, interest or otherwise;

The amendment to subsection (c) has no bearing on the question at issue.

As may be noted, section 7(a) contains, besides the words "salary" and "interest", the word "dividends". It seems obvious that Parliament did not think that dividends were

covered by the Act as it stood. If one adopts the respondent's submission and agrees that the words "or otherwise" are so broad as to include payments of any nature whatsoever to a shareholder, the amendment was unnecessary.

After a careful perusal of the evidence and of the able and exhaustive argument of counsel and a fairly elaborate review of the doctrine and precedents, I am satisfied that the words "or otherwise" contained in subsection (c) of section 7 of the Excess Profits Tax Act, 1940, must be interpreted strictly and that they do not apply to payments made to a shareholder as reimbursement for expenses incurred and services performed, but must be restricted to cover only salaries and interest payments, to which may presumably be added dividends since the enactment of section 7(a) by the statute 6 Geo. VI, chap. 26, assented to on August 1, 1942. I have reached the conclusion that the payments made by appellant to National System of Baking of Alberta Limited were not made by way of salary or interest. With mature deliberation I am unable to convince myself that the payments effected by appellant in the conditions disclosed by the evidence come within any of the definitions of "salary" hereinabove quoted or referred to. Unquestionably they cannot be considered as interest payments.

I do not think that the words "or otherwise", however general and broad they may be but vague and indefinite, can comprehend payments of the nature of those involved in the present appeal, which differ essentially from payments by way of salary or interest.

For these reasons there will be judgment in favour of the appellant maintaining its appeal, setting aside the assessment and the decision of the Minister and ordering that the sum of \$412 for excess profits tax included in the notice of assessment be struck therefrom.

The appellant will be entitled to its costs against the respondent.

*Judgment accordingly.*

The appeal of National System of Baking Limited, from the assessment by the Minister of National Revenue (Court Record No. 20342) for excess profits tax was heard

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by the Honourable Mr. Justice Angers at Calgary on the same date as the case reported. The facts were similar to those set forth above and the appeal was allowed by the learned judge whose written reasons for judgment were delivered on the same date as those in the case reported.

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BETWEEN:

THE WORKMEN'S COMPENSATION  
BOARD OF THE PROVINCE OF } SUPPLIANT;  
SASKATCHEWAN ..... }

AND

HIS MAJESTY THE KING ..... RESPONDENT.

*Crown—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—The Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, c. 303—Workmen's Compensation Board subrogated to rights of widow whose husband's death was caused by the negligence of a servant or employee of the Crown—Respondent's responsibility under Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c) not increased by ss. 3 of s. 9 of The Workmen's Compensation (Accident Fund) Act.*

Suppliant seeks to recover from the Crown the sum of \$8,715.92, representing the capitalization of the compensation which suppliant is liable to pay to Mary Bélanger, widow of Joseph Bélanger, and the children of the said Joseph and Mary Bélanger, under the provisions of the Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, c. 303, as the result of the death of Joseph Bélanger, caused by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

*Held:* That the Workmen's Compensation Board of the Province of Saskatchewan is, under the provisions of The Workmen's Compensation (Accident Fund) Act of that Province, duly subrogated to the rights of the widow of Joseph Bélanger and is entitled to claim from the respondent the reimbursement of the compensation which it has paid in part and is liable to pay to her.

2. That this action brought by suppliant has not and cannot have the effect of increasing the respondent's responsibility under ss. (c) of s. 19 of the Exchequer Court Act, R.S.C. 1927, c. 34. The Petition of Right brought by suppliant could have been instituted by the widow of Joseph Bélanger for herself and her minor children.



PETITION OF RIGHT brought by suppliant to recover from respondent the compensation which it has paid and is liable to pay on account of the death of a workman caused by the negligence of an officer or employee of the respondent.

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

*H. E. Sampson, K.C.* for suppliant;

*J. N. Conroy, K.C.* for respondent.

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

ANGERS J. now (April 10, 1947) delivered the following judgment:

The Workmen's Compensation Board of the Province of Saskatchewan by its petition of right seeks to recover from His Majesty the King the sum of \$8,715.92, representing the capitalization of the compensation which the suppliant is liable to pay to Mary Bélanger, widow of Joseph Bélanger, and their children under the provisions of the Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, chap. 303, as the result of an accident which occurred on September 3, 1942, in which the said Joseph Bélanger was killed.

The petition of right alleges in substance:

His Majesty the King in the right of Canada owns and operates an airfield at the city of North Battleford, province of Saskatchewan, known as No. 35 S.F.T.S., those in charge thereof being members of His Majesty's Air Forces in the right of Canada and servants of the Crown;

Joseph Bélanger, of the said city of North Battleford, was killed on September 3, 1942, at said No. 35 S.F.T.S., while working as labourer for one W. C. Wells, who had a contract for building hangars and runways for the said airfield. At the time of such accident the said Bélanger and three other labourers associated with him were hauling gravel by truck and unloading it on the edge of the runway on said airfield, his death being caused by being struck

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by Oxford Bomber No. BM 702, driven by LAC No. 992619, Robert Arthur Williamson, who landed the said plane on No. 1 runway and who was at the time a member of His Majesty's Air Forces in the right of Canada and a servant of the Crown;

the said Joseph Bélanger died leaving him surviving:

his widow, Mary Bélanger, aged 40,

and the following children:

Marie Marceline Bélanger, aged 14 years,

Helen Bélanger, aged 14 years,

Teresa Blanche Bélanger, aged 11 years,

Wm. Martin Bernard Bélanger, aged 9 years,

Howard Alton Bélanger, aged 6 years,

Ralph Roland Bélanger, aged 4 years, and

Frederick Allan Bélanger, aged 5 months;

the death of the said Joseph Bélanger was caused by the negligence of the said LAC Robert Arthur Williamson and of those in charge of the said airfield and by the defective system used upon the said airfield in connection with the landing of aeroplanes thereon;

the negligence of said LAC Robert Arthur Williamson consisted:

- (a) in turning from the taxi strip on which he was to the apron directly leading to and upon the said Joseph Bélanger and those working with him, he having previously seen and known that the said workmen were engaged in necessary work at the time and place in question;
- (b) in parking his plane where he did after seeing the workmen employed on the apron;
- (c) in not parking his plane nearest the hangar at which the ground crew servicing that particular flight were waiting;
- (d) in not parking his plane further west;

those in charge of the airfield at the time were guilty of negligence and the system in vogue at the airfield was defective, in not providing red flags or other signs around the area and at the place where the labourers were working and that care should be taken to avoid coming in contact with the men so working;

the system in vogue was defective and those in charge were negligent in not providing for a member of a ground crew to wave the said plane to a proper berth on the apron as soon as it entered the taxi strip;

the system in vogue was defective and those in charge were negligent in not inspecting at more frequent intervals the brake cable on the said plane, which cable had not been inspected for about 320 hours and the breakage of which contributed to the accident;

by reason of the said accident the widow and children of the said Joseph Bélanger became entitled under the provisions of the Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, chap. 303, to compensation from the Workmen's Compensation Board of the Province of Saskatchewan, the amount of such compensation being: as provided by section 32 of the Act, and the said Board is duly making payment of such compensation and will continue to do so as provided by the said Act, the total amount of the compensation for which the said Board is liable to the said widow and children being capitalized at \$8,715.92;

the said widow and children under section 9 of said Act have elected to claim such compensation from the said Board in lieu of bringing action against those responsible for the causing of said accident and by reason of such election the Board is subrogated to the rights of the said widow and children to claim damages on account of the said accident;

by reason of the premises the Workmen's Compensation Board of the Province of Saskatchewan claims the amount for which it is liable and so capitalized at \$8,715.92 to the said widow and children of said Joseph Bélanger.

In his statement of defence the Attorney-General on behalf of His Majesty the King, submits that the petition of right is bad in law in that it does not allege any cause of action against His Majesty or any facts giving rise to any liability for which His Majesty is bound or may be adjudged to respond and moreover that, if any cause of action against His Majesty be stated in the petition of right it is not a cause of action for which under the law

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a petition of right will lie; and reserving these and all other objections to the sufficiency in law of the petition, which he submits should be heard and determined before trial of the issues of fact herein, the Attorney-General says in substance:

he denies each and every allegation of fact contained in the petition, except that Joseph Bélanger was killed on September 3, 1942;

he denies that the persons mentioned in the petition, namely LAC R. A. Williamson and those in charge of the airfield and particularly of the plane involved in the accident, or any of them, were at any time officers or servants of the Crown;

in the alternative, if the persons above mentioned or any of them were officers or servants of the Crown, they were not at the time acting within the scope of their duties or employment;

the said Joseph Bélanger well knew that the work which he accepted was dangerous and he voluntarily incurred all the risks involved in the said work and in particular the risk of being injured by aircraft;

if the death of the said Joseph Bélanger was caused by a wrongful act, neglect or default, which is denied, such wrongful act, neglect or default, if death had not ensued, would not have entitled him to maintain an action and recover damages for the reason that the said Joseph Bélanger was injured solely as the result of his own fault or negligence, particulars of which are as follows:

- (a) the said Bélanger at the time of the injury was negligent in that he was unnecessarily standing upon the concrete parking strip, which he knew or should have known was a place of danger because it was to his knowledge customarily used and was then being used by aircraft moving into parking positions;
- (b) the said Bélanger was negligent in that he failed to keep a proper look-out and look for approaching aircraft and failed to see and avoid the aircraft which it is alleged struck him;

the Workmen's Compensation (Accident Fund) Act is not binding on His Majesty and the suppliant is not subrogated to the rights of the widow and children as alleged in the petition;

in the alternative, if any right of action arose by reason of the death of the said Joseph Bélanger, such right of action could not legally pass to the suppliant by assignment, subrogation or otherwise;

the suppliant is not the executor or administrator of the deceased Bélanger and further is not a person for whose benefit an action could be brought by such executor or administrator under the provisions of the Fatal Accidents Act, R.S.S. 1940, chapter 92;

neither the suppliant nor any person or persons suffered damages to the extent of \$8,715.92 or any damages;

the action by way of petition of right herein was not commenced within twelve months after the death of the said Joseph Bélanger, as required by section 5 of the said Fatal Accidents Act and by section 32 of the Exchequer Court Act.

The facts are simple and unchallenged. Joseph Bélanger, on September 3, 1942, date of the accident in which he was killed, was working as a labourer in the employ of one W. C. Wells, who had a contract for building hangars and runways at an airport at the city of North Battleford, province of Saskatchewan, known as No. 35 S.F.T.S. Bélanger, who at the time of the accident was, with three other labourers, hauling gravel by truck and unloading it on the edge of the runway, was hit by an airplane in charge of LAC Robert Arthur Williamson, which landed on the runway where he was working.

The widow elected to claim compensation for herself and her seven minor children under the Workmen's Compensation (Accident Fund) Act. She was granted a compensation as provided by section 32 of the Act, which capitalized totals \$8,715.92. The Workmen's Compensation Board has paid and is paying the said compensation to Mrs. Bélanger for herself and her children in monthly instalments spread over a period of years, depending on the age of the children.

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The Board, which claims to be subrogated to the rights of the widow and contends that the accident was caused by the negligence of the said Robert Arthur Williamson, an officer and servant of the Crown acting within the scope of his duties and employment, seeks to recover by its petition of right from His Majesty the King the said sum of \$8,715.92.

The petition of right is contested, the issues are joined and the solicitor for respondent moved to have the case entered for trial. It was set for the sittings of the Court commencing on the 14th day of September, 1944, in Regina.

At the opening counsel suggested that the Court might entertain argument only on the question as to whether there is a recourse against the Crown open to the Workmen's Compensation Board for the recovery of an amount in whole or in part, paid by it to a victim or the heirs of a victim of an accident under the Workmen's Compensation (Accident Fund) Act. Notwithstanding the omission by counsel to make application for leave to submit the questions of law before trial and the fixing of a date for that purpose in compliance with rule 149 of the General Rules and Orders of the Court and notwithstanding that other questions of law could have been disposed of on the same occasion, particularly that of the prescription of the action, I agreed, on the insistence of counsel, to entertain argument on the sole question of the existence of a recourse against the Crown in conditions similar to those prevailing herein.

The liability of the Crown for claims arising out of the death of or injury to any person is established by subsection (c) of section 19 of the Exchequer Court Act, the relevant portion thereof reading as follows:

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

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

As in the case of *McArthur v. The King* (1) the President held that a person enlisting in an active unit of the army is not an "officer or servant of the Crown" within the

meaning of section 19(c) of the Exchequer Court Act, Parliament amended the said Act by adding thereto section 50A, assented to on July 24, 1943, which is thus worded:

For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

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The question submitted for decision may be conveniently summed up thus: Has the Workmen's Compensation Board a recourse for the recovery of the sum of \$8,715.92, assuming that it can establish that the accident, of which Joseph Bélanger was victim, was caused by the negligence of the said Robert Arthur Williamson, an officer or servant of the Crown acting within the scope of his duties and employment?

It was submitted by counsel for suppliant that the Workmen's Compensation Board is, in virtue of section 9 of The Workmen's Compensation (Accident Fund) Act, subrogated to the rights of the widow and children of Joseph Bélanger. The material portion of section 9 reads as follows:

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitles him or his dependents to an action against some person other than his employer, the workman or his dependents if entitled to compensation under this Part may claim such compensation or may bring such action.

(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependents are entitled under this Part, the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependents.

(3) If the workman or his dependents elect to claim compensation under this Part, the board shall be subrogated to the rights of the workman or his dependents and may maintain an action in his or their names or in the name of the board against the person against whom the action lies and any sum recovered from him by the board shall form part of the accident fund.

It was urged on behalf of respondent that the Workmen's Compensation (Accident Fund) Act does not apply because it was not in force when the liability of the Crown for the death or injury to a person resulting from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment was created by the enactment of the Exchequer Court Act, which was assented to on June 23, 1887, and came into force on October 1,

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1887. This liability is determined by subsection (c) of section 19, which was originally subsection (c) of section 16; the relevant part of the latter read as follows:

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(c) every claim against the Crown arising out of any death or injury to the person or to property 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.

Section 16 became section 20 in chapter 140 of the Revised Statutes of Canada, 1916. The initial paragraph of section 20 and subsection (c) thereof are literally the same as those of section 16.

By chapter 23 of 7-8 George V, which came into force on August 29, 1917, 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.

In chapter 34 of the Revised Statutes of Canada, 1927, section 20 became section 19, which was word for word the same as the section inserted in chapter 23 of 7-8 George V.

By chapter 28 of 2 George VI, assented to on June 24, 1938, paragraph (c) of subsection 1 of section 19 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.

As may be seen the repeal of the former paragraph (c) and the substitution of the new one simply amounted to the striking out of the words "upon any public work" at the end of the paragraph.

By chapter 25 of 7 George VI, assented to on July 24, 1943, the Exchequer Court Act was amended by adding thereto section 50A, which reads thus:

For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.



By this section a person who was at any time since the 24th day of June, 1938, date on which chapter 28 of 2 George VI came into force, a member of the naval, military or air forces of His Majesty in right of Canada is explicitly declared to have been at such time a servant of the Crown.

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From June 24, 1938, members of the naval, military and air forces of Canada unquestionably rendered, by their negligence, the Crown subject to the provisions of paragraph (c) of subsection 1 of section 19.

I may note that when this new liability of the Crown was thus created The Workmen's Compensation (Accident Fund) Act of the Province of Saskatchewan was in force.

It was argued on behalf of respondent that provincial legislatures cannot by their own legislation vary and particularly add to the liability imposed upon the Crown in right of the Dominion of Canada by the enactment of the Exchequer Court Act on June 23, 1887.

In support of his argument counsel relied on the decisions in *Ryder v. The King* (1); *Rochon v. The King* (2); *Ching v. Canadian Pacific Railway Company* (3); *Gauthier v. The King* (4). I may say with deference that I agree with the judgments in these cases when they hold that a provincial statute cannot enlarge the liability of His Majesty the King in the right of Canada. The petition of right herein, instituted with the object of recovering from the respondent damages paid by the suppliant to the widow and the minor children of Joseph Bélanger, hit and killed on an airport at North Battleford by an airplane driven by a member of the air forces of His Majesty in right of Canada, while working as a labourer for one Wells, who was building hangars and runways on the said airport, does not come within the purview of the decisions aforesaid. It has not and cannot have the effect of increasing the respondent's responsibility under subsection (c) of section 19 of the Exchequer Court Act. The petition of right brought by the suppliant could have been instituted by the widow of the victim for herself and her minor children, had she not been content with setting forth a claim under The Workmen's Compensation (Accident Fund) Act, as

(1) (1905) 36 S.C.R. 462.  
 (2) (1932) Ex. C.R. 161.

(3) (1943) S.C.R. 451.  
 (4) (1917) 56 S.C.R. 176.

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she was entitled to do. As a result of the petition the Workmen's Compensation Board of the Province of Saskatchewan has partly paid and is liable to pay a compensation which has been capitalized at \$8,715.92. This is the sum which the Workmen's Compensation Board seeks to recover from the respondent on the ground that the suppliant is, under the provisions of section 9 of The Workmen's Compensation (Accident Fund) Act, subrogated to the rights of Mrs. Bélanger.

I cannot see that the subrogation provided by The Workmen's Compensation (Accident Fund) Act extends or even modifies in any manner the liability of the Crown. Mrs. Bélanger could unquestionably have instituted for herself and her minor children a petition of right with the object of claiming from the respondent the damages suffered as a consequence of the death of her husband. She obtained compensation from the suppliant and the latter now endeavours to recover from the respondent the sum which it is bound to pay.

In the case of *Bessie May Snell and The Workmen's Compensation Board of British Columbia v. His Majesty the King* (1), the facts were identical to those in the present case. It appears from the report that on October 27, 1943, Bessie May Snell made an application under the provisions of The Workmen's Compensation Act of British Columbia, R.S.B.C. 1936, chapter 312, for payment to her on behalf of herself and of her infant son of compensation in virtue of the Families' Compensation Act of British Columbia, R.S.B.C. 1936, chapter 93. This compensation was sought for the death of her husband in consequence of a collision between two motor trucks, one owned by one Dines and driven by the suppliant's husband and an army truck, property of His Majesty the King, driven by a member of the armed forces of Canada.

The suppliant's employment fell within part 1 of The Workmen's Compensation Act and the Board became obligated to pay to the suppliant the sum of \$40 per month during her lifetime, together with a monthly allowance of \$10 for her infant son until he reached the age

(1) (1945) Ex. C.R. 250.

of 16 years and thereafter of \$12.50 between the ages of 16 and 18 years, provided the child then regularly attended an academic, technical or vocational school.

Section 11 of The Workmen's Compensation Act of British Columbia contains (*inter alia*) the following provisions:

11. (1) Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.

(2) If the workman or his dependents bring such action and less is recovered and collected than the amount of the compensation to which the workman or dependents would be entitled under this Part, the workman or dependents shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependents as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

The Board thereby acquired a statutory right of subrogation. Apart from this the Board thought convenient to obtain from Mrs. Snell an assignment of her claims against His Majesty the King and other parties in respect of her husband's death.

The Board brought a petition of right against the Crown in the name of Mrs. Snell by virtue of its right of subrogation and also of the said assignment, which, being equitable only, required the filing of the petition in the name of the assignor (*Union Assurance Company et al. v. B. C. Electric Railway Company Limited* (1)). The respondent did not deny that the collision was due to the negligence of the driver of the army truck, but he disputed liability upon three grounds: (1) that Mrs. Snell, having elected to claim compensation from the Workmen's Compensation Board and having accepted it, is barred from maintaining a claim against His Majesty; (2) that, as she has assigned her right of action against the respondent, she is not entitled to maintain an action against His Majesty; (3) that the provisions of The Workmen's Com-

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(1) (1914) 21 B.C.R. 71, 76.

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pensation Act are not applicable to His Majesty and that the Board cannot acquire any right of action against him by subrogation under the said Act.

Mr. Justice Smith could not find support for any of these contentions. After stating that subsection (c) of section 19 of The Exchequer Court Act imposes a liability upon the Crown for the negligence of its officer or servant 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, that, as pointed out by the President in *Tremblay v. The King* (1), the language of this section does not only give jurisdiction to the Exchequer Court but that it imposes a liability upon the Crown which did not previously exist and that the provincial law applicable to circumstances such as those prevailing in the case before him is the law which was in force in the province on the 24th of June, 1938, when the amendment to section 19(c) came into force, the learned judge declared that on that date the relevant provisions of The Workmen's Compensation Act were in force in the Province of British Columbia.

After referring to the Interpretation Acts, R.S.C. 1927, ch. 1, s. 16 and R.S.B.C. 1936, ch. 1, s. 35, and quoting the text of said sections, which are alike and read thus: "No provision or enactment in any Act shall affect, in any manner (or way) whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby", Smith, D.J., made the following observations (p. 254):

It seems to me that the Workmen's Compensation Act in no way affects the liability of the Crown (Dominion) as created by Section 19(c) aforesaid. It neither adds to it, detracts from it, nor varies it in any manner whatsoever. *Dominion Building Corporation Limited v. The King*, (1933) A.C. 533 at 548. All it seeks to do in sec. 11 is to deal with the disposition of the damages as between the Board and the dependents of the deceased.

The learned judge then points out that this is evident from the language of Duff, J. in *Toronto Railway Company v. Hutton* (2) and quotes a passage therefrom, which is pertinent and interesting.

(1) (1944) Ex. C.R. 1 at 8.

(2) (1919) 59 S.C.R. 413 at 420.

Mr. Justice Smith held that the Crown was responsible in damages to Mrs. Snell and her child, and that they have individual rights.

His Majesty appealed. The Supreme Court dismissed the appeal and affirmed the judgment (1).

I deem it expedient to quote an extract from the reasons of Mr. Justice Kerwin (p. 83):

A petition of right was accordingly brought against the Crown by the widow for damages for Snell's death, (1946) 1 D.L.R. 632, (1945) Ex. C.R. 250. The accident having happened in such circumstances as entitled a workman's dependent to an action against some person other than the workman's employer, and the widow having claimed under The Workmen's Compensation Act, the Workmen's Compensation Board of British Columbia established thereby is by virtue of ss. (3) of s. 11 "subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other persons". The Board also took an equitable assignment in writing from the widow. The Board was joined as a co-suppliant, not as a necessary party,—since the claim is that of the widow on behalf of herself and her infant son—but as a proper party.

The dispute of the claim is founded upon the facts that the widow had a right to claim compensation under the provisions of The Workmen's Compensation Act, although she might choose not to exercise it; that she did make such a claim; that the Board ordered that certain monthly sums be paid to her for herself and for the son; and that these sums have been and are being paid. Although it is doubtful if the point is open on the pleadings, it was also argued that even if these circumstances did not defeat the present claim, the compensation awarded under The Workmen's Compensation Act should lessen *pro tanto* the sum awarded by the trial judge.

If the appellants' arguments were sound, they would apply as well between subjects as between the Crown and subject. It is well settled that it is only pecuniary loss for which compensation is to be paid under Lord Campbell's Act, 1846 (Imp.), c. 93, and legislation similar thereto, such as the British Columbia Families' Compensation Act, and that any pecuniary advantage a dependent has received from the death must be set off against her probable loss.

The learned judge then reviews the decision of the Privy Council in *G. T. R. v. Jennings* (2), an action under the Ontario Fatal Accidents Act. This part has no bearing on the present case.

Mr. Justice Kerwin then continues (p. 84):

In litigation between subjects, an action by the dependent of a workman whose death was caused by a third party would not be defeated by reason merely of the dependent's right to claim compensation under The Workmen's Compensation Act. If the dependent had claimed compensation, the Board, by ss. (3) of s. 11, would have been "sub-

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(1) (1947) 2 D.L.R. 81.

(2) (1888) 13 A.C. 800.

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rogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person". It is not necessary to determine precisely to what the words "or any outstanding part" refer, but I am satisfied that they would not apply so as to reduce the claim of the dependent against a subject wrongdoer. The Board is sub-rogated to the dependent's rights against the third party and the Board's rights would not be defeated or curtailed by anything done by the dependent. That is, as between subjects, it seems clear that the wrongdoer could not successfully contend that the Legislature intended that the receipt by a dependent of compensation under The Workmen's Compensation Act should be deducted from the sum otherwise payable under The Families' Compensation Act. If that were so, the sub-rogation of the Board to the dependent's right would be illusory. Liability to the same extent attaches to the Crown.

The judgment of Taschereau and Estey, JJ., delivered by the latter, contains, among others, the following observations, which seem to me relevant (p. 85):

So far as the Workmen's Compensation Board is concerned the Crown sets up a number of defences which may be summarized thus: that the Board suffered no pecuniary damage; the assignment is ineffective as against the Crown, and s. 11(3) of The Workmen's Compensation Act does not give any remedy to the Board against the Crown in the right of the Dominion.

An examination of Mrs. Snell's position under The Workmen's Compensation Act and under the sections of The Exchequer Court Act already referred to indicates that she had both a claim under the provincial Compensation Act and under The Exchequer Court Act. The contention here is that, having exercised her right and having accepted compensation under provincial legislation, that election on her part has barred her right to recover from the Crown in the right of the Dominion, if not completely then to the extent that she has recovered compensation under that Act.

Taschereau and Estey, JJ., then analyze briefly the decision of the Supreme Court in *Toronto Railway Company v. Hutton* (1) and conclude (p. 86):

It follows, therefore, that the position of the party whose negligence caused the injury is unaffected by the provisions of The Workmen's Compensation Act.

Reverting then to the claim of Mrs. Snell and the compensation allotted to her under The Workmen's Compensation Act, the learned judges make the following observations (p. 86):

The compensation under the statute is in no way a settlement of Mrs. Snell's claim for damages arising out of the negligence of the appellant. The basis for the compensation under the statute, that of "injury by accident arising out of and in the course of employment", is a much wider and different basis from that of a claim founded in

(1) (1919) 59 S.C.R. 413 at 421; (1919) 50 D.L.R. 785 at 790.

negligence. A computation of the claim is also as set out in the statute quite different from that which would be followed in a negligence action. Moreover, The Workmen's Compensation Act provides in effect that the claim of Mrs. Snell at common law for damages continues and may be enforced. It, therefore, follows that the contention of the Crown that whatever damages Mrs. Snell may have suffered have been recovered and because thereof she has no further claim is not tenable.

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Reference may be had with some interest to the decision of the Supreme Court in the case of *The King v. Canadian Pacific Railway Company*, rendered on February 4, 1947, and yet unreported, although not so precisely to the point.

For a definition of "subrogation" and the distinction between "subrogation" and "assignment", see *Stroud's Judicial Dictionary*, second edition, page 1960; *Words and Phrases*, permanent edition, volume 40, page 435, under sub-title "Legal or conventional"; *King v. Phoenix Assurance Company* (1), reasons of Farwell, L.J.

After a careful perusal of the argument of counsel, an attentive study of the doctrine and a fairly elaborate review of the precedents, I have reached the conclusion that the Workmen's Compensation Board of the Province of Saskatchewan was, under the provisions of The Workmen's Compensation (Accident Fund) Act of the said province, duly subrogated to the rights of Mrs. Joseph Bélanger and that it is entitled to claim from the respondent the reimbursement of the compensation which it has paid in part and is liable to pay to her. Needless to say, the suppliant will have to prove negligence on the part of an officer or servant of the respondent while acting within the scope of his duties or employment.

As the application that the Court should, before the trial, entertain argument on the question as to whether there is a recourse against the Crown open to the suppliant for the recovery of the amount which it is liable to pay to Mrs. Joseph Bélanger was made both by counsel for the respondent and counsel for the suppliant, the costs on this application and the hearing which followed will be costs in the cause.

*Judgment accordingly.*

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**BETWEEN:**  
 IRVING AIR CHUTE COMPANY, INC. . . APPELLANT;  
 AND  
 HIS MAJESTY THE KING . . . . . RESPONDENT.

*Patents—Reasonable compensation for use of invention—The Patent Act, 1935, ss. 19, 33—Order in Council P.C. 6982, dated December 4, 1940—Reasonable compensation a question of fact—Usefulness of invention—Value of invention to owner—Established royalty rule—Reasonable royalty rule—Use of invention of combination.*

Respondent entered into contract with S. for purchase of parachutes, the production and sale of which involved use of inventions covered by five patents owned by appellant, and gave S. indemnity against infringement proceedings under Order in Council P.C. 6982 of December 4, 1940. Appellant brought proceedings before Commissioner of Patents for reasonable compensation for use of inventions and appealed from the Commissioner's decision.

*Held:* That what is reasonable compensation for the use of an invention is a question of fact depending upon all the surrounding circumstances and that the usefulness and success of the invention is an important factor.

2. That the principles for measuring damages laid down in the infringement cases, although not binding upon the Commissioner in determining what is reasonable compensation under the Order in Council, should not be disregarded as inapplicable. The Commissioner should take into account the damages to which the owner of the patents would have been entitled against the user of the inventions covered by them, if the Order in Council had not been passed, measured by the profits the user would have made or by the established royalty if there is one, or in its absence by an estimated reasonable royalty, since the amount of such damages represents the value to the owner of the patents of the right that has been taken from him, but the amount of such damages, although a useful guide to the Commissioner, is not binding upon him for he must also take into account another factor, namely, that if the compensation for the use of the invention by a contractor for the Crown is to be reasonable, it must be fair not only to the owner of the patents covering the inventions, but also to the Crown, having regard to all the circumstances of the case. *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1910) 27 R.P.C. 721; (1911) 28 R.P.C. 157, approved.
3. That where the invention is of a combination of elements the essence of the invention is the combination, not any element in it, and the owner is entitled to compensation for its use.
4. That in fixing a reasonable compensation for the use of an invention of a combination the selling price of the article in which such invention is inseparably embodied so that it cannot be used apart from the article is a reasonable base for the application of a reasonable rate of royalty.
5. That when the Commissioner excluded the value of the canopy and shroud lines from the base to which he applied the rate of royalty he considered reasonable he acted on a wrong principle.



Appeal from decision of Commissioner of Patents under Order in Council P.C. 6982, dated December 4, 1940.

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The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*R. S. Smart, K.C.* for appellant.

*Gordon F. Henderson* for respondent.

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

The President now (March 21, 1947) delivered the following judgment:

THORSON, P.—This an an appeal from a decision of the Commissioner of Patents in proceedings taken by the appellant under Order in Council P.C. 6982, dated December 4, 1940, for reasonable compensation for the use of certain inventions. The Order in Council provides:

WHEREAS The Patent Act (1935), Section 19, provides that the Government of Canada may at any time use any patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation for the use thereof, and further provides that any decision of the Commissioner of Patents under the said section shall be subject to appeal to the Exchequer Court of Canada;

AND WHEREAS the Minister of Munitions and Supply reports that in certain cases it is desirable and in the public interest to protect persons engaged in the production of munitions of war or supplies or in the carrying out of defence projects aganst claims for infringement of patents or registered industrial designs;

Now, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Munitions and Supply, with the concurrence of the Secretary of State of Canada, and under and by virtue of the powers conferred by *The War Measures Act* and all other enabling powers, is pleased to order and doth hereby order:

That if the Minister of Munitions and Supply, on behalf of His Majesty the King in right of Canada or on behalf of His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland has agreed or hereafter agrees to indemnify or to protect any person, firm or corporation against any claims, actions or proceedings for the infringement of any patent or registered industrial design based upon the use of the invention or design covered thereby in the production or sale of munitions of war or supplies or in the carrying out of defence projects by such person, firm or corporation, then no claim, action or proceeding for the infringement of any such patent or registered industrial design based upon such use shall be made or instituted against such person, firm or corporation or his or its agents or subcontractors; but His Majesty shall pay to the owner of any such patent or registered

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industrial design which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design covered by such patent or registered industrial design, and any decision hereunder of the Commissioner of Patents shall be subject to appeal to the Exchequer Court.

And section 19 of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, provides:

19. The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.

On September 18, 1940, the respondent, through the Department of Munitions and Supply, entered into a contract with Switlik Canadian Parachute Limited (hereinafter called Switlik) for the purchase of parachutes, the production and sale of which involved the use of inventions covered by five patents owned by the appellant of which its Canadian subsidiary, Irvin Air Chute Limited, was the Canadian licensee. Proceedings for infringement of the patents were then brought against Switlik by the appellant and its Canadian licensee. Then the Order in Council was passed and the Minister of Munitions and Supply gave Switlik the necessary letter of indemnity, which not only freed it from infringement proceedings but also made the respondent liable for "such compensation as the Commissioner of Patents reports to be reasonable". On May 1, 1942, the appellant applied by petition to the Commissioner to fix the compensation. No further steps in the infringement proceedings were taken. At the time of the contract with Switlik the respondent also made a contract for the purchase of the same kind of parachutes with the appellant's Canadian licensee, Irvin Air Chute Limited. Subsequently, the terms of this contract as to the price of the parachutes were revised, but the amount to be paid by way of royalty was left undetermined, it being agreed by the respondent that in addition to the amount specified in the contract he would pay such amount by way of royalty in respect of each parachute as might be determined under the Order in Council to be payable in respect of each parachute manufactured and/or sold by Switlik for or to the respondent. While the jurisdiction under the Order in Council is confined to fixing the com-

pensation to the appellant for the use of its inventions by Switlik, the amount so fixed will also determine the amount of the respondent's liability by way of royalty under its contract with Irvin Air Chute Limited.

The appellant is the owner of the following five Canadian patents of invention, namely, (1) No. 255,164, dated November 3, 1925, for an invention of Guy M. Ball, relating to Body Harness for Aviators; (2) No. 273,872, dated September 13, 1927, for an invention of Leslie L. Irvin and Guy M. Ball, relating to Parachute Packs; (3) No. 304,455, dated September 30, 1930, for an invention of Hilbert Gustave Hamer, relating to Parachute Apparatus; (4) No. 355,200, dated January 7, 1936, for an invention of Leslie L. Irvin, relating to Parachute Apparatus; and (5) No. 355,647, dated January 28, 1936, for an invention of Leslie L. Irvin, relating to Parachute Apparatus. It is admitted for the purpose of these proceedings that all the patents are valid and that the inventions covered by them have been used by Switlik. And it seems to be agreed that the compensation should be found for the use of the inventions collectively rather than individually.

The parachute equipment in which the inventions covered by the patents were embodied consisted of a harness to be worn by the aviator to which there could be attached a container or pack having a canopy with shroud lines and a pilot chute packed therein.

Evidence relating to the patents was given by the appellant's president, George Waite, by way of affidavit submitted with the petition and made part of it. Paragraphs 6 and 7 of his affidavit set out the conditions that a free type parachute equipment must satisfy and the extent to which such conditions were satisfied. Then the almost universal extent to which parachute equipment embodying the inventions covered by the patents has been adopted appears from the following deposition in paragraph 9:

Free type parachutes and harness embodying the basic inventions covered by patents 255, 164 and 273, 872, are a standard equipment in the air forces and commercial air services in at least thirty-six countries, and for many years were the only free type parachutes used or issued therein. Moreover, in all the said countries except the United States the improvements covered by the subsequent patents are also embodied in the standard free type parachutes so used and issued.

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This does not mean that the success of these parachutes is due exclusively to the embodiment therein of the inventions covered by the five patents, but that they have contributed to such success is beyond dispute. In my opinion, the evidence that the inventions have been useful and successful is conclusive. The affidavit also sets out the appellant's royalty arrangements in various countries (Exhibits 2 to 7) and concludes with paragraph 21 as follows:

21. That from my experience in negotiating the above mentioned royalty contracts and other negotiations with manufacturers in the United States, I am able to say that in the industry of manufacturing parachutes a royalty of 10 per cent of the selling price is regarded as a reasonable royalty, subject to a reduction to  $7\frac{1}{2}$  per cent on any parachutes in excess of 10,000 per year.

No contradictory evidence was offered.

The Commissioner examined the inventions with reference to the prior art and expressed the opinion that they were not basic but merely inventions of improvements. He then dealt with the question of royalty and fixed a rate of 5 per cent for the first 5,000 parachutes produced and a rate of 3.75 per cent on those produced in excess of such number and applied such rate, not to the selling price of the whole parachute equipment, but only to the cost of manufacture of the harness and container or pack, leaving out all the rest of the equipment such as the canopy, shroud lines and pilot chute. Finally, he fixed a flat rate of \$2.00 per unit. He further named, although not asked to do so, a rate of 25 cents for container replacements and \$1.75 for harness replacements. From this award the appellant appeals and the respondent cross appeals.

This is the first case under the Order in Council and the only issue is whether the royalty of \$2.00 per unit is reasonable compensation for the use by Switlik of the appellant's inventions. On the basis of the selling price of approximately \$200 per unit, this works out at a rate of approximately 1 per cent. The appellant contends for a rate of 10 per cent with a reduction to  $7\frac{1}{2}$  per cent for each parachute in excess of 10,000. On the other hand, the respondent in its cross appeal contends that the amount reported by the Commissioner is extravagant, having

regard to the total result and ought to be cut in half. There is thus a wide difference between the parties.

Counsel for the appellant stated the respects in which he thought the Commissioner had erred as follows, namely, that there was error in his assumption that the amount of the compensation should be determined by relation to the breadth or narrowness of the claims in the patents; that he disregarded the principles of the *Meters* case (*infra*) in allowing a royalty on only part of the combination claimed; that he had misconceived section 33 of The Patent Act; that even on his own basis of calculation he had improperly reduced the number of parts on which he calculated the royalty; that he based the royalty on the cost of manufacture instead of the selling price; and that he failed to follow the reasonable royalty rule.

I may say at the outset that I am unable to see how the breadth or narrowness of the claims can be relevant. Counsel for the respondent took the position that the Court must look at the contribution made by the inventor to be able to determine what is reasonable compensation for the use of his invention and that the Court might look at the breadth or narrowness of the claims in the light of the prior art in order to ascertain the essence of the inventions and the advance in the art made by the inventor so that he may be compensated accordingly. This argument is open to several objections. It is not possible to depreciate the value of an invention by reference either to the prior art or the narrowness of the claim defining it, for only a slight change from the prior art may make all the difference between success and failure. Moreover, it is wrong to assume from the documents disclosing the state of the prior art that the structure of any particular patent shown therein solved the problem and that the invention under discussion is only a minor improvement, for that requires proof by appropriate evidence and there is no evidence that the prior art worked. Further, the essence of the inventions covered by the patents is to be determined by the language of the claims, and not apart therefrom. The issue is not whether the claims, all of which are admitted as valid, are broad or narrow, but what the inventions as defined by them are and what is

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reasonable compensation for their use by Switlik. What is reasonable is a question of fact, depending upon all the surrounding circumstances. A similar attitude was taken by Luxmore J. in *Applications by Brownie Wireless Co., Ltd.* (1), a case regarding the applications for the grant of compulsory licences on the ground that the patentees had refused to grant licences on reasonable grounds.

There he said:

The grant of the licence which is refused must be a grant "on reasonable terms", an elastic phrase which can only be construed with certainty with reference to the actual facts of each particular case. No one can hope to lay down any exhaustive rules to enable the question whether the terms of a proposed licence are reasonable or not to be answered with certainty in every case. The answer to the question must in each case depend on a careful consideration of all the surrounding circumstances. The nature of the invention covered by the patent, the terms of the licences (if any) already granted, the expenditure and liabilities of the patentee in respect of the patent, the requirements of the purchasing public, and so on.

This does not purport to be an exhaustive statement of all the factors to be considered. It seems clear, for instance, that regard should also be had to such factors as the usefulness and success of the invention. In the present case that is an important factor.

I am also of the opinion that section 33 of The Patent Act has no bearing on the issue before the Court.

The remaining criticisms of the Commissioner's decision are grouped under two main contentions. The first is that where there is an established royalty that is a useful key to the compensation to be paid; that there was an established royalty in the present case; and that the Commissioner failed to follow it. The second contention is that the royalty should be calculated on the selling price of the whole parachute equipment; and that the Commissioner erred in confining the rate fixed by him to the cost of manufacture of only the harness and the container or pack.

In support of both contentions counsel relied on *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (2). This was an action for infringement of patents for improvements in prepayment gas meters. Two patents were involved, the subject matter of the earlier one being a combination with a long driving pinion and a readily changeable crown

(1) (1929) 46 R.P.C. 457 at 473.

(2) (1910) 27 R.P.C. 721; (1911) 28 R.P.C. 157.

wheel in such a manner as to regulate the exact amount of gas supplied for a certain payment in accordance with the fixed price of gas for the time being, and that of the later one being an arrangement for closing the gas supply valve in the meter by means of a cam or inclined face, or its equivalent, and opening the valve by means of a spring. The defendant had sold meters importing one or both of the inventions. By consent judgment was given restraining the defendants from infringing the plaintiffs' patents and an inquiry as to damages was ordered. In arriving at the amount of his certificate the Master, under one head of damages, estimated that but for the defendants' sale of infringing meters the plaintiffs would have sold 5,000 more meters and he assessed the damage under that head at 13s. 4d. per meter as the profit which would have been made on the sale of each of the 5,000 meters. On proceedings to vary the Master's certificate the defendants contended, *inter alia*, that the Master should not have assessed the profit on the whole meter but only such portion as was attributable to the two inventions. The parts involving the inventions were of small intrinsic value and the profit on them represented about 1/44th of the profit on the whole meter. The defendants urged that these parts were unimportant, that the functions which they performed could be performed by many other well-known devices not constituting infringements of the plaintiffs' patents, and that their incorporation in the meters could not possibly justify the damage to the plaintiffs being measured by the profit on the whole meter. In support of their contention they relied upon *Clement Talbot Ltd. v. Wilson* (1) to which I shall later refer. *Eve J.*, however, held that this case had no application to the facts before him. It was his opinion that the mechanism protected by the patents was of the very essence of the meter and he held that the inclusion in the defendants' meter of the infringements resulted in the meter itself being an infringement and that the Master had rightly held that the profit on the meters was a proper factor to be taken into the calculation and not the profit only on the parts of the inventions. On the appeal from

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this judgment, upon which counsel for the appellant relies for his second main contention, the views thus expressed by Eve J. were not questioned. This will be further dealt with after the first contention has been disposed of.

In support of his first main contention, counsel relied upon certain statements by Fletcher Moulton L.J. in the Court of Appeal, at page 164:

There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price—in other words, where he grants licences at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The Court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the Courts consider that every single one of the infringements was a wrong, and that it is fair—where the facts of the case allow the Court to get at the damages in that way—to allow pecuniary damages in respect of every one of them.

The rule referred to has been described as the established royalty rule. The statement clearly indicates one manner of assessing damages in the case of sales of infringing articles, namely, that where there is an established royalty for the use of an invention in an article, such royalty may be used as the measure of damages for the infringement of the patent covering such invention. But Fletcher Moulton L.J. went further and suggested that where there was no established royalty the Court might estimate what could reasonably have been charged and use such estimate as the measure of damages. He continued as follows:

I am inclined to think that the Court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the Court to consider what would have been the price which—although no price was actually quoted—could have reasonably been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure.

The rule thus suggested may be referred to as the estimated reasonable royalty rule. The views expressed in this dictum, although *obiter*, were approved in *Watson, Laidlaw & Co.*



*Ltd. v. Pott, Cassels, and Williamson* (1) by Lord Salvesen in the Inner House of the Scottish Court of Session, and by Lord Shaw in the House of Lords who, in dealing with damages for the unauthorized sale or use of infringing machines in a market which the infringer, if left to himself, might not have reached, described a royalty as "an excellent key to unlock the difficulty" and stated that he was in entire accord with the principle laid down by Lord Moulton in the *Meters* case (*supra*). And Lord Shaw's statement was cited with approval by Kerwin J. in giving the judgment of the majority of the Supreme Court of Canada in *Colonial Fastener Co. Ltd. et al. v. Lightening Fastener Co. Ltd.* (2) And in *British Thomson-Houston Co., Ltd. v. Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek* (3) Lord Clyde considered the dictum authoritative. It is clear that in many cases its application would be fair and reasonable.

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Counsel next referred to cases in which the Courts have been concerned with the question of reasonable royalty in compulsory licence cases. In the *Brownie Wireless Co. Ltd.* case (*supra*) Luxmore J., in dealing with whether a royalty of 12s. 6d. on a certain article was reasonable, expressed the following opinion, at page 475:

There is in fact no necessary relationship between cost price or selling price on the one hand, and the royalty which a patentee is fairly entitled to ask on the other. The best test of whether a royalty is reasonable in amount or the reverse is: How much are manufacturers who are anxious to make and deal with the patented article on commercial lines ready and willing to pay?

Counsel also referred to *Re Beltfasteners Limited et al.* (4); *Re Glaxo Laboratories Ltd.* (5); *International Cone Co. Ltd. v. Consolidated Wafer Co.* (6); and *Celotex Corporation et al. v. Donnacona Paper Co. Limited* (7).

The established royalty rule has been applied for a long time in the United States. In *Clark v. Wooster* (8), Mr. Justice Bradley, delivering the opinion of the Supreme Court of the United States, said:

It is a general rule in patent cases, that established licence fees are the best measure of damages that can be used. There may be

(1) (1913) 30 R.P.C. 285 at 293;

(1914) 31 R.P.C. 104 at 120.

(2) (1937) S.C.R. 36 at 45.

(3) (1923) 40 R.P.C. 119 at 127.

(4) (1940) 57 R.P.C. 104.

(5) (1941) 58 R.P.C. 12.

(6) (1926) Ex. C.R. 143; (1927) S.C.R. 300.

(7) (1939) Ex. C.R. 128.

(8) (1886) 119 U.S. 322 at 326.

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damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant; and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subject of allowance by the court, under the authority given to it to increase the damages.

And *Vide* also *Tilghman v. Proctor* (1). The Courts in the United States have also adopted the theory of a reasonable royalty, similar to that suggested by *Fletcher Moulton L.J.* in the *Meters* case (*supra*), and counsel for the appellant cited a number of cases in which 10 per cent of the selling price of the infringing article was held to be a reasonable royalty: *Dunkley Co. v. Vrooman et al* (2); *A. Mecky Co. v. Garton Toy Co.* (3); *W. S. Godwin Co. v. International Steel Tie Co.* (4); *International Vitamin Corporation v. E. R. Squibb & Sons* (5).

Counsel for the appellant then referred to a number of cases in the United States Court of Claims, where it was required to fix a just and reasonable compensation for the use by the United States of inventions covered by patents. The problem was very similar to the one now before this Court. In *Carley Life Float Company v. United States* (6) the plaintiff was the owner of a patent covering life floats and had granted an exclusive licence to a certain company to manufacture and sell under the patent subject to royalties which varied from 20 per cent to 13·75 per cent of the actual selling price. The United States purchased from an unlicensed manufacturer a certain number of floats which infringed the patent. The Court of Claims applied the principles laid down by the Supreme Court of the United States in *Clark v. Wooster* (*supra*) and *Tilghman v. Proctor* (*supra*) and held that "just and reasonable compensation" to the plaintiff was 10·86 per cent of the total of the infringing sales, together with interest at 6 per cent from the last date of delivery to the date of judgment. The Court fixed the established royalty as just and reasonable compensation. And similarly in *Barlow v. United States* (7) the Court held that a royalty of 10 per cent established by a licence contract was a reasonable one. In *Olsson v. United States* (8) the plaintiff's claim

(1) (1887) 125 U.S. 136.

(2) (1921) 272 Fed. 468.

(3) (1921) 277 Fed. 507.

(4) (1928) 29 Fed. (2nd) 476.

(5) (1935) 27 U.S.P.Q. 440.

(6) (1932) 13 U.S.P.Q. 112.

(7) (1937) 34 U.S.P.Q. 127.

(8) (1938) 37 U.S.P.Q. 767.

was for compensation for the manufacture and use by the United States of howitzers embodying his invention resulting in savings to the United States in weight and manufacturing costs and other advantages of value in use. The Act of June 25, 1910, as amended by the Act of July 1, 1918, provided that whenever an invention described in and covered by a patent of the United States "shall hereafter be used by the United States without licence of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims". The Court held that the compensation to which the plaintiff was entitled was the fair and reasonable value to him of the property right or licence appropriated by the Government, based upon an implied agreement by the United States to pay reasonable and entire or just compensation for such value. It followed *Mamie C. Wood et al v. United States* (1) where the Court said:

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But this court, in the leading case of *McKeever* (14 C. Cls. R. 396; affirmed by the Supreme Court, see 18 id. 757), laid down a sufficient rule for such cases. The question to be determined is. What was the invention worth in the market? What would the parties have taken and paid if the matter had come to an express agreement? What would any person needing the invention have been willing to pay for it?

The Court then concluded that the reasonable and entire compensation to which the plaintiff was entitled must be an amount which the United States ought to have paid him, or would probably have been willing to pay, for a licence to use his invention by reason of its utility and the several advantages accruing to the United States by reason of its embodiment in the guns in question. The Court considered that this was less than the total monetary value of the savings and advantages to the United States by reason of such use and held that 25 per cent thereof, together with interest from the date of use, was a reasonable and entire compensation to the plaintiff. There is a striking resemblance between the rule in the *McKeever* case, adopted by the Court, and the test suggested by Luxmore J. in the *Brownie Wireless Co. Ltd.* case (*supra*) and it is interesting to note the manner in which the Court assimilates the rule to that of an estimated reasonable

(1) 36 C. Cls. 418 at 426.

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royalty and illustrates the way in which the value of the invention to the owner may not be the same as its value to the user of it. The most recent Court of Claims case cited was *Marconi Wireless Telegraph Company of America v. United States* (1). There Whaley, Chief Justice, said, at page 250:

The Courts look with favour toward the establishment of a reasonable royalty as a measure of compensation in a patent accounting. This method usually obviates many difficulties connected with the establishing of such items as costs, profits, apportionments, expense of doing business, etc., all of which are matters frequently difficult to ascertain in a legal procedure.

If the plaintiff has already established a royalty by a licence or licences, he has himself fixed the average of his compensation and if this has been established prior to the infringement the task of the Court then becomes easy.

The Court found that 10 per cent was a reasonable royalty since the patent in suit and another patent were licensed at a minimum royalty of 20 per cent and subsequently, after the patent in suit expired, licenses for the other patent alone were reduced to 10 per cent. It is to be noted that the legislation under which the Court of Claims cases were decided is similar in principle to the Order in Council under which the appellant's claim for compensation is made.

Counsel for the respondent took the position that the issue was not one of awarding damages but of fixing a reasonable compensation for use of the inventions pursuant to a statutory right; that no infringement of the patent or any tortious act by the Crown was involved and that cases dealing with the measure of damages for infringement of patent rights were not applicable. Indeed, so it was urged, there were no cases binding on the Commissioner and no guiding principles with respect to which he could have erred; all the Commissioner was required to do was to look at the inventions broadly, ask himself what they were worth, and make a jury award accordingly; and that an award so made ought not to be disturbed.

When the Crown makes use of an invention under section 19 of The Patent Act, 1935, it, in a sense, exercises a right reserved out of the patent granted by it and the statutory right to be paid reasonable compensation for the

use of the invention is not related to any infringement. Nevertheless, the very use of the word compensation connotes some loss to the owner of the patent from the use of the invention by the Crown. But the situation under the Order in Council, although similar, is not precisely the same, for it is clear that, but for the Order in Council and assuming the patents to have been valid and used by Switlik, the appellant would have had a good cause of action against Switlik for infringement of its patents and would have been entitled to damages, measured by the profit on the sale of the infringing parachutes as in the *Meters* case (*supra*) or according to the established royalty if there was one or an estimated reasonable royalty if there was not. This right would represent the value of the patent to the appellant so far as Switlik would be concerned. But the Order in Council has taken such right of action away from the appellant and substituted a statutory right of action against the Crown for reasonable compensation. It may, I think, be assumed that if it had been intended that the right of the appellant against the Crown should be identical with the right to damages, it would have had against Switlik the Order in Council would have so provided. But it has not done so. On the other hand, and to the extent that the damages would be in the nature of compensation, there could not be any great difference between the two rights, and a compensation fixed without regard to the right to damages could not be said to be a reasonable one. Under the circumstances, the principles for measuring damages laid down in the infringement cases, although not binding upon the Commissioner in determining what is reasonable compensation under the Order in Council, should not be disregarded as inapplicable. The Commissioner should take into account the damages to which the owner of the patents would have been entitled against the user of the inventions covered by them, if the Order in Council had not been passed, measured by the profits the user would have made as in the *Meters* case (*supra*) or by the established royalty if there is one, or in its absence by an estimated reasonable royalty, since the amount of such damages represents the value to the owner of the patents of the right that has been taken

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from him, but the amount of such damages, although a useful guide to the Commissioner, is not binding upon him for he must also take into account another factor, namely, that if the compensation for the use of the invention by a contractor for the Crown, as Switlik was, is to be reasonable it must be fair not only to the owner of the patents covering the inventions but also to the Crown, having regard to all the circumstances of the case.

Counsel for the appellant contended that an established royalty had been proved. He relied upon the appellant's licence agreements referred to in paragraph 15 of Mr. Waite's affidavit (Exhibits 2 to 7) in Austria, Canada, Sweden and Finland, Spain, Yugoslavia and Great Britain, together with Mr. Waite's deposition in paragraph 21 that in the industry of manufacturing parachutes a royalty of 10 per cent of the selling price is regarded as a reasonable royalty, subject to a reduction to 7½ per cent on any parachutes in excess of 10,000 per year, and urged that this statement was unchallenged. Counsel for the respondent contended that the royalties referred to did not establish a royalty applicable to the facts before the Commissioner. He pointed out that the licence agreements were not between parties dealing with one another freely and at arms' length but between the appellant and its subsidiaries; that there was no identity of subject matter in that the patents covered by them were not the same as those here in question; that the agreements gave exclusive rights of user and rights to use not only present but also future inventions; and that generally the considerations and circumstances surrounding the agreements were different from those that the Commissioner had to consider. In addition the agreements were all made prior to the war and there was nothing to indicate what would be a reasonable royalty under wartime conditions. The evidence showed an enormous increase in the number of parachutes required and such increase must be taken into account. The number which the Government had on hand in 1935 was only 301; and between 1935 and 1939 it ordered only 1,138, or an average of 285 per year. But between October 1939, and September 10, 1943, it placed orders for 44,682 parachutes made up as follows: 24,940 man-carrying chutes; 22,780

man-carrying chutes; 7,962 war supply order. The last-mentioned number was supplied by the appellant's Canadian subsidiary operating under a 10 per cent royalty arrangement with the appellant, but the first two numbers represent the orders placed with Switlik and the appellant's subsidiary. While the Commissioner's jurisdiction extends only to the fixing of compensation for the use of the inventions by Switlik, it was agreed that the total number ordered might be taken into account as indicative of the volume of the wartime requirements.

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Under all the circumstances the Commissioner declined to accept the rate of royalty suggested by counsel for the appellant and adopted as reasonable a rate of 5 per cent on the first 5,000 parachutes produced and 3.75 per cent on those in excess of 5,000.

While there was no evidence of any royalties other than those fixed in the licence agreements, it should be noted that even if a royalty had been established it would not have been more than a guide to the Commissioner. He took the view that it had not been established that the patented inventions before him formed the complete subject matter on which the royalties were set in the licence contracts and he also took into account the greatly enlarged wartime demand for parachutes and the fact that one of the patents was due to expire on November 3, 1943. I think he was justified in considering such factors and I can find no error in his rejection of the rate of royalty suggested on the appellant's behalf. Whether he should have gone so far as to cut it in half is another matter, on which there may be a difference of opinion, but while that is so, I am unable to say that the rate adopted is unreasonable under wartime conditions. Moreover, the principle of a rate on a sliding scale according to volume of production has been recognized by the appellant itself and has much to commend it. Under the circumstances I see no reason in law for disturbing the rate found by the Commissioner.

This brings me to the appellant's second main contention that the Commissioner ought to have applied the rate of royalty fixed by him to the selling price of the whole parachute equipment and that when he applied it only

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to the cost of manufacture of the harness and the pack, leaving out such other elements as the canopy and shroud lines, there was error on his part.

Counsel for the respondent relied upon *Clement Talbot Ltd. v. Wilson et al* (1), to which I have already referred. There the defendants had imported a car containing certain patented parts under circumstances constituting infringement of the plaintiff's patents. The patents related to a carburettor and a control mechanism, both car accessories. In an infringement action judgment was given for the plaintiffs, including an inquiry as to damages. The plaintiffs claimed the amount of the profit on the sale by them of a car with the patented accessories, but the Court of Appeal denied such claim and held the amount of the damages was the loss of profit by not selling the accessories. This case was relied upon by the defendants in the *Meters* case (*supra*), as already indicated, who contended that the patented parts in the meters were analogous to the car accessories in that case. But Eve J. disagreed. At page 730 he said:

I do not think there is anything in common between the accessories in that case and the parts embodying the inventions in this case. There the accessories were of a nature capable of being applied to any car, and were certainly capable of being and were in fact dealt with as separate. Here nothing of that sort takes place and the parts incorporating the invention are, in my opinion, component and essential parts of the meter regulating and controlling—from the Gas Company's point of view—the most important functions of the meter, that is to say, the supply of the exact amount of gas to which the consumer is entitled, having regard to the amount that he has paid and the current price of gas. In my opinion, the mechanism protected by these patents is of the very essence of the meter;

Counsel contended that the inventions covered by the patents were only for minor improvements in the pack and harness and were in the same class as the accessories in the *Clement Talbot Ltd.* case (*supra*); and that it rather than the *Meters* case (*supra*) should govern. To determine whether there is any foundation for such contention it is necessary to examine the patents and ascertain what the inventions covered by them are.

Patent No. 255,164 relates to a parachute harness. The Commissioner found that it was for an improvement over



the inventions covered by six prior patents; that the difference was one of construction that did not constitute a new principle; and that it was an improvement rather than a basic patent. He also noted that it would expire on November 3, 1943. Counsel for the respondent sought to extract the essence of the invention in order to determine the contribution to the art made by the inventor. His analysis was that the patent was for an improvement in a parachute harness whereby the waistband was made extensible through the side portions so that it was adjustable by means of buckles and that the essence of the advance over the prior art was the use of the side portions to permit the adjustment of the waistband. But, as counsel for the appellant pointed out, the nature of the invention cannot be disposed of so simply. It must be found in the claims as stated in the patent; they define the inventions and there is no need to go further. There are 28 claims in the patent, of which claims 1 to 6, 9, 10 and 25 are relied upon. Claim 1 reads as follows:

1. In a harness adapted for attachment to the body of an aviator the combination of a U-shaped main supporting strap, a waistband connected with the U-shaped main supporting strap, shoulder straps connected at similar ends in fixed relation to the U-shaped strap and extending upwardly in crossed relation and thence downwardly for positioning at the front of the aviator, and means adjustably connecting the opposite ends for movement along said sides of the U-shaped strap.

Here the invention claimed is a combination of four elements, namely, a U-shaped main supporting strap, a waistband, shoulder straps and adjustable means. It is not proper to say that the essence of the invention is the last element merely because it is the new one and the others are old. The essence of the invention of a combination is the combination itself. The remaining claims 2-6 and 9-10 are also claims to combinations with variations in respect of the elements. Claim 25 is of a different nature, claiming a U-shaped main supporting strap as a subordinate integer. The patent covered more, therefore, than the invention of an improvement in the adjustability of the waistband through the use of the side portions of the U-shaped strap; it covered the new combinations of elements of the harness, including the improved means for adjusting the waistband, resulting in an improved harness.

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Patent No. 273,872 which is the most important of the five patents, relates to parachute packs. The Commissioner noted that the inventors claimed a parachute pack which includes a harness, a container and a parachute folded therein. He referred to prior patents as disclosing that the combination of a parachute, a container and a harness was known as early as 1919 and 1920 and agreed with counsel for the respondent that the patent should be regarded as one for an improved container adapted to house a parachute and to be used with a parachute harness and not for a combination of a harness, a container and a parachute. Counsel for the respondent took the view that the essence of the invention consisted of four novel features, namely, the use of pockets in the pack in which to tuck the shroud lines folded back and forth in a zigzag manner, cutting the material on the bias so that the strain can be transmitted transversely across the fabric, the use of tongues or flaps to seal the pack and the use of two tongues instead of one to keep the pilot chute separate from the main parachute. He argued that there was neither a new parachute assembly nor a new pack and that the patent covered only inventions of minor improvements in the pack. This, in my opinion, is an incorrect analysis of the inventions covered by this patent. The contention that it covers only inventions of minor improvements in a parachute pack is quite unwarranted. It does far more than that as the language of the claims clearly indicates. The validity of the patent is admitted and that extends to the claims and each claim must be regarded as if there were a patent for it by itself. It was, therefore, not open to the Commissioner or to counsel for the respondent to determine what the inventions covered by the patent were by reference to the prior art or any source apart from the language of the claims for they define the inventions, and the definitions therein are conclusive. There are 28 claims in the patent of which claim 1 reads as follows:

1. In a parachute pack, a parachute including shroud lines, a container therefor comprising a back having flaps for releasable connection, means providing a series of pockets in said back for the orderly reception of loops of said shroud lines, and tongues extending from the edges of some of said flaps adjacent to the corners of the back to be set up

freely to provide corners of the container to approximate a box-like structure when the pack is closed, the said tongues opening outwardly in release of said flaps.

This is plainly a claim for the combination of a number of elements in a parachute pack, namely, a parachute including shroud lines, a container comprising a back and having flaps, pockets in the back for the shroud lines, and tongues from the edges of flaps. It is not necessary to a claim for a combination that the word "combination" should be used in it, if in fact a combination of elements is claimed as the invention: *Baldwin International Radio Co. of Canada Ltd. v. Western Electric Co. Inc. et al* (1). What is claimed as an invention is the combination in a parachute pack of the elements named with their specified limitations. No claim is made for any one of the elements by itself, such as the pockets in the back, but only for all of them combined together in it. Then some of the elements are in themselves subcombinations, as exemplified in claim 2, which reads:

2. In a parachute pack a container, a parachute packed therein having shroud lines, and pockets in said container for tucking said shroud lines when packing said parachute.

Here the claim is directed only to three elements in a parachute pack, namely, the container, the parachutes and the pockets. This is the broadest claim in the patent. Claim 3 is more limited. It reads:

3. In a parachute pack a container, a parachute packed therein having shrouds, and spaced pockets in said container having the bundle of shrouds laid back and forth zig-zag between the same and packed therein.

Claims 2 and 5 cover the combination of claim 3 with greater definition of the elements. Then claim 7 introduces a new element. It reads:

7. In a parachute pack, a main parachute, a container including a back and flaps to fold over the same and retain the parachute between them and the back of the container, pockets in said back permitting an orderly non-tangling arrangement and packing of looped ends of the shrouds of said parachute, the canopy of said parachute being folded and packed over the pockets containing said shrouds and out of danger of entanglement therewith, a pilot parachute to overlie said main parachute, and a loose tongue attached inwardly to one of said flaps to be interposed between said parachute so that the pilot parachute is contained between said tongue and the overlying flaps.

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Here there is a combination of five elements with their respective definitions and limitations, a container having a back and flaps, pockets in the back for the shroud lines, a main parachute, a pilot parachute and a loose tongue between the main parachute and the pilot parachute. Then claim 9 brings in yet another element, namely, the harness. It reads:

9. In a parachute pack the combination with an aviator's harness including suspension straps, a container adapted to receive the ends of the suspension straps therein, a parachute, shroud lines connecting the parachute with the ends of the suspension straps, means for separably placing the shroud lines in parallel lengths in substantially the same plane within the container, and means for releasably closing the container.

This combination includes the elements in claim 2 and also the harness with suspension lines and the suspension lines are required to extend into the container so that they may be connected with the shroud lines. Then claims 10 to 13 resemble claim 7 and claims 14 to 17 are like claim 1. Claim 18 is a claim to the material of the container cut on a bias as a subordinate integer. Then claim 25 relates to releasably connected flaps and a pad on the back, and claims 27 and 28 are for the corner flaps that seal in the pack. It is plain from what has been said that the patent includes a succession of combination claims. The minimum combination has only three elements, the container, the pockets, and the canopy with the shroud lines tucked into the pockets. Then a fourth element is added in another combination, namely, the loose tongue or flap between the main parachute and the pilot parachute. Then in another combination there are corner flaps or aprons, and finally, there is a combination including the harness. Practically every element in the whole parachute equipment is included in one or other of the combinations.

In all the combination claims the combination claimed includes the canopy and shroud lines. It is the combination that is claimed and it must be taken as the invention covered by the patent. The invention is in the assembly of the elements and not in any individual element. That being so, it does not matter that some of the elements are old and not the subject of separate inventions. From this it is obvious that it is entirely erroneous to speak

of the inventions covered by this patent as inventions of minor improvements in a pack. What is covered is a series of combinations of elements in a pack. There is, therefore, no justification in seeking the essence of the inventions in the pockets for receiving the shroud lines or in any other novel feature, as counsel for the respondent attempted to do, for these are not the inventions claimed. If the combination is the invention, then the essence of it is the combination, not any element in it, and it is wrong to speak of anything except the combination as its essence. It is the combination itself that is the novelty. This is established beyond dispute in *British United Shoe Machinery Company Ltd. v. A. Fussell & Sons Ltd.* (1), where Fletcher Moulton L.J. said:

If what you have claimed, and the monopoly which you have obtained, is for a combination, that combination is the novelty, and you have no obligation beyond accurately defining it.

And in the same case, Buckley L.J., at page 657, said:

The combination is the novelty and to sufficiently describe the combination is sufficient to describe the novelty;

These statements were approved by Rinfret J., as he then was, speaking for the Supreme Court of Canada in the *Baldwin v. Western Electric* case (*supra*), at page 104. *Vide* also Terrell on Patents, 8th Ed., pp. 78-81. The pockets in the back of the container to receive the shroud lines attached to the canopy are not the essence of the invention nor are they claimed as such. By themselves they are worth nothing; they become important only when used in connection with a flap that will open and a pilot chute and a main parachute with shroud lines tucked into them. It is only as part of a combination that the pockets function. The idea of having pockets for the shroud lines was itself not new, for that was referred to in one of the patents filed on behalf of the respondent, where the pocket was in the canopy, but the idea of the place where the pockets were put, namely, in the back of the container together with what was combined with them was new. In this case the Court is not really concerned with ascertaining whether the combination was novel or not. The claim for it is admitted as valid, so that its novelty cannot be denied. But even apart from the admission I think it is

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clear that there was the invention of a new combination. It is quite true that the idea of a combination of a harness, a pack and a container was known as early as 1919 or 1920, as the Commissioner says. But the invention of a combination in general terms is not claimed. It is only a particular combination that is claimed as a novel one, namely, the combination of a container, pockets in the container and a parachute with shroud lines where the pockets are in the back of the container and the shroud lines are laid back and forth in a zigzag manner all in one plane and tucked into the pockets; this combination was never claimed before. This was a substantial and important invention.

The test of a combination is that it should lead to a unitary result rather than a succession of results; that the result should be different from the sum of the results of the elements composing it; and that it should be a simple and not a complex result. In *British United Shoe Machinery Co. v. A. Fussell & Sons Ltd.* (1), Buckley L.J. said:

For this purpose a combination, I think, means not every collocation of parts, but a collocation of inter-communicating parts so as to arrive at a desired result, and to this, I think, must be added that the result must be what, for the moment, I will call a simple and not a complex result.

There may be an interaction between the elements so long as they combine for a common and simple result flowing from the combination and not attributable to any of the elements. The inventions covered by the patent completely answer these tests of a combination. The whole pack with the container, the pockets in the back, the canopy and the shroud lines, the pilot chute, the loose tongue and the flaps constitute one safety device, operating in such a manner that the elements interact upon one another so that when the aviator jumps and pulls the rip cord, the flaps open, letting the pilot chute out first, then the loose tongue lets out the main parachute and the shroud lines are released in an orderly manner from the pockets without any danger of entanglement, and since the shroud lines are attached through the pack to the harness the common and simple result is that the aviator is safely airborne. All the elements are necessary to this one result.

(1) (1908) 25 R.P.C. 631 at 657.

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Patent No. 304,455 relates to a parachute apparatus. The Commissioner described it as an invention of a quick release of the harness from the pack and regarded it as an improvement and not a basic patent. Counsel for the respondent pointed out that the invention was an improved coupling means for attaching a detachable pack to a harness enabling the aviator to put it on in front instead of at the back. Counsel for the appellant agreed that the invention was an improvement in the connections between the shroud lines in the pack and the suspension lines of the harness, but also pointed out that several of the claims, of which there are 45, were for combinations of various elements. For example, claim 1 reads:

1. In parachute apparatus the combination of harness for attachment to the body of an individual, a unitary pack comprising a container having a parachute releasably packed therein, means to open the container and means to detachably connect the unitary pack to the harness with the pack disposed at the front of the bearer.

This is the broadest claim directed to a combination which enables the pack to be held at the front. Then a particular and novel combination is claimed in claim 6 which reads:

6. In parachute apparatus a harness attachable to the body of an individual including suspension lines extensible when in operation upwardly above the individual, a releasable parachute pack, and complementary fastening devices on the pack and ends of the suspension lines constituting the sole connection of the parachute pack with the harness.

Here there is a combination of three elements, namely, a harness including suspension lines, a releasable parachute pack and complementary fastening devices all cooperating with one another towards a common and simple result. Then claim 11 is for a combination including a rip cord for the container at a side of the pack and claim 17 defines a sub-combination of shroud lines and fasteners. It may, I think, be said of this patent that almost every strap and fastener in the harness enters as an element into some one of the combinations claimed.

There is no controversy about Patent No. 355,200 which relates to a parachute apparatus. The inventions covered by it are of improvements in the adjusting means and quick release means in the harness by the use of a strap on which the quick release means moves and means whereby it is prevented from moving too far. The invention relates exclusively to the harness.

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And there is no real controversy with regard to Patent No. 355,647. The Commissioner said that the improvement covered by it was the use of a socketing device to hold the coupling means for attaching the harness to the pack. Counsel for the respondent described it as the keeper means adapted to hold the snap fasteners of the harness in a fixed position. But counsel for the appellant considered the invention a broader one as a combination of a single point release and a detachable pack.

In view of this analysis of the patents I am unable to see how the *Clement Talbot Ltd.* case (*supra*) can have any application to the facts of this case. There is no resemblance between the car accessories in that case and the parts embodying the inventions in this one. There the accessories were capable of being and were in fact dealt with separately. That could not be done in the case of the inventions embodied either in the harness or in the pack or in the parachute equipment as a whole.

The Commissioner took the view that "the patented inventions reside in the body harness, accessories and container only and do not extend to the main parachute, pilot parachute and kit bag". It was also his opinion that the inventor was entitled to royalties only on what he had invented, and that no royalties should be paid on what was in the public domain. This meant that in the case of inventions for improvements the royalties should be confined to the cost of the parts embodying such improvements. This was the same kind of argument as that which was rejected in the *Meters* case (*supra*). And it ought to be rejected here. The Courts have not adopted such arguments where they were assessing damages according to either an established royalty or an estimated reasonable royalty in cases where the parts of an article embodying the invention were not separable from it. In such cases the rate of royalty has been applied not to the cost of the parts embodying the invention but to the selling price of the whole article. And, in so far as the royalty cases are a useful guide to the Commissioner in determining what is reasonable compensation for the use of an invention, similar principles are properly applicable in cases where the only use that can be made of the invention



is through an article in which the invention is inseparably embodied and where there cannot be any use of it apart from such articles. In such case the selling price of the article, as in the case of the royalty cases, affords a reasonable base for the application of a reasonable rate leading to a reasonable result. The Commissioner did not hesitate to extend his royalty rate to the cost of the whole harness and the whole pack, notwithstanding the fact that there were old elements in each that were not claimed as inventions and were in the public domain. That he was right in doing so is, in my opinion, beyond dispute. I think he would have been right even if the only inventions had been those other than the combinations, but when the inventions of the combinations are taken into account there is no room for doubt. In such combinations as those defined in claim 1 in Patent No. 255,164 and claims 1 and 6 of Patent No. 304,455 there is hardly any part, either of the harness or of the pack, that is not included as an element of the combination and certainly all of them are essential and component parts thereof. There could, therefore, be no use of the inventions apart from the article in which they were embodied. And if the compensation is only for the use of the inventions, the value of the article in which the parts embodying them are inseparably included is a reasonable base for the application of a reasonable rate of royalty. The rate was properly applicable to the value of the harness and pack and there can, therefore, be no grounds for the respondent's cross appeal. Similarly, the Commissioner ought to have included in the base to which he applied his rate of royalty the value of such elements as the canopy and shroud lines. His failure to do so arises, I think, from a misconception of the nature of the invention. It is not correct to say that the inventions resided only in the body harness, accessories and container, for this leaves out all the combinations claimed in Patent No. 273,872, all of which include the canopy and shroud lines. It is not proper to omit these combinations from the computation and they must be taken into account. It is no answer to say that there was no separate invention covering the canopy and shroud lines and that they are, therefore, in the public domain and

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not subject to royalty, for there were inventions of combinations in which such elements were included with other elements. Indeed, there is hardly any element that was not so included in some one of the combinations. Even if royalties were payable only in respect of the value of the parts embodying the inventions, what justification could there be for excluding therefrom the value of the combinations of essential elements? And if the compensation is to be paid for the use of the inventions, why should compensation be denied for the use of the inventions consisting of the combinations, for that is really one of the effects of the Commissioner's award? The elements of the combinations claimed are inseparably included in the parachute equipment. The combination of the canopy and shroud lines tucked in a particular manner into the pockets at the back of the container is an example; it is not possible to separate the shroud lines attached to the canopy from the manner in which they are tucked into the pockets. The case is even stronger when account is taken of the fact that there is hardly any element that is not included in some one of the combination claims and that all are component and essential parts necessary to its working as a single safety device. There is almost complete identity between the parachute equipment and what is covered by the combination inventions. Under the circumstances there could not be a use of the inventions defined in the combination claims in Patent No. 276,782 apart from the parachute equipment and since the compensation is payable for the use of the inventions I see no reason why the value of the parachute equipment in which they are inseparably embodied should not serve as a reasonable base for the application of the rate fixed by the Commissioner. Certainly if this were a case where Switlik had to pay reasonable royalties for the use of the inventions covered by the patents, such royalties would be based on the selling price of the parachute equipment. That would have been the usual and normal method of computation. I am unable to find any reason for taking a different course in the present case and must, therefore, conclude that, when the Commissioner excluded the value of such elements as the canopy and shroud lines from the base to which he applied the

rate of royalty he considered reasonable, he acted on a wrong principle and that his resulting award cannot stand.

This leaves only the question of the quantum of compensation to be allowed. Counsel for the respondent took the view that a lump sum should be awarded for the total use of the inventions, but, in my judgment, this would not be proper, for just as each unit of parachute equipment would be an infringing article in infringement proceedings, so also there is a use of the inventions involved in the manufacture or sale of each unit and the compensation should, therefore, be fixed on a unit basis.

The Commissioner considered that a royalty based on the selling price was objectionable because of the variable factors therein over which the Crown had no control and concluded that a royalty based on the cost of production would eliminate the variable factors. Counsel for the respondent also stated that the present trend of decisions was towards using the cost of manufacture as the base for fixing royalties, but this statement is not supported by authority. In the present case the spread between the selling price and the cost of manufacture is not very great and counsel for the appellant had no objection to the cost of manufacture being used provided a proper royalty rate was used. The important thing after all is that the compensation should be a reasonable one. Undoubtedly, the usual and accepted method of determining the amount of royalties in respect of articles that are the subject of manufacture and sale is to compute them on the basis of the selling price of the article and I can see no real reason why the Commissioner, once he had fixed a rate which he considered reasonable, should not have applied it in the usual and accepted manner.

The Commissioner spoke of the royalty rate fixed by him as one-half of the percentage royalty asked by the patentee, but then proceeded to make a series of further reductions; first, by applying his reduced rate on increased volume, so that it went into effect after only 5,000 parachutes were produced; then, by applying his rate only to the cost of manufacture of the harness and pack; and finally, by a further slight reduction in reaching his flat rate of \$2.00 per unit; with the result that his final award

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works out at approximately one-eighth of the amount contended for by the appellant and 1 per cent of the selling price of the equipment. With the utmost respect to the Commissioner, I do not think this award is fair to the appellant and I find no warrant for such a low rate in the cases. If the rate fixed by the Commissioner is applied to the selling price of the parachute equipment, and the sliding scale is applied in accordance with the average of the number of units ordered from Switlik and the appellant's subsidiary, the result per parachute equipment unit will be approximately \$8.00. This amount per parachute equipment unit would, I think, having regard to all the circumstances, including wartime conditions, be reasonable compensation to the appellant for the use by Switlik of the inventions covered by the patents and the Court so finds. The result is that the appeal from the Commissioner's decision is allowed; that the award of compensation there made is set aside and an award of \$8.00 per parachute equipment unit substituted; and that the respondent's cross appeal is dismissed. The appellant is entitled to its costs of the appeal and cross appeal.

*Judgment accordingly.*

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BETWEEN :

MINERALS SEPARATION NORTH } PLAINTIFF:  
 AMERICAN CORPORATION .... }

AND

NORANDA MINES, LIMITED ..... DEFENDANT.

*Patents—Infringement—Use of xanthates in froth flotation concentration of ores—The Patent Act, 1923, ss. 7(1), 14(1), 43(1)—The Patent Act, 1935, ss. 37(1), 61(1)(a)—Specification should be construed fairly—Disclosures required in specification—Correct and full description of invention—Specification must not contain misleading statements—Inventor must disclose all necessary information and all useful information within his knowledge—Claim must be free from avoidable ambiguity or obscurity—Inventor must not claim what is useless—Specification the dictionary for the claims—Maxim ut res magis valeat*

*quam pereat—Selection patent—Nonpayment of application fees not a defence in infringement action—Anticipation—Unsuccessful experimentation not prior invention—Test of anticipation—Delay in bringing action for infringement not laches or acquiescence.*

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Plaintiff sued for infringement of its patent covering invention relating to new and useful improvements in froth flotation concentration of ores. Defendant attacked validity of patent.

*Held:* That a specification should be construed "fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent". *Hinks & Son v. Safety Lighting Co.* (1876) 4 Ch. D. 607 at 612 followed.

2. That the inventor has correctly and fully described his invention in its various aspects so that any person skilled in the froth flotation art would know precisely what the inventor has found to be new and useful.
3. That the inventor has fulfilled the duty of full disclosure required of him by section 14(1) of the patent Act, 1923.
4. That claim 6 is invalid for avoidable obscurity and ambiguity.
5. That the construction of a specification is a matter of law for the Court.
6. That the interpretation of the word xanthate in claim 9 comes within the application of the principle that "the specification itself provides the dictionary by which the scope and effect of the terms in the claims is to be ascertained", and the word should be read in the light of the inventor's definition in paragraph 4 of the specification. *Western Electric Co. v. Baldwin International Radio of Canada* (1934) S.C.R. 570 followed.
7. That it would be erroneous to construe the word xanthate in claim 9 as including a useless xanthate, such as cellulose xanthate, and declaring the claim invalid on that account, when the word is fairly capable of another meaning which will exclude cellulose xanthate and support the patent, particularly when such meaning is in accord with the common dictionary meaning of the word and clearly the meaning with which the inventor himself has used the term in the specification and that it is sound in principle and consistent with authority under the circumstances to resort to the maxim *ut res magis valeat quam pereat* and give effect to the construction that will validate the patent.
8. That the patent is not a selection patent.
9. That the patent contains a recital that the petitioner has complied with the requirements of the Patent Act, and it is not open to the defendant in an infringement action to deny the validity of the patent on the ground that the fees payable on the application for it have not been paid, even if such has been the case.
10. That the defendant has failed to discharge the onus of proving that the invention was previously known by Martin or that he had disclosed it in such manner that the invention had become available to the public.
11. That delay in bringing an action for infringement until just before the patent has expired is not laches or acquiescence on the part of the plaintiff.

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Action for infringement of patent.

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

*W. L. Scott, K.C.* and *E. G. Gowling, K.C.* for plaintiff.

*O. M. Biggar, K.C., P. C. Finlay* and *Christopher Robinson* for defendant.

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

The President now (May 28, 1947) delivered the following judgment:

This is an action for the infringement of letters patent 247,576, dated March 10, 1925, issued by the Commissioner of Patents to the plaintiff. The petition for the grant was made by Cornelius H. Keller, who assigned all his right, title and interest in and to his invention to the plaintiff.

The invention relates to "froth flotation concentration of ores" and is an improvement in the existing process. This requires description.

Ore, as extracted from the ground, is a mixture of minerals, some being valuable as containing the metals sought to be recovered and others being worthless material, such as silica or rock or as containing metals whose recovery is not desired. The worthless material is known as gangue and the purpose of any concentration of ores process is to separate the valuable minerals from the gangue. The ore is a physical mixture of minerals rather than a chemical compound, which means that the minerals can be separated by physical means and not by chemical reaction.

The valuable metals in the ore could be recovered at a smelter but there was always waste expense in transporting and treating worthless gangue. Efforts were continuously made to eliminate or lessen such expense by finding some process whereby the separation of the valuable minerals from the gangue could be done at the mine and only the valuable minerals sent to the smelter. Prior to the invention of the froth flotation process there were two ways in which this could be done. In some cases, where the ore

was rich, the valuable minerals could be picked out by hand. The other method was the use of the gravity concentration process. This was based on the difference in the specific gravities of the valuable minerals and the gangue. The ore was crushed and the crushed ore put in a tray and shaken in water either up or down or from side to side causing the valuable minerals, being heavier, to fall to the bottom leaving the gangue at the top. There were, however, many ores which did not lend themselves to picking the valuable minerals out by hand or to the gravity concentration process.

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A great advance took place when the froth flotation process was invented in 1905. In this process the ore was first crushed to a certain size. The crushed ore then went into a series of mills in which it was ground to the desired degree of fineness; some ores had to be ground more finely than others. The final grinding was invariably carried on in the presence of water. The finely ground ore included particles of the consistency of sand, called the sands, and also some very fine substances of the consistency of powder or fine mud, known as the slimes. When the final grinding was completed, the mixture of the sands, the slimes and the water was known as ore pulp. This was placed in a vat and more water was added to the mixture so that it flowed freely, about four parts of water to one of finely ground ore. There was added either to the ore in its final grinding stage or to the freely flowing ore pulp a substance known as a mineral frothing agent or reagent, the terms agent or reagent each being used, and the whole mixture was then violently agitated with air introduced into it. The purpose of the agitation was to mix the ingredients thoroughly and also to promote the formation of air bubbles with their resulting froth.

The secret of the success of the process lay in finding that some frothing agents, when added to the ore pulp, had the remarkable properties, when the mixture was violently agitated and air was introduced into it, not only of creating air bubbles in the mixture which rose to the top in the form of a froth, but also of causing the valuable minerals in the mixture to attach themselves to the bubbles and float to the top of the mixture in the froth that formed there. Such frothing agents were known as mineral frothing

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agents. The particles of gangue did not attach themselves to the bubbles but sank to the bottom of the mixture when the agitation had ceased. The froth into which the valuable minerals had been concentrated by the rising bubbles then overflowed or was otherwise removed from the top of the mixture. This froth with its valuable minerals was known as the concentrate. What was left in the mixture after the froth was removed was called the tailings. The tailings included the worthless gangue but also some valuable minerals which had not risen with the froth. The tailings were then run through a series of further processes of the same kind with a view to concentrating in the fresh froth such valuable minerals as had not floated to the top in the previous process until it was no longer economical to do so. When no more valuable minerals could be economically recovered the remaining tailings, consisting mostly of gangue but still containing some valuable minerals, were run off to a dump.

The success of the froth flotation process depended upon the use of an effective mineral frothing agent. Many different kinds were referred to during the course of the trial, a very good one being steam distilled pine oil. The mineral frothing agents varied in effectiveness with different types of ores, and metallurgists and others engaged in the process used the kind of mineral frothing agent that gave the best results when applied to the particular type of ore with which they were working; sometimes a combination of mineral frothing agents was required.

Ore pulps might be acid, alkaline or neutral and it was found that with some mineral frothing agents and some kinds of ores the froth flotation worked best in an acid pulp or circuit. If that was so sulphuric acid was added to the pulp to make it acid. Sulphuric acid by itself was not a mineral frothing agent. Sometimes, on the other hand, the best results were obtainable in an alkaline pulp or circuit in which case an alkali, such as caustic soda, was added to the pulp to make it alkaline. Similarly, if a neutral pulp produced the best results the necessary steps were taken to make it such.

Just as there were some valuable minerals left with the gangue that was run out with the final tailings, so there was some gangue in the concentrate. Where the con-



concentrate was of insufficient grade to send to a smelter because of too much gangue it was run through another flotation to eliminate the gangue as far as possible. The tailings from the concentrate were called middlings, and these were also run through flotation processes to recover the valuable minerals in them until it was no longer economical to do so. Sometimes, further grinding of the minerals in the concentrate was needed.

The concentrate always had to be cleaned and dried before it could be sent to the smelter and filtration of it was always necessary. Some of the water could be siphoned off but the thick pulp had to be run through a filter and the water squeezed out by suction, leaving a cake almost dry.

The froth flotation process did not entirely supersede the gravity one, for at some mines both processes were used. The gravity process was used to the extent that was possible and then the tailings from the gravity concentrator went to the flotation plant for further treatment by the froth flotation process.

An improvement was made in the froth flotation process about 1910 when it was found that certain minerals could be selected from the others by froth flotation. This was known as selective froth flotation and was most usually applied to lead zinc ores. By the use of certain mineral frothing agents the lead bearing minerals could first be floated off, the resulting froth being a concentration of the lead and some other metals, such as silver, which tended to go with it. The lead concentrate thus formed went separately to the smelter. The tailings left after the lead concentrate was removed, containing the gangue and the zinc and other metals, were then treated with some other suitable mineral frothing agent that would float off the zinc separately.

When the concentrate was cleaned and dried it was sent to the smelter which completed the work of recovering the valuable metals in it. Even with the selective flotation process it was not yet possible to take out of the lead concentrate such metals as gold and silver as might be combined with the lead or which tended to go into the concentrate with it. The necessary separation had to be done at the smelter. The same was true with regard to the

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metals that might be combined with the zinc in the zinc concentrate or which tended to go into the concentrate with it.

While the froth flotation process was a remarkable one and made possible the development of mines with low grade ore bodies, it did not produce complete recoveries of the valuable minerals in the ore, for some still remained in the tailings and, on the other hand, there was still room for improvement in the grade of the concentrate which was measured by the ratio of the valuable metals in it to its total volume. To the extent that there was worthless material in the concentrate there was still a waste of transportation and smelter charges, since they were applicable to the volume of the concentrate and the smelter paid only for the valuable metals contained in it.

Moreover, although great success attended the froth flotation process in respect of the kind of ores on which it would work, it did not work at all on oxide ores and, indeed, on oxidized ores it did not work unless the oxidized ores were first sulphidized.

This was the state of the art known as froth flotation concentration of ores prior to the improvement proposed by Keller. Keller was an assayer on the staff of the plaintiff working at San Francisco, and it appears that he was seeking a sulphidizing agent that would enable the valuable minerals in oxide ores to be concentrated by the froth flotation process, when he hit upon an improvement in the froth flotation process itself late in 1922. His proposals were embodied in the specification of an application for a United States patent filed October 23, 1923. The patent issued as No. 1,554,216 and was dated September 22, 1925. The patent in suit corresponds exactly with the United States patent.

The essence of the Keller invention, which may be called the Keller process, was that he proposed the use of certain new agents, which were not themselves frothing agents, in addition to the mineral frothing agents already in use. The basic new agents whose additional use in the froth flotation process was proposed were certain defined substances known as xanthates. Analogous substances were also found to be useful under specified circumstances.

Claims were not made to any xanthates or analogous substances as new substances, but only to their use along with mineral frothing agents.

So far as the Keller process relates to the use of potassium or sodium xanthate it has proved very useful. The efficiency of the former froth flotation process has been substantially increased. In some cases the improved process makes better recoveries of the desired valuable minerals; in others it makes the same recoveries with less quantities of mineral frothing agent; sometimes the increased efficiency is seen in reducing the time required for agitation; the time required for filtration of the concentrate has been reduced by as much as one-half; and the selective froth flotation is made more effective. When the Keller process was adopted at the big Anaconda mine after a competitive test it created a great stir. It has been very extensively used all over the world and many millions of tons of ore have been treated by it. Many of the biggest mining companies in Canada have licences under the patent and use the process at their mines, for example, International Nickel Company, Consolidated Mining and Smelting Company, Hudson Bay Mining and Smelting Company, Britannia Mining and Smelting Company and others (Exhibit G 14). The invention made by Keller was, in my opinion, a very meritorious one.

The defendant is one of twenty Canadian mining companies that have refused to take out licences under the patent and this action is brought to enforce the plaintiff's rights. The defence consists of attacks on the validity of the patent.

Consideration of these attacks will involve examination of the terms of the specification. The paragraphs have been numbered for convenience of reference. Paragraphs 1 to 8, around which controversy revolves, read as follows:

1. Be it known, that I, Cornelius H. Keller, a citizen of the United States of America, and a resident of San Francisco, County of San Francisco, State of California, Chemist, have invented certain new and useful improvements in Froth Flotation Concentration of Ores and do declare that the following is a clear, full, and exact description of the same.

2. This invention relates to the froth-flotation concentration of ores, and is herein described as applied to the concentration of certain ores with mineral-frothing agents in the presence of certain organic compounds containing sulphur.

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3. It has been found that certain sulphur derivatives of carbonic acid greatly increase the efficiency of the froth-flotation process when used in connection with mineral-frothing agents. The increased efficiency shows itself sometimes in markedly better recoveries, sometimes in effecting the usual recoveries with greatly reduced quantities of the usual mineral-frothing agents, and sometimes in greatly reducing the time needed for agitation to produce the desired recoveries.

4. The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives or carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance. These form anions and cations in solution. Excellent results were also obtained by agitating ore pulps with the complex mixture produced when 33½ per cent of pine oil was incorporated with an alcoholic solution of potassium hydrate, and xanthates or analogous substances were produced by adding carbon disulphide to this mixture.

5. The galena-bearing froth obtained with xanthates or analogous substances used at the rate of 0.2 pounds per ton of ore had a characteristic bright sheen, like a plumbago-bearing froth, and seemed to make a more coherent froth than when other materials were used on the same ore.

6. In general the substances referred to are not mineral-frothing agents,—producing only a slight scum, and some evanescent frothy bubbles, when subjected to agitation which would produce mineral-bearing froth on an ore pulp in the presence of a mineral-frothing agent. The substances are effective in enabling a selective flotation of lead and zinc; and cause uncombined silver, if present, to tend to go into the lead concentrate rather than with the zinc, where these are separated in separate concentrates: Usually pre-agitation is unnecessary, the brightening and other effects seeming to be practically instantaneous. The pulps may be either acid, alkaline or neutral according to circumstances.

7. Two sticks of caustic potash weighing perhaps 15 grams were partly immersed in about 80 cc. of commercial carbon disulphide and kept for about ten days in a closed bottle containing some air in the warm region of the laboratory where were the hot plates used for drying. These eventually yielded a yellow or orange salt which was used with pine oil at the rate of approximately half a pound to a ton of ore in concentrating Hibernia ore from Timber Butte Mining Company. The test was with a neutral pulp, and the concentrates were seen to be clean with brightened lead sulphide particles.

8. For laboratory purposes potassium xanthate was prepared as follows: 198.4 grams of 88.5 per cent caustic potash was dissolved in 524 grams ethyl alcohol (denatured No. 5 formula) at a temperature of 124° F., in a reflux condenser. The solution was cooled at 58° F. It contained a large excess of alcohol over the theoretical amount needed for the subsequent reactions. To this was added, while stirring, and in a cooling bath, the theoretical amount of carbon disulphide. The reaction was substantially instantaneous, producing a thick pulp of potassium xanthate. The pulp was cooled and centrifuged in a laboratory machine, yielding crystals containing about 20 per cent moisture. The yield thus obtained was 74.7 per cent. Another 17.5 per cent was obtained by evaporation of the mother liquor. Both the centrifuged crystals and the residue from the mother liquor gave excellent results in flotation. It was found in cases where sulphuric acid was used that the centrifuged material yielded better results than the uncentrifuged.

Then follow paragraphs 9 to 19 which describe experiments and tests, several of them on a large scale, made on various types of ores, with their results. These need not, I think, be set out. There are 11 claims in the patent but the only ones in suit are claims 6, 7, 8 and 9, which read as follows:

6. The process of concentrating ores which consists in agitating a suitable pulp of an ore with a mineral-frothing agent and an alkaline xanthate adapted to co-operate with the mineral-frothing agent to produce by the action of both a mineral-bearing froth containing a large proportion of a mineral of the ore, said agitation being so conducted as to form such a froth, and separating the froth.

7. The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate.

8. The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of potassium xanthate.

9. The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate and a frothing agent.

The main attacks upon the validity of the patent are directed against the specification, both in respect of the disclosures and against the claims in suit. The attacks upon the disclosures consist of a main general attack and four specific charges; those against the claims are of a specific nature. In view of the final conclusion I have reached, it will be necessary for me to deal with each of the attacks made. There are so many of them that these reasons for judgment, if they are to deal properly with the issues raised, some of which involve questions of considerable difficulty, cannot be otherwise than lengthy.

The requirements of a valid patent specification have in Canada been reduced to statutory form. Section 14 of The Patent Act, Statutes of Canada, 1923, chap. 23, which governs the interpretation of the present specification, provides in part as follows:

14. (1) The specification shall correctly and fully describe the invention and its operation or use as contemplated by the inventor. It shall set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter. It shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

The Act speaks of the specification as ending with a claim or claims, which indicates that it has two parts, the first dealing with what leads up to the claims, which may be

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called the disclosures, and the claims themselves. At the same time it should be borne in mind, in considering the cases, that the term specification in Canada includes both the disclosures and the claims.

The requirements of a specification generally were well stated by the former President of this Court in *De Forest Phonofilm of Canada Limited v. Famous Players Canadian Corporation, Limited* (1), but he did not attempt to separate the requirements into those that relate only to the disclosures and those that relate only to the claims. This is not easy to do for some requirements, such as freedom from avoidable obscurity or ambiguity, are applicable to both; nevertheless, the requirements relating to the disclosures are not the same as those relating to the claims; and both sets of requirements must be complied with. In view of the attacks upon the disclosures it is, I think, desirable to set out, with more particularity than section 14 (1) of the Act does, the duties of disclosure required of an inventor in consideration of the grant of a valid monopoly in respect of his invention.

Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full. The purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application. The description must be correct; this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple and distinct as the difficulty of description permits. It must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed and render it difficult for them without trial and experiment to comprehend in what manner the invention is to be performed. It must not, for example, direct the use of alternative methods of putting it into effect if only one is practicable, even if persons skilled in the art would be likely to choose the practicable method. The description of the invention must

also be full; this means that its ambit must be defined, for nothing that has not been described may be validly claimed. The description must also give all information that is necessary for successful operation or use of the invention, without leaving such result to the chance of successful experiment, and if warnings are required in order to avert failure such warnings must be given. Moreover, the inventor must act *uberrima fide* and give all information known to him that will enable the invention to be carried out to its best effect as contemplated by him. This statement of the extent to which the disclosures must go in describing the invention and its operation or use as contemplated by the inventor, if the patent is not to fail for either the ambiguity or insufficiency of such description, is abstracted from a number of cases cited by counsel for the defendant: *Smith Incubator Co. v. Seiling* (1); *French's Complex Ore Reduction Co. v. Electrolytic Zinc Process Co.* (2); *The British Ore Concentration Syndicate Limited v. Minerals Separation Limited* (3); *Simpson v. Holliday* (4); *Natural Colour Kinematograph Co. Ltd. v. Bioschemes Ld. (re G. A. Smith's Patent)* (5); *Badische Anilin und Soda Fabrik v. La Société Chimique des Usines du Rhone and Wilson* (6); *Gold Ore Treatment Company of Western Australia Ld. v. Golden Horseshoe Estates Co. Ld.* (7); *Vidal Dyes Syndicate Ld. v. Levinstein Ld.* (8); *The Franc-Strohmenger and Cowan Inc. v. Peter Robinson Ld.* (9). Section 14. (1) does not, in my opinion, alter the requirements of the law, as laid down in the cases; it merely puts them into statutory form. If they are not complied with, then the patent fails, not for ambiguity or insufficiency of description, as the cases put it, for the Act does not refer to these terms, but for non-compliance with statutory conditions. The result is the same.

When it is said that a specification should be so written that after the period of monopoly has expired the public will be able, with only the specification, to put the invention to the same successful use as the inventor himself could do, it must be remembered that the public means persons

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| (1) (1937) S.C.R. 251.         | (6) (1897) 14 R.P.C. 875 at 888. |
| (2) (1930) S.C.R. 462.         | (7) (1919) 36 R.P.C. 95 at 132.  |
| (3) (1909) 26 R.P.C. 33 at 47. | (8) (1912) 29 R.P.C. 245 at 269, |
| (4) (1866) 1 E & I. App. 315.  | 273.                             |
| (5) (1915) 32 R.P.C. 256.      | (9) (1930) 47 R.P.C. 493 at 501. |

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skilled in the art to which the invention relates, for a patent specification is addressed to such persons. In the present case, the specification is addressed to such persons as skilled metallurgists and chemists engaged in the art of froth flotation concentration of ores. It should, therefore, be looked at through their eyes and read in the light of the common knowledge which they should possess. But it is important to note that such common knowledge must be limited to that which existed at the date of the specification.

The main general attack on the disclosures was that it fails to describe the invention at all. The words of each paragraph were minutely scrutinized. It was contended that paragraph 2 indicated that the invention was really wider than "herein described" and might be applied to something altogether different from the concentration of ores, and that the references to "certain ores" and "certain organic compounds" left the reader in the dark as to the kind of ores and the kind of organic compounds; that paragraph 3 did not advance the definition since it did not indicate which sulphur derivatives of carbonic acid were meant: that in the first part of paragraph 4 the words "herein disclosed in some detail as carried out with" the salts mentioned showed that the inventor was careful not to say that the invention consisted in the use of such salts leaving him free to say that such use was not restrictive but merely a particular example of his invention, that the words "an organic radical" meant "any organic radical", that the phrase "such as an alkyl radical" means "for example, an alkyl radical", that two possible interpretations could be given to the word "alkyl", that the word "also" in the third paragraph indicated that something that was not "xanthates" was meant, that the first and second sentences added nothing to what the invention was and the third presented a problem in construction and that up to the end of this paragraph the boundaries of the class of sulphur derivatives recommended for use remained undefined; that paragraphs 5 and 6 gave no help; that paragraph 7 lead into new territory and dealt with a compound that was not xanthates and had no organic radical in it and thus was a considerable extension of the scope of the invention; that there is a description of certain reagents which are recommended, that the invention as described



is an invention of the use of certain sulphur derivatives of carbonic acid in the most general terms; that paragraph 8 is confined to a description of how potassium xanthate is made "for laboratory purposes" only, that the term "theoretical" is another indication of the carelessness and vagueness and unsatisfactory character of the specification, which might have been made clear, simple and definite; that the inventor approached the question of describing the invention but was careful to sheer off so that he could, according to the circumstances, contend that his invention was a narrow or broad one; that nobody can tell what sulphur derivatives are recommended but that all that can be gathered is that there are certain sulphur derivatives of carbonic acid which, with certain ores, the inventor thinks will be useful.

There is no doubt that the specification is not well drawn, but there is a vital difference between imperfection of draughtsmanship and non-compliance with statutory requirements. There may be faults of expression that do not affect the validity of the patent. A patent specification is not an exercise in composition, and the Court should not concern itself with faults of language that do not amount to breach of the statutory conditions for the grant of the patent. The proper attitude of mind of the Court in construing a specification was well described by Sir George Jessell, M.R. in *Hinks & Son v. Safety Lighting Co.* (1) when he said that it should be construed "fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent." This statement has received full acceptance. The need for fair construction was stated by Lord Parmoor in the House of Lords in the *Natural Colour v. Bioschemes* case (*supra*), at page 270. The Supreme Court of Canada has also shown the same attitude. In *French's Complex Ore Reduction Co. v. Electrolytic Zinc Process Co.* (2) Rinfret J., as he then was, in delivering the judgment of the Court, approved Sir George Jessell's statement and said that the specification "should not be construed astutely". And in *Baldwin International Radio Co. of Canada Ltd. v. Western Electric Co. Inc. et al.* (3) Rinfret J., again speak-

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(1) (1876) 4 Ch. D. 607 at 612.

(3) (1934) S.C.R. 94 at 106.

(2) (1930) S.C.R. 462 at 470.

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ing for the Court, said that the respondents were entitled to have the claims interpreted "by a mind willing to understand, not by a mind desirous of misunderstanding", thus approving the remarks of Chitty J. in *Lister v. Norton Brothers and Co.* (1). And in *Western Electric Co. v. Baldwin International Radio of Canada* (2) Duff C. J., giving the judgment of the Court, pointed out that where the Courts have been satisfied that there was a meritorious invention they have resorted to the maxim *ut res magis valeat quam pereat*, and said:

And, where the language of the specification, upon a reasonable view of it, can be so read as to afford the inventor protection for that which he has actually in good faith invented, the Court, as a rule, will endeavour to give effect to that construction.

The test of whether a specification complies with the requirements of the first sentence in section 14.(1) is whether persons skilled in the art, on reading the specification in the light of the common knowledge existing at its date and being willing to understand it, would be unerringly led to the invention and be enabled to put it to full use.

The first criticism in the attack on the disclosures for failure to describe the invention, namely, that paragraph 2 indicates that the invention may be applicable to something quite different from the concentration of ores may be dismissed offhand as hypercritical; paragraph 1 makes it clear that the invention is one of new and useful improvements in froth-flotation concentration of ores; nothing else is contemplated or could reasonably be inferred. The next comment is that the definition of an invention need not appear in a single sentence or paragraph, so long as it appears in the disclosures as a whole. This is particularly true in the case of inventions that are difficult of description. Descriptions of inventions involving the use of chemical substances are frequently difficult by reason of the nomenclatures of chemistry and the limits of their application. The description of the invention under review is of such a nature. All that need be said further with regard to paragraph 2 is that the terms "certain ores" and "certain organic compounds containing sulphur" are not yet defined. The description of the invention is advanced in the first sentence of paragraph 3 by the reference to

(1) (1886) 3 R.P.C. 199 at 203.

(2) (1934) S.C.R. 570 at 574.

“certain sulphur derivatives of carbonic acid”. There is no statement yet as to which of these are meant, but the class of “organic compounds containing sulphur” referred to in paragraph 2 has been limited to those that are sulphur derivatives of carbonic acid.

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The suggestion of counsel for the defendant that the description of the invention stops at the end of paragraph 3 is without merit and should be rejected, for it is clear, notwithstanding the clumsiness of the phraseology used, that the class of sulphur derivatives of carbonic acid whose use in froth flotation is proposed is limited by paragraph 4 to the salts of such derivatives that come within the definition contained in the first two sentences of the paragraph and the specific xanthates or analogous substances referred to in the third sentence. Paragraph 4 is, in my opinion, a vital part of the description of the invention. The first sentence refers to certain defined salts of the sulphur derivatives of carbonic acid as the new substance. To come within the class of such defined salts, the salts must satisfy two conditions, namely, they must contain an organic radical, such as an alkyl radical, and they must be known as xanthates. This definition of the salts is, conversely, a definition of the xanthates whose use is proposed. The inventor does not propose the use of all or any xanthates, but only that of those that contain a radical of the alkyl type. Moreover, the second sentence in the paragraph must be read with the first, for the statement “these form anions and cations in solution” is clearly restrictive of the xanthates referred to in the first sentence and is part of their definition. Thus, when the two sentences are read together it is, I think, clear that so far as the invention relates to the use of xanthates as a new substance in froth flotation, the only xanthates whose use is contemplated by the inventor are those that come within the class defined as “containing an organic radical, such as an alkyl radical”, and also comply with the requirement that “they form anions and cations in solution”.

Most of the expert evidence at the trial related to the meaning and extent of the chemistry terms in this definition. They require most careful attention for it is upon their interpretation that the issue largely depends. The

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experts called by the parties, Mr. A. H. Higgins for the plaintiff, and Dr. C. B. Purves and Mr. R. L. Bennett for the defendant, were all men of standing and experience and the Court has had the benefit of their explanations and opinions as to the meaning of the chemistry terms used in the specification and the extent of their application. Mr. Higgins has been retained by the plaintiff as its chief consulting metallurgist since 1925 and is outstanding in his experience and knowledge of the froth flotation art. Dr. Purves is a professor of industrial and cellulose chemistry at McGill University and has carried out extensive research on the chemistry of carbohydrates and cellulose. Mr. Bennett has been employed by the defendant as a metallurgist on froth flotation since 1942, and before that had varied practical experience including that of an assayer and chemist.

The basic compound to be considered is carbonic acid. It is represented by the formula  $H_2CO_3$  which means that each molecule of it consists of two atoms of hydrogen, one of carbon and three of oxygen. The central atom is carbon. It has four bonds or affinities, each equivalent in its properties, by which it can be linked with another carbon atom or an atom of another element. Each oxygen atom has two bonds but each hydrogen atom has only one. The bonds are in the nature of arms or hooks to grasp or unite with other atoms. It is essential to the stability of a compound that all the bonds of all the atoms in it should be mutually satisfied or, to put it in descriptive terms, that all the arms of all the atoms in it should be full. The links between the atoms need not necessarily be single, except, of course, in the case of single bond atoms. A description of the structural formation of carbonic acid will illustrate what is meant. The central carbon atom is bonded on one side with an oxygen atom by double links, and on the other with two separate groups of atoms, known as hydroxyl groups, in each case by a single link. Each hydroxyl group consists of an atom of oxygen and one of hydrogen, the hydrogen atom in each case being bonded with the oxygen atom by a single link. Thus all the bonds of all the atoms in the molecule are mutually satisfied; or, in other words, all the arms of all the atoms in it are full.

The next thing to be considered is what is meant by "sulphur derivatives of carbonic acid". Theoretically, and only by indirect means, the atoms of oxygen in carbonic acid may be replaced by atoms of sulphur. If only one oxygen atom is replaced by a sulphur atom the resulting compound is known as monothiocarbonic acid of which there are two forms; in one the sulphur, which has two bonds like the oxygen, is substituted for the oxygen that is bonded with the carbon by the double links, in which case it may be called sulphocarbonic acid, and in the other the sulphur is substituted for the oxygen in one of the hydroxyl groups bonded with the carbon by a single link. If two oxygen atoms are replaced by two sulphur atoms the result is dithiocarbonic acid, which likewise may take two forms; in one case a sulphur atom is substituted for the oxygen atom bonded with the carbon by the double links and another sulphur atom is substituted for the oxygen in one or other of the hydroxyl groups bonded with the carbon by a single link, in which case it may be called sulphothiocarbonic acid, and in the other case a sulphur atom is substituted for the oxygen atom in each of the singly linked hydroxyl groups. Thio indicates sulphur and the prefix sulpho indicates the substitution by sulphur of the doubly linked oxygen. Finally, where all three oxygen atoms are replaced by sulphur atoms, the result is trithiocarbonic acid, of which there can be only one form. There are thus five, and only five, acids that are sulphur derivatives of carbonic acid, where the only change made is the substitution of sulphur for oxygen, the other elements in the compound remaining the same. These acids are known generally as thiocarbonic acids. There is also a form of dithiocarbonic acid, of the kind called sulphothiocarbonic, where the hydrogen in the hydroxyl group, in which sulphur has not been substituted for the oxygen, is replaced by an ethyl or other alkyl radical. The acid thus derived is known as xanthic acid. These sulphur derivatives all appear on the chart, Exhibit P 54, prepared by Mr. Higgins, which shows both their formulae and their structural formations.

The term "salts of the sulphur derivatives of carbonic acid" is next to be considered. Salts are the result of the union of an acid and a metal. Since the acids that are

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sulphur derivatives of carbonic acid are the thiocarbonic acids, including xanthic acid, above referred to, the salts resulting from a union between them and a metal are known generally as thiocarbonates. There will, therefore, to correspond with the acids, be as many forms of thiocarbonates as there are of thiocarbonic acid, namely, two forms of monothiocarbonate, two of dithiocarbonate and one of tri-thiocarbonate. These substances may all be called analogous, since the acids from which they result are analogous. Since xanthic acid is a form of dithiocarbonic acid, as already shown, its resulting salt, which is known as xanthate, is a form of dithiocarbonate. It was part of the scheme of the general attack upon the disclosures to show, if possible, that the limits of the classes of substances referred to in the specification were undefined, and counsel for the defendant contended that this was so in respect of the compounds referred to as sulphur derivatives of carbonic acid. He relied upon the opinion expressed by Dr. Purves who considered that the class should be extended to include compounds, in which in addition to the substitution of sulphur for oxygen, other elements or groups in the compound are replaced by elements or groups other than sulphur and not containing sulphur. These are shown on the chart, Exhibit D 57, with its explanatory notes, prepared by Dr. Purves. He adopts as being sulphur derivatives of carbonic acid the thiocarbonic acids, including xanthic acid, together with the salts resulting from them, including xanthates, and then proceeds to add to the list. In respect of one of the monothio derivatives, where sulphur has been substituted for the oxygen in one of the hydroxyl groups, he adds two other compounds in which nitrogen or chlorine has been substituted for the other hydroxyl group; and in respect of the other monothio derivative, where sulphur has been substituted for the doubly-linked oxygen, he adds four other compounds in two of which nitrogen replaces either one or both of the singly-linked hydroxyl groups and in the other two the replacement is by chlorine. Similarly, in respect of the dithio derivatives, he adds two compounds in which nitrogen or chlorine has been substituted for the hydroxyl group in which sulphur has not been substituted for the oxygen.

He cannot, of course, make any similar addition to the trithio derivatives. There is also added to his chart a note to the effect that the list might be extended to include four additional compounds in which the chlorine was replaced by bromine and four more in which it was replaced by iodine. Dr. Purves went even farther. He said that he could have included more substances on his chart but had stopped at an arbitrary point. He went so far as to say that if one of the oxygen atoms were replaced by sulphur, the other oxygen atoms could be replaced by other elements and the resulting compounds would all be sulphur derivatives of carbonic acid, but he was unable to say what elements other than nitrogen, chlorine, bromine or iodine might be substituted.

Mr. Higgins thought that the expression "sulphur derivatives" was properly applicable only to derivatives in which sulphur was the only substitution for oxygen; that it was not proper to include the compounds referred to by Dr. Purves in which the oxygen atoms were replaced by sulphur and some other element such as nitrogen or chlorine; and that such a compound should be described, not as a sulphur derivative, but as a sulphur nitrogen or sulphur chlorine derivative. I agree with Mr. Higgins. The inclusion of the compounds in dispute could be justified only by reading the word "sulphur" in the expression "sulphur derivatives" as though it meant "sulphur containing", but such an extension of meaning is not permissible. Dr. Purves freely admitted that he could not be dogmatic as to what can be included under the head of sulphur derivatives of carbonic acid and that the additional compounds shown on his chart can be described accurately as sulphur nitrogen or sulphur chlorine derivatives of carbonic acid. He said that he had included them because they are closely related to carbonic acid and thiocarbonic acids and contended that everything on his chart was included in Richter's chapter on derivatives of carbonic acid. The reference is to Richter's treatise on Organic Chemistry, recognized as the best text book on the subject in English (Exhibit P 88). In my opinion, Richter supports the position taken by Mr. Higgins rather than that of Dr. Purves. On page 431, he shows only the five acids referred to by Mr. Higgins as

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the acid sulphur derivatives of carbonic acid and then states that "the free acids are not known, or are very unstable, but numerous derivatives such as salts, esters, and amides are known" and, on page 434, he refers to the chlorides of the sulphocarbonic acids. This indicates, I think, that Richter regards the compounds, which Dr. Purves added to his chart, as derivatives of the thiocarbonic or sulphocarbonic acids he referred to as free acids. My conclusion is that the nitrogen or chlorine containing compounds referred to by Dr. Purves ought to be described either as sulphur nitrogen or sulphur chlorine derivatives of carbonic acid or, alternatively, as nitrogen or chlorine derivatives of thiocarbonic acid and that the expression sulphur derivatives of carbonic acid should be restricted to compounds in which the only substitution for oxygen is by sulphur. The reference by Dr. Purves to Watts' Dictionary of Chemistry further confirms my opinion. This leaves the limits of the class of substances that can be described as sulphur derivatives of carbonic acid clearly and precisely defined. They are the thiocarbonic acids shown on Exhibit P 54, including xanthic acid, and the thiocarbonates resulting from them, including xanthates. The extent of the class of xanthates depends upon what is meant by an alkyl radical and what metal may be used in their production.

The term "alkyl radical" in the first sentence of paragraph 4 is of vital importance and much of the defendant's attack was concentrated on it. Its meaning and significance in the specification must, therefore, be precisely ascertained. Mr. Higgins defined a radical as part of a chemical compound and Dr. Purves explained that in chemistry it was found convenient to assume that certain groupings of atoms pass through chemical changes without altering their relative position. Such a grouping is a radical; it is not a complete molecule but a grouping of atoms. Radicals may be organic or inorganic depending on whether they contain atoms or carbon or not. We are here concerned only with organic radicals and only those that are alkyl radicals. Counsel for the defendant, in line with the general scheme of attack sought to construe the words "containing an organic radical, such as an alkyl radical" as expansive.



In support of such construction he referred to the amendment made in the United States patent office prior to the issue of the United States patent. Originally the first sentence of paragraph 4 read:

The invention is herein disclosed in some detail as carried out with salts of the alkyl sulphur derivatives of carbonic acid known as xanthates, as the new substance.

By the amendment the word "alkyl" before the word sulphur was struck out and after the word acid the expression "containing an organic radical, such as an alkyl radical and" was inserted. Counsel for the defendant contended that by the amendment there was a deliberate extension of the class of salts whose use was proposed; that the term "organic radical" meant "any organic radical" and that the expression "such as an alkyl radical" was in no sense restrictive but merely illustrative. It was argued that the whole expression "an organic radical, such as an alkyl radical" meant "any organic radical, for example, an alkyl radical". This would have been a convenient construction for the defendant; indeed, it would have ended the plaintiff's case for there are certain kinds of organic radicals, such as aryl radicals, with which xanthates cannot be made at all, and there are some xanthates containing certain other organic radicals, such as the cellulose radical, that are useless in froth flotation. The expression cannot have the meaning suggested. The amendment was clearly corrective of an erroneous placing of the word alkyl and at the same time restrictive and definitive of the substances referred to. If the term "an organic radical" meant "any organic radical" there would be no need at all for the expression that follows. The expression "such as an alkyl radical" is a qualifying one and has a clear and precise meaning; it is referable to the term "an organic radical" which precedes it and is clearly restrictive and definitive of it. I have carefully consulted the New English Dictionary and Webster's New International Dictionary. Both make it perfectly clear that the expression "such as", referring back as it does to "an organic radical", means an organic radical of the kind or type that is subsequently stated. The whole expression means, therefore, that the only organic radical that is to be considered is an organic

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radical of the kind or type known as alkyl. The expression is an integral part of the definition of the class of salts, or xanthates, whose use in froth flotation is proposed. No xanthate which does not contain an alkyl radical is contemplated by the inventor, for it would fall outside the defined meaning of xanthates inserted in the specification.

Mr. Higgins defined an alkyl radical as the residue of a saturated hydrocarbon. The first in the series of saturated hydrocarbons is called methane  $\text{CH}_4$ , consisting of a carbon atom with each of its four bonds or affinities satisfied with a hydrogen atom, that is, each of its four arms has grasped a hydrogen atom so that all its arms are full. The residue of this saturated hydrocarbon, that is, the grouping of atoms that would remain if one of the hydrogen atoms were removed, is an alkyl radical called methyl  $\text{CH}_3$ . This is the first in the series of alkyl radicals. Methyl is what would be left of methane if one of its hydrogen atoms were removed. The hydrogen atom is only theoretically removable since the remaining compound would be unstable, so that methyl cannot exist by itself. It has been isolated but only in a very transitory way. It can, however, enter into chemical composition or reaction in various ways. Since one of the bonds of the carbon atom in methyl is unsatisfied, that is, one of its arms is not full, it is said to have a free valence, that is, one bond or arm free to unite with or grasp another atom or group of atoms. Valence is the extent to which an atom can combine with another atom or group of atoms. Where an atom has only one free valence it is called monovalent. If there are two or three free valences it is said to be divalent or trivalent. And if it were possible to have an isolated carbon atom it would have four free valences and be called tetravalent. If all the bonds are satisfied there are no free valences and the atom is nonvalent. In this sense methyl is a monovalent radical. The next hydrocarbon is called ethane  $\text{C}_2\text{H}_6$ , consisting of two carbon atoms, each having three of its bonds satisfied with hydrogen atoms and the remaining fourth bond satisfied by being linked with the other carbon atom by a single link. It is of the essence of a saturated hydrocarbon containing more carbon atoms than one that such atoms should be bonded with one another by

a single link. Ethane is, therefore, a saturated hydrocarbon and its radical, called ethyl  $C_2H_5$ , being the residue of a saturated hydrocarbon, that is, the grouping of atoms that would remain if one hydrogen atom were removed, is an alkyl radical. Having only one free valence it is monovalent. The addition of each carbon atom to a hydrocarbon requires the addition of two hydrogen atoms to complete its saturation, and in each case, when one hydrogen atom is removed, the residue or grouping of atoms that remains is an alkyl radical. The alkyl radicals are shown on Mr. Higgins' chart, Exhibit P54, as methyl  $CH_3$ , ethyl  $C_2H_5$ , both already dealt with, propyl  $C_3H_7$ , butyl  $C_4H_9$ , amyl  $C_5H_{11}$  and hexyl  $C_6H_{13}$ . This does not exhaust the list of alkyl radicals for it continues as the number of carbon atoms in the hydrocarbons of the saturated hydrocarbon series increases. It will be seen that in every alkyl radical there are twice as many plus one hydrogen atoms as there are carbon atoms, so that the general formula for all alkyl radicals may be stated as  $C_nH_{2n+1}$ . It follows that if the formula for any particular radical does not fall within this general one, such radical is not an alkyl radical. Every alkyl radical is the residue of a saturated hydrocarbon and answers to the same formula  $C_nH_{2n+1}$ ; and every such radical is monovalent in the sense that, regardless of the number of carbon atoms in it, it has only one bond or arm free to unite with or grasp another atom or group of atoms. The definition of the particular class of organic radicals, known as alkyl radicals, given by Mr. Higgins is thus shown to be a clear and precise one.

The precision of this definition did not suit the defendant. It was necessary to attempt to enlarge its scope in order to include xanthates that would not work in froth flotation or to show that the term "alkyl" was ambiguous. Counsel for the defendant relied upon evidence given by Dr. Purves. He explained that the great division of organic radicals was into aryl and aliphatic radicals. The aryl radicals are those derived from compounds of the benzene class. The formula for benzene is  $C_6H_6$ , that is, six carbon atoms and six hydrogen atoms. Its structural formation is dis-

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tinctive. The carbon atoms are not joined in a chain but in a symmetrical ring with each carbon atom bonded to a carbon atom on one side by a single link and to a carbon atom on the other by a double link. This satisfies three of the bonds of each atom, the remaining bond being satisfied by a hydrogen atom, so that there are six hydrogen atoms in a circle each attached to a carbon atom in the central ring, which is called a benzene ring. If one hydrogen atom is removed, the residue or group of atoms that remains is the radical called phenyl  $C_6H_5$ . It is the simplest in the series of aryl radicals. All the aryl radicals are derived by the removal of a hydrogen atom directly from a benzene ring. They differ in chemical behaviour from other radicals, one aspect of such behaviour being that they cannot be used in making xanthates. All organic radicals, whatever their kind or type, that are not aryl radicals, are called aliphatic radicals. The term aliphatic is thus one of the broadest terms in organic chemistry. Dr. Purves then divided the aliphatic radicals into those that are monovalent and those that are not. The importance of this subdivision lies in the fact that only monovalent aliphatic radicals can be used in making xanthates. Dr. Purves defined a monovalent aliphatic radical as one in which there is only one bond per carbon atom free to unite with another atom or group. This is not the same monovalency as that of the alkyl radical as defined by Mr. Higgins which has only one free valence, not per carbon atom, but in the whole radical, regardless of the number of carbon atoms in it.

Dr. Purves said that, according to Mr. Higgins' definition, alkyl radicals form a precise subsection of aliphatic radicals. He did not challenge the accuracy of the definition and agreed that it was a good, clear cut definition and the most precise one used in the text-books and that it was widely and commonly used. But he also said that in chemistry the term alkyl radical was sometimes used in a wider sense and sometimes in a different one. There was, however, one limit to the territory it takes in, namely, that it never covers a wider territory than that of aliphatic radicals. In its narrowest sense, he said, the term has the meaning given

by Mr. Higgins, which is its most precise meaning; in its widest sense it is used in contrast with aryl radical; but it never includes an aryl radical.

While Dr. Purves said that in books of reference the term alkyl had a different meaning from that given by Mr. Higgins, the only chemistry reference book he mentioned was Watt's Dictionary of Chemistry in which, he said, alkyl was defined simply as an alcoholic radical. By these statements and the reference to Watts' the suggestion was left with the Court that in organic chemistry the terms "alkyl radical" and "alcoholic radical" are used synonymously. Such a suggestion is, in my opinion, unwarranted. Dr. Purves explained that the term "alcoholic radical" means that the radical must be such as to give an alcohol where a hydroxyl group has been added to its free valence. According to this explanation, alcohol has two radicals, one the "alcohol radical" and the other the hydroxyl group. When a hydroxyl group is added to an aryl radical the resulting compound is a phenol which, according to Dr. Purves, is not an alcohol. It is obvious, with this explanation of its meaning, that the term "alcoholic radical" is as wide in extent as the term "alcohol" itself, which, according to Watts', was originally limited to one substance, namely, spirit of wine, but is now applied to a large number of compounds which in their external characteristics show little or no resemblance to common alcohol. It is easy to see how the terms alkyl and aryl may be used in contrast to one another, for the simplest alcohol is produced from a hydroxyl group attached to the simplest alkyl radical, methyl  $\text{CH}_3$ , making methyl alcohol  $\text{CH}_3\text{OH}$ , and the simplest phenol is produced from a hydroxyl group attached to the simplest aryl radical phenyl  $\text{C}_6\text{H}_5$ , making the phenol  $\text{C}_6\text{H}_5\text{OH}$  known as carbolic acid. Nor can there be any quarrel with the description of an alkyl radical as an alcoholic radical so far as the substances commonly called alcohol are concerned for they are all derived from saturated hydrocarbons  $\text{C}_n\text{H}_{2n+2}$  by the substitution of an hydroxyl group for one of the hydrogen atoms so that such alcohols consist of the radical  $\text{C}_n\text{H}_{2n+1}$  and a hydroxyl group, and in respect of such alcohols the terms "alkyl" and "alcoholic" as applied to their radicals

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would have exactly the same meaning and there would be no confusion with regard to them. But when it comes to alcohols in the wide sense of the term, meaning for the scientific chemist a range of compounds that extends from potable liquids to substances used for making rayon silk, with the radicals for each class or series of such compounds conforming to a specific formula, it becomes obvious, I think, that the statement that each radical of such compounds, meaning thereby the residue or group of atoms remaining after the removal of one or more hydroxyl groups, is an alcoholic radical, no matter what the formula for it may be, is a descriptive statement and not a chemical definition. A study of Watts' supports this view.

It is interesting to note that in the 1882 edition of Watts' the term "alkyl" does not appear. In the 1888 edition, reprinted 1911, it appears simply as follows: "Alkyl. An alcohol radicle". Under the article "Alcohols" Watts', after describing the composition of alcohols and their derivation from hydrocarbons containing even numbers of hydrogen atoms by the substitution of one or more hydroxyl groups for an equal number of hydrogen atoms, classifies alcohols as monohydric, dihydric, trihydric, etc., according to the number of hydroxyl groups they contain. He then divides the monohydric alcohols into five series. Each series is described by a formula to which all the alcohols in that series answer. If a hydroxyl group is subtracted from the general formula of the series the general formula of the radical of such alcohols appears. For example, the first series is described as series  $C_nH_{2n+2}O$  or  $C_nH_{2n+1}OH$ , the latter description being written to show the alcoholic radical and the hydroxyl group in that series. Each alcohol in this series is derived from the paraffin  $C_nH_{2n+2}$  by the substitution of a hydroxyl group for a hydrogen atom and the alcohols in the series are described as methyl alcohol, ethyl alcohol, propyl alcohol, butyl alcohol, amyl alcohol, hexyl alcohol, etc. Paraffin is merely another word for saturated hydrocarbon, being derived from *parum* and *affinis*, indicating paucity and affinity, namely saturation. The alcoholic radical in this series is identical with the alkyl radical as defined by Mr. Higgins. The only other series that need be mentioned is the fourth. It is interest-

ing because of Dr. Purves' statement that the term "alkyl radical" is never broad enough to include the aryl radical. Watts describes this series of monohydric alcohols by the formula  $C_nH_{2n-6}O$ , which equals  $C_nH_{2n-7}OH$ , and says that these alcohols are derived from the aromatic hydrocarbons  $C_nH_{2n-6}$  in the same manner as the fatty alcohols from the paraffins (or saturated hydrocarbons)  $C_nH_{2n+2}$ . The lowest member of this series is phenol  $C_6H_6O$  or  $C_6H_5OH$ , the radical of which  $C_6H_5$  is described by Dr. Purves on his chart of organic radicals (Exhibit D 86) as phenyl, an aryl radical. The inclusion of phenols in the series of monohydric alcohols implies also the inclusion in the term "alcohol radicle" of the radicals of such phenols, all of which, according to Dr. Purves, are aryl radicals. If Watts' is relied upon as authority for the suggestion that an "alkyl radical" means the same thing as an "alcohol radicle", it must follow, according to Watts', that the term "alkyl radical" includes such aryl radicals as phenyl. Yet Dr. Purves was quite emphatic in saying that the term "alkyl radical" could never include an aryl radical. Dr. Purves might have pointed out that Watts' classification of monohydric alcohols as including phenols is broader than is now accepted, from which it follows that if the statement in Watts' that "alkyl" is "an alcohol radicle" is to be taken as meaning that "alkyl radical" and "alcohol radicle" are synonymous terms, as Dr. Purves suggests, then it must, on Dr. Purves' own evidence, be considered as being now erroneous. Dr. Purves should have made this clear. The fact is that when the statement was made in Watts' the term "alkyl" was a comparatively new term in chemistry, the precise limits of which had not been defined. I have already mentioned that it does not appear at all in the 1882 edition. It is also significant that it does not appear in the first volume of the New English Dictionary published in 1888. If the statement in Watts' is to be taken as a definition it must be rejected as taking in too much territory according to modern classifications of radicals. It must be remembered that the classification of radicals had not proceeded as far in 1888 as at the time of the Keller specification. This is shown by the fact that the 1888 edition of Watts' does not give any definition

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for either aryl or aliphatic radicals, although Dr. Purves said that this was the broad classification of radicals and that aliphatic was one of the broadest terms in organic chemistry. It was, therefore, in my opinion, unfair of Dr. Purves to refer to Watts' as an authority showing that in organic chemistry the term alkyl was used in a different sense from that in which Mr. Higgins used it. The only chemistry reference given by him showing a different use was Watts'. No up to date reference book was cited. In Webster's New International Dictionary "alkyl" is defined as meaning "any radical of the methane series, such as methyl, ethyl, propyl, etc." This is the same meaning as that given by Mr. Higgins. It is defined in the same way in the Century Dictionary and Encyclopedia— "A generic name applied to any alcohol radical, such as methyl ( $\text{CH}_3$ ), ethyl ( $\text{C}_2\text{H}_5$ ), propyl ( $\text{C}_3\text{H}_7$ ), etc." Other reference books are to the same effect, for example, Kingzett, Chemical Encyclopaedia (1928) — "Alkyl (Radicals) — The monovalent groupings ( $\text{C}_n\text{H}_{2n+1}$ ), such as methyl and ethyl, which form the radicals of the monovalent alcohols", and Hutchinson's Technical and Scientific Encyclopaedia — "Alkyl (Chem.) — A name given to the group remaining when one atom of hydrogen is removed from the molecule of a hydrocarbon of the paraffin series. The names of the individual alkyls are obtained from those of the hydrocarbons by changing —ane to —yl. e.g. Methane  $\text{CH}_4$  methyl  $\text{CH}_3$  etc." and Hackh, Chemical Dictionary (1930) — "Alkyl — Alphyl, Aaryl. A monovalent radical derived from an aliphatic hydrocarbon by removal of one hydrogen atom, as methyl — ethyl or propyl. Their general formula is  $\text{C}_n\text{H}_{2n+1}$ ." and Bennett's Standard Chemical and Technical Dictionary (1939) — "Alkyl. Denoting a non-cyclic saturated hydrocarbon radical of general formula  $\text{C}_n\text{H}_{2n+1}$ ." There can be no doubt as to the generality of the definition given by Mr. Higgins, and there is no room in my opinion for the suggestion of ambiguity or wider meaning left by Dr. Purves. There was another suggestion left by Dr. Purves which, in my opinion, was also unfair. When asked whether metallurgists would know the varieties of definitions he had referred to he replied that he could only speculate on that question, that it would depend on where



the metallurgist got his training and the work of reference he looked up and said "if he looked up Watts' under Alkyl to see what alkyl meant, he would see it meant an alcohol radical". There is suggested in this reply that a metallurgist engaged in froth flotation on seeing the term "alkyl radical" in paragraph 4 might on looking up Watts' conclude that the term alkyl radical covered as wide a territory as the term "an alcohol radicle". It must be remembered that the specification is addressed to persons skilled in the art, metallurgists and chemists working on froth flotation, having the knowledge of the art as of the date of the specification and not of 1888. Such a person would not be confused by looking up Watts'. He would see the description of alkyl as "an alcohol radicle" and would conclude that this was a description rather than a definition of the term. On looking up "alcohols" he would be confirmed in this view, for he would see the wide range of substances covered. He would see that the monohydric alcohols were classified in series according to given formulae from which he could find the formula of the radical they contained. He would see that there were included together such extremes as the radicals of the paraffin series and the aryl radicals of the phenol series. He would know, as Dr. Purves did, that "alkyl" could not include "aryl" and this would lead him elsewhere than to Watts' for an accurate definition of "alkyl". Indeed, it is altogether inconceivable that a person skilled in the art of froth flotation as of the date of the specification who wished to ascertain the limits of the meaning of such a comparatively new term in organic chemistry as "alkyl radical" would confine his enquiries to Watts', for he would know that since 1888 there had been a great advance in the knowledge of radicals and an increased clarification in their classification and definition. He would, therefore, without question consult more recent text books than Watts'. If he did so he would see the generality of the use of the term alkyl in the sense given by Mr. Higgins. In my opinion, the term "alkyl radical" has the exact, precise meaning that was given to it by Mr. Higgins and I do not think that any skilled metallurgist or chemist engaged in froth flotation could have failed to

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understand the term according to such meaning or would have been misled into thinking it had the wider meaning suggested as possible by Dr. Purves.

But if there is any doubt in the matter, which I for my part do not see, the doubt should be resolved in favour of the patentee. In his definition, which is a difficult one, the inventor has chosen a term which has a precise and exact meaning which, if applied, will hold his invention. He should not lose it merely because someone has been astute enough to find another possible meaning which, if applied, will destroy the patent. In such circumstances, there has been no avoidable obscurity or ambiguity on the part of the inventor and, no lack of good faith being shown on his part and the definition being a difficult one, that meaning should be adopted which will support the patent. That principle is supported by the decision of the House of Lords in *Natural Colour v. Bioschemes (supra)*, to which further reference will be made when the claims are considered.

The xanthates referred to in paragraph 4 are the result of the union of xanthic acid and a metal. If the alkyl radical is ethyl and the metal is potassium the resulting xanthate is potassium ethyl xanthate. Xanthic acid has already been described as a form of dithiocarbonic acid, called sulphothiocarbonic, consisting of a central carbon atom bonded on the one side with a sulphur atom by double links and on the other side with a sulphur hydrogen group by a single link and a group consisting of oxygen and an alkyl radical, in this case ethyl, also by a single link. Potassium ethyl xanthate results when the hydrogen in the sulphur hydrogen group is replaced by potassium K. The resulting formula is  $SCSKOC_2H_5$  showing the structural arrangement already described. Any alkyl radical may replace ethyl and any metal permitted by the definition may replace potassium, so that if M is used to designate the metal and R the radical the general formula becomes  $MCS_2RO$ , the metal, carbon disulphide, the radical and oxygen. When it is known what M and R respectively represent, the calculation of the quantities of the elements required for the formation of the xanthate is fixed by inflexible chemical laws based upon the atomic weights of

the atoms. Exhibit P 55 shows the way in which two of the commonest xanthates, namely, potassium xanthate and sodium xanthate are made. In the case of potassium xanthate the ingredients are caustic potash, which is potassium hydroxide KOH, ethyl alcohol  $C_2H_5OH$ , and carbon disulphide  $CS_2$ , each having the molecular weight that is the total of the atomic weights of the atoms in it. The formula for this mixture with all the elements included is  $KCS_2C_2H_5O$ , which represents potassium ethyl xanthate, plus  $H_2O$ , which is water. The significant fact is that in the production of potassium ethyl xanthate with the ingredients mentioned some water is always also formed because of the hydroxyl groups in both the caustic potash and the ethyl alcohol. When the water is removed, pure potassium xanthate results. The theoretic amount of any ingredient required for the production of a given quantity of potassium xanthate is a matter of chemical certainty. Exhibit P 55 shows that to produce 160 grams of potassium ethyl xanthate there will be required 56 grams of potassium hydroxide, 46 of alcohol and 76 of carbon disulphide, which in addition to the desired quantity of xanthate will also produce 18 grams of water. The result will be 89.9 per cent potassium ethyl xanthate and 10.1 per cent water. It is useless to vary the proportions of the ingredients or to increase the quantities of any of them, but frequently an excess of alcohol over the theoretic amount required is used to enable easier control of the reaction and the excess may then be driven off with the water in various ways. The figures given above are the theoretic ones and are based upon the use of pure ethyl alcohol, but if 10 per cent water is used less xanthate would result, for reasons that will be amplified later, but there would not be enough to stop the reaction.

A brief reference may be made to the list of xanthates filed by the defendant (Exhibit D 61). An attempt was made to show the number of xanthates to be enormously large. Indeed, it was suggested by counsel for the defendant that it might run into hundreds of thousands. Yet the number included in the list was only 91, classified in 16 groups according to the radical contained. The list was filed subject to the agreement between the parties that it

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constitutes all the references to xanthate prior to 1923 which could be found by the defendant in the scientific literature; that none of the references are to metallurgical publications but all are in the chemical field; that all the references are to laboratory experiments (with the exception of cellulose xanthate in rayon) and are reports either of success in preparing the type of xanthate disclosed, or of laboratory exploration of one or more of its properties; and that none of the references are to preparation or use outside the laboratory. Of the 16 groups listed, 10 are excluded from the definition of xanthates in paragraph 4 by the requirement of the first sentence that the radical contained must be of the alkyl type. Which of the xanthates in the remaining 6 groups may be included depends upon the metals used in their production. There are fifty metallic elements but xanthates made with some metals are excluded from the inventor's definition by the requirement of the second sentence that the xanthates must "form anions and cations in solution". This sentence was brought into the paragraph by way of amendment at the same time as the amendments to the first sentence and its restrictive effect was properly admitted. Only such xanthates as form anions and cations in solution are contemplated by the inventor. When a salt is dissolved in water a physical splitting of the molecules takes place through the fact that they carry a charge of electricity and can be separated by the influence of an electric current, the anion from the acid side to the anode and the cation from the metal side to the cathode. For the purposes of the definition the word "solution" in the sentence is the important one, for if a xanthate is to be capable of forming anions and cations in solution it must first of all be soluble. The solubility of a substance is related to the solvent that is to be used and the term "solubility" or "solution" must always be considered according to its context. Its meaning is relative to the circumstances under which it is used. When a substance is stated to be soluble without mention of the solvent, it is generally implied that it is soluble in water. This means that it is all capable of being dissolved in water. I understood Dr. Purves to say that for practical operating reasons in organic chemistry a substance could be regarded as soluble in water if it took 500 parts of water

or less to dissolve it completely. A very much smaller degree of solubility is required to enable a substance to form anions and cations for that takes the word soluble out of the working range of the practical organic chemist into that of the physicist. To the physicist, for example, even glass might be soluble, but its order of solubility is so low that it would not be considered soluble by an organic chemist. On the other hand, a much higher degree of solubility would be expected by the chemist or metallurgist engaged in froth flotation for he would think of solubility in relation to the quantity of water used in froth flotation, and if a large amount of water, judged by such a standard, is required to dissolve a substance it would be regarded by him as substantially insoluble. This becomes of importance when the classification of xanthates according to whether they are made with heavy or light metals is considered. Mr. Higgins classified among the heavy metals lead, zinc, copper, mercury, tin, nickel, cobalt and so forth, and described as light metals the alkali group of metals, and also magnesium and aluminum. Mr. Higgins stated, and there was no contradiction of his evidence on this point, that xanthates formed with the heavy metals were not soluble in the sense in which a metallurgist would use them. Copper xanthate, for instance, is one of the most insoluble compounds known to the chemist and some of the other xanthates might give a very slight solution but certainly not enough for them to be of any use in the flotation process. All the xanthates shown on Exhibit D 61 which are formed with heavy metals are, therefore, excluded from the definition of the class of xanthates whose use in froth flotation is proposed, on the ground that they are not soluble in water in the sense in which a chemist or metallurgist engaged in froth flotation would regard that term. This leaves the xanthates formed with the light metals including mainly the alkali metals of which the main ones are potassium and sodium. The xanthates formed from such metals are readily soluble in water. The other metals in the alkali group are caesium, lithium and rubidium. The number of xanthates contemplated by the inventor, instead of running into the hundreds of thousands, is thus shown to be comparatively small.

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This concludes the analysis of the description of the invention so far as it relates to the use of xanthates. I have come to the conclusion that it is precise and as reasonably clear from avoidable obscurity or ambiguity as the difficulty of the description permits. A person skilled in the froth flotation art would, in my opinion, have no doubt as to the class of xanthates whose use was proposed by the inventor.

The description of the invention does not, however, stop with the definition of the class of xanthates although it might well have done so, since the use of such xanthates could in itself be the subject matter of a patent. The inventor goes on to describe the rest of his invention. In the third sentence of paragraph 4 he discloses that excellent results were also obtained by agitating ore pulps with a certain complex mixture the nature of which he then describes. The sentence is a clumsy one but its meaning is clear to any one desirous of understanding it. The complex mixture with which the ore pulps are agitated is produced as follows; the pine oil is incorporated with an alcoholic solution of potassium hydrate and carbon disulphide is added to the mixture. There will be potassium xanthate in the mixture, but there will also be other substances that are analogous to it, because of the water in the alcohol. The inventor thus covers substances analogous to xanthates. These are the various thiocarbonates already described. The thiocarbonates are salts, just as xanthate is, resulting from the union of a metal with the thiocarbonic acid from which they are derived. Xanthate is itself a dithiocarbonate derived from xanthic acid as already explained. If the same metal, for example, potassium, is used in the thiocarbonates as in the xanthate the resulting salts are analogous substances, the only difference being that the thiocarbonates are monothiocarbonates, dithiocarbonates or trithiocarbonates depending upon whether one, two or three atoms of oxygen have been replaced by sulphur in the thiocarbonic acid from which they are derived, and that xanthate is the only one that contains an alkyl radical. The class of analogous substances is as defined as the class of xanthates.

In paragraph 5 the inventor refers to the galena-bearing froth obtained with xanthates or analogous substances, which is merely a reference to their beneficial effect on a lead zinc ore.

In paragraph 6 the inventor discloses that the substances referred to, whether xanthates or analogous substances, are not mineral frothing agents but when used in the presence of a mineral frothing agent are effective in enabling a selective flotation of lead and zinc and cause uncombined silver to tend to go into the lead concentrate rather than with the zinc. There is no attack on this paragraph, except with regard to the last sentence, which will be dealt with separately.

Then paragraph 7, which was inserted by way of amendment, discloses that the invention goes further than already described and covers the use of the substance described in the paragraph to the extent mentioned in it. This substance is neither a xanthate nor exclusively an analogous substance. The salt described as yellow or orange results from the union of caustic potash and carbon disulphide. The evidence is that this substance was a mixture of which about two-thirds was potassium trithiocarbonate, the remainder being potassium carbonate. Potassium trithiocarbonate is a substance analogous to potassium xanthate, but potassium carbonate is not. To this extent, therefore, the invention extends to a substance which is neither a xanthate nor an analogous substance. Potassium trithiocarbonate is derived from trithiocarbonic acid by the substitution of an atom of potassium for the atom of hydrogen in each of the sulphur hydrogen groups. It differs from potassium xanthate in having all three atoms of oxygen substituted by sulphur instead of two and in not having an alkyl radical, its place being taken by another potassium atom. Both are sulphur derivatives of carbonic acid. Potassium carbonate is not a sulphur derivative of carbonic acid but a direct derivative, the hydrogen atom in each of the hydroxyl groups in carbonic acid being replaced by an atom of potassium. The test with this substance was carried out with Hibernia ore, a lead zinc ore, with a neutral pulp.

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Then paragraph 8 describes how the inventor made potassium xanthate for laboratory purposes, which he need not have done since no claim is made to xanthate as a new substance.

The remainder of the disclosures deals with experiments and tests made by the inventor on various types of ores and may be regarded as part of the description of the operation and use of the invention as contemplated by the inventor. The description of the invention itself is contained in the first eight paragraphs. It has been described by the inventor in respect of its various aspects in the manner indicated. He has disclosed that his primary and best invention is the use of certain xanthates and has defined the class of such xanthates in the first two sentences of paragraph 4; he has also disclosed that the complex mixture referred to in the third sentence of paragraph 4, consisting of xanthates or analogous substances, produced excellent results; then in paragraphs 5 and 6 he has disclosed that in dealing with lead zinc ores he found good results with xanthates or analogous substances; and, finally, in paragraph 7 he discloses that, on a particular type of ore and with a neutral circuit, he found useful results with the particular substance described in the paragraph. He could, I think, have applied for one patent in respect to the use of xanthates and another in respect of the use of the other substances and it may well be that under The Patent Act, 1935, Statutes of Canada 1935, chap. 32, his application would be divided, but it is also clear from section 37(1) of such Act that his patent is not invalid by reason only that more than one invention is included. In my opinion, the inventor has correctly and fully described his invention in its various aspects so that any person skilled in the froth flotation art would know precisely what the inventor has found to be new and useful, primarily as his best invention the use of the xanthates he defined, and also, on the ores specified and within the limits stated, the use of the other substances specified. He put into the specification everything that he found useful and has, I think, in this respect fully complied with the requirement of the Act.

In addition to the main general attack on the specification for failure to describe the invention, which fails for the



reasons given, four specific charges were made, two of which related to statements that were said to be misleading.

The first of such statements is the implied one that useful results can be obtained with a compound prepared in accordance with paragraph 7. Counsel contended at first that this is positively misleading in that the compound does not lead to the useful results promised, and later that it is inferentially misleading in that it recommends the use of useless material. He argued that the paragraph misleads the person who is trying to put the invention into operation, puts him off the track and directs him away from obtaining successful results. The argument has no merit. The inventor does not propose the use of the substance referred to in paragraph 7 as an alternative to the use of xanthate, nor does he suggest anywhere that it is equal in value to xanthate. The disclosures show that potassium or sodium xanthate is the best substance to use, and many proofs of its value are given. Then in paragraph 7, the inventor also shows that on a particular kind of ore, namely, a lead-zinc ore, and with a particular kind of pulp, namely, a neutral one, useful results were accomplished with the substance referred to, namely, that the concentrates were seen to be clear with brightened lead sulphide particles. There is nothing more in the paragraph. The inventor does not hold out the substance as having special value, but merely states what he found when he was working out his invention, namely that this was one of the substances he found useful in its specified and limited sphere. There is no statement in the paragraph, either express or implied, that can be considered misleading. As for the contention that the substance is useless, the evidence proves the contrary. It was tested at Noranda by Mr. Bennett, the defendant's metallurgist, who said that the tests indicated that it was substantially inert as a flotation collecting agent. He could not say that it was useless for the tests showed a higher percentage of copper recovery than was possible without it, although the grades in the concentrates were somewhat lower. The value of this evidence is lost by the fact that the tests were with a copper ore in which there was no lead or zinc and with a very alkaline pulp, whereas paragraph 7 shows useful results in a test made with a neutral pulp on Hibernia ore, which was a lead-zinc ore. On the other hand,

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Mr. Higgins gave evidence that he had made an experiment similar to that set out in paragraph 7 and that it was successful, that while the concentrate was not as good as with potassium xanthate it showed a distinct selection of lead from zinc. He made his experiment with a lead-zinc ore called Orphan Girl, which was the nearest in kind to Hibernia ore which he could find, the Hibernia mine having closed down. In my opinion the evidence of Mr. Higgins proves that the substance referred to, far from being useless, is useful on a lead-zinc ore like Hibernia ore with a neutral pulp. This attack on the disclosures fails.

The second statement said to be misleading is the final sentence in paragraph 6, namely, "The pulps may be either acid, alkaline or neutral according to circumstances". As it stands, it is merely a statement of fact, for all three kinds of circuits were in use "according to circumstances", depending upon the type of ore and the kind of mineral frothing agent that was used. Some ores and some mineral frothing agents worked best in an acid circuit, others in an alkaline one and others in a neutral one. Although the trend was away from the use of acid circuits, a few large mines, including Anaconda, still used an acid circuit. Counsel for the defendant did not quarrel with the statement as a statement of fact but read a misleading implication into it. He contended that its inclusion in the specification is meaningless unless the inference is drawn that it means that the invention is of equal value and operates in the same way whether the circuit used is acid, alkaline or neutral, and that with such an inference the statement is misleading, since there were differences in behaviour of the reagents, known to the inventor, which he did not disclose. This attack is not well founded. So far as the use of xanthate is concerned there is no evidence that it does not work successfully in all kinds of circuits. As for the other substances the specification indicates that there are differences and points them out. The evidence showed that in the large scale tests at Anaconda in which an acid circuit was used pure xanthate worked better than xanthate mixed with other substances. This fact was known to the inventor and was, no doubt, the reason for the last sentence in paragraph 8 that "it was found in cases where sulphuric

acid was used that the centrifuged material yielded better results than the uncentrifuged." This is a warning to any person reading the specification that if he is dealing with an acid circuit he should use xanthate by itself rather than xanthate mixed with analogous or other substances. As to the use of xanthates or analogous substances in alkaline or neutral circuits there is no evidence of any difference in effect. As to the use of the substance referred to in paragraph 7 the only statement as to its effect is that on Hibernia ore, a lead-zinc ore, useful results were obtained in a test made with a neutral pulp. There is no statement or suggestion that the same result would follow with a different ore or with a different circuit. I find nothing misleading in the last sentence of paragraph 6.

The next charge is that the inventor knew that his proposed reagents did not work on oxide ores but had failed to disclose this necessary information. Ores are sulphide or oxide depending upon whether the metalliferous minerals they contain are mainly sulphide or mainly oxide. The metalliferous minerals referred to are those that are chemical combinations of metals and other elements. If the combination contains sulphur it is sulphide, but if it contains oxygen it is oxide. Sulphide ores tend to reaction by oxygen when exposed to the air and are then said to be oxidized. There was controversy during the trial as to the position of oxide ores with regard to froth flotation. Mr. Bennett gave evidence that froth flotation worked particularly well only on sulphide ores. He knew that oxide ores were difficult to treat but was not able to say whether they could be treated at all. When counsel for the plaintiff called Mr. Higgins to give evidence in rebuttal on this question objection was taken by counsel for the defendant on the ground that Keller on his commission evidence had testified that certain oxides were relatively easily floated and others were floated with more difficulty and that another witness, Wilkinson, also giving evidence on commission, showed that oxide ores were the subject of flotation, and that counsel for the plaintiff could not give evidence to contradict his own witnesses. I allowed Mr. Higgins to be examined on the question reserving consideration of the objection. While there is some support for the objection, it is not clear whether oxide ores could be

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treated in froth flotation without some sulphidizing agent. In view of this, and also in view of Mr. Bennett's uncertainty, I think that Mr. Higgins could properly be asked what the situation was. His evidence settled the matter beyond dispute. He stated categorically that in 1923 it was not possible to separate oxide ores by the froth flotation process without first subjecting them to the action of a sulphidizing agent, and that this was a matter of common knowledge in 1923 to persons skilled in the art. This evidence, which I accept, is in accord with the general tenor of Keller's evidence. He was really searching for a sulphidizing agent to treat oxide ores so that they could be separated by froth flotation when he fell upon the use of xanthate. He discovered that it worked well with sulphide ores but did not work at all with oxide ores, from which he concluded that xanthate was not a sulphidizing agent. If the use of xanthate had enabled the flotation of oxide ores Keller should have said so, for that would have been a new and startling development in froth flotation, but he was under no duty to say that it did not work with such ores, since it was already known in the art that the froth flotation process did not work at all with oxide ores so long as they remained oxide and the particles were not discovered by a sulphide film. This attack on the disclosures was, in my opinion, an unreasonable one.

One other attack on the disclosures was made. It was contended that in the course of the tests at Anaconda, in which an acid circuit was used, the inventor had learned a better method of preparing xanthate for use in an acid circuit than that described in paragraph 8 but had failed to disclose this useful knowledge. This contention requires careful consideration by reason of the chemistry questions involved, but there are, I think, two answers to it. The first is that the inventor did not have to describe any method of preparing xanthate at all, since xanthate itself as a new substance is not the subject of his invention. The second answer is that there was no real chemical difference, having regard to the ingredients used, between the method described in paragraph 8 and that used in the successful test at Anaconda. This requires a clear statement of what happened at Anaconda and a careful analysis of the various methods of preparing the xanthate. The method described

in paragraph 8 may be called the Keller method. There were several distinct steps in it. First, the caustic potash was dissolved in the alcohol at a given temperature in a reflux condenser to retain what might otherwise be lost through the mixture being volatile, and the solution was then cooled. The second step was that while this solution was stirring in a cooling bath the carbon disulphide was added, the resulting reaction being substantially instantaneous and producing the potassium xanthate. A third step was then taken; the thick pulp was cooled and centrifuged, that is, the solid substance was thrown out from the liquid, yielding xanthate crystals containing about 20 per cent moisture. Then there was a fourth step; the liquid remaining after the solid substance was thrown out by the centrifuging, called the mother liquor, also contained some xanthate and this was recovered by evaporation of the liquid. Keller had conceived his invention in September, 1922, and made his first formal demonstration in the plaintiff's San Francisco laboratory in March, 1923. Anaconda ore was a problem and the Anaconda slimes were particularly difficult. In May, 1923, arrangements were made for large scale tests of the Keller process at Anaconda. Two samples of xanthate were taken to Anaconda, one being that used in the laboratory, and the other, consisting of 250 pounds each of potassium xanthate and sodium xanthate having been made by Great Western Electric Chemical Company. The plaintiff's staff went out to supervise the demonstration. The tests took place in June, 1923. Counsel for the defendant refers to them as encouraging but not conclusive, but the evidence is that they were successful and created quite a furore in the Anaconda Mill. This was the first Anaconda test. Then Anaconda arranged for a further test on a full section of the mill, and an order was placed with Great Western Chemical Company for 1,000 pounds of potassium xanthate. The second test was run during July and August, 1923. While the results were successful they were disappointing in that they were not as good as anticipated, and the tests were stopped. The xanthate had been prepared by the Company according to the method given by their chemist, Dr. Rosenstein. Keller felt certain that the lack of anticipated results was due to the inferior quality of the xanthate and there were acri-

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monious discussions with Rosenstein. The method used by Rosenstein, which may be called the Rosenstein method, differed from the Keller one in two important particulars. The first difference was that instead of the caustic potash being dissolved in alcohol, it was dissolved in water because it is more soluble in water than in alcohol, and the alcohol and carbon disulphide were added to such solution. The second major difference was that the resulting mixture was not centrifuged at all, but merely dried by evaporation. A third test at Anaconda was then arranged. This was to be a competitive test between xanthate and another flotation agent called thiocarbonamid. Two sections of the mill were to run side by side, one using xanthate and the other thiocarbonamid. An order for 1,500 pounds of xanthate was placed with the Great Western Chemical Company and special instructions were given to prepare it according to what counsel for the defendant called the Nutter method. The steps in this method were as follows. First, the caustic potash was dissolved in an excess of alcohol and the mixture allowed to settle; the water in the mixture went to the bottom in what was called the aqueous layer, leaving the alcohol, called the supernatant liquid, at the top. The next step was to get rid of the water, either by decanting the alcohol solution off the top or draining or siphoning the water layer away from the bottom. Then the carbon disulphide was added to the solution containing the alcohol, which was the only part of the original mixture that was used for the reaction. Finally, the resulting compound was centrifuged and only the centrifuged material was used in the test, the mother liquid being "dumped down the sewer". The only difference between this method and the Keller one was that the water was removed from the first solution before the carbon disulphide was added to produce the reaction and only the centrifuged material was used in the test. The result was that xanthate won the competitive test and Anaconda adopted the Keller process. Counsel for the defendant said that this proved that the Nutter method was the best one and contended that Keller should have disclosed it to the public so that it should be in the same position as he was to make the most effective use of the invention in an acid circuit. The criticism requires consideration of the chemical reactions involved.

I have already discussed the manner in which potassium xanthate is produced through the reaction resulting when carbon disulphide is added to a mixture of caustic potash and alcohol, but some reference should be made to the effect of the presence of water in the mixture during the reaction. Its effect is peculiar. Water has hydroxyl groups similar to those in alcohol so that when alcohol and water are present the sets of hydroxyl groups compete against one another for the other reagents in the mixture. The presence of water in the mixture thus tends to reduce the yield of xanthate and also to increase that of other salts that are not xanthate. Moreover, impurities form in the reaction if the ingredients used are not pure and these will be in the mixture and in the solution if an excess of alcohol is used. Centrifuging throws the solids out of the solution leaving the mother liquid with whatever it contains. If there are impurities they tend to remain with it rather than to adhere to the solids thrown out by the centrifuging. The centrifuging does not squeeze all the liquid out of the centrifuged material for some remains in the form of moisture. And the mother liquor will have some xanthate still in it which the centrifuging has not been able to throw out, and it will also contain whatever impurities there were in the ingredients and whatever other substances the water in the mother liquor was able to attract in its competition with the alcohol less what went with the solids. The result is that while the centrifuged material still contains some liquid and, therefore, some impurities and substances other than xanthate there is no doubt that it is more nearly a pure xanthate than the product of the mother liquor when evaporated or the product without centrifuging would be. It is, therefore, apparent why there was a different result with the xanthate prepared by the Nutter method from that prepared by the Rosenstein one. The use of water in the latter method in dissolving the caustic potash would accentuate the formation of substances other than xanthate and the failure to centrifuge would leave all such substances, as well as any impurities in the solids when the mixture was dried by evaporation, so that the resulting product was not pure xanthate but included other substances and impurities as well. The success in the third test proved the superior value of pure

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xanthate in an acid circuit. But that is all, in my opinion, that it did prove. While the tests at Anaconda did show that the product prepared by the Nutter method was more nearly pure xanthate and worked better than that prepared according to the Rosenstein one, there is no proof that there would not have been the same success with xanthate prepared according to the Keller method if only the centrifuged material had been used. There would be some moisture in the Nutter method xanthate just as there was in the centrifuged material referred to in paragraph 8 and some of it would have been water, with its accompanying impurities and substances other than xanthate, for there would still have been some water in the supernatant liquid even after the aqueous layer had been removed, and there is no evidence that it was more free from impurities and substances other than xanthate than the centrifuged material of the Keller method xanthate was. Mr. Higgins described the Keller method as quite a good one and Dr. Purves agreed that it would give a good yield. He did not like the use of denatured alcohol for this meant that there would be a little methyl alcohol mixed with the ethyl alcohol so that there would be some methyl xanthate mixed with the ethyl xanthate and there would also be some water. He said that the less water there was the greater the yield of xanthate would be, but he agreed that the small amount of methyl and water present in the Keller method would not be a matter of any practical consequence. He also agreed that the Keller method could be applied to commercial production. When Dr. Purves was asked to compare the Keller method with the Nutter one he said that the latter showed the presence of water and that he could not really compare the two methods without knowing how much water there was. This indicates that the quantity of water that is present is important. Dr. Purves' view was that the results of the two methods were substantially the same and that the Nutter method was basically simply a device for using an inexpensive grade of alcohol containing water. He could see no chemical difference between the two methods. The use of pure alcohol would yield more xanthate but would cost more; the use of a cheaper alcohol containing water would yield less xanthate but would cost less. The only difference between the Keller



method and the Nutter one was that in the latter after the caustic potash was dissolved in the alcohol the water in the mixture was removed by draining or siphoning it away or by decanting the alcohol before the carbon disulphide was added to the solution. Dr. Purves' evidence that he could see no chemical difference between the two methods supports the contention of counsel for the plaintiff that the only difference between the two methods was purely a mechanical one made necessary by the fact that a cheap alcohol in which there was more water than was desirable was being used and that it was merely a process of removing the excess water. Even when pure alcohol is used some water is produced in the reaction for, as we have seen, potassium hydrate KOH, ethyl alcohol  $C_2H_5OH$  and carbon disulphide  $CS_2$  produce potassium ethyl xanthate  $KCS_2C_2H_5O$  plus water  $H_2O$ . The small amount of additional water involved in the use of the denatured alcohol referred to in paragraph 8 would make no real difference, either as to the yield or purity of the xanthate produced. These are all facts that a chemist would know and are matters relating to the manufacture of xanthate. Consequently, if instead of using pure alcohol or the denatured alcohol referred to in paragraph 8 the chemist wished to use a cheaper alcohol containing an excessive amount of water, he would know that if he wanted to get the same results as he would get with pure alcohol, he would have to take steps to drive off the excess water, and that it would be desirable to do so before the carbon disulphide was added and the reaction took place. In my opinion the defendant has not been able to prove the grounds upon which his last attack on the disclosures of the specification was based.

The defendant thus fails in all its attacks upon the disclosures portion of the specification. In my view, any person skilled in the froth flotation art on reading the specification would know what the invention related to and what it was. He could have no doubt as to its ambit or scope. Moreover, he could with the specification and his knowledge of the art put the invention into effect as successfully as the inventor could do himself. He is directed to the use of the best substance without any need for experimentation and can then deal with the other sub-

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stances found to be useful as he chooses under the conditions mentioned. There are no misleading statements to put him off the track. He has been given the necessary warning if he is dealing with an acid circuit. The inventor has, I think, fulfilled the duty of full disclosure required of him by section 14.(1) of the Act.

Section 14.(1) also requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. By his claims the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property. His fences must be clearly placed in order to give the necessary warning and he must not fence in any property that is not his own. The terms of a claim must be free from avoidable ambiguity or obscurity and must not be flexible; they must be clear and precise so that the public will be able to know not only where it must not trespass but also where it may safely go. If a claim does not satisfy these requirements it cannot stand. The need for freedom from avoidable ambiguity or obscurity cannot be better expressed than it was by Lord Loreburn in the House of Lords in *Natural Colour v. Bioschemes* (*supra*) (1) where he said:

It is the duty of a patentee to state clearly and distinctly, either in direct words or by clear and distinct reference, the nature and limits of what he claims. If he uses language which, when fairly read, is avoidably obscure or ambiguous, the Patent is invalid, whether the defect be due to design, or to carelessness or to want of skill. Where the invention is difficult to explain, due allowance will, of course, be made, for any resulting difficulty in the language. But nothing can excuse the use of ambiguous language when simple language can easily be employed, and the only safe way is for the patentee to do his best to be clear and intelligible.

And in the same case Lord Parker said, at page 269:

It is open to the Court to conclude that the terms of a Specification are so ambiguous that its proper construction must always remain a matter of doubt, and in such a case, even if the Specification had been prepared in perfect good faith, the duty of the Court would be to declare the Patent void.

*Vide* also *General Railway Signal Co., Ltd. v. Westinghouse* (2); *Whatmough v. Morris Motors, Ltd.* (3)

(1) (1915) 32 R.P.C. 256 at 266.

(3) (1940) 57 R.P.C. 177 at 198.

(2) (1939) 56 R.P.C. 295 at 382.

The inventor may make his claims as narrow as he pleases within the limits of his invention but he must not make them too broad. He must not claim what he has not invented for thereby he would be fencing off property which does not belong to him. It follows that a claim must fail if, in addition to claiming what is new and useful, it also claims something that is old or something that is unless: *Vidal Dyes v. Levinstein (supra)* (1); *Natural Colour v. Bioschemes (supra)* (2).

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The attacks upon the claims may now be considered. Objection was taken to claim 6 on the ground of ambiguity. It reads as follows:

The process of concentrating ores which consists in agitating a suitable pulp of an ore with a mineral-frothing agent and an alkaline xanthate adapted to co-operate with the mineral-frothing agent to produce by the action of both a mineral-bearing froth containing a large proportion of a mineral of the ore, said agitation being so conducted as to form such a froth, and separating the froth.

Three expressions were said to be ambiguous, namely, "suitable pulp of an ore", "alkaline xanthate" and "adapted to co-operate". "Suitable pulp of an ore" may mean that the suitability is related either to the fineness of the ore and the amount of water required for the pulp or to the nature and kind of the ore and whether it can be treated by froth flotation. This means no more than that the pulp should be suitable for froth flotation; this would be known to a practical metallurgist or chemist. I see no objection to the expression. Nor was the expression "adapted to co-operate" seriously challenged, although it was said to be ambiguous. The strongest exception was taken to the term "alkaline xanthate". Xanthate is a neutral salt and the term alkaline xanthate appears as a contradiction. By itself it does not make sense. Mr. Higgins considered it a slip of the tongue but did not think any metallurgist would misunderstand it. He regarded it as synonymous with alkali xanthate or alkali metal xanthate. Dr. Purves stated that the expression did not make sense to a chemist since xanthates are neutral substances. It struck him as a conundrum. His first impression was that it meant a xanthate in an alkaline solution, but it might mean a xanthate made with an alkali or an alkali metal. Mr.

(1) (1912) 29 R.P.C. 245 at 268,  
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(2) (1915) 32 R.P.C. 256 at 266,  
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Bennett thought the expression a contradiction in terms, but considered that it was possible to regard alkaline as meaning alkali metal and that such a meaning was a reasonable one. The inventor made several clarifying and important amendments during the course of prosecuting his patent application but this term remained untouched. He could have avoided ambiguity if he had used more care. As the expression stands it is either contradictory or incomplete. Counsel for the plaintiff contended that if it meant alkali metal xanthate to a metallurgist or chemist the claim should be upheld, but this means interpretation of the claim by experts. The construction of a specification is for the Court and not for the experts. Moreover, to read the word "alkaline" which has a well known meaning as if it were "alkali metal" is not construction of the claim but amendment of it, which is not the function of the Court or within its powers. I find obscurity and ambiguity, which the inventor could have avoided. Claim 6 must, therefore, fail.

Of the remaining claims in suit claim 9 is the significant one. It reads as follows:

9. The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate and a frothing agent.

Two attacks upon this claim were made; one, that it extends to some xanthates that will not work in froth flotation and that it is bad because it claims something that is useless, and the other, that there is nothing in the disclosures to warrant confining the claim to a non-acid circuit.

As to the first objection it is said that the claim covers all xanthates and that there are two classes of xanthate that will not work in froth flotation, one being cellulose xanthate and the other copper, cobalt and calcium xanthates. The main attack on claim 9 centred on cellulose xanthate. The evidence that it will not work successfully in froth flotation is conclusive. Mr. Bennett prepared it in accordance with instructions from Dr. Purves and tested it at Noranda. The tests proved that the recoveries made with it were very low, that the purer the xanthate was and the more of it that was used the worse the results were. Far from having any use in froth flotation, it had a

positively depressing effect on copper minerals and seemed to prevent them from coming into the froth. Counsel for the defendant contended that notwithstanding the fact that the inventor had tried it and discarded its use he had included its use in claim 9 and that the claim was accordingly bad. A great deal of evidence was given at the trial on this subject and much argument was devoted to it.

Cellulose xanthate was originated as early as 1893. Its discovery was the foundation for the viscose industry and the rayon silk industry and in 1923 it was known chiefly for its value in the latter connection.

The cellulose xanthate was prepared for the tests as follows. The first ingredient was cellulose to which was added a caustic soda solution, that is, caustic soda dissolved in water. This was agitated and stirred for two hours. The compound was then filtered, the excess solution discarded and the residue pressed between blotters. The resulting swollen gelatinous mass was shredded with scissors to get it into small particles or crumbs. These were aged or ripened for 46 hours and then carbon disulphide was added. This mixture was agitated and stirred for 3 hours and any excess carbon disulphide was removed. What was left was a highly swollen, yellow, somewhat crumbly material. This was crude cellulose xanthate, really a mixture of cellulose xanthate with some caustic soda in it. This compound was known as viscose. The obtaining of pure cellulose xanthate required further processes. To the yellow crumbly material a caustic soda solution and water were added until all the crumbs were dissolved, forming a viscous clear solution. While this was being stirred methyl alcohol was added causing the cellulose xanthate to coagulate. All excess alcohol was decanted and the coagulated material was further treated with alcohol to wash out all excess caustic soda, leaving only the pure cellulose xanthate.

The essential chemical difference between sodium cellulose xanthate and sodium ethyl xanthate is that in the former sodium is mixed with cellulose, whereas in the latter it is mixed with ethyl alcohol. The cellulose takes the place of the ethyl alcohol, with the result that the cellulose xanthate contains the cellulose radical whereas the sodium ethyl xanthate contains the ethyl radical. There

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are other differences which are perhaps of a physical rather than a chemical nature. The ethyl xanthate is a crystalline substance, the cellulose xanthate a fibrous one. The ethyl xanthate dissolves easily in water, whereas the cellulose xanthate to the extent that it does dissolve forms only what is called a colloidal solution.

The evidence shows a number of practical differences between sodium cellulose xanthate and sodium or potassium ethyl xanthate. Cellulose xanthate is more difficult and takes longer to make; more care has to be taken of temperatures and times. Cellulose xanthate is not readily purchasable on the market for in the rayon industry the material that is used is viscose; the xanthate itself is not a commercial product. Consequently, if xanthate were to be purchased it would be in the form of viscose, which does not lend itself to shipment or storage except for very short periods, for the xanthate in it quickly decomposes. Sodium or potassium ethyl xanthate, on the other hand, is easily and quickly made, the ingredients for its production are readily procured, the xanthate is sold on the market, is easily shipped and can be stored in large quantities at the mine. Moreover, the cost of cellulose xanthate was greater than that of ethyl xanthate. So far as froth flotation was concerned there were obvious disadvantages in using cellulose xanthate as compared with ethyl xanthate, even if their use was equally efficacious.

Counsel for the plaintiff had several replies to the defendant's criticism that claim 9 was invalid because it covered cellulose xanthate which was useless in froth flotation. Mr. Bennett admitted that as a practical metallurgist and chemist he would, after reading the specification, first try potassium or sodium xanthate. I think any person skilled in the art would do the same thing. He would be led immediately and directly to that kind of xanthate, and no other, as the best substance to use and he would be able to achieve the same best success as the inventor could without any experimentation on his part. The situation is quite different from that in the *Natural Colours v. Bioschemes* case (*supra*), on which the defendant relied, for there the reader of the specification was given no indication as to which red and green he would have to use to succeed and his success with the invention depended on his

finding the right colours himself by his own experiments. Mr. Bennett also admitted that in view of the disadvantages in the use of cellulose xanthate, as compared with potassium or sodium xanthate, he would not, as a practical man, use it in froth flotation even if it did work. Under the circumstances, counsel for the plaintiff contended that the claim should not be held invalid. His argument was that cellulose xanthate was a different kind of xanthate from the kind whose use was proposed in the specification; that no practical metallurgist or chemist engaged in froth flotation, having been directed by the specification to use potassium or sodium xanthate would think of using cellulose xanthate; that it was not necessary to consider whether the word xanthate was wide enough to include cellulose xanthate or not, since no practical person skilled in the art would think that the claim extended to it; and that if there was any doubt whether the word did or did not include cellulose xanthate it should be resolved in favour of the patentee since no person would be led to use it. Counsel relied on *Thermit Ld. v. Weldite Ld.* (1). In that case the proposal in the specification was to combine powdered aluminium and the powdered oxide of a metal with the idea that the aluminium would join with the oxygen in the metal and leave the metal. The purpose was to get a metal free from oxygen for welding purposes. Aluminium has a particular affinity for oxygen. It was stated in the specification that all metals or their alloys could be gained in this way. The patent was attacked on the ground that in the case of some metals this process did not work—that the aluminium would not combine with the oxygen in the metal. It was held that since it was known to chemists that there were certain metals with which aluminium would not react at all, that the statement in the specification that all metals or their alloys could be gained by the process should be read as referring only to those metallic compounds which are capable of reduction by aluminium under the conditions described in the specification. It was contended that a similar principle should be applied in the present case, and that the claim should be read as referring only to a xanthate of the kind which a person skilled in the art would regard as practical and

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(1) (1907) 24 R.P.C. 441.

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adequately described in the specification. This suggested construction of a claim in the light of the knowledge of practical persons skilled in the art is an interesting one, but the weakness of the contention that it should be applied in the present case lies in the fact that at the time of the specification there was no knowledge in the art of the use or efficiency of any xanthate in the froth flotation process. It was the discovery of the value of the use of certain xanthates of a defined class as a new substance in froth flotation that was the very subject matter of the invention. The situation is not similar to that existing in the *Thermit* case (*supra*), where there was chemical knowledge as to what metals would react with aluminium, and it cannot be considered applicable, even if otherwise acceptable as an authority.

The plaintiff has, however, a complete answer to the defendant's contention. It is clear from the correspondence that the inventor was not concerned with cellulose xanthate and was not afraid of infringement through its use. He was anxious, however, about trithiocarbonate. It was for these reasons that the amendments were made. Paragraph 4 was amended, as already noted, to make sure that only such xanthates were included as contained an organic radical of the alkyl type and formed anions and cations in solution; and all other xanthates were excluded from consideration. Then by the inclusion of paragraph 7 the inventor protected himself from infringement from the trithiocarbonate side. By his definition of the kind of xanthate whose use he proposed and his exclusion of other xanthates thereby the inventor was entitled to have the word xanthate, which was not a common word, interpreted to mean what he intended it to mean, namely, only the kind of xanthate he had specifically defined in the first two sentences of paragraph 4. The word xanthate is thus used with the meaning which the inventor has given to it. If it is so read, then cellulose xanthate must be excluded from its ambit on two grounds, as will be shown later.

The construction of a specification, both as to the disclosures and as to the claims, is a matter of law for the Court, and it is well established that there are cases in which the terms in a claim may, and should, be interpreted in the sense in which the inventor has used them in the



specification. In such cases, the specification is the dictionary of the claims and serves a purpose similar to that of the definition section of a statute. The basic case for the statement of this principle is *Needham and Kite v. Johnson and Co.* (1). In that case there were two possible constructions of the word "conduit" in one of the claims, but the Court adopted that which would validate the patent, and Lindley L. J., at page 58, laid down the following rule:

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The expression "conduit" requires explanation, and one must look for it, and see what it does mean. Of course it does mean that which the patentees have said it means. You are not to look into the dictionary to see what "conduit" means, but you are to look at the specification in order to see the sense in which the patentees have used it.

The same principle was stated by the House of Lords in *British Thomson-Houston Company Ltd. v. Corona Lamp Works Ltd.* (2). There one of the claims was for an incandescent electric lamp having a filament "of large diameter", and one of the attacks on the patent was that the ambit of the claim had not been sufficiently defined. Sargent J. gave effect to this objection and the Court of Appeal affirmed his judgment, but it was unanimously reversed by the House of Lords. At page 67, Viscount Haldane, after stating that the specification must be read as a whole, said:

The Claiming Clauses, for example, are not to be taken as standing in complete isolation. For if the Patentee has used in these clauses expressions which he has already adequately interpreted in the body of his Specification, he is entitled to refer to the Specification as a dictionary in which the meaning of the words he uses has been defined.

The principle has also been recognized in Canada, the leading authority being the decision of the Supreme Court of Canada in *Western Electric Co. v. Baldwin International Radio of Canada* (3). Duff C. J., speaking for the Court, there applied the principle "that the specification itself provides the dictionary by which the scope and effect of the terms in the claims is to be ascertained" to one of the claims before the Court. The claim related to the use of a combination of sound amplifiers. It was disclosed in the specification that the combination would work "without transformers" and that the absence of transformers was a characteristic and essential feature of the invention, but there was no statement in the claim that the combination should be "without transformers". The judgment contains

(1) (1884) 1 R.P.C. 49.  
 (2) (1922) 39 R.P.C. 49.

(3) (1934) S.C.R. 570.

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a number of illuminating statements. At page 580, Duff C. J., agreed with the holding of the President of this Court that the language of this claim must be construed by reference to the disclosure of the nature of the invention in the body of the specification, and also said:

This is especially one of those cases in which it is the document itself which affords the most valuable assistance possible for ascertaining the scope and signification of the phrases employed to limit the claim.

Later, he found it impossible to separate the claim from a passage in the specification in which it was clear that the discovery was of a combination that would operate “without transformers” and said, at page 583:

I have no doubt whatever that, on a proper construction of the specification as a whole, the combination mentioned in the second claim is the combination described in the passage just quoted; or that the “thermionic” repeaters mentioned in the claim must be taken to be thermionic repeaters having the characteristics ascribed by definition to those which the inventor has succeeded in securing the results which he says are secured by his invention.

In the result, the claim was held to be limited to a combination that worked “without transformers” even although no such limitation was expressed in the claim itself. The two cases last cited were further referred to by the Supreme Court of Canada in *Smith Incubator Co. v. Seiling* (1). There Duff C. J. said, at page 256:

Lord Haldane’s judgment in *British Thomson-Houston Co. Ltd. v. Corona Lamp Works Ltd.* (*supra*) at page 67, affords an illustration of the manner in which expressions used in the claim may be interpreted by reference to the body of the specification. *Western Electric Co. Inc. v. Baldwin International Radio of Canada* (*supra*) is another case in which the description in the body of the specification of the invention provided a lexicon interpreting the phrases in the claim.

and Rinfret J. (all other members of the Court concurring) said, at page 259:

The rule is that the claims must be regarded as definitely determining the scope of the monopoly having regard to the due and proper construction of the expressions they contain.

and, at page 260:

The claims must be construed in the light of the rest of the specification; and that is to say, that the specification must be considered in order to assist in comprehending and construing the meaning—and possibly the special meaning—in which the words or the expressions in the claims are used.

These authorities were relied upon by counsel for the plaintiff in support of his submission that the word xanthate in claim 9 should be read as meaning only the kind of xanthate which the inventor had defined in paragraph 4 of the specification.

Counsel for the defendant, however, contended that the meaning of the word could not be limited by importing any qualification from the specification and relied upon two cases in support of his contention. The first was the judgment of Davis J., speaking for the Supreme Court of Canada, in *B.V.D. Company Ltd. v. Canadian Celanese Ltd.* (1). There the validity of claims in a patent in respect of fabrics containing a thermoplastic derivative of cellulose was under attack. They could be saved from invalidity on the ground of anticipation by previous patents only if they could be limited to the use of the cellulose derivative in the form of yarns, filaments and fibres and such limitation appeared in the disclosures of the specification. Yet Davis J. held that the claims could not be so limited. At page 237, he said:

We are invited to read through the lengthy specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. But the claims are unequivocal and complete upon their face. It is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention. Upon that ground the patent is invalid.

It is difficult to read the judgment in this case without feeling that the Court was to some extent influenced by the fact that the inventor had limited his claims in his British and United States patent applications but had omitted any limitation in his Canadian one. The other case relied upon was that of the English Court of Appeal in *Molins and Molins Machine Co. Ltd. v. Industrial Machinery Co. Ltd.* (2). There a claim was made to a "cigarette making machine on the continuous rod type". It was contended that the claim ought to be read as being limited to high

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(1) (1937) S.C.R. 221.

(2) (1938) 55 R.P.C. 31.

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speed machines in order to give effect to the object of the invention but this contention was rejected. Greene M. R., as he then was, said, at page 39:

It is sufficient for me to say that in my opinion there is no justification whatever for importing into the claim, drawn as it is in simple and direct language, a limitation extracted either from the language of the body of the specification or from the purpose at which the invention is aiming. It has been laid down over and over again that this method of construing a Patent Specification is inadmissible.

These cases do not deny the principle that the specification is the dictionary by which the scope and effect of the terms in the claims is to be ascertained but merely indicate that it is not of general application and ought not to be applied in cases where a claim is expressed in simple and direct language or in wide or general terms whose meaning is plain and unequivocal. Some of the authorities cited by Davis J. in the *B.V.D. Company* case (*supra*) make this clear. For example, in *Terrell on Patents*, 8th Edition, at page 134 it is said.

If the words of the claim are plain and unambiguous it will not be possible to expand or limit their scope by reference to the body of the specification.

And in *Ingersoll Sergeant Drill Company v. Consolidated Pneumatic Tool Company Ltd.* (1) Lord Loreburn said:

The idea of allowing a patentee to use perfectly general language in the Claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the Specification, is wholly inadmissible

And in *British Hartford-Fairmont Syndicate, Ltd v. Jackson Bros. (Knottingley), Ltd.* (2) Romer L. J. said:

But where the construction of a Claim when read by itself is plain, it is not in my opinion legitimate to diminish the ambit of the monopoly claimed merely because in the body of the Specification the Patentee has described his invention in more restricted terms than in the Claim itself.

In my opinion, this case is quite a different kind of case from those relied upon for the defendant. Xanthate is not a common word at all, nor is it a word whose meaning is so plain and unequivocal that it necessarily includes cellulose xanthate, for authority can be found in the dictionaries for two meanings of the word, the commonest one of which completely excludes cellulose xanthate and the other only possibly includes it. The *New English Dictionary* (1928) defines xanthate as "A salt of xanthic (sulphocarbethylic) acid" and xanthic acid as "a complex acid containing sul-

(1) (1908) 25 R.P.C. 61 at 83.

(2) (1943) 49 R.P.C. 495 at 556.

phur and carbon, also called sulphocarbethylic or ethyl-disulphocarbonic acid ( $C_2H_5OS_2$ ), many of whose salts (*xanthates*) are yellow." When this formula is rewritten to show the structural formation of the acid it is  $SCSHOC_2H_5$ , being that form of dithiocarbonic acid in which the alkyl radical, ethyl, has replaced the hydrogen in the hydroxyl group in which sulphur has not been substituted for the oxygen. This definition is exactly the same as that contained in the first sentence of paragraph 4. If this meaning is given to the word "xanthate" in claim 9, it cannot include cellulose xanthate, for its radical is quite different from the ethyl one. The definition of xanthate in Watts' Dictionary of Chemistry is the same. All that would be found there would be "Xanthates. The salts  $RS.CS.OEt$  where R is a metal; v. Ethyl Dithiocarbonate" and "xanthic acid v. Ethyl Dithiocarbonate". Then Mono-ethyl Dithiocarbonate is given as " $EtO.CS.SH$ . anthogenic acid. Xanthic acid". Et is the symbol for ethyl  $C_2H_5$ . This definition would not fit cellulose xanthate. It should be noted, however, that this definition antedates the discovery of cellulose xanthate. The most recent dictionary meaning is to be found in Webster's New International Dictionary (Second Edition) (1942). It defines xanthate as "a salt or ester of xanthic acid" and one of the meanings of xanthic as "Pertaining to or designating any of a series of thio acids having the general formula  $ROCSSH$ , obtained in their salts (xanthates) by treating alcoholates with carbon disulphide; specif., ethyl-xanthic acid,  $C_2H_5OCSSH$ , a colourless unstable oil. Alkali-metal xanthates form yellow precipitates with copper salts". The specific illustration in this definition would also exclude cellulose xanthate but the general formula might include it if R is read as being broad enough to include the cellulose radical and if the word alcoholates is read as including a solution of a metal hydroxide, water and cellulose. The definition might convey such a meaning to a scientific chemist of Dr. Purves' standing who might classify cellulose as an alcohol. It is interesting to note that in the earlier edition of this dictionary, published in 1910, a less extensive meaning of xanthic acid is given, with the same formula as that in the New English Dictionary. Of the chemical dictionaries to which reference was made for the

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meaning of the word "alkyl", the only one that mentions cellulose xanthate is Hutchinson's Technical and Scientific Encyclopædia. The others all give a meaning to xanthate which would exclude cellulose xanthate. For example, Hack's Chemical Dictionary (1930) gives the following, namely "xanthate. xanthogenate. A salt of xanthic acid of the general type, MO.CS.SET, or MO.CSSR, where M is a metal and R an alkyl radical". This is the same definition as that in the first sentence of paragraph 4 and excludes cellulose xanthate. On the evidence of the experts a wider meaning than the common dictionary one was given which did include cellulose xanthate. The list of xanthates (Exhibit D 61) shows 16 groups of substances called xanthates in 10 of which the radical is not of the alkyl type, one of these being cellulose xanthate. Dr. Purves explained that, while the nomenclatures of chemistry accurately describe compounds according to their constituent elements, they are not as accurate and precise in the matter of description of classifications of substances. The classifications are being revised from time to time as knowledge grows. Indeed, when substances such as potassium ethyl xanthate and cellulose xanthate, which differ so greatly both in chemical composition and in behaviour, are classified under the same term, it would not be strange if one were to question the correctness of the classification or the aptness of the term. It should also be remembered that none of the references to the xanthates listed in Exhibit D 61 were to publications in the metallurgical field. And counsel for the defendant strongly urged that there was no common knowledge of xanthates in the froth flotation art at the time of the invention by which the meaning of the word xanthate could be ascertained. Certainly, to borrow an expression from Duff C. J. in *Western v. Baldwin* (*supra*), at page 582, the word xanthate was not a term of art having "a generally understood signification in the art at the date of the patent". The term is a technical chemistry term, the meaning of which might not be known to the persons to whom the specification is addressed. Under the circumstances, it seems to me that it would be proper and reasonable for a reader unfamiliar with the term to look at the specification to see whether the inventor has used it with a defined special meaning. If he did so

he would find a definition of xanthates in paragraph 4 that is in accord with the common dictionary meaning but is more restricted by reason of the requirement of the second sentence in it. In my opinion, this case falls fairly within the proper application of the principle stated by Duff C. J. in *Western v. Baldwin* (*supra*) that "the specification itself provides the dictionary by which the scope and effect of the terms in the claims is to be ascertained". The word xanthate in claim 9 should, therefore, be read in the light of the inventor's definition in paragraph 4 of the kind of xanthate whose use in froth flotation he found useful. That is the only kind of xanthate he had in mind.

Counsel for the defendant is under the onus not only to prove that cellulose xanthate is useless in froth flotation but also to show that it comes within the definition given in paragraph 4. The first part of the onus is discharged, but the second is not. There are two grounds for holding that he has not succeeded in bringing cellulose xanthate within the definition. In the first place, the evidence as to whether cellulose xanthate can form anions and cations in solution is not free from doubt. Dr. Purves stated that it would form anions and cations if it were soluble, but he was not at all sure whether it was soluble in water. He had no definite knowledge about the matter but admitted that its solubility was not very large. Dr. Purves is an outstanding expert on cellulose and his doubt on the subject is important. Mr. Bennett stated that he had added 1 gram of carefully purified potassium cellulose xanthate to 100 grams of distilled water and that substantially all of the gram was dissolved, from which he concluded that it was soluble in water to the extent of approximately one per cent. Solubility must in this case be looked at from the point of view of the froth flotation process and it is far from clear that this degree of solubility is enough. Moreover, Mr. Bennett admitted that the solution was a colloidal solution and Mr. Higgins stated that in 1923 colloids were not used in froth flotation but were avoided like poison. On cross-examination it was brought out that in some cases sodium silicate was used in froth flotation and that it would form a colloid if used in an acid, but Mr. Higgins said that he did not know a single case where it was used except in an alkaline circuit. I conclude that

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cellulose xanthate was not soluble in the sense in which a froth flotation metallurgist or chemist would use the term. There is a second ground upon which the defendant completely fails. Cellulose xanthate is a different kind of xanthate from the xanthates whose use is proposed in the specification. The cellulose radical is not an alkyl radical. It is a radical of a carbohydrate, which means that it has oxygen in it, the formula of the radical being  $C_6H_7O_2$  taken X times, whereas an alkyl radical is a radical of a being  $C_nH_{2n+1}$ . Dr. Purves admitted that the cellulose saturated hydrocarbon and has no oxygen in it, the formula radical was not like methyl or ethyl etc. If the term alkyl radical is to receive the precise meaning given by Mr. Higgins and in the dictionaries referred to, as I think it should, then it is clear beyond any possible dispute that the radical in cellulose xanthate is not an alkyl radical. The result is that cellulose xanthate is completely excluded from the definition of xanthates given in paragraph 4 and consequently from the word xanthate in claim 9.

Moreover, since the onus is on the defendant to bring cellulose xanthate within the ambit of claim 9, I am of the view that if there is any doubt in the matter it should, under the circumstances of the case, be resolved in favour of the patentee. There is support for this opinion in *Natural Colour v. Bioschemes (supra)*. In that case, there is an illuminating discussion on the subject of ambiguity in a specification, and how it should be dealt with in its various aspects. I have already quoted the language of Lord Loreburn and Lord Parker, in connection with the attack on claim 6. In the same case Lord Parmoor points out that the word ambiguity is itself ambiguous and may denote several things. In the first place, it may denote that the language used is not sufficiently explicit in describing the nature and ambit of the invention to ensure to the public the benefit of the discovery. Secondly, it may denote language that is designedly capable of alternative constructions; this is a studied and affected ambiguity that is inconsistent with the good faith required of a patentee. There is a third sense which is quite different. At page 272, Lord Parmoor says:

In a third sense there is ambiguity which arises from the difficulty of accuracy in expression, there being no suspicion of the want of good faith, and where the language used, if capable of being construed in the sense



claimed, would give a sufficient description of a new and useful invention. I apprehend that in this case the same principles apply to the construction of a Patent grant as to other documents which determine public rights or obligations, as distinct from documents which define the contractual relationship between the contracting parties, and that, if, applying these principles, the grant is fairly capable of being construed in the sense claimed, it is a valid grant and supports the claims of the inventor to his monopoly right.

The principle involved in this statement is properly applicable in the present case. The inventor has taken care in the specification to define the kind of xanthate whose use in froth flotation he proposes. It is part of the definition that the xanthate must contain an organic radical of the alkyl type. In the most precise sense of that term, which is consistent with its use in modern chemistry reference books, cellulose xanthate would be excluded from the definition because its radical is not of the alkyl type. It is only by importing into the word alkyl a meaning as wide as that of aliphatic that cellulose xanthate could possibly be included in the inventor's definition. Then, with regard to the meaning of the word xanthate in the claim itself we find that the common dictionary meaning of the word is similar to that which the inventor has used in his definition and will by itself exclude cellulose xanthate and that it is only by giving an extended meaning to the term that cellulose xanthate could be included. Moreover, while the word xanthate cannot be interpreted according to any common knowledge in the art, for the reason that it was a new term in the art, the specification itself is full of references to the kind of xanthate the inventor contemplated. Under the circumstances, I think it would be erroneous to construe the word xanthate in claim 9 as including a useless xanthate, such as cellulose xanthate, and declaring the claim invalid on that account, when the word is fairly capable of another meaning which will exclude cellulose xanthate and support the patent, particularly when such meaning is in accord with the common dictionary meaning of the word and clearly the meaning with which the inventor himself has used the term in the specification. It is, I think, sound in principle and consistent with authority under the circumstances to resort to the maxim *ut res magis valeat quam pereat* and give effect to the construction that will validate the patent. This, in my opinion, would be fair construction and consistent with a

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“reasonable and judicial anxiety to support a really useful invention”. I, therefore, come to the conclusion that the word xanthate in claim 9 was not intended to include and does not include cellulose xanthate.

Neither does the claim include calcium, copper or cobalt xanthate. There is no evidence that xanthates made with these substances, if they can be made at all, will not work. All that the defendant has to rely on is a statement in Keller’s notebook (Exhibit K 12, page 70) to the effect that he had told Mr. Nutter that copper xanthate, cobalt xanthate and calcium xanthate were not useful “as they are insoluble”. If these xanthates are insoluble they are excluded from the definition. Mr. Higgins spoke of copper xanthate as one of the most insoluble compounds in chemistry. Cobalt is also one of the heavy metals whose use in making xanthates is excluded. Calcium is an alkaline earth rather than a metal and while there is no evidence that calcium xanthate is insoluble, except the statement by Keller in his notebook, Mr. Higgins says that calcium hydrate is only very slightly soluble in water and it would follow, I think, that the same is true of the xanthate.

There was also some controversy as to ammonium xanthate. In the first place, the evidence is quite clear that xanthate cannot be made with ammonium directly but must be made indirectly by making sodium or potassium xanthate first, then acidifying such xanthate and then neutralizing it with ammonia. Tri-methyl-phenyl ammonium and tetra-methyl-ammonium will make xanthates but these are not the same substances as ammonium. As I read the evidence relating to ammonium I think it quite irrelevant in considering claim 9 because there is no evidence that ammonium xanthate will not work. The defendant relies upon a statement by Keller to Mr. Nutter on August 2, 1923, (Exhibit K 38) that he had made ammonium xanthate and that the substance was not very stable. He gave the formula he used which showed that he tried to make it directly, substituting only  $\text{NH}_4$  (ammonia), which is really a radical, for either sodium or potassium. Dr. Purves says that with this substitution the inventor would wind up with the ammonium salt of thio-carbamic acid which is not a xanthate at all. If this substance is not a xanthate there is not a tittle of evidence

that ammonium xanthate, which can be made only indirectly, is useless in froth flotation. And even if the substance referred to by Keller is ammonium xanthate, there is proof that it has usefulness for Keller says that it gives a good selection between lead and zinc, although its action on copper is not as favourable as potassium or sodium xanthate. Whichever way it is regarded there is no evidence of its uselessness.

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One other objection to claim 9 remains for consideration. It will be remembered that the claim is limited to a non-acid pulp. It was contended by counsel for the defendant that no foundation for such a limitation was laid in the disclosures in view of the statement in paragraph 6 that the pulp may be either acid, alkaline or neutral according to circumstances. It was also contended that in confining his claim to a non-acid pulp, Keller was claiming an invention that really belonged to Lewis who had been allowed to take out a patent for the use of xanthate in an alkaline circuit. We are not concerned with why Lewis was allowed to do this or with the Lewis patent. Moreover, it seems to me that the last sentence in paragraph 6 provides a sufficient basis for enabling the inventor to make a claim in respect of any kind of a circuit. That being so, I see no reason why he should not restrict his claim to a non-acid circuit if he desires to do so. I find no substance in this objection. I find, therefore, that claim 9 in the patent is valid.

Under the circumstances, I find it unnecessary to pass on the validity of claims 7 and 8, or to deal with the contention that if claim 8 is valid then sodium xanthate is the chemical equivalent of potassium xanthate.

In addition to the attacks upon the disclosures and the claims, the validity of the patent was challenged on a number of other grounds. The contention that it was a selection patent and was invalid because it did not satisfy the requirements of such a patent may be dealt with briefly. Terrell on Patents, 8th Edition, refers to selection patents at pp. 81-82. In the case of chemical patents the invention may reside in the selection of a particular substance or group of substances out of a class for a particular purpose.

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The general principles governing the validity of selection patents were stated in *In re I. G. Farbenindustrie A.G.'s Patents* (1) by Maugham J.:

First, a selection patent to be valid must be based on some substantial advantage to be secured by the use of the selected members (The phrase will be understood to include the case of a substantial disadvantage to be thereby avoided) Secondly, the whole of the selected members must possess the advantage in question. Thirdly, the selection must be in respect of a quality of a special character which can fairly be said to be peculiar to the selected group.

A selection patent appears to presuppose an originating patent. In this case the originating patent was said to be the Perkins United States Patent No. 1,364,304, dated January 4, 1921, said to cover the invention of the use in froth flotation of "certain non-obaginous solid organic compounds, which themselves have substantially no frothing properties, but which have valuable properties as collecting agents for the mineral". It was contended that this general description covered xanthates and the other substances referred to in the patent in suit, such as trithiocarbonate and monothiocarbonates, and that this made the patent in suit stand in relation to the Perkins patent as a selection patent. Then it was contended that the second requirement for the validity of a selection patent, namely, that all the selected members must possess the advantages claimed for them, could not be complied with since xanthates and the other two substances, trithiocarbonate and monothiocarbonates, were of unequal advantage and that, in consequence, the whole patent was invalid. In my view, the plain answer is that the patent in suit is not a selection patent in relation to the Perkin's one. A study of the Perkin's patent shows that it would be quite unreasonable to regard the substances referred to in the patent in suit as selected members of the class of substances dealt with in the Perkin's patent. They are not so at all. For example it is said in the Perkin's patent that the collecting agents are substantially insoluble, and are commonly referred to as insoluble, but are soluble to a very small degree, whereas it is of the essence of the xanthates covered by the patent in suit that they should be soluble. Furthermore, the specific compounds referred to in the Perkin's patent, for example, diazo-amino-benzene, are not of the same class

as the substances covered by the patent in suit. Under the circumstances, it cannot, in my opinion, properly be said that the patent in suit is a selection patent covering the use of members of the class of substances, if there is any, whose use is covered by the Perkin's patent. This contention as to the invalidity of the patent is quite untenable.

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The next attack on the patent was that it was void because there was no authority in the Commissioner of Patents to issue it. The facts on which this argument is based are as follows. On October 23, 1924, a letter was sent by Messrs. Caron & Caron on behalf of the inventor to the Commissioner of Patents enclosing a petition, oath and specification together with the fee of \$15. The letter also stated that a new specification, which might be amended to correspond with the case filed in the United States, would be substituted as soon as completed. The specification indicated that the invention related to a method for which the inventor had applied for a patent in the United States of America under serial number 670,242 on October 23, 1923. It was, to say the least, a very informal specification and was obviously filed with the intention of getting the benefit of a convention filing date. Then, on the following day, October 24, 1924, Messrs Caron & Caron filed a new petition signed by the inventor and an oath, as well as the specification in duplicate and a third copy of the claims, "to be substituted for those filed yesterday." An assignment from the inventor to the plaintiff and an assignment fee of \$2 was also inclosed, but no further fee of \$15 was paid. The specification filed on October 24, 1924, is the one included in the patent subsequently issued on March 10, 1925. Counsel for the defendant took the position that the two applications were in respect of different inventions; that the \$15 fee had been paid and received in respect of the application of October 23; that no fee had been paid in respect of the application of October 24; and that since the statutory requirement of payment of the proper fees had not been complied with, the Commissioner had no jurisdiction to receive or deal with the application or to issue a patent

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based upon it and that the patent was, therefore, void. The section relied upon is section 43 of the 1923 Act which provides:

43. (1) The following fees shall be payable before an application for any of the purposes herein mentioned shall be received by the Commissioner, that is to say:—

On filing an application for patent . . . . 15.00.

It would be strange if a person could justify what would otherwise be an infringement by such a defence as this. There are two answers. The argument disappears altogether if there were not two different applications. There was certainly no intent to make two applications: the letters from Caron and Caron make this clear. Moreover, the file wrapper (Exhibit D 83) shows that the Commissioner dealt with the matter as though only one application were involved, under one serial number and with one filing date. In my opinion, he did so correctly, for all that happened was that on October 24th, a new set of documents relating to the application made on October 23rd, was filed. The most that can happen, if the papers filed on October 23rd are not complete, is that the plaintiff is not entitled to October 23rd as its filing date, but should have it only as of October 24th. That still leaves one application. As it is, nothing turns on the date and I see no reason for disturbing it. The next answer to the defence is *Fada Radio Limited v. Canadian General Electric Company Limited* (1). There the defendant sought to attack the validity of a re-issued patent because of the absence of an affidavit. There was some question as to whether it was required, but in any event, Anglin C. J., delivering the judgment of the Supreme Court of Canada, said; at page 523:

We are satisfied that any insufficiency in the material on which the Commissioner acts, the entire absence of an affidavit or any defect in the form or substance of that which is put forward as an affidavit in support of the claim, cannot, in the absence of fraud, . . . . avail an alleged infringer as a ground of attack on a new patent issued under s. 24.

And, at page 524:

The recital of the patent that the applicant . . . "has complied with the requirements of the *Patent Act*" is conclusive against the appellant in the absence of fraud.

And then a number of United States cases are referred to. This statement of principle is applicable in the present case.

(1) (1927) S.C.R. 520.

The patent in suit contains a recital that the petitioner has complied with the requirements of The Patent Act, and it is not open to the defendant in an infringement action to deny the validity of the patent on the ground that the fees payable on the application for it have not been paid, even if such has been the case.

Finally, the defence of anticipation of the invention was set up. Counsel for the defendant contended that there was nothing in the way of information contained in the specification of the patent in suit which was not contained in a document eight years earlier and made available to the public at that time. The document relied upon is called Bulletin No. 2 (Exhibit G-3), dated August 15, 1915, and compiled by one R. B. Martin under the circumstances hereinafter set forth. It is headed "Preparation of Flotation Reagents" and deals with a number of substances called Kotrix, Mimola, Cinol, Grabanol, Stanol. We are concerned only with that portion which deals with Stanol, reading as follows:

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STANOL

PREPARATION OF STANOL

Measure out 100 c c of Denatured alcohol  
 " " 10 c c " Carbon sulphides  
 Weigh " 1 gram of Caustic soda

Shake until dissolved and digest under a reflux condenser until the caustic soda has disappeared.

Several Stanols have been made up varying the proportion of carbon disulphides and caustic soda to meet the condition of the ore under treatment. The following proportion will serve as a guidance:

A Stanol

Denatured Alcohol ..... 100 c c  
 Carbon Disulphide ..... 10 c c  
 Caustic Soda (NaOH) ..... 1 gram

B Stanol

Denatured Alcohol ..... 90 c c  
 Carbon Disulphide ..... 20 c c  
 Caustic Soda (NaOH) ..... 1 gram

C

Denatured Alcohol ..... 80 c c  
 Carbon Disulphide ..... 30 c c  
 Caustic Soda ..... 1 gram

D

Denatured Alcohol ..... 100 c c  
 Carbon Disulphide ..... 10 c c  
 Caustic Soda ..... 5 grams

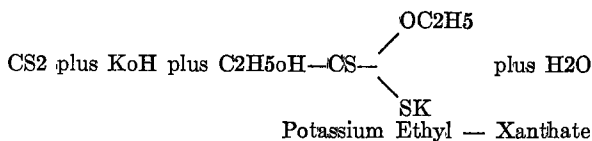
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E	Denatured Alcohol .....	90 c c
	Carbon Disulphide .....	20 c c
	Caustic Soda .....	5 grams
F	Denatured Alcohol .....	100 c c
	Carbon disulphide .....	10 c c
	Resin .....	10 grams
	Caustic Soda .....	1 gram
G	Denatured Alcohol .....	90 c c
	Carbon Disulphide .....	20 c c
	Caustic Soda .....	5 grams
	Resin .....	20 grams

Boil under reflux condenser until the resin is saponified. Dilute with 500 c c of water.

These formulas illustrate that in preparing Stanol variation can be practised by the addition of resin, the alcohol can be diminished and the caustic soda should always be governed as to only have present sufficient quantity to produce the reaction sought for. With some ores an excess of caustic soda to neutralize the acidity seems to impart specific results over the neutral Stanol.

The theory of forming flotation compounds from alcoholic caustic Potash and carbon disulphide may be expressed as follows:



The equation illustrates that if we digest under reflux condenser

Carbon Disulphide .....	57.6%
Caustic Potash .....	26.8
Denatured Alcohol .....	15.6
	100.0

we should upon the completion of the reaction obtained crystalline Potassium xanthate which, however, is soluble in alcohol and can be employed at any strength to effect flotation of copper salts.

Potassium xanthate is not a frothing agent and therefore it must be mixed with some appropriate agents that will give a voluminous froth. Alcohol, resin and pine oil seem to be the most suitable agents for this purpose.

It might be conjectured that some arrangements of combining Potassium xanthate with alcohol and resin and then mixing this compound with mineral oil, would be the initial step of using such a commercial mixture for the flotation of copper carbonates.

A substituted product may be formed by using caustic soda

Carbon Disulphide .....	70.8%
Caustic Soda .....	10.0
Denatured Alcohol .....	19.2
	100.0



The soda compound does not seem to produce the correspondent good results as is produced with the potassium xanthate. The high cost of potassium salt will prevent this compound from entering as a competitor of the much cheaper sodium salt.

All the experiments conducted so far have been by the use of sodium hydrate and denatured alcohol.

A very good compound is made up for alkali ores by using 20 per cent sodium ethyl xanthate and 80 per cent denatured alcohol.

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At the time of Bulletin No. 2 Martin was in the employment of Minerals Separation American Syndicate (1913) Limited, the predecessor of the plaintiff, as a metallurgist and engineer under an employment agreement dated March 6, 1915, one of the terms of which was that he was to disclose and assign to his employer all inventions made by him during his employment relating to the treatment of ores or tailings, flotation concentration or reagents. On the same date Martin also entered into an option agreement with Minerals Separation, Limited, a British Company related to the plaintiff's predecessor, whereby he agreed to disclose all inventions theretofore made by him relating to the treatment of ores or tailings or flotation concentration or reagents to such company for its benefit and to Mr. H. D. Williams for patent application purposes, and to give the company an exclusive option to purchase such inventions for \$5,000. The agreement also provided that if in the company's opinion any of his reagents could be successfully and profitably manufactured as a patented flotation oil or reagent the Company would do its best to exploit its manufacture and pay him 25 per cent of the net profits therefrom. Bulletin No. 2 was one of a number of reports made by Martin both in the course of his employment and pursuant to the option agreement.

Counsel's attack on the patent based on Bulletin No. 2 is a twofold one, namely, that before Keller made the invention for which the patent in suit was issued it was known by Martin in 1915, and that the Bulletin was a publication that anticipated the invention in that it had been disclosed or used in such a manner that it had become available to the public. He argued that he was not barred from this defence by anything contained in section 61.

(1) (a) of The Patent Act, 1935, which provides as follows:

61. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made

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by the inventor by whom the patent was applied for it had already been known or used by some other inventor, unless it is established either that,

(a) before the date of the application for the patent such other inventor had disclosed or used the invention in such manner that it had become available to the public; or that

This was introduced as section 37A of the Patent Act, R.S.C. 1927, chap. 150 by An Act to amend the Patent Act, Statutes of Canada, 1932, chap. 21, section 4. Counsel argued that section 61. (1) (a) could not be retroactive in effect and that, in any event, there had been a disclosure of the invention such as to meet the conditions of the section. It was agreed that a disclosure made to persons under a duty of confidence is not a disclosure at all, but it was argued that when Martin delivered the bulletin to his employer and to the British Company he made a disclosure to persons who were under no obligation of confidence and that such disclosure made the contents of the bulletin available to the public. Counsel contended that this put these companies in the dilemma of being in one or other of two relations so far as Martin was concerned, namely, either they were in the same position as the inventor or they were in the position of being the public. Consequently, when the Keller invention was used at Anaconda in 1923, the plaintiff, as the successor of Martin's employer, could not say that such use was that of an invention made only in 1923 by Keller, when they knew of it as an invention made by Martin in 1915. Accordingly, so the involved argument goes, either Martin made his invention available to the public in 1915 when he disclosed Bulletin No. 2 to his employer and the British Company or, alternatively, the plaintiff made it available to the public in 1923 by its use at Anaconda. It is clear that counsel, although relying only on Bulletin No. 2 and its disclosure to the persons receiving it, could not abandon the defence alleged in the statement of defence that Martin was a prior inventor, for the defence of anticipation based on Bulletin No. 2 depends upon the assumption that when Martin compiled it in 1915 he knew the invention covered by the patent in suit. Whether he did so cannot be determined by a consideration of Bulletin No. 2 by itself. It is a matter of inference to be drawn not only from the document but also from the

facts and circumstances leading up to and surrounding its compilation. The onus of proof of the fact of Martin's prior knowledge of the invention lies on the defendant.

The evidence of Mr. Higgins is important. He first met Martin late in February or early in March, 1915, at the office of the British Company in New York. He was its chief metallurgist and had instructions to examine Martin's inventions to see whether they had any value. Soon afterwards he and Mr. H. D. Williams, the patent attorney for the British Company and the plaintiff's predecessor, had a further meeting with Martin at which Martin disclosed all the inventions later referred to in Bulletin No. 2 except grabanol. At that time the substance later named stanol was called natrola or nitrola. Both Mr. Williams and Mr. Higgins took notes of the disclosures made. It was important that Martin should demonstrate his inventions. In order that he should be able to do so the British Company made a laboratory available to him and supplied him with the apparatus and chemicals he requested. In the laboratory there were the necessary testing machines for flotation tests and in the basement the necessary apparatus to crush ore. Martin also had chemistry reference books at his disposal. Subsequently, early in June, 1915, Mr. Higgins discussed with Martin certain draft specifications for certain substances, including stanol, which Martin had prepared for patent application purposes. Martin had been making tests with his various substances including stanol. Mr. Higgins and his assistant, Mr. Waling, supervised the making of these tests. Mr. Higgins saw how Martin made stanol. This was about the end of July or the middle of August. Moreover, he saw Martin make tests with stanol and he made some tests himself. When asked what was the result of these tests Mr. Higgins' reply was "They were perfectly negative. Neither Martin nor Waling nor I found the least use in stanol." Some use was found in kotrix, which was a sulphidizing agent, and in reconstructed oil, called mimola, which was a mineral frothing agent. Bulletin No. 2 was received directly from Martin by Mr. Higgins on September 14, 1915. Mr. Higgins stated that there were so many formulae in the Bulletin that he requested Martin to put the best of each one into a book; this was subsequently done and the book handed to Mr.

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Higgins on October 21, 1915. On September 28, 1915, Mr. Higgins received from Martin Bulletin No. 3 in which no mention of stanol was made. He then instructed Martin to furnish a further report and to make a test on Anaconda Copper Company's ore. Then he received Bulletin No. 4 from Martin in which Martin stated that stanol was not satisfactory for the Anaconda ore. This was the last Mr. Higgins heard of stanol until sometime in 1923, for although Martin compiled 88 bulletins altogether the last one in which he mentioned stanol was Bulletin No. 4. Patent applications were filed for kotrix and re-constructed oils, but not for stanol. Mr. Higgins stated that patents were secured for everything which Martin and he regarded as of any value. Stanol was never patented.

The evidence given by Mr. Higgins, together with the documents, including Bulletin No. 2, prepared by Martin is, I think, quite relevant to the issue whether Martin on August 15, 1915, knew the inventions covered by the patent in suit, and is, in my judgment, against the contention that he did so. The very first disclosure by Martin to Mr. Higgins and Mr. Williams of the substance called natrola or nitrola, which was the same as stanol, showed that he was thinking of something different from the use of xanthate. He was looking for new flotation reagents that would be patentable and entitle him to the chance of a share of the profits from their exploitation, which would not happen in the case of a known substance such as xanthate which would not be patentable. Then we come to the draft specifications to which Mr. Higgins referred. These were sent with a covering letter, dated March 19, 1915, to Dr. S. Gregory, the managing director of both the plaintiff's predecessor and the British Company and referred to Mr. Higgins. The reference to stanol is as follows:

*Stanol*, an alkaline organic sulphide containing a great many complex organic compounds produced from organic sulphides and an alkali. This solution should be of vital importance to the flotation industry, especially so should your Company decide to manufacture it as a patent flotation agent.

This was a description of something other than xanthate, for xanthate is not a complex compound at all and being already known could not be patented as a flotation agent. The draft specifications were discussed with Martin by

Mr. Higgins and carry the latter's notes made at the time. The specification relating to stanol is quite inconsistent with the suggestion that Martin had the use of xanthate in mind. Of this fact there are many indications. Martin describes stanol as an "organic alkali sulphide salt". Mr. Higgins' note of the formula after his discussion with Martin is " $(C_2H_5)_2S$ ", which is ethyl sulphide a substance not related to xanthate and Mr. Higgins was not sure that it was a compound. Then reference is made to the substance

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obtained by the action of an alkali upon the numerous organic compounds, such as the hydrocarbon and carbohydrates, including the more specific groups of alcohols, carbon disulphide, carbon tetrachloride, and other carbon compounds, such as methanes, carbon monoxide, etc in the presence of an organic sulphide, or an alkali sulphide.

Xanthate cannot be made with such substances as carbon tetrachloride, methanes, or carbon monoxide. Later Martin says that

variation may be practiced in the process of manufacturing the alkali organic sulphide by varying and selecting the raw organic material.

That is not true of xanthate whose composition is fixed by non-variable chemical laws. Then there is another very significant statement, namely,

The presence of water and other impurities are essential in promoting the formation of the desired compound. The reaction that takes place is complicated and many compounds that may be classed as impurities are formed, of which the mercaptans, alkynes, and esters, are hereby classed as beneficial to the reaction and necessary in the application of compounding the alkali organic sulphide and the ultimate employment of this agent in promoting flotation.

This statement is proof that Martin did not know the use of xanthate as Keller did. Xanthate is not a complex compound but the result of a very simple chemical reaction. And, far from being essential in the formation of xanthate, the presence of water and other impurities is quite the reverse. Then Martin went on to say,

In preparing the alkali organic sulphide, I prefer the employment of sodium hydrate, as the alkali, and alcohol and water as the organic base, and carbon disulphide as the organic sulphide, though in practice it is feasible to employ other analogous combination to effect the same results.

The most that can be said for this statement is that some of the ingredients of stanol also enter into the composition of xanthate, but this does not mean that stanol was xanthate and there is no suggestion that Martin knew the

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value of the use of xanthate as such. The claims in the draft specification also suggest something other than the use of xanthate for some of them assert that stanol replaces oil in flotations or is used in preference to oil. That could not be said of xanthate. Mr. Higgins stated that he could not understand most of the specification and suggested to Martin that it did not disclose what he had to sell and that he had better make some and show how the substance worked. Mr. Higgins said that after that he saw Martin work in the laboratory up to about the end of July or the middle of August. He described the way in which Martin made stanol as follows: first he put in the alcohol and then the carbon disulphide and shook them up; then he put in the caustic soda and water; this was all in a flask that was put on a wire gauze over a bunsen burner; the flask was fitted with a reflux condenser and the substance was thoroughly boiled, sometimes for as long a period as three days. The mixture was then brown muddy liquid. If Martin had known the use of xanthate he would not have made it in such a manner, for he would have known not only that water should not be added but also that prolonged heating would cause decomposition. Whatever may be the cause one thing is certain, namely, that neither Martin nor Mr. Higgins nor his assistant Waling found the least use in stanol. There is no contradiction of this evidence. It seems to me that up to the date of Bulletin No. 2 the evidence is conclusive against the defendant's contention that Martin knew the value of the use of xanthate in froth flotation.

Then came Bulletin No. 2, which counsel for the appellant relies upon as proof that Martin knew the invention covered by the patent in suit. The document as a whole is inconsistent with any such contention and its contents require comment. The first formula would be a very strange one if Martin were thinking of xanthate as his active reagent for the ingredients used would produce very little xanthate. This is Stanol A which could produce only 3.9 per cent xanthate, the balance being mostly alcohol and some carbon disulphide. Then the instructions are given "shake until dissolved and digest under a reflux condenser until the caustic soda has disappeared". These are

indefinite, but there is nothing to indicate that Martin had a different method in mind from that which he used in the manner described by Mr. Higgins. Then the statement is made that "several stanols have been made up varying the proportion of carbon disulphides and caustic soda to meet the condition of the ore under treatment". Martin could not have been thinking of xanthate, for the proportion of the ingredients entering into its composition is not variable. Then 7 different formulae for stanol are given with varying compositions, Stanol D being the one that will produce the most xanthate, approximately 19 per cent. These are all called stanol which is not xanthate; nowhere is there any indication that xanthate is the product being sought. Then Martin suggests that the stanols should be diluted with water, which is quite inconsistent with his really knowing the value of the use of xanthate. Then come the references to potassium ethyl xanthate in the bulletin. Counsel argues that these show that Martin really proposes the use of xanthate as his active reagent. This is quite inaccurate. He does no such thing. Nowhere in Bulletin No. 2 does Martin propose the use of xanthate. The only reagent whose use he proposes is stanol, compounded in different proportions of ingredients and then he expresses the theory of forming his compounds from alcoholic caustic potash and carbon disulphide in terms of a chemical formula which represents potassium ethyl xanthate, and then, after setting out certain proportions, he states that "we should upon the completion of the reaction obtained crystalline Potassium xanthate which, however, is soluble in alcohol and can be employed at any strength to effect flotation of copper salts". I think it is clear that Martin is here travelling in the field of conjecture. He expresses a theory in terms of a chemistry formula which means potassium ethyl xanthate together with an expectation of potassium ethyl xanthate being effective in flotation for which there is no foundation of experimentation or knowledge at all, but is founded solely on speculation and conjecture. No crystalline potassium xanthate was ever obtained. Indeed, there is an admission that there were no experiments at all with caustic potash. And there is no evidence of any tests or experiments with

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any xanthate. The reference to the effectiveness of potassium xanthate is pure speculation. So far as any tests with stanol go they were failures. Moreover, the formula of the ingredients is wrong. The correct formula as per exhibit P 55, is carbon disulphide 42.7 per cent instead of 57.6 per cent, caustic potash 31.5 per cent instead of 26.8 per cent and denatured alcohol 25.8 per cent instead of 15.6 per cent. This is, I think, evidence that Martin was not thinking of xanthate. The proportion suggested where caustic soda is used instead of caustic potash is even more out of line. Then with regard to the soda compound he says that it "does not seem to produce the corresponding good results as is produced with the potassium xanthate". How could he know whether this is so since no experiments were conducted with the latter? Nowhere in the document is there any statement or suggestion that xanthate is his reagent or any direction that xanthate should be used. Martin is thinking of stanol and the most that can be said for Bulletin No. 2 is that it contains a statement that in theory there is some xanthate in stanol and a speculation that it should be effective in flotations. But speculation and conjecture are not knowledge. I can find no justification in Bulletin No. 2 for saying that Martin knew the invention that Keller later made.

Furthermore, what happened subsequently bears out that Keller was not thinking of xanthate and had no knowledge of its value in froth flotation. Mr. Higgins, knowing that stanol was a failure and seeing so many formulae in Bulletin No. 2, instructed Martin to put the best of them in a book. This Martin did and in Exhibit G 4 the following entry is made under the heading Stanol: "Denatured alcohol 100 c c., Carbon Disulphide 100 c c., Caustic Soda (NaCH) 100 grs. Digest under reflux condenser". This is further proof that Martin had no thought of xanthate, for these are not the proper proportions; not only is there an excess of alcohol, but there is also a great excess of caustic soda, which would tend to cause the decomposition of any xanthate produced. Moreover, the heating of the mixture would also hasten the decomposition. If Martin had known the value of xanthate, it is inconceivable that he would have put this down as the best of his formulae.



Coupled with this fact is his further statement in Bulletin No. 4 that stanol was not satisfactory with the Anaconda ore. This was the very kind of ore with which Keller made such a success with xanthate as to create a furore at Anaconda. Then after the admission of this failure in Bulletin No. 4 there is no further record of stanol and no suggestion that Martin was thinking of xanthate was made until after Keller discovered its value in 1923. It is established beyond dispute that Keller knew nothing of Martin's work or of Bulletin No. 2 when in 1923 he was looking for a sulphidizing agent for oxidized ores and fell upon his important invention of the use of xanthate. Even if it could be said that Martin had made experiments and had failed and that he had abandoned his experiment, it has been long settled that unsuccessful experimentation is not prior invention. In *Galloway v. Bleaden* (1) Tindal C.J. said:

a mere experiment, or a mere course of experiments, for the purpose of producing a result which is not brought to its completion, but begins and ends in uncertain experiments—that is not such an invention as should prevent another person, who is more successful, or pursues with greater industry the claim in the line that has been laid out for him by the preceding inventor, from availing himself of it, and having the benefit of it;

And even if it could be said that Martin had some idea of the use of xanthate in froth flotation that would not be enough to make him a prior inventor, for it was said in *The Permutit Company v. Borrowman* (2) by Viscount Cave L.C.:

It is not enough for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process.

On the evidence before me I have no hesitation in finding that the defendant has failed to discharge the onus of proving that when Martin compiled Bulletin No. 2 he knew the invention covered by the patent in suit.

And I find no assistance for the defendant in the tests carried on by Mr. Bennett at Noranda in 1944. He used Stanol D prepared in two ways, namely, one by simply mixing the ingredients shown in Bulletin No. 2 and the other by boiling them for only 15 minutes. He then ran

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(1) (1839) 1 Webster's P.C. 520 at 525.

(2) (1926) 43 R.P.C. 356 at 359.

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tests with sodium ethyl xanthate and Stanol D. The amounts used are significant. Of sodium ethyl xanthate he used only .08 pounds per ton of pulp, but of Stanol D he used .45 pounds. It is clear that he worked from the amount of xanthate that was necessary to success and then used the necessary amount of Stanol D that would produce the same amount of xanthate. Stanol D would yield 18.74 per cent of xanthate while Stanol A would yield only 3.91 per cent. It follows that if Mr. Bennett had used Stanol A he would have had to use 2.25 pounds per ton. He, therefore, used the Stanol that had the largest potential xanthate content. Under these circumstances his evidence was that Stanol D gives as good results in flotation as sodium ethyl xanthate. But this must be considered also in the light of the fact that to accomplish equal results almost 6 times as much Stanol D would be required as would be needed in the case of sodium ethyl xanthate. This is an important cost factor and is important in respect of an invention of an improvement in a process by the reduction of cost. At first sight it seems strange that Stanol D worked in the tests as made by Mr. Bennett in 1944 but failed to show any usefulness in the tests made by Martin in 1915. The answer is plain. The tests were made under different circumstances. Mr. Bennett did not have only Bulletin No. 2 to work with. He had the 1944 knowledge of the use of xanthate derived from the Keller specification. He knew how much xanthate was required for success and worked from that as a starting point, using whatever quantity of Stanol D was necessary to give him the same amount of xanthate. It may be assumed, I think, that if he had used less than .45 pounds of Stanol D per ton the results would not have been as satisfactory. Without the knowledge of the use of xanthate he could not have known from Bulletin No. 2 what amount of stanol was necessary for success for it gave no information on the subject. If Martin had had the same knowledge of the use of xanthate in 1915 as Mr. Bennett had in 1944 he would not have failed in his tests with stanol. The fact that he did fail and that Mr. Bennett succeeded is, in my opinion, clear evidence that Martin did not have the knowledge of the use of xanthate that Mr. Bennett had, namely,

the use that was the subject matter of the Keller invention. The suggestion implied in the defendant's suggestion that stanol is the same thing as xanthate is absurd.

The finding that when Martin compiled Bulletin No. 2 he did not know the invention covered by the patent in suit really disposes of the defendant's plea of anticipation. Counsel for the defendant relied upon Bulletin No. 2 as having shown that Martin had the same information in 1915 as Keller had in 1923 and that its disclosure to the British Company and the plaintiff's predecessor was a disclosure to the public of as good information as is contained in the specification of the patent in suit. There was also reliance upon an alleged public use of the invention at Anaconda in 1923. There are several answers to the appellant's argument on this branch. Bulletin No. 2 was received by Mr. Higgins directly from Martin at a time when Mr. Higgins was acting for the British Company to see whether Martin had any inventions worth purchasing. If there was any invention the disclosure to Mr. Higgins was in confidence and both he and his principal were under a duty of confidence with regard to it and it cannot be considered as a disclosure to the public. Thereafter, there was no disclosure by the alleged inventor. Then when the inventions were paid for in 1917 there was no further disclosure by any one for Bulletin No. 2 was never again referred to. The public use at Anaconda in 1923 can have importance only if Martin made the same invention as Keller did. If, as has been found, Martin was not a prior inventor, then the public use at Anaconda in 1923 was of an invention quite different from Martin's and has no bearing on the present question.

Moreover, even if it were assumed that Martin knew the Keller invention, it does not follow that Bulletin No. 2 can be regarded as anticipation of the Keller invention. The only possible resemblance to anticipation in Bulletin No. 2 consists in the references to xanthate and a resemblance can be seen only if the document is looked at in the light of the knowledge imparted by the Keller patent. That is not anticipation. It might be said that there was a clue to the Keller invention but this is not enough. In order that a document should anticipate an invention,

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it must give the same information as the specification in the patent covering the invention. The test of anticipation was carefully discussed by the Judicial Committee of the Privy Council in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.* (1). There Lord Dunedin, at page 54, referred to the statement of Lord Moulton in *British Ore Concentration Syndicate v. Minerals Separation* (2):

It cannot be too carefully kept in mind in patent law that, in order to render a document a prior publication of an invention, it must be shown that it publishes to the world the whole invention, i.e., all that is material to instruct the public how to put the invention in practice. It is not enough that there should be suggestions which, taken with suggestions derived from other and independent documents, may be shown to foreshadow the inventions or important steps in it.

And, at page 52, after referring to the cases he expressed the test of anticipation as follows:

Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that Patent, if he had had the alleged anticipation in his hand, have said, "That gives me what I wish"?

It is obvious that Bulletin No. 2 does not begin to meet these tests. No one having only Bulletin No. 2 could put the Keller invention of the use of xanthate in froth flotation into practice. It gave no instructions as to the amount of stanol to use and it is obvious from Mr. Bennett's evidence that the amount required would depend upon which stanol was used. Then the instructions as to its preparation namely "shake until dissolved and digest under a reflux condenser until the caustic soda has disappeared" are indefinite. Mr. Bennett found ambiguity in the words "and digest"; then, acting upon the assumption that "digest" meant boil, he boiled the ingredients, but only for fifteen minutes, and not for three days as Martin did. The conclusion is, in my opinion, inescapable that if any one had had only Bulletin No. 2 he would have met with the same failure as Martin did. I have no hesitation in finding that there was no anticipation of the invention in Bulletin No. 2. Counsel for the defendant admitted that it was not a printed publication within the meaning of section 7 of the Act. This means that it could have importance only if it came within section 61 (1) (a), assuming its retroactivity. This it cannot do for the con-

(1) (1929) 46 R.P.C. 23.

(2) (1909) 26 R.P.C. at 147.

ditions of the section, namely, of prior invention, of disclosure by the inventor, and of disclosure in such manner that the invention had become available to the public, have not been satisfied. Under the circumstances it is not necessary to consider whether section 61 (1) (a) of the 1935 Act is retroactive or not. The defence of anticipation of the invention, in my opinion, fails completely.

In its statement of defence the defendant alleged that the plaintiff was not entitled to the relief claimed because of its laches and acquiescence in that it postponed the bringing of this action and nineteen other infringement actions until a few days before the expiry of the patent in order to avoid the risk of provoking an attack on its validity and the loss of benefits that would result from a successful attack. The facts may be stated briefly. In August, 1930, the plaintiff requested the defendant to sign a licence agreement for the use of amyl xanthate which the defendant had been using at its mill at Noranda and, subsequently, there was further correspondence between the parties on the subject. Then on February 12, 1936, Mr. J. Y. Murdock, the defendant's president, notified Mr. J. A. Boyd, the plaintiff's representative, to the effect that he had concluded that the defendant was not liable for and should not pay any royalty to the plaintiff. Then there was further correspondence without any change of result. The defendant persisted in its refusal to pay royalty and no steps were taken by the plaintiff to enforce payment until this action was taken some 10 days before the expiry of the patent. Dr. S. Gregory, the plaintiff's president, on his examination for discovery, explained that he had recommended to the board of directors that no action should be taken until the patent expired or was about to expire and that he had given two reasons for this, namely, that the tonnage the plaintiff would gain by fighting with Mr. Murdock's corporation, the defendant, was a small fraction of what was coming from other directions; and that he thought a fight with the defendant would disturb the relationship with the licensees that were paying royalties. Acting on his advice the plaintiff refrained from taking action. It was this inaction that was relied upon as laches and acquiescence. But counsel for the defendant admitted

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that he could not, in this Court, maintain this defence in view of the statement by Fletcher Moulton L.J. in *Vidal Dyes Syndicate v. Levinstein Ltd.* (1) that it is settled law that a patentee need not attempt to stop an infringement when he first learns of it and that his right of action against an infringer is not affected by the circumstance that he did not take action until just before the expiry of the patent. While counsel admitted that he could not urge the defence of laches and acquiescence in this Court he did not abandon it. I adopt the statement of Fletcher Moulton L.J. as applicable in the present case. The plaintiff's delay in bringing action was not laches or acquiescence on its part.

This leaves only the question of infringement. If the plaintiff's patent is valid there is no doubt that it was infringed by the defendant. The process used by the defendant at Noranda is described in Exhibit M 1; there is no difference between it and that disclosed in the Keller specification. Then Exhibit M 2 sets out the list of reagents used by the defendant in its four circuits. It shows that during the years for which the plaintiff may claim damages, the defendant used potassium amyl xanthate in its copper circuit, sodium ethyl xanthate in its pyrite flotation circuit, potassium amyl xanthate in its pyrite regrinding circuit, and also during the years 1940, 1941 and 1942 potassium hexyl xanthate in the same circuit, and potassium amyl xanthate in its pyrrhotite retreatment circuit. The type of circuit used by the defendant was an alkaline one.

Under the circumstances there will be judgment for the plaintiff declaring that claim 9 is valid, that it has been infringed by the defendant and that the plaintiff is entitled to damages in such amount as may be found on an inquiry as to damages by the Registrar if the parties cannot agree as to the amount. The plaintiff is also entitled to costs.

*Judgment accordingly.*

BETWEEN :

HENRIETTA A. R. ANDERSON . . . . . APPELLANT;

AND

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

1944  
Sept. 25  
1947  
May 20

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(f), 5(c)—Adoption—Householder—Self-contained domestic establishment maintained by appellant who supported therein two persons connected with her by adoption by verbal agreement with parents—Appeal allowed.*

Appellant, an unmarried person, during the years material to this appeal maintained a self-contained domestic establishment as defined by the Income War Tax Act and supported therein two minor children who retained their original surname. These children were adopted by appellant by a verbal agreement with their parents and during these years were dependent upon and connected with the appellant by such adoption.

The Commissioner of Income Tax assessed appellant for the years 1935 to 1939 inclusive and refused to allow exemption claimed by appellant for her support of these children on the grounds that the adoption was not an adoption within the meaning of the relevant provisions of the Income War Tax Act. The appellant appealed to this Court.

*Held:* That the position of appellant with respect to the two children meets all the exigencies of clause (iii) of paragraph (c) of sub-section (i) of section 5 of the Income War Tax Act, R.S.C. 1927, c. 97 as amended by 23-24 Geo. V, c. 41, s. 4, since she was at all times an individual who maintained a self-contained domestic establishment and who actually supported therein two persons connected with her by adoption, and the appeal must be allowed.

APPEAL under the provisions of the Income War Tax Act.

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

*N. W. Whittaker, K.C.* for appellant.

*H. A. Beckwith* and *A. A. McGrory* for respondent.

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

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ANGERS J. now (May 20, 1947) delivered the following judgment:

This is an appeal under section 58 and following of the Income War Tax Act by Henrietta A. R. Anderson, of the city of Victoria, province of British Columbia, against the decision of the Minister of National Revenue affirming the assessments for the years 1935, 1936, 1937, 1938 and 1939, which appear from copies of the notices of assessment included in the record of the Department of National Revenue to have been mailed on June 3, 1942.

In her notice of appeal, dated June 23, 1942, a copy whereof also forms part of the record of the Department, the appellants states in substance that:

she is and was at all times material a Normal School teacher;

in 1932 she adopted Beverley Price, then aged 7 years, and Helen Price, then aged 4 years, by verbal agreement with their parents, Charles Price and Margaret Grace Price, now of Vancouver, B.C.; by this agreement said parents voluntarily surrendered the said Beverley and Helen Price into the appellants' sole custody and the appellants agreed to be solely responsible for the custody, education, care and maintenance of the said children;

from 1932 until 1940 the said Beverley and Helen Price resided with the appellants and were maintained, educated and cared for solely by and at the expense of the appellants; during 1940 the appellants voluntarily surrendered the said Beverley Price to her parents at their request, but the said Helen Price continued to reside and to be maintained, educated and cared for solely and at the expense of the appellants;

from 1932 up to the present time (June 23, 1942) the appellants was an unmarried person and maintained a self-contained domestic establishment as defined by the Income War Tax Act and supported therein the said Beverley Price until 1940 and the said Helen Price up to the present time (June 23, 1942), the said Beverley and Helen Price being dependent upon and connected with the appellants by said adoption;



during the taxation years 1935 to 1939 inclusive, the appellant claimed and was allowed exemption from taxation as provided by said Act on the grounds set out in paragraph 4;

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the Commissioner of Income Tax now claims that the said adoption was not an adoption within the meaning of the relevant provisions of the Income War Tax Act and has re-assessed the appellant for the taxation years 1935 to 1939 inclusive;

the appellant appeals from the assessments for the years 1935 to 1939 inclusive and claims exemption from payment of the amounts included in the said assessments.

The decision of the Minister, dated November 5, 1942, signed by the Minister of National Revenue per the Commissioner of Income Tax, also part of the record of the Department, sets forth, *inter alia*:

WHEREAS the taxpayer duly filed Income Tax Returns showing her income for the years ending 31st December, 1935, 1936, 1937, 1938 and 1939.

AND WHEREAS in filing her said Returns the taxpayer, a single person, purporting to have adopted two children, claimed exemption as a single person maintaining a self-contained domestic establishment supporting therein two dependent relatives.

AND WHEREAS in assessing the taxpayer, she was treated as a single person without dependents and taxes were assessed by Notices of Assessment dated the 3rd June, 1942.

The decision of the Minister then refers to the notice of appeal, summing up its averments, and concludes:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said Assessments on the ground that for Income Tax purposes adoption means the legal adoption of a child or children; that while the taxpayer has, with the consent of the parents, had the temporary guardianship and support of the said children in her own domestic establishment, she did not in fact legally adopt them; and therefore by reason of the provisions of Section 5 and other provisions of the Income War Tax Act in that respect made and provided, the Assessments are affirmed as being properly levied.

On November 30, 1942, in compliance with section 60 of the Income War Tax Act, the appellant sent to the Minister a notice of dissatisfaction with a statement of further facts, statutory provisions and reasons.

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The statement in question sets forth in substance:

the exemption claimed by the appellant is under section 5 (c) (iii) of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended by 1940, chap. 34, section 11;

the adoption of Beverley and Helen Price is an adoption within the meaning of said section 5 (c) (iii).

The reply of the Minister, as usual, denies the allegations contained in the notice of appeal and the notice of dissatisfaction in so far as incompatible with the allegations of his decision and affirms the assessments as levied.

The claim for exemption made by the appellant with regard to the years 1935 to 1939 is based upon the fact that she had in her home and under her care two minor children, Beverley Campbell Price and Helen Rae Price during that period.

The appellant was examined for discovery. Questions and answers 11 to 13, 19 to 23, 25 to 28, all inclusive, and 30 and 31 were used in evidence. A brief summary thereof seems apposite.

The examination discloses that up to 1934 (1932 by error), when the appellant was moved from Vancouver to the Normal School at Victoria, the children were living with her at the home of an aunt of their mother in North Vancouver and that both went to Victoria with the appellant. The appellant said that up to that time she had not exercised parental control over them to any great extent and had not made any claim for keeping them. According to her the aunt was keeping house and feeding the children. The appellant paid for Beverley's music lessons and probably, part of the time, for her clothing.

Speaking about the agreement with the children's parents with reference to their adoption, the appellant declared that she went to see the parents and asked them if she could get the children. An extract from the deposition seems convenient (p. 4):

A. \* \* \* I went to see the parents and I said can I have the children because if I can't I doubt whether I would go to Victoria and they said there was no question whatsoever about my taking the children with me.

\* \* \* \*

A. I don't think there was any more than that. I doubt if the question of maintenance was ever even mentioned. It was simply taken for granted that if I took them I would do for them.

Further on the witness added (p. 5):

I wanted to know even before I accepted the position, I wanted to know if I could take the two girls with me. I went as far as to say I wanted to know quickly because I would not take the position if I could not take them and the mother and father just looked at me and agreed. There was no question about having the girls.

The appellant stated that there was no discussion between the parents and herself about a written agreement or an adoption by Court order. According to her there was no understanding about the continuation of contact between the children and their parents; the matter was taken for granted. The appellant said she took the children home at Christmas time to see their parents and also sometimes during the summer. According to her the children never corresponded with their parents except when the father was at the Kamloops Sanatorium. The appellant corresponded with the mother from time to time, telling her how the children were getting along.

The appellant admitted that the children retained their original surname Price and that she had no wish to change that.

Testifying at the trial, the appellant declared that she is Instructor in and Vice-Principal of the Victoria Normal School.

She said that she filed her income tax returns for the years 1935 to 1939 inclusive and claimed exemption for two children, Beverley Campbell Price and Helen Rae Price. She paid her income tax for that period on the basis that she was entitled to this exemption.

In 1942 she received revised assessments for the years 1935 to 1939 inclusive, totalling \$192.89. Copies of these assessments form part of the record of the Department of National Revenue transmitted to the Registrar of the Court by the Deputy Minister for Taxation.

She declared that during the years 1935 to 1939 she lived in a house rented on Foul Bay Road for a year and nine months and subsequently in her own house on Richmond Road. She stated that in the first house she had four bedrooms, that she slept and had her meals

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there, that the two children were living with her and that she maintained the house entirely at her own expense. She said that in her house on Richmond Road there were three bedrooms, that she slept and ate there and that she maintained that home entirely at her own expense.

She declared that, before taking the children to Victoria, she was living with a woman who was on her school staff and who was related to the children.

She asserted that she was very interested in the children, that they spent most of their holidays with her and that she rented a camp in the summer and took them along with her for two months.

She said that, when she took the girls with her to Victoria in 1934, Beverley was nine years old and Helen six.

Asked what took place between Mr. and Mrs. Price and herself with regard to her having the children, Miss Anderson replied that she told them that she had received notice that she was going to be moved to Victoria and that she wanted to know how they felt about her taking the children. She said to them, that, if she could not bring the children, she was not quite sure whether she would take the position. She declared that the reasons why she wanted to bring the children with her were in the first place that she had always been fond of children and secondly that the home conditions were not good for them. She specified that at the time Mr. Price was unemployed and had very little money, that he was threatened with tuberculosis and that in fact he later went to the sanatorium at Kamloops. She added that "due to the conditions in the home the relations between the parents were not at all good" and she "thought that it was no place for children to be brought up". She thought she "could do more for the children than the parents could". She asserted that the parents never expressed a wish that the children should be returned to them.

To the question as to what happened in 1940 with regard to Beverley, the appellant answered thus (p. 8):

A. We went home for the Christmas holidays and Beverley I think became very attracted with Vancouver and thought it would be a better

and much more exciting place to live. She knew then that her father was going to Kamloops and I think that she just conceived the idea that if she went home she would have a wonderful time. Her mother had little or no control over her and I think she was just attracted and thought it would be better to go home.

Q. Did the parents make any request that Beverley go back to them?

A. Oh no, they were very angry when she went.

Q. And Helen remained with you?

A. Yes.

The witness testified that she paid for the children's maintenance during the period from 1934 to 1940 and for their education. She added that since 1940 she has paid for Helen's maintenance. She said she provided for them the ordinary school education, Beverley going to the end of grade 10, which is the first year of high school, and Helen to grade 12, to wit, the last year of high school. She stated that both girls had ten years of piano instruction, and that Helen, in addition, had two years of violin instruction. She declared categorically that the parents never offered to pay any costs of the maintenance and education of the children. She said she regarded the children just as if they were her own.

In cross-examination Miss Anderson specified that the relative with whom the children and she were living in Vancouver was an aunt of their mother. She admitted that during the period when she lived in Vancouver with the children she was not providing for them entirely.

She repeated that the children corresponded with their father while he was in Kamloops and said they did so at her request, as she "thought it would be a nice gesture on their part". She added that they acknowledged receipt of the gifts which they received on various anniversaries and appropriate times for gifts, such as Christmas.

No evidence was adduced on behalf of respondent.

The provisions of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended by 22-23 George V, chap. 43, section 4, assented to on May 26, 1932, and made applicable by section 11 to income of the 1931 taxable period and periods ending therein and of all subsequent periods, in virtue

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whereof the appellant claims exemption are contained in paragraph (c) of subsection (1) of section 5. The relevant part of said subsection reads as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

- (c) Twenty-four hundred dollars in the case of a married person or householder or any other person who has dependent upon him any of the following persons:
- (i) A parent or grandparent,
  - (ii) A daughter or sister,
  - (iii) A son or brother under twenty-one years of age or incapable of self-support on account of mental or physical infirmity;

The definition of "householder" is given in subsection (f) of section 2 of the Income War Tax Act as set out in chapter 97 of the Revised Statutes of Canada 1927, which in part, after countless amendments and a much laboured reshaping of the Act, became clause (iii) of paragraph (c) of subsection (1) of section 5; it is in the following terms:

(f) "householder" means

- (i) an individual who at his own and sole expense maintains a self-contained domestic establishment employing therein on full time a housekeeper or servant, or
- (ii) an individual who maintains a self-contained domestic establishment and who actually supports and maintains therein one or more individuals connected with him by blood relationship, marriage or adoption;

Does the word "adoption", inserted in paragraph (f) of subsection 1 of section 2 of the Income War Tax Act by 16-17 George V, chap. 10, and constantly kept in the numerous statutes which followed, apply only to adoptions made in compliance with the requirements of an adoption Act of one of the provinces or does it include a *bona fide de facto* adoption? This is the question arising for solution.

It was argued on behalf of appellant that if Parliament had intended to restrict the exemptions in the case of adoption to adoptions carried out pursuant to an agreement in writing it would have said so. In support of this argument reliance was placed on *Maxwell, The Interpretation of Statutes*. Counsel quoted a passage on page 2 of the eighth edition, which is reproduced in the ninth edition at page 3 under the caption "Literal Construction". It reads thus:

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning;

The author refers to the case of *The Queen on the Prosecution of J. F. Pemsel v. The Commissioners of Income Tax* (1). At page 309 we find the following observations by Fry, L.J.:

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There are some rules of construction to which it is convenient to refer. The words of a statute are to be taken in their primary, and not in their secondary, signification. If, therefore, the words are popular ones they should be taken in a popular sense, but if they are words of art they should be *prima facie* taken in their technical sense. That was laid down by Lord Wensleydale in *Burton v. Reeve* (16 M. & W. 307), where he says: "When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears." That rule is not, in my opinion, the less applicable when the words have a distinct technical meaning and a vague popular one.

The judgment of the Court of Appeal was affirmed by the House of Lords, the decision whereof is reported under the name *The Commissioners for Special Purposes of The Income Tax and John Frederick Pemsel* (2). We find in the reasons of Lord Halsbury, L.C., dissenting on the main point at issue, the following observations which, although not absolutely to the point, are interesting (p. 542):

Whether these dispositions, or any of them, are charitable purposes, within the meaning of the exemption I have quoted above, must be determined upon a consideration of what those words "charitable purposes" mean in the exemption in question.

Now, before proceeding to discuss the words themselves, I somewhat protest against the assumption that the alternative is to be between a popular and what is called a technical meaning, unless the word "technical" itself receives a construction different from that which is its ordinary use. There are, doubtless, some words to which the law had attached in the stricter sense a technical meaning; but the word "charitable" is not one of those words, though I do not deny that the old Court of Chancery, in enforcing the performance of charitable trusts, included in that phrase a number of subjects which undoubtedly no one outside the Court of Chancery would have supposed to be comprehended within that term. The alternative, therefore, to my mind may be more accurately stated as lying between the popular and ordinary interpretation of the word "charitable," and the interpretation given by the Court of Chancery to the use of those words in the statute of 43 Elizabeth.

After commenting briefly on the judgment of the Court of Session in re *Baird's Trustees v. Lord Advocate* (3), in which the judges were of opinion that the words "charitable

(1) (1888) 22 Q.B.D. 296  
 (2) (1891) A.C. 531.

(3) (1888) 15 Sess. Cas. 4th  
 Series, 682.

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purposes" must be read in their popular signification and could not have the comprehensive meaning attached to them in the English law, Lord Herschell made the following remarks (p. 571):

I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means.

\* \* \* \*

I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less as a charitable purpose than the ministering to physical needs; and I do not believe that the application of the word "charity" to the former of these purposes is confined to those who entertain the view which I have just indicated. It is, I think, constantly and generally used in the same sense quite irrespective of any belief or disbelief in the advantage or expediency of the expenditure of money on these objects.

The author's next reference is to *Corporation of the City of Victoria and Bishop of Vancouver Island* (1). Lord Atkinson, who delivered the judgment of the Judicial Committee of the Privy Council, expressed the following opinion (p. 387):

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey v. Pearson*. (1857) 6 H.L.C. 61, 106, Lord Wensleydale said: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Lord Blackburn quoted this passage with approval in *Caledonian Ry. Co. v. North British Ry. Co.*, (1881) 6 App. Cas. 114, 131, as did also Jessel M.R. in *Ex parte Walton*, (1881) 17 Ch. D. 746, 751.

(1) (1921) 2 A.C. 384.



Further on Maxwell makes these comments (p. 14):

It is but a corollary to the general rule in question, that nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express.

In support of this proposition Maxwell relies on the dicta of Tindal, C.J., in *Everett v. Wells* (1); of Lord Eldon, L.C., in *Davis v. Marlborough* (2); of Lord Westbury, L.C., in *Ex parte The Vicar and Churchwardens of St. Sepulchre's* (3); of Lord Westbury, L.C., in *Re Cherry's Settled Estate* (4).

The author then quotes the following extract from the reasons of Lord Mersey in *Thompson v. Gould & Co.* (5):

It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

Referring to the decision of the House of Lords in *Vickers, Son, & Maxim v. Evans* (6), Maxwell cites these remarks of Lord Loreburn, L.C. (p. 955):

The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

*Craies* in his *Treatise on Statute Law*, fourth edition, dealing with the construction of statutes, also upholds the doctrine that, if the words used are unambiguous, they must be construed in their natural and ordinary sense. At page 68 we find the following statement:

1. The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of the Parliament which passed them. "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature" (*Warburton v. Loveland* (1831), 2 D. & Cl. (H. L.) 480, 489).

(a) The rule now under review is expressed in various terms by different Judges. The epithets "natural," "ordinary," "literal," "gram-

(1) (1841) 2 M. & Gr. 269, 277.

(2) (1819) 1 Swan. 74, 83.

(3) (1863) 33 L.J. Ch. 372, 375.

(4) (1862) 31 L.J. Ch. 351, 353.

(5) (1910) 79 L.J.K.B. 905, 911.

(6) (1910) 79 L.J.K.B. 954.

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matical," and "popular" are employed almost interchangeably, but their indiscriminate use leads to some confusion, and probably the term "primary" is preferable to any of them, if it be remembered that the primary meaning of a word varies with its setting or context, and with the subject-matter to which it is applied; for reference to the abstract meaning of words, if there be any such thing, is of little value in interpreting statutes.

See decisions mentioned in note (h) at the foot of page 68.

Further on the author explains the rule in these terms (p. 80):

2. The rule that the language used by the Legislature must be construed in its natural and ordinary sense requires some explanation. The sense must be that which the words used ordinarily bore at the time when the statute was passed. Said Lord Esher, M.R., in *Clerical, etc., Assurance Co. v. Carter*, (1889), 22 Q.B.D. 444, 448. "There has been a long discussion of various puzzling matters in relation to the provisions of the Income Tax Acts, but, after all, we must construe the words of schedule D according to the ordinary canon of construction; that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced."

Dealing with the departure from the grammatical meaning, Craies expresses the following opinion (p. 83):

The canon as to departure from the grammatical meaning is thus stated by Lord Blackburn in *Caledonian Ry. v. North British Ry.*, (1881), 6 App. Cas. 114, 131: "There is not much doubt about the general principle of construction. Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey v. Pearson*, (1857), 6 H.L.C. 61, 106, in the following terms: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted—at least in the Courts of law in Westminster Hall—that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further." I agree in that completely, but in the cases in which there is a real difficulty this does not help us much, because the cases in which there is a controversy as to what the grammatical and ordinary sense of the words used with reference to the subject-matter is \* \* \*

See *Beal's Cardinal Rules of Legal Interpretation*, third edition, p. 343; *Sedgwick, Interpretation and Construction of Statutory and Constitutional Law*, second edition, p. 219; *Christophersen et al v. Lotinga* (1); *Abley v. Dale* (2).

(1) (1864) 33 L.J.C.P. 121, 123. (2) (1851) 20 L.J.C.P. 233, 235.

I think that it may be advantageous to refer to a few definitions of the word "adoption."

In *Wharton's Law Lexicon*, fourteenth edition, "adoption" is defined as follows:

*Adoption*, an act by which a person adopts as his own the child of another.

Following this definition the dictionary contains these commentaries:

Until recently there was no law of adoption in this country though it exists in other countries, \* \* \*

By the Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29), after the 31st December, 1925, the Court (usually in the Chancery Division) may authorize the adoption of an infant who is under twenty-one years of age, a British subject, and resident in England and Wales, by an applicant who is more than twenty-five years of age, and also twenty-one years older than the infant, unless closely related, and a British subject, resident and domiciled in England or Wales, but a single adopter, only, will be authorized unless two spouses jointly apply \* \* \*

The consents of the parents and guardians (if any) and of any other persons having the custody of, or hable to contribute to, the support of the child, are required, and one of two spouses may not apply without the consent of the other, but the Court may dispense with any of these consents in the special circumstances provided for by the Act.

The *Imperial Dictionary of the English Language* (by John Ogilvie), second edition by Charles Annandale, contains the following definitions:

The act of adopting, or the state of being adopted; the taking and treating of a stranger as one's own child;

*The New English Dictionary*, edited by James A. H. Murray, volume I, defines "adoption" as follows:

The action of voluntarily taking into any relation; esp. of taking into sonship.

We find in *Webster's New International Dictionary*, second edition, this definition:

*Adoption*—voluntary acceptance of a child of other parents to be the same as one's own child.

In *Osborn's Concise Law Dictionary*, at the word "adoption", we read the following remarks:

Prior to the Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29), the institution of adoption was unknown to English law. By that Act the High Court, the County Court, and a Court of Summary Jurisdiction is empowered on the application of any person desirous of adopting an infant who has never been married, to make an adoption order with the consent of the infant's parents or guardians (if any). Such order extinguishes the rights, duties, obligations and liabilities of parents or

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guardians of an adopted child as to its custody, maintenance and education, including the right to consent or dissent to its marriage, and vests them in the adopter, as though the adopted child had been born in wedlock to the adopter. The adopted child assumes the liability of a lawful child as to maintaining its parents, with regard to its adopted parents, and two spouses stand to an adopted child as its lawful father and mother. An applicant for an adoption order must not be under twenty-five years of age and must not be less than twenty-one years older than the infant, unless they are within the prohibited degrees of consanguinity.

There are material and interesting commentaries on the question of adoption in *Halsbury's Laws of England*, second edition, volume 17, under section 6 entitled "Adoption", particularly nos 1406, 1407, 1409, 1410 and 1416. I deem it appropriate to quote nos 1407 and 1416:

1407. But under the Adoption of Children Act, 1926, which was the first statutory recognition of the position of adopted children, the court has power, upon an application in the prescribed manner by any person desirous of being authorized to adopt an infant who has never been married, to make an order authorizing the applicant to adopt the infant. Such an order is called an adoption order.

1416. An adoption order extinguishes all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to his future custody, maintenance, and education, including all rights to appoint a guardian or to consent or give notice of dissent to marriage. All such rights, duties, obligations, and liabilities become vested in, exercisable by, and enforceable against the adopter as though the adopted child were a child born to the adopter in lawful wedlock; in respect of these matters and in respect of the liability of a child to maintain its parents, the adopted child stands to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

Reference may also be had beneficially to *Eversley on Domestic Relations*, fifth edition, pp. 415, 416 and 417. The author first deals with the Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29) and explains the procedure to be followed for the purpose of obtaining an adoption order. He then sets forth the circumstances in which the adoption order may be granted as well as the restrictions in connection therewith. His observations are substantially similar to those found in *Halsbury's Laws of England*. Under the caption "Effect of Adoption Order", Eversley says (p. 416):

All the rights, duties, obligations and liabilities of the parent or guardian are extinguished upon an order being made, and these vest in and are exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and the adopted child stands in the same position as to the obligation to maintain its parents in regard to the adopter; and where the adopters

are spouses their position is that of lawful father and mother, and the adopted child is in the position towards the adopters of a child born in lawful wedlock to the adopters.

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On page 417, dealing with what he calls "Existing De Facto Adoptions", the author writes:

Where at the commencement of the Act (January 1, 1927) any infant was in the custody of and for two years was being brought up by any person or two spouses jointly, the Court may on the application of such person or spouses, and notwithstanding that the applicant is a male and the infant a female, make an order without requiring consents if satisfied that it is just and equitable and for the infant's welfare that consents should not be required.

See *Words and Phrases*, permanent edition, vol. 2 v<sup>o</sup> Adoption, p. 476 et seq.

Counsel for appellant referred to section 15 of the Interpretation Act (R.S.C. 1927, chap. 1), intimating that it is remedial; in fact the marginal note thereto is "Every Act remedial"; the section reads thus:

Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The principle expressed in this section applies, as I think, to the provision of the Income War Tax Act dealing with exemptions. The interpretation given to this provision must not be narrow, mean and rigid; on the contrary it should be broad, generous and liberal.

The first Adoption Act in British Columbia, being chapter 2 of the Statutes of 1920 (10 George V), was passed on April 17, 1920.

Section 2 enacts:

Any adult unmarried person, or any adult husband or wife, or any adult husband and his adult wife together, may adopt an unmarried minor by applying for and obtaining leave pursuant to this Act.

Section 4 provides that application for leave to adopt a minor shall be made by petition to the Court. Section 2 says that the "Court" means the Supreme Court (of the province).

Section 5 stipulates that no order for adoption shall be made without the written consent, verified by affidavit, of the following persons: (a) the minor, if over twelve

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years of age; (b) the petitioner's husband or wife, unless they are lawfully separated or they jointly adopt the minor; (c) the parents, or surviving parent, or the parent having the custody of the minor, if legitimate, and the mother only if the minor is illegitimate; (d) the parent by adoption if the minor has been previously adopted; (e) the guardian or adult person having lawful custody of the minor, if he can be found, where the minor has no parent living or no parent whose consent is necessary; (f) a children's aid society, or the Superintendent of Neglected Children, where the minor has no parent living whose consent is necessary and no guardian having lawful custody of the minor can be found.

Subsection 2 of section 5 deals with the powers of the Court to dispense with the consent of a parent in certain cases which are not pertinent herein.

Section 6 regarding the order of adoption reads thus:

On the hearing of the petition, if the Court is satisfied of the ability of the petitioner to bring up, maintain, and educate the minor properly, and of the propriety of the adoption, having regard to the welfare of the minor and the interest of the natural parents, if living, the Court may make an order for the adoption of the minor by the petitioner.

Section 7 determines the effect of the adoption as follows:

Upon the making of the order of adoption:

- (a) The natural parents of the minor, and any previous parent by adoption, and the guardian or person in whose custody the minor has been shall be divested of all legal rights in respect of the minor, and shall be freed from all legal obligations and duties in respect of the minor as from the date of the order;
- (b) The minor shall take the surname of the petitioner as his parent by adoption, or such name as the Court on the request of the petitioner may order;
- (c) The parent by adoption and the minor shall sustain toward each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act.

Counsel for respondent submitted that, when the word "adoption" was first introduced in the Income War Tax Act in 1926, there were Adoption Acts in force in all the provinces and that these Acts, with one exception, provided for an application to the Court by means of a petition and for a Court order. This is exact as may be ascertained by reference to the several Acts which are, leaving aside the Act of British Columbia previously referred to, as follows:

Statutes of Alberta, 1913 (second session), chapter 13, The Infants Act, section 27—assented to October 25, 1913—reproduced in chapter 216 of the Revised Statutes of Alberta, 1922.

Statutes of Saskatchewan, 1921-22, chapter 64, The Adoption of Children Act, section 3—assented to January 24, 1922;

Statutes of Manitoba, 12 George V, chapter 2, An Act respecting the Welfare of Children, Part IX, section 120—assented to April 6, 1922;

Statutes of Ontario, 11 George V, chapter 55, The Adoption Act, 1921, section 3—assented to April 8, 1921;

Statutes of Quebec, 14 George V, chapter 75, An Act respecting Adoption, section 1—assented to March 15, 1924;

Consolidated Statutes of New Brunswick, 1903, chapter 112, The Supreme Court in Equity Act, section 240; reproduced in chapter 113 of the Revised Statutes of New Brunswick, 1927, The Judicature Act, Order 56, Special Proceedings in the Chancery Division, section 56;

Revised Statutes of Nova Scotia, 1900, chapter 122, Of the Adoption of Children, section 1; reproduced in the Revised Statutes of Nova Scotia, 1923, chapter 139.

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Chapter 6 of the Acts of the General Assembly of Prince Edward Island, 1916, entitled An Act regarding Adoption of Children, 1916, assented to on May 4, 1916, provides for the adoption of children by an agreement in writing. Section 1 enacts:

An agreement in writing by the parent or next of kin of an infant to assign all rights whatever over such infant to a third person named in such agreement, shall be considered a transfer of guardianship of such infant, and shall be binding in the case of males until they attain the age of twenty-one years, and in the case of females until the age of twenty-one, unless sooner married.

Section 3 stipulates that:

Any agreement duly executed transferring or purporting or intending to transfer the guardianship of a child shall be valid in law notwithstanding any defect in form or substance to transfer such guardianship and shall impose upon the transferee all such obligations and duties as are imposed by law upon a parent or guardian.

The Act does not provide for any application to the Court to ratify or confirm the agreement.

Neither of these Acts preclude the informal adoption.

It was submitted on behalf of appellant that the word "adoption" has an ordinary, popular meaning, widely used by the public, which has not been destroyed or discarded by the enactment of the various provincial adoption statutes. It was urged that, prior to the passage of these statutes, adoptions were made by written or by oral agreements and that the statutes did not preclude that form of adoption. Even if we conclude that the adoption Acts have not done away with the form of adoption generally

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in use before the provincial legislature thought fit to enact statutes dealing with adoption, the problem with which we are confronted is not solved. We have to determine if the word "adoption" inserted in the Income War Tax Act by 16-17 George V, chapter 10, means an adoption carried out in compliance with the requirements of one of the various adoption Acts or an adoption made in accordance with the ordinary, common and usual sense given to the word by the great majority, nay the quasi-unanimity of the people.

As suggested by counsel for appellant, it would have been a very simple thing for the legislators to add after the word "adoption" the words "in accordance with the provisions of the adoption act in force in the province where the adoption is contracted" or words to the same effect. May we conclude, notwithstanding the omission of this phrase, that Parliament intended to restrict the exemption to adoptions executed in conformity with the provincial laws? No, if we adopt the doctrine laid down by the authors and upheld in the numerous decisions therein cited, in which I am disposed to concur.

A regulation (No. 18), dated December 3, 1942, published in the *Canada Gazette* of December 12, gives the definition of the terms "blood relationship", "marriage" and "adoption" in clause (iii) of paragraph (c) of subsection 1 of section 5; the relevant part thereof reads thus:

Whereas the First Schedule to the Income War Tax Act provides for the taxation, in the same manner as a married person, of an unmarried person who maintains a self-contained domestic establishment and actually supports therein a person wholly dependent upon the taxpayer and "connected with him by blood relationship, marriage or adoption";

And whereas, under Section 75, subsection 2, of the Income War Tax Act, regulations may be made for carrying this Act into effect:

Now therefore for the purposes of the said First Schedule, it is hereby declared that:

\* \* \* \*

(c) "adoption" only extends to children legally adopted.

Section 75 of the Income War Tax Act at the time read as follows:

75. The Minister shall have the administration of this Act and the control and management of the collection of the taxes imposed hereby, and of all matters incident thereto, and of the officers and persons employed in that service.

2. The Minister may make any regulations deemed necessary for carrying this Act into effect, and may thereby authorize the Commis-



sioner of Income Tax to exercise such of the powers conferred by this Act upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Income Tax.

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I entertain a serious doubt about the legality of this regulation. I do not think that the Governor General in Council can amend an Act of Parliament; much less the Commissioner of Income Tax. This manner of legislating is utterly undemocratic, nay purely and simply autocratic.

I may note incidentally that the Commissioner of Income Tax became Deputy Minister of National Revenue for Taxation by order-in-council P.C. 5867, passed on July 24, 1943, in accordance with section 1 of chapter 24 of 7 George VI, assented to on the same date.

This regulation dated December 3, 1942, is posterior to the taxation years involved and has no bearing in the present case. No retroactive effect is given to it and retroactivity is not to be presumed: *Maxwell, Interpretation of Statutes*, ninth edition, p. 221; *Craies*, op. cit., p. 331; *Beal's*, op. cit., p. 468; 31 *Halsbury's Laws of England*, second edition, p. 513; *Winter et al v. Trans-Canada Insurance Co.* (1); *Young v. Adams* (2); *Midland Railway Co. v. Pye* (3); *Snowdown Colliery Co. Ltd., in re South-Eastern Coalfield Extension Co. Ltd. v. Snowdown Colliery Co. Ltd.* (4); *Smith v. Callander* (5); *West v. Gwynne* (6).

The case is governed by the Act as it existed before the above regulation was made by the Commissioner of Income Tax pursuant to the authorization granted to him by the Minister, in virtue of subsection (2) of section 75. It is common knowledge that informal adoption was still largely practised after the various Adoption Acts came into force; many among the adopters were those who were totally unaware of the existence of Adoption Acts.

It is idle to say that the Adoption Acts had no connexity with income tax. Indeed all were enacted before the word "adoption" was put into the Income War Tax Act. In 1926 Parliament added the words "or adoption" after the words "blood relationship" and "marriage" but omitted in the interpretation section a definition of "adoption".

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| (1) (1934) 1 Ins. L.R. 326.         | (4) (1925) 94 L.J. Ch. 305, 307, |
| (2) (1898) A.C. 469.                | 308.                             |
| (3) (1861) 10 C.B. (n.s.) 179, 191. | (5) (1901) A.C. 297, 305.        |
|                                     | (6) (1911) 2 Ch. 1, 15.          |

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If we take the word "adoption" in its popular sense it means the act by which a person adopts as his own the child of another or, in other terms, the acceptance by a person of a child of other parents to be the same as his own child.

Angers J.

This is precisely what the appellant has done with regard to Beverley Price and Helen Price, minor children of Charles Price and Margaret Grace Price, with the latter's consent and, as the evidence discloses, to their relief and entire satisfaction. Beverley was then seven years old and Helen four. During the Christmas holidays of 1940 the children, accompanied by the appellant, went to Vancouver to see their parents. Beverley, thinking Vancouver was a more lively and exciting place than Victoria, decided not to return to Victoria but to stay with her parents in Vancouver. So from 1932 to 1940, both inclusive, the appellant had the care and custody of the two children. After the Christmas holidays of 1940, when Beverley made up her mind to stay with her parents in Vancouver, Helen continued to remain with the appellant.

The proof shows that from 1934 to 1940 Beverley and Helen Price were kept, maintained, educated and cared for by the appellant at her own expense. The proof also reveals that during the period when the appellant lived at the home of the children's great-aunt in Vancouver she was not providing for the children entirely, but only partially. From 1934 however, when she moved to Victoria, she alone provided for them.

It seems obvious to me that the position of appellant with respect to Beverley and Helen Price meets all the exigencies of clause (iii) of paragraph (c) of subsection 1 of section 5 of the Income War Tax Act, as amended by 23-24 George V, chapter 41, section 4, which was previously paragraph (f) of section 2 of chapter 97 of the Revised Statutes of Canada, 1927, and originally clause (ii) of paragraph (n) of section 2 as enacted by 16-17 George V, chapter 10, section 1. Indeed she was at all material times an individual who maintained a self-contained domestic establishment and who actually supported therein two individuals connected with her by adoption.

From 1934 to 1940 she alone looked after the care, custody, support and education of Beverley and Helen Price and the proof discloses that she did it unsparingly. She treated the two children as well as if they had been her own. I believe that is what the law, as originally drawn, contemplated. I do not think that Parliament intended that the adoption ought to be made in compliance with the requirements of the various adoption acts, the main and most important objects whereof concern civil status and civil rights, which do not fall within the field of the Dominion jurisdiction but form part of the domain of the provinces. After giving full consideration to clause (iii) of paragraph (c) of subsection 1 of section 5 and the fact that the word "adoption" was inserted in the section of the statute dealing with deductions and exemptions unreservedly, I am satisfied that the legislators, who are usually accurate and precise, wanted, at a time when the exchequer was not so heavily burdened, to put on the same footing as the natural parents any individual who, maintaining a self-contained domestic establishment (otherwise residence), actually supports therein one or more persons connected with him by blood relationship, marriage or adoption.

After a careful perusal of the appellant's testimony and of the exhaustive argument of counsel, an attentive study of the law and its numerous amendments and a review of the precedents, I have reached the conclusion that the case of the appellant comes within the ambit of clause (iii) of paragraph (c) of subsection 1 of section 5 and that she is entitled to the exemption thereby provided for and that consequently her appeal must be maintained.

There will be judgment maintaining the appeal, setting aside the assessments for the year 1935, 1936, 1937, 1938 and 1939 and the decision of the Minister and declaring that the appellant is entitled to the exemptions claimed in her notice of appeal.

The appellant will be entitled to her costs against the respondent.

*Judgment accordingly.*

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BETWEEN :

DAME JULIETTE CARROLL, widow  
 of the late EDWARD TASCHE-  
 REAU and DAME MARGUERITE  
 CARROLL, married woman, having  
 separation of property by marriage  
 contract with her husband LOUIS  
 LARUE, and the said LOUIS LA-  
 RUE, mis en cause,.....

SUPPLIANTS,

AND

HIS MAJESTY THE KING,.....RESPONDENT.

*Crown—Judges Act R.S.C. 1927, c. 105, s. 27—Interpretation Act R.S.C. 1927, c. 1, ss. 13 and 14—British North America Act ss. 58 et seq.—Retired Judge having a pension when appointed Lieutenant Governor of a province is entitled to receive both pension and salary—“Becomes entitled to a salary in respect of any public office under His Majesty in respect of his Government of Canada”—“Such salary shall be reduced by the amount of such pension”—“Public Office”—Lieutenant Governor of a province is not a person receiving a salary in respect of a public office under His Majesty in respect of the Government of Canada.*

*Held:* That a lieutenant governor of a province is not a person receiving a salary in respect of a public office under His Majesty in respect of his Government of Canada, but one receiving a salary in respect of a public office under His Majesty in respect of his government of one of his provinces.

- 2. That where a retired Justice of the Court of King’s Bench entitled to a pension is appointed lieutenant governor of a province he is entitled to receive his pension as a retired Justice and his salary as lieutenant governor.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before the Hon. Mr. Justice Angers at Ottawa.

*Aimé Geoffrion, K.C.* and *Fernand Choquette, K.C.* for suppliants.

*F. P. Varcoe, K.C.* and *D. W. Mundell* for respondent.

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

ANGERS J. now (July 4, 1947) delivered the following judgment:

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Cette cause vient devant moi pour audition en droit avant le procès suivant jugement rendu le 21 juin 1944.

La question de droit soumise à la Cour pour décision est la suivante:

Assuming that the Honourable H. G. Carroll became entitled on February 18, 1921, to a pension under the Judges Act at a rate of \$6,000 per annum and was entitled to receive the same during and in respect of the period from April 2, 1929, to May 3, 1934, and that during the said period he occupied the office of Lieutenant Governor of Quebec to which office there was attached the salary of \$10,000 per annum and assuming that he received payment out of the Consolidated Revenue Fund of Canada in respect of the said pension and of salary as Lieutenant Governor during the said period at the rate of \$10,000 per annum, are the suppliants entitled to the relief sought by the petition of right?

Par leur pétition de droit amendée les pétitionnaires en leur qualité d'héritières légales de feu Dame Amazélie Boulanger, veuve de l'honorable juge H. G. Carroll, décédée intestat à Québec le 4 janvier 1943, réclament de Sa Majesté le Roi la somme de \$30,000 comme pension ou partie de salaire due audit H. G. Carroll lors de son décès avec intérêt sur \$6,000 depuis 1930, sur \$6,000 depuis 1931, sur \$6,000 depuis 1932, sur \$6,000 depuis 1933 et sur \$6,000 depuis 1934 et dépens.

Dans leur pétition les pétitionnaires allèguent en substance ce qui suit:

elles sont les filles et les seules héritières légales de Dame Amazélie Boulanger, veuve de l'honorable juge H. G. Carroll, décédée à Québec sans testament le 4 janvier 1943;

ladite Amazélie Boulanger était légataire universelle dudit H. G. Carroll, ancien lieutenant-gouverneur de la province de Québec, en vertu d'un testament olographe en date du 5 septembre 1936;

ledit H. G. Carroll est décédé le 20 août 1939;

ladite Amazélie Boulanger avait accepté la succession de son mari et payé les droits de succession exigibles en vertu de la loi;

les pétitionnaires ont accepté la succession de leur mère et payé les droits de succession exigibles en vertu de la loi;

le 2 avril 1929 ledit H. G. Carroll a été nommé lieutenant-gouverneur pour la province de Québec;

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lors de sa nomination comme lieutenant-gouverneur, ledit H. G. Carroll avait droit de toucher et touchait une pension du gouvernement de Sa Majesté pour le Canada en sa qualité d'ancien juge de la Cour du Banc du Roi de la province de Québec;

ledit H. G. Carroll a occupé la fonction de lieutenant-gouverneur de la province de Québec du 2 avril 1929 au 3 mai 1934;

durant cette période de cinq ans le gouvernement de Sa Majesté pour le Canada aurait dû verser audit H. G. Carroll sa dite pension de \$6,000 par année, soit un total de \$30,000;

le gouvernement de Sa Majesté pour le Canada, s'appuyant sur l'article 27 du chapitre 105 des Statuts Révisés du Canada de 1927, a, durant le terme d'office dudit H. G. Carroll comme lieutenant-gouverneur, retenu à celui-ci la dite somme de \$30,000, soit à même la pension susdite soit à même son salaire, à raison de la dite pension;

la disposition légale susmentionnée ne pouvait justifier la retenue par le gouvernement de la dite pension ou partie de salaire au total de \$30,000 parce que le lieutenant-gouverneur d'une province n'exerce pas "une charge publique sous Sa Majesté pour son gouvernement du Canada", mais bien une charge publique sous Sa Majesté pour son gouvernement de la province, en l'espèce, la province de Québec;

au surplus, aucune restriction ne pouvait justifier la retenue de cette pension ou partie de salaire dans l'arrêt ministériel nommant ledit H. G. Carroll à la fonction de lieutenant-gouverneur;

ledit H. G. Carroll avait soumis de son vivant une réclamation au ministère de la Justice pour le paiement de ladite pension ou partie de salaire à laquelle il n'a jamais renoncé;

les pétitionnaires en leur qualité d'héritières légales de leur mère, Dame Amazélie Boulanger, elle-même légataire universelle dudit H. G. Carroll, sont justifiables de réclamer ladite somme de \$30,000 avec intérêt depuis 1930 sur \$6,000, depuis 1931 sur \$6,000, depuis 1932 sur \$6,000, depuis 1933 sur \$6,000, et depuis 1934 sur \$6,000.

Dans sa défense amendée l'intimé plaide ce qui suit:

il admet que l'honorable H. G. Carroll est décédé le 20 août 1939;

il admet que ledit H. G. Carroll a été nommé lieutenant-gouverneur de la province de Québec le 2 avril 1929, selon un arrêté en conseil et que cette nomination a été faite par lettres patentes en date du 2 avril 1929, prenant effet à cette date;

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par lettres patentes sous le grand sceau du Canada en date du 29 janvier 1904, ledit H. G. Carroll a été nommé juge puîné de la Cour Supérieure de la province de Québec;

ledit H. G. Carroll a continué à exercer cette fonction jusqu'à ce que, par lettres patentes sous le grand sceau du Canada en date du 24 décembre 1908, il ait été nommé juge puîné de la Cour du Banc du Roi de la province de Québec;

le dit H. G. Carroll a résigné sa fonction de juge puîné de la Cour du Banc du Roi le 18 février 1921;

par lettres patentes sous le grand sceau du Canada en date du 18 février 1921, Sa Majesté a accordé au dit H. G. Carroll une pension de \$6,000 par année et proportionnellement pour toute période de moins d'une année, commençant à la date susdite;

il admet que le dit H. G. Carroll a occupé les fonctions de lieutenant-gouverneur de la province de Québec du 2 avril 1929 au 3 mai 1934;

il déclare ne pas admettre ou nier les autres allégations de la pétition de droit;

il dit que paiement de la dite pension et du salaire autorisé par la loi à être payé au dit H. G. Carroll comme lieutenant-gouverneur lui a été fait durant toute la période pendant laquelle il a occupé cette position;

alternativement, si le paiement de la dite pension a été retenu, des surpayes sur son salaire comme lieutenant-gouverneur de la province de Québec au montant de \$6,000 par année ont été faites au dit H. G. Carroll durant toute la période de prétendu non-paiement de la dite pension, le montant total desdits paiements étant égal à la réclamation des pétitionnaires pour pension et ledit H. G. Carroll était endetté envers Sa Majesté en rapport avec ces surpayes de salaire; Sa Majesté a droit d'opposer le montant des dites surpayes contre le montant de la réclamation des pétitionnaires et celle-ci est compensée par un montant égal réclamé par Sa Majesté des pétitionnaires pour les raisons susdites.

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Une copie de la commission nommant l'honorable Henry George Carroll lieutenant-gouverneur de la province de Québec en date du 2 avril 1929 a été produite comme pièce 1. Cette commission, après la disposition concernant la nomination dudit Henry George Carroll comme lieutenant-gouverneur, stipule ce qui suit:

Et par les présentes, Nous vous autorisons et vous ordonnons à vous le dit HENRY GEORGE CARROLL, de faire et exécuter toutes choses se trouvant sous votre juridiction en bonne et due forme et la confiance que nous avons reposée en vous, suivant les divers pouvoirs, les dispositions et les directions qui vous ont été conférés en vertu de l'Acte du Parlement du Royaume-Uni de la Grande-Bretagne et de l'Irlande, passé dans la trentième année du Règne de feu Sa Majesté, connu sous le nom de "L'Acte de l'Amérique Britannique du Nord, 1867" et de tous les autres statuts à ce sujet de même qu'en vertu de la présente Commission, suivant telles instructions qui vous sont données par les Présentes ou qui pourront l'être dans l'avenir, à l'égard de la Province de Québec, sous la signature de Notre Gouverneur Général suppléant de Notre Dominion du Canada ou par ordre de Notre Conseil Privé du Canada, et suivant telles lois qui sont ou qui peuvent devenir en existence dans la Province de Québec.

Annexées à la commission sont les instructions au lieutenant-gouverneur (texte anglais), intitulées "Instructions to the Lieutenant Governor or other Chief Executive Officer or Administrator for the time being, *carrying on the Government of the Province of Quebec*".

Après avoir observé que l'Acte de l'Amérique Britannique du Nord, 1867, dispose qu'il y aura pour chaque province un officier appelé lieutenant-gouverneur, qui sera nommé par le Gouverneur Général en Conseil par instrument sous le grand sceau du Canada, et déclaré que, de l'avis du Conseil Privé du Roi pour le Canada, le Gouverneur Général en Conseil a, par commission sous le grand sceau du Canada, nommé (.....) lieutenant-gouverneur de la province de Québec et lui a permis et ordonné de faire toutes choses relevant de sa juridiction et de sa charge en conformité des pouvoirs, dispositions et directions à lui conférés ou attribués en vertu du dit acte et de tous autres statuts à cet égard et de la dite commission, les dites instructions stipulent, entre autres, ce qui suit:

IV. The Lieutenant Governor is to take care that all Laws assented to by him in my name, or reserved for signification of my pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margin, and be accompanied in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws.



V. Whenever the Lieutenant Governor assents to a Bill, he shall, within ten days thereafter, send an authentic copy of the Act to the Secretary of State of Canada. (The Lieutenant Governor shall not assent to any Bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the second schedule to the said Act, unless an address has been presented to him by the Legislative Assembly, stating that the second and third readings of the Bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all the said Electoral Divisions or Districts.

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VI. The Lieutenant Governor, on receipt of a copy of an Order in Council disallowing an Act with my certificate of the date on which the Act was received by me, shall forthwith make proclamation in the said Province of such certificate, and of the disallowance of the said Act.

Un bref résumé des faits me paraît opportun.

L'honorable H. G. Carroll a été nommé juge puîné de la Cour Supérieure de la province de Québec par lettres patentes sous le grand sceau du Canada en date du 29 janvier 1904. Il a exercé cette fonction jusqu'au 24 décembre 1908 alors que, par lettres patentes sous le grand sceau du Canada portant cette date, il a été nommé juge puîné de la Cour du Banc du Roi de la province de Québec. Il a résigné cette situation le 18 février 1921. Par lettres patentes sous le grand sceau du Canada en date du 18 février 1921, Sa Majesté le Roi lui a accordé une pension de \$6,000 par année.

Par lettres patentes sous le grand sceau du Canada en date du 2 avril 1929, l'honorable H. G. Carroll a été nommé lieutenant-gouverneur de la province de Québec et il a occupé cette charge du 2 avril 1929 au 3 mai 1934.

Le traitement du lieutenant-gouverneur de la province de Québec est de \$10,000 par année: S.R.C. 1927, chap. 182, art. 3. L'intimé a soustrait de ce traitement de \$10,000 la pension de \$6,000 accordée au dit H. G. Carroll durant la période où il a exercé les fonctions de lieutenant-gouverneur. Cette soustraction a été faite en vertu de l'article 27 de la Loi des Juges, S.R.C. 1927, chapitre 105, lequel est ainsi conçu:

27. Si une personne est admise à une pension après le premier jour de juillet mil neuf cent vingt, en vertu de la présente loi, et si elle vient à recevoir un traitement attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada, le montant de cette pension sera soustrait de ce traitement.

La question à résoudre est de savoir si le lieutenant-gouverneur d'une province occupe une charge publique sous Sa Majesté pour son gouvernement du Canada ou pour son gouvernement d'une province du Canada.

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Me Geoffrion a invoqué et brièvement commenté les articles suivants de l'Acte de l'Amérique Britannique du Nord et de la Loi d'interprétation. Il me semble à propos de résumer sommairement ses observations.

L'article 58 de l'Acte de l'Amérique Britannique du Nord, 1867, prévoit qu'il y aura, pour chaque province, un officier appelé lieutenant-gouverneur, nommé par le Gouverneur-Général en Conseil par instrument sous le grand sceau du Canada.

L'article 59 stipule que "le lieutenant-gouverneur restera en charge durant le bon plaisir du Gouverneur-Général". L'article ajoute cependant que tout lieutenant-gouverneur nommé après le commencement de la première session du parlement ne pourra être révoqué dans le cours des cinq ans suivant sa nomination à moins qu'il n'y ait cause.

L'article 60 dit que les salaires des lieutenants-gouverneurs seront fixés et payés par le parlement du Canada.

L'article 61 ordonne qu'un lieutenant-gouverneur, avant d'exercer ses fonctions, prêtera devant le Gouverneur-Général ou quelque personne par lui autorisée les serments d'allégeance et d'office prêtés par le Gouverneur-Général.

L'article 62 arrête que les dispositions de l'acte relatives au lieutenant-gouverneur s'appliquent au lieutenant-gouverneur de chaque province ou à tout autre chef exécutif ou administrateur temporairement administrant le gouvernement de la province quel que soit son titre.

L'article 63 pourvoit à la nomination par le lieutenant-gouverneur de personnes devant former le conseil exécutif de l'Ontario et du Québec.

L'article 65 décrète ce qui suit:

Tous les pouvoirs, attributions et fonctions qui—par aucun acte du parlement de la Grande-Bretagne, ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, ou de la législature du Haut-Canada, du Bas-Canada ou du Canada, avant ou lors de l'union—étaient conférés aux gouverneurs ou lieutenants-gouverneurs respectifs de ces provinces ou pouvaient être par eux exercés, de l'avis, ou de l'avis et du consentement des conseils exécutifs respectifs de ces provinces, ou avec la coopération de ces conseils ou d'aucun nombre de membres de ces conseils, ou par ces gouverneurs ou lieutenants-gouverneurs individuellement, seront—en tant qu'ils pourront être exercés après l'union, relativement au gouvernement d'Ontario et Québec respectivement—conférés au lieutenant-gouverneur d'Ontario et Québec, respectivement, et pourront être par lui exercés, de l'avis ou de l'avis et du consentement ou avec la coopération des conseils exécutifs respectifs ou d'aucun de leurs membres, ou par le lieutenant-

gouverneur individuellement, selon le cas; mais ils pourront, néanmoins (sauf ceux existant en vertu d'actes du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués ou modifiés par les législatures respectives d'Ontario et Québec.

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Il ressort de cet article, quelque prolix, que tous les pouvoirs, attributions et fonctions qui, avant ou lors de la confédération, pouvaient être exercés par les gouverneurs ou lieutenants-gouverneurs du Canada, du Haut-Canada ou du Bas-Canada de l'avis ou de l'avis et du consentement des conseils exécutifs respectifs de ces provinces ou avec la coopération de ces conseils ou d'aucun nombre de membres d'iceux ou par ces gouverneurs ou lieutenants-gouverneurs individuellement, seront conférés au lieutenant-gouverneur d'Ontario ou de Québec respectivement et pourront être par lui exercés, de l'avis ou de l'avis et du consentement ou avec la coopération des conseils exécutifs respectifs ou d'aucun de leurs membres, ou par le lieutenant-gouverneur individuellement, selon le cas. L'article ajoute que ces pouvoirs, attributions et fonctions, sauf ceux existant en vertu d'actes du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, pourront être *révoqués ou modifiés par les législatures* respectives d'Ontario et de Québec. Révocation et modification ne sont pas du ressort du parlement du Canada.

Comme le signalait le procureur des pétitionnaires, l'article 65 ne mentionne que les provinces d'Ontario et de Québec, parce que l'article 64 gouverne le cas des deux autres provinces faisant originairement partie de la confédération, savoir le Nouveau-Brunswick et la Nouvelle-Ecosse.

L'article 69 concerne la province d'Ontario et n'est point pertinent.

L'article 71 décrète qu'il y aura pour la province de Québec une législature composée du lieutenant-gouverneur et de deux chambres: le conseil législatif et l'assemblée législative.

L'article 72, qui a trait à la constitution du conseil législatif, dit, entre autres, qu'il se composera de vingt-quatre membres, qui seront nommés par le lieutenant-gouverneur *au nom de la Reine*, par instrument sous le grand sceau de Québec.

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L'article 75, auquel le procureur des pétitionnaires n'a pas fait allusion, stipule qu'advenant une vacance dans le conseil législatif, par démission, décès ou autre cause, le lieutenant-gouverneur, *au nom de la Reine*, nommera, par instrument sous le grand sceau de Québec, une personne ayant les qualifications voulues pour la remplir.

L'article 77 pourvoit à la nomination par le lieutenant-gouverneur, par instrument sous le grand sceau de la province, d'un membre du conseil législatif comme orateur de ce corps et de sa révocation et de son remplacement.

L'article 82 décrète que le lieutenant-gouverneur devra, de temps à autre, *au nom de la Reine*, par instrument sous le grand sceau de la province, convoquer l'assemblée législative.

La durée de l'assemblée législative du Québec est fixée par l'article 85 à quatre ans à compter du jour du rapport des brefs d'élection, à moins qu'elle ne soit dissoute plus tôt par le lieutenant-gouverneur.

L'article 90 déclare que les dispositions de l'Acte de l'Amérique Britannique du Nord concernant le parlement du Canada, relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des actes et à la signification du bon plaisir quant aux bills réservés, s'appliqueront aux législatures des provinces, "en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'Etat, un an à deux ans, et la province au Canada".

Il est à peine nécessaire de signaler que les articles 55, 56 et 57 doivent être interprétés conjointement avec l'article 90.

Le lieutenant-gouverneur a dans le domaine provincial les mêmes pouvoirs que le gouverneur-général dans le domaine fédéral. Il peut sanctionner un *bill* voté par la ou les chambres, selon le cas, de la législature, refuser sa sanction ou réserver le *bill* pour le bon plaisir du gouverneur-général.

Il a été suggéré de la part de l'intimé que le devoir imposé au lieutenant-gouverneur de transmettre une copie authentique de l'acte (*sic*) au gouverneur-général pour la

signification de son bon plaisir ou pour le désaveu de l'acte fait du lieutenant-gouverneur un officier du gouvernement du Dominion. Cette prétention me paraît mal fondée. Le pouvoir de sanctionner une loi, de refuser la sanction ou de réserver la loi à la signification du bon plaisir du gouverneur-général dépend du lieutenant-gouverneur uniquement. Il n'a pas d'instruction à recevoir du gouverneur-général relativement à l'exercice de ce pouvoir.

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Il est oiseux de signaler que, lorsqu'une loi d'une législature provinciale a été sanctionnée, elle n'a d'effet que dans les limites de la province. La sanction d'une loi, le refus de la sanction ou la réserve de la loi au bon plaisir du gouverneur-général sont des actes concernant le gouvernement de la province, qui n'ont rien à faire avec le gouvernement du Canada.

L'article 92, énumérant les sujets soumis au contrôle de la législation provinciale, ordonne que dans chaque province la législature pourra exclusivement faire des lois concernant, entre autres, l'amendement de temps à autre de la constitution de la province, sauf les dispositions relatives à la charge du lieutenant-gouverneur.

Après avoir stipulé que la législature de chaque province pourra exclusivement faire des lois relatives à l'éducation et mentionné les conditions auxquelles ces lois seront sujettes, l'article 93, auquel le procureur des pétitionnaires a fait brièvement allusion, contient, entre autres, les dispositions suivantes:

(3) Dans toute province où un système d'écoles séparées ou dissidentes existera par la loi, lors de l'union, ou sera subséquemment établi par la législature de la province,—il pourra être interjeté appel au gouverneur-général en conseil de tout acte ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestant ou catholique romaine des sujets de Sa Majesté relativement à l'éducation;

(4) Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur-général en conseil jugera nécessaire pour donner suite et exécution aux dispositions du présent article,—ou dans le cas où quelque décision du gouverneur-général en conseil, sur appel interjeté en vertu du présent article, ne serait pas mise à exécution par l'autorité provinciale compétente,—alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l'exigeront, le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions du présent article, ainsi qu'à toute décision rendue par le gouverneur-général en conseil sous l'autorité de ce même article.

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J'avouerais que cet article ne me paraît avoir aucune portée sur la question qui nous occupe. Il en est de même, à mon avis, quant à ce qui concerne l'article 95, également cité par le procureur des pétitionnaires, qui accorde au parlement du Canada et aux législatures provinciales le pouvoir concurrent de légiférer en matière d'agriculture et d'immigration.

Le procureur des pétitionnaires discutant la portée de l'article 118, qui fixe les subventions annuelles payables aux provinces par le gouvernement du Canada, a signalé son analogie avec l'article 60 qui impose au parlement du Canada la charge de payer les salaires des lieutenants-gouverneurs, concluant que le paiement de ces salaires n'a rien à voir avec la question de savoir si ces traitements sont attachés à une charge publique sous Sa Majesté pour son gouvernement du Canada, selon les termes de l'article 27, ou sous Sa Majesté pour son gouvernement de la province. Cette conclusion me paraît juste.

Le procureur des pétitionnaires a mentionné les paragraphes (13) et (14) de l'article 37 de la Loi d'interprétation (S.R.C. 1927, chap. 1), disant qu'il le faisait avec quelque hésitation vu qu'à son avis les fonctions, devoirs et pouvoirs du lieutenant-gouverneur se trouvent entièrement exposés dans l'Acte de l'Amérique Britannique du Nord et qu'aucune législation du parlement du Canada ne peut les modifier.

Les paragraphes (13) et (14) se lisent ainsi:

(13) "lieutenant-gouverneur" signifie le lieutenant-gouverneur alors en fonctions, ou tout autre chef exécutif ou administrateur alors chargé d'exercer le gouvernement de la province indiquée par la loi, quel que soit le titre sous lequel il est désigné;

(14) "lieutenant-gouverneur en son conseil" signifie le lieutenant-gouverneur ou la personne exerçant alors le gouvernement de la province indiquée par la loi, agissant sur l'avis, ou sur l'avis et du consentement du conseil exécutif de ladite province, ou de concert avec ce dernier;

Ces dispositions indiquent clairement que le lieutenant-gouverneur est chargé d'exercer le gouvernement de la province.

Me Fernand Choquette, C.R., procureur des pétitionnaires, a plaidé en français immédiatement après Me Aimé Geoffrion, abondant dans le sens des arguments que celui-ci avait fait valoir avant lui en anglais.

Le procureur de l'intimé a appuyé sa prétention que le traitement du lieutenant-gouverneur en est un "attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada" sur les articles 58, 59, 60, 61 et 62 et en particulier les articles 55, 56 et 57, interprétés en union avec l'article 90. Il a appuyé sur le fait qu'en vertu des articles 55, 56 et 57, modifiés conformément aux dispositions de l'article 90, le lieutenant-gouverneur remplit ses fonctions pour le gouverneur-général et en ses lieu et place. J'aurai à dire un mot de cette interprétation dans un instant.

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Le procureur de l'intimé a fait mention des instructions au lieutenant-gouverneur ou autre chef exécutif ou administrateur pour le temps d'alors administrant la province et déclaré qu'elles engagent le lieutenant-gouverneur sous tous les rapports. Il a invoqué les clauses IV, V, VI et VII. Les trois premières sont citées plus haut; la dernière, pour moi sans portée sur le sujet, est ainsi conçue:

VII. The Lieutenant Governor shall not quit the Province without having first obtained leave from me for so doing, under my Sign Manual, or through the Secretary of State of Canada.

Le procureur de l'intimé soutient qu'il ressort de ces dispositions que la situation est comme si l'Acte de l'Amérique Britannique du Nord avait requis le Gouverneur-Général d'exercer les fonctions du Souverain dans le Dominion et dans la province, mais que, vu les nécessités provenant des circonstances, les fonctions du Gouverneur-Général doivent être exercées dans la province par une personne nommée par lui à cette fin. L'avocat a particulièrement souligné l'article 55 de l'Acte de l'Amérique Britannique du Nord, lequel, modifié conformément aux dispositions de l'article 90, se lit ainsi:

55. Lorsqu'un bill voté par les chambres du parlement sera présenté au lieutenant-gouverneur pour la sanction du Gouverneur-Général, le lieutenant-gouverneur devra déclarer à sa discrétion, mais sujet aux dispositions du présent acte et aux instructions du Gouverneur-Général, ou qu'il le sanctionne au nom du Gouverneur-Général, ou qu'il refuse cette sanction, ou qu'il réserve le bill pour la signification du bon plaisir du Gouverneur-Général.

Me Varcoe a appuyé sur le fait que l'article 55 démontrerait clairement que, lorsque le lieutenant-gouverneur accomplit les fonctions à lui dévolues en vertu de l'Acte de

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l'Amérique Britannique du Nord, il le fait *sujeet aux instructions du Gouverneur-Général*. Cette assertion me paraît aller au-delà de la portée de l'article.

Le procureur de l'intimé a fait valoir que la Loi des juges ne soulève aucune question constitutionnelle et qu'elle n'a trait qu'aux traitements, pensions, frais de voyage et retraite des juges. Il allègue que l'article 27 est un article purement financier, se rapportant uniquement au cas d'un juge admis à une pension, qui "vient à recevoir un traitement attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada", traitement en réalité payable à même les fonds du Dominion.

Le procureur de l'intimé a émis l'opinion que ce que le législateur avait en vue en mentionnant dans l'article 27 "un traitement attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada" c'était les personnes recevant un traitement du gouvernement du Canada en rapport avec une charge publique. C'est là toute la question en litige. Me Varcoe a insisté sur le point que l'article 27 n'a rapport qu'aux personnes recevant des traitements du gouvernement du Canada en rapport avec une charge publique, à l'exclusion de celles ayant un contrat ou exerçant une autre occupation. Ceci me paraît évident en soi.

Les procureurs des parties ont cité quelques décisions; il est opportun d'en faire mention brièvement. Je traiterai d'abord de celles invoquées par le procureur des pétitionnaires.

La décision considérée comme la plus pertinente par Me Geoffrion est celle rendue par le Conseil Privé dans la cause *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* (1).

Le sommaire du jugement se lit ainsi:

The British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each province.

*Held*, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect



of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.

Me Geoffrion a attiré l'attention du tribunal sur les observations suivantes de Lord Watson, qui a rendu le jugement du Conseil Privé (p. 441):

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge v. The Queen*, 9 A.C. 117, Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level.

Plus loin Lord Watson ajoute (p. 442):

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme.

Plus loin (p. 443):

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by

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the Queen, the Lieutenant-Governor of a province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the "Governor-General in Council by Instrument under the Great Seal of Canada," or, in other words, by the Executive Government of the Dominion, which is, by sect. 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

Le procureur des pétitionnaires déclare que le principe consacré par cette décision a été reconnu maintes fois, particulièrement dans une cause de *Bonanza Creek Gold Mining Company, Limited v. The King and Attorney-General for the Province of Quebec et al.*, interveners (1). Me Geoffrion fait observer que dans cette cause il s'agissait d'une autre prérogative de la Couronne, que le Conseil Privé a déclaré appartenir au lieutenant-gouverneur pour la raison que celui-ci était directement le représentant du Roi et non son représentant par l'intermédiaire du Gouverneur-Général, nonobstant sa nomination par ce dernier.

Il s'agissait en l'espèce du pouvoir de créer une corporation de droit commun et il a été décidé qu'il était dans les attributs du lieutenant-gouverneur d'émettre des lettres patentes à la corporation l'autorisant à exercer les affaires de mine et que celle-ci a l'état civil et la capacité voulus pour accepter et exploiter des baux et droits miniers dans le territoire du Yukon, conférés par l'autorité du Dominion et du territoire du Yukon.

Je crois avantageux de citer un extrait du sommaire du jugement (p. 566) :

Sect. 92 of the British North America Act, 1867, confines the actual powers and rights which a provincial Government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to

(1) (1916) 1 A.C. 566.

incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity.

*Held*, therefore, that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Companies Act (R.S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights in the Yukon Territory conferred by the authorities of the Dominion and the Yukon Territory.

A la page 580 du rapport l'on trouve les observations suivantes du Vicomte Haldane:

There can be doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidences of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A. C. 437, 443. It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."

The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is "to do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as "The British North America Act, 1867," and of all other statutes in that behalf and of this our present commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario."

Une formule substantiellement semblable, *mutatis mutandis*, est comprise dans la Commission pièce 1.

A l'appui de sa prétention que l'article 27 s'applique au traitement attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada, quelle qu'elle soit et qu'elle soit exercée dans le domaine fédéral ou dans le domaine provincial mais rémunérée par le gouvernement fédéral le procureur de l'intimé a invoqué les décisions dans

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les causes suivantes: *United States v. Hartwell* (1); *In the matter of a reference concerning the power of the Governor-General in Council to disallow Acts passed by the legislatures of the provinces and the power of reservation of the lieutenant-governors* (2); *Attorney-General of Canada v. Attorney-General of Ontario* (3).

La décision dans *United States v. Hartwell* n'a pas de portée directe sur la présente cause; elle a été citée pour faire voir la définition de "public office", qui équivaut à la "charge publique" ("public office" dans le texte anglais) mentionnée dans l'article 27.

La partie du sommaire du jugement qui nous intéresse se lit ainsi:

1. An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties.

A la page 393 du rapport l'on trouve les considérations suivantes du juge Swayne, qui a rendu le jugement de la Cour Suprême des Etats-Unis:

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

J'avouerai que cette définition, qu'il était peut-être nécessaire d'insérer dans le jugement, me paraît plutôt élémentaire.

Assimilant l'expression "public office" définie dans le jugement de la Cour Suprême des Etats-Unis à la même expression comprise dans l'article 27, le procureur de l'intimé conclut, à juste titre, que les mots "charge publique" impliquent un emploi dont la jouissance, la durée, les émoluments et les devoirs sont caractéristiques. Passant à la charge de lieutenant-gouverneur, Me Varcoe allègue que la

(1) (1867) 6 Wallace's Report, 385.

(3) (1890) 20 O.R. 222.

(2) (1938) S.C.R. 71.

période de jouissance, la durée et les émoluments sont fixés par le gouvernement du Canada, et que les devoirs sont, en vertu de l'article 55 de l'Acte de l'Amérique Britannique du Nord, sous le contrôle absolu du Gouverneur-Général en Conseil. Il conclut de là qu'à tous ces égards la charge de lieutenant-gouverneur est de celle dont tous les traits caractéristiques tombent sous le contrôle du Gouverneur-Général en Conseil et qu'elle est en conséquence une "charge publique" sous Sa Majesté pour son gouvernement du Canada". Encore une fois je noterai que c'est le cas en litige, qu'il y aura lieu de décider et sur lequel naturellement je devrai revenir. Dans la cause suivante, *In the matter of a reference concerning the power of the Governor-General in Council to disallow acts passed by the legislatures of the provinces and the power of reservation of the lieutenant-governors*, il s'agissait d'une référence à la Cour Suprême du Canada par ordre du Gouverneur-Général en Conseil au sujet de quatre questions de droit ainsi formulées (loc. cit. p. 72):

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1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the *British North America Act, 1867*, still a subsisting power?

2. If the answer to question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of Bills passed by the legislative assembly or legislative authority of province vested in the Lieutenant-Governor by section 90 of the *British North America Act, 1867*, still a subsisting power?

4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

Les réponses unanimes de la Cour Suprême ont été les suivantes (*ibid*):

1. The first question referred is answered in the affirmative;

2. The second question referred is answered in the negative, save that the power of disallowance shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General;

3. The third question referred is answered in the affirmative;

4. The fourth question referred is answered in the negative, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

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Le procureur de l'intimé reconnaît que cette cause est tout à fait différente de celle qui nous occupe, vu qu'elle a pour objet de faire déterminer si le droit de désaveu de lois provinciales par le gouverneur-général était tombé en désuétude. Il avoue que cette question n'offre aucun intérêt en l'espèce et que tout ce qu'il désire tirer de cette décision sont les observations faites par le juge en chef Duff tant pour lui-même que pour son collègue, le juge Davis, que l'on trouve à la page 77 du rapport:

There is nothing, however, in all this in the least degree incompatible with a Lieutenant-Governor reserving a bill for the signification of the pleasure of the Governor General who is the representative of the Crown or in the disallowance of an Act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada.

Je crois bon de citer, en sus de cet extrait, quelques observations du savant juge qui le précède (p. 76):

In the course of the judgment delivered by Lord Haldane on behalf of the Judicial Committee, the judgment and the reasons in *The Liquidators of the Maritime Bank* case ((1892) A.C. 437) were recognized by the Board as laying down the governing principles in respect of the relation of the Crown to the provinces. In substance, these judgments declare that, in the appointment of a provincial Governor, the Governor General in Council under section 58 is acting as the Executive Government of the Dominion which, by section 9 of the statute, is declared to be vested in the Queen; in other words, the act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown.

#### Lord Watson proceeds:

a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government (*Liquidators of the Maritime Bank v. The Receiver-General of New Brunswick* ((1892) A.C. 437, at 443)).

The act of a Lieutenant-Governor in assenting to a bill or in reserving a bill is the act of the Crown by the Crown's representative just as the act of the Governor General in assenting to a bill or reserving a bill is the act of the Crown.

A la suite du passage cité par Me Varcoe nous lisons ceci (p. 77):

It seems proper in this connection to call attention to the functions of the Dominion Government respecting the appointment and the removal of a Lieutenant-Governor. By section 58 of the *B.N.A. Act*, the Lieutenant-Governor is appointed by the Governor General in Council by instrument under the Great Seal of Canada. His commission runs in the name of the Sovereign, just as the commissions of other great officers of state (appointed by the same authority under such instruments) run in the name of the Sovereign. But his Instructions emanate from the

Governor General and it is the Governor General in Council who determines their character; and in assenting to bills, withholding assent, and reserving bills for the signification of the Governor General's pleasure, he exercises his discretion subject to the Instructions of the Governor General. He holds office during the pleasure of the Governor General (sec. 59). His salary is fixed and provided by the Parliament of Canada.

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Il ressort clairement de ces considérations que le lieutenant-gouverneur est tout autant le représentant de Sa Majesté pour les fins du gouvernement d'une province que l'est le Gouverneur-Général pour celles relevant du gouvernement du Dominion.

Il me semble opportun de reproduire quelques remarques de feu le juge Crocket, qui me semblent avoir quelque pertinence (p. 85):

There may be a question as to whether the intention of s. 90 was to substitute "the Governor General's name" for "the Queen's name", concerning the assent to bills in the Legislatures of the Provinces. I am inclined to agree with the conclusion expressed by Dr. Todd in his "Parliamentary Government in the British Colonies" (1894) for the reasons stated at p. 440 by that experienced and eminent authority on that subject, as well as for the reason that it has been definitely decided by the Judicial Committee of the Privy Council that the Lieutenant-Governor is as much the representative of the Sovereign for all purposes of the Provincial Government as is the Governor General for all purposes of the Dominion Government (see *Maritime Bank v. Receiver-General of New Brunswick* ((1892) A.C. 437), and *Bonanza v. The King* ((1916) 1 A.C. 566); and *In re The Initiative and Referendum Act* ((1919) A.C. 935), that the correct constitutional practice is for the Lieutenant-Governor to assent to or to withhold his assent in the Sovereign's name. This, however, is a mere matter of form. Whether a Bill is assented to by the Lieutenant-Governor of a Province in the King's name or in the Governor General's name, it must be taken to have been assented to in behalf of the Sovereign and to have become an Act which is subject to the exercise of the power of disallowance by the appropriate authority.

Le procureur de l'intimé tire de cette décision la conclusion qu'il n'y a rien d'incompatible dans le fait que le Roi soit représenté dans le domaine provincial par un officier du Dominion quand on considère que cet officier est, d'après la constitution, nommé et payé par le gouvernement fédéral et que son terme d'office est fixé conformément aux instructions du Gouverneur-Général en Conseil. Peut-être n'y a-t-il rien d'incompatible dans le fait suscit, mais la question est précisément de savoir si la nomination et la rémunération du lieutenant-gouverneur par le gouvernement fédéral et la fixation de la durée de

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son terme d'office par celui-ci, en vertu de l'Acte de l'Amérique Britannique du Nord, en fait un officier du gouvernement fédéral.

Le procureur de l'intimé s'appuie ensuite sur le jugement de la High Court of Justice, Chancery Division, de la province d'Ontario dans une cause de *The Attorney-General of Canada v. The Attorney-General of Ontario (supra)*, dans laquelle se présentait la question de savoir si un gouvernement provincial a le pouvoir d'accorder un pardon à une personne condamnée pour une offense commise à l'encontre d'un statut provincial. Me Varcoe s'en rapporte particulièrement à un passage de l'argument de Me Edward Blake, l'avocat du procureur-général de l'Ontario, auquel aurait souscrit le juge Boyd, qui a rendu le jugement de la Cour. Je crois juste de citer le passage de l'argument invoqué ainsi que les remarques du juge y afférentes. L'on trouve à la page 229 du rapport les remarques suivantes de Me Blake ayant trait à l'article 2 de la loi intitulée "Act respecting the executive administration of the laws of this province" (51 Vict. ch. 5, Ont.) :

This section, however, gives no power to remit a sentence under a Dominion Act. What its latter part refers to are ante-confederation Acts creating offences not dealt with by subsequent Ontario Acts, or it may be to common law offences. This is not an Act as to the office of Lieutenant-Governor, within the meaning of B.N.A. Act, sec. 92, sub-sec. 1, which has reference to the position of the Lieutenant-Governor as a link between the Province and the Dominion, such power as he holds as a federal officer. But if we are to enter into the considerations suggested, and to minimize guarding provisions, we must investigate the scheme of the Provincial constitution under the B.N.A. Act. The Provinces are not mere major municipalities. In the B.N.A. Act we find, after the Executive power, and the Legislative power of the Dominion have been dealt with, the heading "Provincial Constitutions," which imports governmental power. Then comes the heading "Executive power", exactly the same as in the case of the Dominion. The very name "Lieutenant-Governor," implies that he is in the place of the Governor General, who represents the Queen. He uses a great seal, the sign of Sovereign power, by which the Sovereign speaks: B.N.A. Act, sec. 82. The Regal power is a unit. The Province has an Attorney-General, who is the officer representing the Queen in the Courts according to theory of the English Constitution.

Voyons maintenant les observations du juge (p. 247) :

What has just been said, answers also the argument based upon section 92, sub-sec. 1 of the Imperial Act, which forbids interference with the office of Lieutenant-Governor. That veto is manifestly intended to keep intact the headship of the Provincial Government, forming, as it



does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

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Le procureur de l'intimé a résumé sa plaidoirie en alléguant: 1o que l'article 27 ne concerne pas les officiers en rapport avec leur position au point de vue constitutionnel, mais vise tous les officiers dont les salaires sont payés par le Parlement du Canada; 2o que le lieutenant-gouverneur est le représentant du gouverneur-général tout comme celui-ci est le représentant du Souverain, et que comme tel il est sous le contrôle absolu du gouverneur-général en conseil à propos de pratiquement toutes ses fonctions et qu'il est conséquemment un officier fédéral; 3o que, s'il est à quelque titre un officier provincial, il exerce alors ce qui pourrait être appelé une fonction double, fédérale et provinciale, que c'est en rapport avec sa fonction fédérale que le Parlement du Canada pourvoit à son salaire et que c'est à cet égard que l'article 27 reçoit son application. J'avouerai que ce troisième motif, captieux et foncièrement sophistique, invoqué par l'intimé ne me paraît pas avoir beaucoup de poids.

Les premier et deuxième motifs, sur lesquels s'appuie la thèse du procureur de l'intimé, soulèvent toute la question à résoudre.

Me Varcoe a voulu constater une analogie entre le cas du lieutenant-gouverneur, officier fédéral à double fonction, et celui du Commissaire de l'impôt sur le revenu, nommé par le gouvernement du Canada pour percevoir, comme l'indique son titre, l'impôt sur le revenu fédéral et investi dans quelques provinces du pouvoir de percevoir l'impôt provincial sur le revenu. Je dois dire que je ne vois aucune analogie entre les deux cas. Le lieutenant-gouverneur, nommé et rémunéré par le gouvernement fédéral, n'exerce qu'une seule fonction et ce dans les limites de la province pour laquelle il a été nommé. Le Commissaire de l'impôt sur le revenu, également nommé et rémunéré par le gouvernement fédéral, exerce sa fonction comme tel à travers tout le Canada; dans certaines provinces s'ajoute à sa fonction originale de percepteur de l'impôt fédéral sur le revenu celle de percepteur de l'impôt provincial. Le procureur de l'intimé a fait observer que cet officier fédéral

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détient de ce fait une double fonction et il en conclut: "no one would ever suggest that, because he had already accepted the functions of a Dominion Government official, he thereby ceased to be a Federal Officer". Si l'on entend par les mots "officier fédéral" quelqu'un nommé et rémunéré par le gouvernement du Canada, la proposition me paraît indiscutable; si par contre, l'on entend désigner par ce qualificatif une personne qui, bien que nommée et rémunérée par le gouvernement fédéral, remplit sa fonction exclusivement dans le territoire de la province pour laquelle il a été nommé, la proposition remet sur le tapis la question dans son intégralité mais malheureusement n'en dispose point.

Le procureur de l'intimé a signalé que la cause de *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* portait sur la propriété et les revenus de la province et non sur la fonction du lieutenant-gouverneur, si ce n'est incidemment. Il a fait observer qu'il y a une distinction à faire entre le lieutenant-gouverneur et le lieutenant-gouverneur en conseil. Au dire de l'avocat le premier est un officier qui remplit des fonctions statutaires, tandis que le second est le gouvernement exécutif de la province et que, dans les causes invoquées par les pétitionnaires, particulièrement celle de *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, c'est le gouvernement exécutif de la province qui a été déclaré être un corps autonome et indépendant du gouvernement fédéral. Il a ajouté que cette déclaration ne s'étend pas au lieutenant-gouverneur indépendamment de son conseil et que c'est indépendamment de son conseil que le lieutenant-gouverneur reçoit son salaire.

En terminant le procureur de l'intimé a réitéré sa déclaration qu'en décrétant l'article 27 le parlement n'était pas intéressé dans la question de savoir si l'officier nommé et payé par lui avait quelque fonction à exécuter comme officier provincial. D'après lui tout ce qui concernait le parlement était de s'occuper des salaires d'officiers du Dominion pour qui il pourvoyait le salaire.

Le procureur des pétitionnaires, en réplique, a insisté sur le fait que la seule question qui se présente se réduit à

déterminer si un lieutenant-gouverneur est un officier quant à tout le Canada ou bien seulement quant à la province. C'est bien là, ce me semble, le nœud de la question ou, autrement dit, le fond du débat.

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Répondant à la suggestion du procureur de l'intimé que la décision du Conseil Privé dans la cause de *The Liquidators of the Maritime Bank of Canada v. The Attorney-General of New Brunswick* portait sur les attributs du gouverneur-général en conseil et non du gouverneur-général seul, Me Geoffrion s'est référé aux observations de Lord Watson et en a cité un passage que l'on trouve à la page 443 du rapport reproduit en partie ci-dessus. Je crois inutile de transcrire ici le court extrait des notes de Lord Watson compris dans la citation qui précède. La prétention du procureur des pétitionnaires sur ce point me paraît bien fondée.

Me Geoffrion a représenté que dans la cause de *Bonanza Creek Gold Mining Co. v. The King* comme dans celle de *The Liquidators of the Maritime Bank of Canada v. The Attorney-General of New Brunswick*, il a été décidé que la nomination d'un lieutenant-gouverneur est une prérogative de la Couronne.

Se reportant à la décision rendue dans la cause de *Attorney-General of Canada v. Attorney-General of Ontario* le procureur des pétitionnaires a allégué qu'elle donnait lieu à trois remarques qui peuvent se résumer ainsi: 1o il s'agit d'un *obiter dictum*; 2o la seule question qui se posait dans cette cause était le pouvoir de la législature provinciale d'élargir les devoirs du lieutenant-gouverneur; 3o la législature peut amender la constitution de la province, mais elle ne peut affecter la fonction du lieutenant-gouverneur et, en particulier, lui conférer le pouvoir d'accorder un pardon.

C'est bien là, partiellement, la portée du jugement dans cette cause. Il n'offre guère d'intérêt dans le cas présent.

Le procureur des pétitionnaires a fait ressortir que la seule relation qu'il y a entre le lieutenant-gouverneur et le gouvernement fédéral se limite à la présentation au gouverneur-général, pour sanction ou désaveu, des lois votées

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par la législature. Il a insisté sur le devoir du gouverneur-général de déclarer si ces lois seront mises en vigueur dans la province.

Le procureur des pétitionnaires a plaidé que par la Loi des Traitements (S.R.C. 1927, chap. 182) le traitement du lieutenant-gouverneur de la Province de Québec a été fixé à \$10,000, que l'intimé a sur ce montant payé \$4,000 et qu'il lui incombe d'établir l'autorisation, en vertu de l'article 27 de la Loi des juges, de ne payer que \$4,000 au lieu de \$10,000.

Revenant aux instructions au lieutenant-gouverneur (pièce 1), Me Geoffrion fait remarquer qu'il ne s'y trouve rien au sujet de l'Acte de l'Amérique Britannique du Nord si ce n'est les paragraphes IV et VII, qui ne présentent en l'espèce aucun intérêt quelconque.

Les clauses IV, V et VI des instructions ont été reproduites ci-dessus. La clause VII, dont le procureur des pétitionnaires a fait mention, décrète que le lieutenant-gouverneur ne devra pas quitter la province sans avoir au préalable obtenu du gouverneur-général, sous sa signature ou par l'entremise du Secrétaire d'Etat du Canada, la permission de le faire.

Après une lecture attentive desdites clauses, j'en suis arrivé à la conclusion qu'elles n'ont aucune portée sur la question en litige et ne peuvent aider à interpréter les mots "une charge publique sous Sa Majesté pour son gouvernement du Canada" de l'article 27 de la Loi des Juges.

Le lieutenant-gouverneur d'une province est le représentant direct du Roi dans les limites de la province pour laquelle il a été nommé. Il n'a aucun rôle à jouer dans le gouvernement du Canada. Ses relations avec celui-ci se bornent à sa nomination, sa rémunération et sa révocation, pour ce qui le concerne personnellement, et à la présentation au gouverneur-général, pour sanction ou désaveu, des lois votées par la législature, pour ce qui concerne l'exécution de sa charge.

Si l'on s'en tient au sens littéral des mots—et je crois qu'il y a lieu de le faire; voir à ce sujet *Maxwell, Interpretation of Statutes*, 9ème édition, page 3; *Craies, Treatise*

on *Statute Law*, 4ème édition, pages 68, 80 et 83 *in fine*; *Beal's Cardinal Rules of Legal Interpretation*, 3ème édition, page 343; *Sedgwick, Interpretation and Construction of Statutory and Constitutional Law*, 2ème édition, page 219-, je ne crois pas que l'on puisse soutenir que la fonction d'un lieutenant-gouverneur équivaille à "une charge publique sous Sa Majesté pour son gouvernement du Canada". A mon avis, il s'agit d'une charge publique sous Sa Majesté pour son gouvernement de la Province de Québec. Le lieutenant-gouverneur d'une province n'a aucun pouvoir ni aucune juridiction hors des limites de celle-ci. Si le législateur eût voulu comprendre dans l'article 27 un lieutenant-gouverneur, il aurait été facile et simple d'ajouter après les mots "pour son gouvernement du Canada" ceux-ci: "ou de l'une de ses provinces". Peut-être était-ce l'intention du législateur; il n'a pas jugé à propos de l'exprimer. Il faut s'en tenir à la lettre du texte. Je ne crois pas qu'il soit prudent et sage de s'aventurer dans le champ des présomptions ou des hypothèses.

La solution à laquelle je suis arrivé me semble conforme aux décisions du Conseil Privé dans les causes de *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick* et *Bonanza Creek Gold Mining Company Ltd. v. The King and Attorney-General for the Province of Quebec et al., intervenants*, susmentionnées.

Les observations de Lord Watson dans la première cause me paraissent assez pertinentes. Il est inutile de les répéter ici quand elles ont déjà été reproduites ci-dessus (pp. 15 et 16).

Le lieutenant-gouverneur d'une province est nommé par le gouverneur-général en conseil par instrument sous le grand sceau du Canada, suivant les dispositions de l'article 58 de la Loi de l'Amérique Britannique du Nord, autrement dit par le gouvernement et le pouvoir exécutif du Canada, lesquels sont par l'article 9 de la même loi expressément attribués à Sa Majesté.

L'on doit conclure de là que l'acte du gouverneur-général et de son conseil en nommant un lieutenant-gouverneur est l'acte, par intermédiaire, de la Couronne elle-même. Le lieutenant-gouverneur est tout autant le représentant de

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Sa Majesté pour les fins du gouvernement provincial que l'est le gouverneur-général pour les fins du gouvernement du Dominion.

Dans ces conditions je suis d'opinion que le lieutenant-gouverneur ne peut être considéré comme une personne recevant "un traitement attaché à une charge publique sous Sa Majesté pour son gouvernement du Canada". Il en résulte que la pension accordée à l'honorable H. G. Carroll comme ancien juge de la Cour du Banc du Roi de la province de Québec ne peut être soustraite du traitement attaché à la charge de lieutenant-gouverneur, par lui occupée du 2 avril 1929 au 3 mai 1934. La réponse à la question soumise est donc affirmative, avec cependant cette restriction que les pétitionnaires n'ont pas droit à l'intérêt sur la somme de \$30,000 qu'ils réclament. En effet, aucun intérêt n'est recouvrable de la Couronne à moins d'être stipulé dans une convention ou reconnu par un texte de loi: *In re Gosman* (1); *Algoma Central Railway Co. v. The King* (2); ce jugement a été infirmé par la Cour Suprême du Canada (3) sur la question de l'interprétation de la Loi des douanes et la décision de la Cour Suprême a été confirmée par le Conseil Privé (4); *The London, Chatham and Dover Railway Co. v. The South Eastern Railway Co.* (5); *The Toronto Railway Co. v. The Queen* (6); *Ross et al. v. The King* (7); *Johnson v. The King* (8).

Les pétitionnaires auront droit à leurs dépens sur cette audition en droit et sur la motion qui lui a donné lieu.

A défaut d'appel ou du paiement par l'intimé aux pétitionnaires de la dite somme de \$30,000, avec les dépens à être taxés suivant la procédure ordinaire, dans un délai de trente jours, les parties pourront faire motion en vue de faire fixer l'endroit et la date du procès.

*Judgment accordingly.*

(1) (1881) L.R. 17 Ch.D. 771;  
 (2) (1901) 7 Ex.C.R. 239;  
 (3) (1902) 32 S.C.R. 277;  
 (4) (1903) A.C. 478;  
 (5) (1893) L.R. App. Cas. 429;

(6) (1896) A.C. 551;  
 (7) (1902) 7 Ex. C.R. 287;  
 (1902) 32 S.C.R. 532;  
 (8) (1904) A.C. 817.

BETWEEN :

STANDARD STOKER COMPANY, INC. PETITIONER,

AND

THE REGISTRAR OF TRADE MARKS, RESPONDENT.

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*Trade Mark—The Unfair Competition Act, 22-23 Geo. V, c. 38, s. 29—  
 “Standard”—Mark consisting of word used in laudatory nature and  
 not meaning the articles made by petitioner is not registrable—Where  
 part of mark abandoned registration of remaining portion refused.*

*Held:* That the word “Standard” used in connection with goods is of a  
 laudatory nature and cannot mean the articles made by the petitioner.

2. That since petitioner had used the words “Standard Stoker” on his goods to bring them to the attention of the public he cannot now abandon one part of his chosen mark and obtain a declaration under s. 29 of The Unfair Competition Act in respect to only one portion of it.

APPLICATION for registration of a trade mark.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

*E. G. Gowling, K.C.* and *J. C. Osborne* for petitioner.

*W. P. J. O’Meara, K.C.* for respondent.

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

CAMERON J. now (August 2, 1947) delivered the following judgment:

This is an application under section 29 of the Unfair Competition Act, chapter 38, 22-23 George V, for a declaration that it has been proved to the satisfaction of the Court that the word “Standard” has been so used by the petitioner, the Standard Stoker Company Inc., as to have become generally recognized by dealers in and users of the class of wares in association with which it has been used (locomotive stokers), as indicating that the petitioner assumes responsibility for their character and quality, and that the petitioner is entitled to the registration of the word “Standard” as its trade mark. The petitioner had previously filed an application for registration of the word

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“Standard” as a trade mark, but the application was refused by the Registrar of Trade Marks under subsections 26(c) and 2 (m). No appeal was taken from that decision of the Registrar. For the purpose of this petition, it is admitted that the word “Standard” is not registrable under section 26. Counsel for the Registrar opposes this application.

The facts are not in dispute and may be summarized briefly as follows:

The petitioner is a corporation organized under the laws of the State of Delaware, having its head office in New York City, and since 1913 has manufactured mechanical stokers, fuel pushes, conveyors and similar apparatus. It has carried on business in the United States of America, Canada, South Africa, France, Russia, India, Australia, China, Brazil and Chile.

From January 1, 1930, to September 30, 1946, the petitioner sold 917 locomotive stokers in Canada, the sales being made to railways and locomotive companies, all for use in Canada; and in each case the stoker had applied thereto a stamping or nameplate, (Ex. A) bearing in the centre the words, “Standard Stokers”, around which was an oval, outside of which are the words, “The Standard Stoker Company, Inc., New York, U.S.A.”

The petitioner adopted the word “Standard” for the purpose of distinguishing locomotive stokers sold by it in 1913 in the United States of America, and, about 1920, in Canada. The word “Standard” has been continuously used in the manner above described since January 20, 1929, in the United States and since June 10, 1930, in Canada. In its catalogue the petitioner has used the words “Standard Stoker” to identify its locomotive stokers and such catalogue was sent to the Canadian Pacific Railway Company, Canadian National Railway and other railways in Canada.

In addition to affidavits of the officers of the petitioner, the application is supported by affidavits of Canadian officials of two railways and of two locomotive companies, all of which have for many years purchased stokers from the petitioner. In general, each of these affidavits indicates that the stokers manufactured and sold by the petitioner



are expensive articles, the average price being about \$3,000; that they are not bought or used by the ordinary public, but are purchased and used only by railways and large engineering works.

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In each case the affiant states:

4. That I am personally aware that the Standard Stoker Company, Inc., uses the word "Standard" to distinguish locomotive stokers and parts thereof, which are manufactured and sold by it, from other wares falling within the same category, and uses the word "Standard" for the purpose of indicating to dealers in and/or users of such wares that they have been manufactured and sold by it.

5. That the use of the word "Standard", as used by the Standard Stoker Company, Inc., has for many years indicated to me that locomotive stokers and parts thereof, bearing the said word, have been made and sold by the Standard Stoker Company, Inc.

6. That I have been associated with.....(name of employer).....and that the word "Standard", as used by the Standard Stoker Company, Inc, has since the year..... indicated to me that the Standard Stoker Company, Inc. assumes responsibility for the character and quality of locomotive stokers, and parts thereof, bearing the said word.

E. A. Turner, President of the petitioner, in his affidavit, states:

I am aware that the word "Standard" is recognized by dealers in and users of locomotive stokers throughout the Dominion of Canada as a symbol identifying products sold by the Standard Stoker Company, Inc.

The word "Standard" appears on locomotive stokers sold by the Standard Stoker Company, Inc., and I verily believe has by long usage become adapted to distinguish such locomotive stokers as wares sold by the said Standard Stoker Company, Inc.

As stated, the application is made under section 29 (1) of the Unfair Competition Act, which is as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

The petitioner alleges that although the word "Standard" may be an ordinary word descriptive of the product, it has nevertheless acquired a secondary meaning and, through long usage by it, has been recognized by dealers in and users of locomotive stokers as indicating that the petitioner assumes responsibility for its character and quality; that

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"Standard" is a symbol which has become adapted to distinguish the wares of the petitioner from other wares falling within the same category.

The petitioner, pursuant to Rule 35, gave due notice of this application in the Canada Gazette, but no objections were filed with the Registrar of the Court.

Cameron J. Counsel for the Registrar opposes the application on two main grounds:

(1) that the word "Standard" cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another, and

(2) that the applicant has never used the word "Standard" by itself in Canada and that, therefore, the requirements of section 29 (1), of the Unfair Competition Act, have not been complied with.

"Standard" is a descriptive word and therefore would come within the implied prohibition in section 26 (1) (c). But some words which are originally descriptive and therefore unregistrable under section 26 may acquire a secondary meaning that is distinctive through their use in association with wares. But in order to obtain the benefit of the special provisions of section 29, its requirements must be met; and to be registrable under that section the proposed mark must be a trade mark as defined by section 2 (m), that is, it must be distinctive. *Lime Cola Co. v. Coca Cola Co.* (1). Section 2 (m) is as follows:

"Trade mark" means a symbol which has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark.

The problem to be answered here is whether the proposed mark "Standard" is capable of being distinctive.

The affidavits used by the petitioner in support of his application would indicate quite clearly that to the users of locomotive stokers in Canada the word "Standard" as used in Canada by the petitioner has come to mean the

stokers of the petitioner. That evidence is uncontradicted. But by judicial decisions certain common English words have been held to be incapable of distinctiveness and, therefore, not registrable as trade marks. In this category are purely laudatory words. In the case of *C. Fairall Fisher v. British Columbia Packers Ltd.* (1), the President of this Court held that a laudatory epithet such as "Select" (including any corruptions or misspelling of it such as "Sea-lect") should not be made the subject of registrability as a trade mark under section 29 *no matter what the extent of its user may have been.*

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At page 133 he said:

There are some words which, because of their nature, are common property and cannot be made the subject of monopoly. They are incapable of distinctiveness. Laudatory epithets are of such a nature. They are, it is true, descriptive of quality. But, while merely descriptive words may acquire distinctiveness by user of them in association with the goods of a particular person in such a way that they have become adapted to distinguish his goods from those of another person, no amount of user or laudatory epithets can give them the quality of distinctiveness that is essential to a trade mark. If a mark cannot be distinctive it cannot become adapted to distinguish and no amount of user of it can make it a trade mark.

In that case, the President of this Court adopted the principles laid down in *Joseph Crosfield's and Sons Ltd's Application* (2) commonly referred to as the *Perfection Case*. There an application was made to register the word "Perfection" as a trade mark for common soap. The applicant had used it for thirty years. Prior to the Trade Marks Act, 1905, the word was not registrable, but under section 9 (5) of that Act, a wide discretion was given to the Board of Trade and the Court to allow the registration of words not previously registrable. The Court of Appeal held that the word "Perfection" was not a distinctive mark, notwithstanding its long user by the applicants, was not adapted to distinguish their goods from those of other persons and could not, therefore, be registered as a trade mark. Cozens-Hardy M. R. said, at p. 854:

It is apparent that no word can be registered under this paragraph unless it is "distinctive"—that is to say, is "adapted to distinguish" the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so "adapted" such as "good", "best", and "superfine". *They cannot have a secondary meaning as indicating only the goods of the applicant.* There are other words which

(1) (1945) Ex. C.R. 128.

(2) (1909) 26 R.P.C. 837.

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are capable of being so "adapted", and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this paragraph to geographical words, and it is possible to suggest words having direct reference to character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world, and is not, in my opinion, capable of being registered.

At page 858, Fletcher Moulton L.J. said:

The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself are not very strong it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself was open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a Court to permit the registration of ordinary laudatory epithets, such as "best", "perfect", etc. On the other hand, in the case of a peculiar collocation of words it might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use.

And at page 862, Farwell L.J. stated:

I cannot myself see how words which are simply a direct statement of quality, for example "good" or "best" can ever lose their primary meaning and come to mean not good or best but the articles made by A.B.

In my view, the word "Standard" falls within the category of laudatory epithets. There are a large number of definitions of the word "Standard", some of which are as follows:

Murrays New English Dictionary, Vol. IX:

"An authoritative or recognized exemplar of correctness or some definite degree of any quality."

"A definite level of excellence, attainment—wealth or the like, or a definite degree of any quality viewed as a prescribed object of endeavour or as the measure of what is adequate for some purpose."

Words and Phrases (American), Permanent Edition, Vol. 39, page 855:

"'Standard' is a type or model of a combination of elements accepted as correct or perfect."

Websters:

"That which is set up and established by authority as a rule for the measure of quantity, weight, extent, value or quality."

The Concise Oxford Dictionary:

“Weight or measure to which others conform, or by which the accuracy of others is judged.”

Its meaning was considered judicially in the case of *Standard Ideal Company v. Standard Sanitary Manufacturing Company* (1) where MacNaghten J., giving the judgment of the Judicial Committee of the Privy Council, said, at page 795:

The word “Standard” is a common English word. It seems to be used not unfrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning; but obviously it is intended to convey the notion that the goods in connection with which it is used are of high class, or superior quality, or acknowledged merit.

These definitions all indicate that when the word “Standard” is used in connection with goods, it conveys the meaning that the goods are of a high or approved degree of excellence or perfection—that they are of good quality—and the word, in my view, is therefore of a laudatory nature. It is a direct statement of quality and could never, to adapt the words of Farrell, L.J., cited above, lose its primary meaning and come to mean, not “Standard”, but the articles made by the petitioner.

Counsel for the petitioner referred to *Canadian Shredded Wheat Company, Limited v. Kellogg Company of Canada* (2) and suggested that the judgment of Lord Russell of Killowen recognized that words like “Standard” could acquire a secondary meaning. I do not so interpret that judgment. At page 142, after referring to certain sections of the Trade Marks and Designs Act, he stated:

The effect of this provision is that a word is not registrable under the Act as a trade mark which is merely descriptive of the character and quality of the goods in connection with which it is used (*Standard Ideal Co. v. Standard Sanitary Manufacturing Co.*, L.R. (1911) A.C. 78 and *Channell v. Rombough*, (1924) Canadian Supreme Court Reports, 600). It is, however, clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or indicate that the goods in connection with which it is used are the goods of a particular manufacturer; in other words that the word in question has in its secondary meaning become indicative of origin. (*Crosfield's Application*, L.R. (1910) 1 Ch. 130, 26 R.P.C. 837). But the onus on the person who attempts to establish this secondary meaning is a heavy one.

I think it is clear that when he used the words “such a descriptive mark”, he was not referring to the word

(1) (1910) R.P.C. 789.

(2) (1938) 55 R.P.C. 125.

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“Standard” but generally to a trade mark which is merely descriptive of the character and quality of the goods in connection with which it is used.

It is interesting to observe that at the end of the same paragraph he added these words:

Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning.

I have already referred to the case of *Standard Ideal Company v. Standard Sanitary Manufacturing Company Limited (supra)* and, while that was an action for infringement and passing off under the Trade Marks and Designs Act (1879), consideration was given to the question as to whether the word “Standard” was appropriate to distinguish the goods of one person from another.

I do not propose to set out all the facts in that case. The plaintiff had registered its trade mark “Standard” and claimed an injunction restraining the defendant company from using the word “Standard” in connection with their goods, which were of the same nature. The plaintiff there was an American company and “Standard” formed part of its name. The same conditions apply to the petitioner in the instant case. There, as here, the trade mark in question was the one word, “Standard”. In that case, after referring to the meaning of the word “Standard”, Lord MacNaghten stated at page 795:

Without attempting to define “the essentials necessary to constitute a Trade Mark ‘properly speaking’” it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used, and having no reference to anything else, cannot be an apt, or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a Trade Mark. The Plaintiff Company was therefore not entitled to register the word “Standard” as a Trade Mark. The result is, in accordance with the decision of the Supreme Court in *Partlo v. Todd* (17 S.C.C. 196), that the word, though registered, is not a valid Trade Mark. The action, so far as it is based on alleged infringement of Trade Mark, must fail.

Counsel for the petitioner laid great emphasis upon the words, “and having no reference to anything else”, as suggesting that if there were any reference to anything else, the judgment could have been otherwise. I cannot find “any other reference” in the word “Standard” as now applied for than existed in the above case.

Petitioner's counsel, while recognizing the difficulty of overcoming the judgment in the case of *Standard Ideal Company v. Standard Sanitary Manufacturing Company* (*supra*), referred me to the concluding paragraph of that judgment, part of which is as follows:

There remains the charge of passing off. On that question also their Lordships are compelled to differ from the Court of King's Bench. The evidence falls far short of establishing the proposition that the word "Standard" has acquired a secondary signification, and so means, as applied to articles of toilet use, goods manufactured by the Plaintiff Company.

It is argued that from this part of the judgment it should be inferred that the word "Standard" could acquire a secondary meaning. It is to be remembered, however, that in that case the first part of the judgment has to do with infringement of the trade mark. The portion of the paragraph now last quoted has to do solely with the second part of the claim,—passing off. In view of the very definite finding that the word "Standard" cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another, it should not, I think, be inferred that because the plaintiff in that case had failed to establish the proposition that the word had acquired a secondary signification, that such secondary meaning could have been established by additional evidence.

I feel also that effect must be given to the second objection raised by a counsel for the Secretary of State; namely that the proposed mark "Standard" has not been used as such in Canada. The petitioner has used the words "Standard Stokers" on a stamping or name plate, around the edge of which appears the name and address of the manufacturer. There is no evidence whatever that the single word "Standard" has at any time been used in Canada in association with the wares of the petitioner and it can scarcely be found under section 29 that proof has been given that the mark "Standard" has been so used by the petitioner as to have become generally recognized by dealers in and/or users of stokers as indicating that the petitioner assumes responsibility for their character or quality, or their place of origin.

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I was not referred to any case in which a declaration had been made under section 29, authorizing the registration of a word mark which is only one part of words which had long been used together by the petitioner. It is the words "Standard Stoker" that the petitioner has used on his goods to bring the attention of the public to his wares, and not the one word "Standard". I am quite unable to see how the petitioner can now abandon one part of his chosen mark and ask for a declaration under section 29 in respect of only one portion of it. The application must be dismissed on that ground also.

For the reasons stated the application is therefore dismissed. There will be no order as to costs.

*Judgment accordingly.*

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BETWEEN:

THE CORPORATION OF THE  
 TOWNSHIP OF PICKERING,.... } SUPPLIANT,

AND

HIS MAJESTY THE KING,.....RESPONDENT.

*Crown—Petition of Right—Expropriation of highway of which soil and freehold vested in suppliant—Highways held in trust for the public—Suppliant not entitled to compensation for their loss.*

Suppliant claims compensation for loss of highways included in area of land taken by His Majesty under the Expropriation Act for war purposes.

*Held:* That the owner of expropriated property is to be compensated for the loss of the value of the property according to its value to him, but in estimating such value regard must be had to the conditions under which he held the property and any restrictions to which it was subject, and the circumstances could be such that the value of the property to the owner in terms of money was nil.

2. That where highways are included in land taken by His Majesty under the Expropriation Act for public purposes and the soil and freehold in them is vested in the municipality in which they are situate, the municipality holds such highways in trust for the public and is not entitled to any compensation to itself for their loss through the expropriation.

PETITION OF RIGHT by suppliant to recover the value of highways included in area of land expropriated by His Majesty for war purposes.



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

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*W. J. Beaton, K.C.*, for suppliant.

*J. L. Wilson, K.C.*, for respondent.

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

THE PRESIDENT now (July 23, 1947) delivered the following judgment:

The suppliant's claim arises out of the expropriation by His Majesty of a large area of land in the Township. The expropriation was effected by the deposit, pursuant to section 9 of the Expropriation Act, R.S.C. 1927, chap. 64, of a plan and description of the land in the office of the registrar of deeds for the registration division of the County of Ontario for the Township of Pickering on October 21, 1940. The land, consisting of 2505 acres, was taken by His Majesty through the Minister of Munitions and Supply for war purposes, namely, the construction and operation of a large shell filling plant. Within the expropriated area there were 10 miles of road allowances, on 7.9 miles of which there were improved highways with culverts and small bridges, the remaining 2.1 miles being unimproved.

The suppliant bases its claim upon the contention that at the date of the expropriation it was the owner of the road allowances and is entitled to compensation for their loss through the expropriation.

The title of the suppliant is clear. Section 454 (1) of The Municipal Act, R.S.O. 1937, chap. 266, reads as follows:

454. (1) Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this or any other Act.

and section 455 provides:

Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways and bridges within the municipality.

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These provisions had their origin in sections 433 and 434 of The Municipal Act, 1913, Statutes of Ontario, 3-4 Geo. V., chap. 43. Prior to 1913 the soil and freehold of highways and roads were vested in the Crown although jurisdiction over them was exercised by the council of the municipality in which they were situate. The earliest enactment on the subject in the Province of Upper Canada was in 1810, Upper Canada Statutes, 50 Geo. III, chap. 1, section 35 of which provided:

XXXV. And be it further enacted by the authority aforesaid, That when any highway or Road shall be altered, amended, or laid out, under the provisions of this Act, that the soil and freehold of such highway or road, shall be thereby vested in His Majesty, his heirs and successors.

This was repealed in 1858 by section 403 of "An Act respecting the Municipal Institutions of Upper Canada", Statutes of Canada, 22 Vict., chap. 99. Section 301 of that Act provided:

301. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out, according to Law, shall be vested in Her Majesty, Her Heirs and Successors

And section 302 provided:

Subject to the exceptions and provisions hereinafter contained, every Municipal Council shall have jurisdiction over the original allowances for Roads, Highways and Bridges within the Municipality.

These provisions continued in force after the Province of Ontario was created and in 1873 were carried into "An Act respecting Municipal Institutions in the Province of Ontario", Ontario Statutes, 36 Vict., chap. 48 by sections 405 and 406, and remained in effect until altered in 1913 as indicated.

It may be assumed that the road allowances were the same as those laid out in the original survey by the Crown according to a plan dated November 18, 1854. They were never acquired by dedication, purchase or otherwise from private individuals but were always public highways and held as such either by the Crown or, since 1913, by the suppliant municipality.

There are some other observations. There is no debenture or other debt against the expropriated highways for which the suppliant is liable. It is also clear that the suppliant need not provide any new highways to replace those taken away; indeed, the facilities for public access

from No. 2 Provincial Highway to Pickering Beach Park have been improved by the respondent through improvement in the road between lots 8 and 9, to which the suppliant contributed, the erection of a new bridge over the C.N.R. right of way and the construction of a new bypass road south of it connecting with the Pickering Beach Road. And, in one sense, the suppliant has benefited by the expropriation in that it has been relieved of the obligation of paying its share of the cost of annual maintenance of the roads.

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The Court has jurisdiction to deal with the claim under section 19 (a) of the Exchequer Court Act, R.S.C. 1927, chap. 34:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(a) Every claim against the Crown for property taken for any public purpose;

And section 47 of the same Act prescribes the standard by which the amount of the claim must be measured.

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The value referred to means money value so that the sole question before the Court is what, if any, was the money value to the suppliant of the highways included in the land taken by His Majesty. It is well established that the owner of expropriated property is to be compensated for the loss of the value of the property according to its value to him and not its value to the expropriating party. But in estimating such value to the owner regard must be had to the conditions under which he held the property and any restrictions to which it was subject. It could happen that the circumstances were such that the value of the property to the owner in terms of money was nil. These statements are, in my opinion, fully supported by *Stebbing v. Metropolitan Board of Works* (1), particularly as explained in the House of Lords by Lord Dunedin in *Corrie v. MacDermott* (2). The value to be estimated is, as Lord Dunedin put it, the "value to the owner as he holds."

(1) (1870) 6 Q.B. 37

(2) (1914) A.C. 1056.

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The respondent contends that the suppliant has suffered no loss of money value through the expropriation and is consequently not entitled to any compensation. I have come to the same conclusion.

There is a great difference between the proprietary interest of a municipality in the highways within its limits, even although the soil and freehold in them are vested in it, and that of an individual in his own land. The latter is private and exclusive of the public, whereas the former is held for the public and open to it. The difference was well expressed by Rinfret J., as he then was, speaking for the majority of the Supreme Court of Canada in *City of Vancouver v. Burchill* (1), when he said:

Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to "pass and repass"; and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets does not stand in the same position as a land owner with regard to his property.

There is also a fundamental difference between the ownership of highways by a municipality over which the public has the free right to "pass and repass" and the ownership of a railway by a company where the operation of the railway is for commercial purposes of gain, so that the decision of the Judicial Committee of the Privy Council in *International Railway Company v. The Niagara Parks Commission* (2), on which counsel for the suppliant relied, has no applicability to the present case.

The fact that the suppliant held the highways as trustee for the public makes it impossible, in my view, for the suppliant to succeed in its claim for compensation to itself for their loss through their being taken by His Majesty for public purposes under the Expropriation Act. It has been lawfully released from any obligation to the public in respect of them and it cannot show any loss of money value to itself through their having been taken. Its title to the highways as trustee for the public is not, in my judgment, the kind of ownership of property for which

(1) (1932) S.C.R. 620 at 625.

(2) (1937) O.R. 607.

compensation for its loss through expropriation for public purposes is contemplated by law. This view has been recognized by the authorities. In *Lewis on Eminent Domain*, Third Edition, page 321, the author says:

As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

And a similar opinion is expressed in *Nichols on Eminent Domain*, Second Edition, where the author says, at page 394:

Whatever doubts may arise regarding other property, it is well settled that streets and highways are held in trust for the public, and whatever estate or interest in them belongs to the city or town in which they lie is owned by the municipality in its governmental capacity and as an agency of the state.

The views expressed by these authors have been adopted by this Court in *Corporation of Town of Dartmouth v. The King* (1). In that case Angers J. said, at page 200:

The question arises as to whether the suppliant is entitled to compensation for the parcels of streets expropriated. The doctrine and jurisprudence are unanimous in disallowing compensation for streets expropriated on the ground that the municipality holds them in trust for the public.

In addition to the authors referred to Angers J. cited a large number of cases in support of his conclusion that the suppliant in that case was not entitled to compensation for the loss of its streets included in the expropriated area. In my opinion, a similar attitude should be taken with regard to the claim of the suppliant in the present case. It is consequently unnecessary to estimate the value of the expropriated road allowances either from the point of view of their value as farm land or from that of the cost of construction of the highways less depreciation.

The result will be that there will be judgment declaring that the suppliant is not entitled to any of the relief sought by it in its petition of right and that the respondent is entitled to costs.

*Judgment accordingly.*

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BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada, .....	}	PLAINTIFF;
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AND

GAS AND OIL PRODUCTS LIMITED, DEFENDANT.

*Revenue—Customs Tariff Act, R.S.C. 1927, c. 44, s. 35, Schedule A, par. 710 (f)—Action for duties on packaging charges on gasoline imported in drums dismissed.*

Defendant imported from The United States of America motor fuel in drums owned by defendant. The fuel was purchased from the Ethyl Corporation, a company carrying on business in the United States. The Crown alleges that the value of the fluid imported is greater than that declared by defendant and that such excess is accounted for by a charge for packaging the drums or filling them with motor fuel, paid by the defendant to the Ethyl Corporation. The action is to recover from defendant customs duties on this packaging charge.

*Held:* That the packaging charge so-called is merely an item of cost taken into account in a formula used to ascertain what credit on freight charges should be allowed defendant. The defendant paid the freight to the railroad and not to the Ethyl Corporation which corporation endeavoured to equalize the cost to the defendant between a shipment by tank car and a shipment of drums. In the result no packaging charge was imposed and the action must be dismissed.

INFORMATION exhibited by the Attorney General of Canada to recover customs duties alleged to be owing to the Crown by defendant.

The action was tried before the Honourable Mr. Justice O'Connor at Calgary.

*H. W. Riley, Jr. and N. McDermid* for plaintiff.

*S. J. Helman, K.C., and R. H. Barron* for defendant.

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

O'CONNOR J. now (August 23, 1947) delivered the following judgment:

Information exhibited by the Attorney-General of Canada to recover from the defendant customs duty on packing charges alleged to be coverings as defined in the Customs Tariff Act, R.S.C., 1927, chap. 44, and amendments thereto.

The facts have been agreed upon by counsel and may be summarized as follows:—

The defendant is a distributor of gasoline and oil and carries on business in Calgary, Alberta.

The defendant during the relevant period imported motor fuel of a declared value of \$120,816.00 from the Ethyl Corporation, a company carrying on business in the United States.

The defendant owned the drums which when empty would be returned by the defendant to the Ethyl Corporation, filled by the Ethyl Corporation with the fluid and shipped by freight to the defendant.

The Ethyl Corporation would then send an invoice to the defendant similar to Exhibit "A", which showed 36 drums containing 4,320,000 cubic centimetres Tetraethyl Lead Content at  $\cdot 0018c = \$7,776.00$ .

The fluid was then cleared through the Canadian Customs on that basis, i.e.,  $\cdot 0018c$  per cubic centimetre, and all the duties paid on the fluid. No question arises as to any duty on the drums themselves. The duty on these was paid on the first shipment in which they were used.

The Ethyl Corporation and the defendant had entered into an agreement (Exhibit 1), dated March 1st, 1938, whereby the Ethyl Corporation agreed to sell this fluid to the defendant. The agreement provided *inter alia*:—

(b) TANK CARS—On shipments in ETHYL'S tank cars ETHYL will prepay and absorb the freight from ETHYL'S plant to destination.

DRUMS—On shipments in drums (which will originate only from Carney's Point, N.J.) ETHYL will absorb and credit to LICENSEE a freight allowance based on the weight of the anti-knock compound content of the drums, and at the prevailing published tank car rate from cheapest source of supply (North Baton Rouge, Louisiana, or Carney's Point, N.J.), it being understood that such allowance shall be no greater than the actual freight paid by LICENSEE on the weight (net) of the anti-knock compound, and furthermore, when the rate from North Baton Rouge to destination is lower than that from Carney's Point, then ETHYL will absorb and credit LICENSEE with a further amount equal to the additional charges incurred by LICENSEE as a result of shipping from Carney's Point. Rates used for determining this further credit will be on the basis of the cheapest approved method of transportation. LICENSEE agrees to pay full freight charges assessed by carrier on such drum shipments and to pay ETHYL a per drum packaging charge which will be established from time to time by ETHYL.

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A Memorandum (Exhibit "E") headed "Illustrating Application of the Revised Terms of Article 1 'Sale of Anti-knock Compound'" of an Agreement between the defendant and Ethyl Corporation is as follows:—

In applying the principles referring to shipments of Anti-Knock Compound outlined in the revision of Article 1, the following terms and conditions will govern subject to the changes as provided in said Article:

1. *Tank Car Shipments*

Tank car shipments shall be on the basis of freight allowed from Ethyl's plant to destination.

11. *Drum Shipments*

(a) All drum shipments will originate from Carney's Point, New Jersey.

(b) Freight allowance on the weight of the anti-knock compound content of the drums will be made at the prevailing published tank car rate from the cheapest source of supply (North Baton Rouge, Louisiana, or Carney's Point, New Jersey). The allowance shall be no greater than the actual freight paid by Licensee on the weight (net) of the anti-knock compound.

(c) Freight on the gross weight of the shipment will be equalized to the North Baton Rouge, Louisiana, rate when the rate is lower than that from Carney's Point, New Jersey. The rate used for determining this further credit will be that applicable via the cheapest approved method of transportation.

(d) The packaging cost will be at the rate of \$6.40 per 55 gallon drum.

The above packing charge as outlined in the preceding conditions is based on Ethyl's present average costs, and is subject to revision by Ethyl from time to time.

Several typical examples of the application of these principles are outlined as follows:

1. A drum shipment of 16 55-gallon drums of anti-knock compound with a gross shipping weight of 14,400 pounds, containing 11,950 pounds of anti-knock compound, is made from Carney's Point to Destination 1 at the less than carload rate of \$1.44 per 100 pounds, which is lower than the less than carload rate from North Baton Rouge to Destination 1; the tank car rate from Carney's Point to Destination 1 is \$1.06 per 100 pounds. The cost to Licensee for delivery and packaging of this shipment will be determined as follows:—

Total freight paid by Licensee to Carrier, on 14,400 pounds,	
@ \$1.44 per 100 pounds .....	\$207.36
Freight Allowance made by Ethyl on 11,950 pounds of anti-knock compound @ \$1.06 per 100 pounds .....	126.67
	<hr/>
Net freight expense to Licensee .....	\$ 80.69
Packaging charge on 16 drums @ \$6.40 .....	102.40
	<hr/>
Total cost to Licensee for delivery and packaging .....	\$183.09
	<hr/>



Then follow several other examples.

This was signed by the defendant and returned to the Corporation.

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Pursuant to this arrangement for an allowance on freight, after each shipment the Ethyl Corporation issued a credit note similar to Exhibit "C" which is:—

We today credit your account as follows:—

Our Invoice No. A-4281, December 14, 1944.

Freight allowance to Licensee on fluid weight:

25,576 lbs. @ \$2.12 per 100 lbs. ....	\$542.21
Freight allowance to Licensee to equalize to B.R. Gross wt. 31,082 lbs. @ 30c per 100 lbs. ....	93.25
	635.46
(\$2.42-\$2.12) Freight allowance .....	635.46
Packaging charge: 36—55 gallon drums \$5.50, per drum .....	198.00
	\$437.46

At the end of each month an account was rendered similar to Exhibit "D" which shows:—

Reference	Debit	Credit	Balance
A. 4281 .....	\$7,776.00		
CMJ. 642 .....		\$437.46	\$7,338.54

The plaintiff alleges that the value of the motor fuel was declared at \$120,816.00 and that the true value was in fact \$124,024.23.

Section 35 (1) of the Customs Act, R.S.C., 1927, chap. 42 provides:—

35. Whenever any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

The difference of \$3,210.00 is alleged to be a charge for packaging the drums, i.e., filling the drums with motor fuel. The plaintiff alleges that this is a charge for coverings as defined by Paragraph 710 of Schedule A of the Customs Tariff Act, R.S.C., 1927, chap., 44 and amendments. Paragraph 710 specifies coverings, inside and outside, used in covering or holding goods imported therewith, shall be subject to the provisions set out. Subparagraph (f) of Paragraph 710 is:—

(f). Provided also that the term coverings in this paragraph shall include packing boxes, crates, casks, cases, cartons, wrapping, sacks, bagging,

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rope, twine, straw, or other articles used in covering or holding goods imported therewith, and the labour and charges for packing such goods, subject to the regulations prescribed by the Minister.

The defendant denies that the difference is a charge for packaging the drums and in the alternative that if there were, this does not represent coverings within the meaning of *Paragraph 710 (supra)*.

Mr. Bell, of the Customs Department, Senior Hardware Appraiser at Calgary of Customs, said that it had never been the practice of the Department to take freight charges into account for duty purposes. If the exporter in the United States paid the freight charges, the duty was still assessed on the fair market value, and if the Canadian importer paid the freight charges, the duty was still assessed on the fair market value in the United States.

In other words the amount realized by the United States exporter or the total cost to the Canadian importer were not taken into account in assessing duty.

In my opinion Mr. Bell was quite correct. *Section 35 (supra)* clearly lays down that the value shall be the fair market value when sold for home consumption in the principal markets of the country (in this case the United States) whence the same were exported directly to Canada, so that freight paid or allowed is not to be taken into account.

The fact that in tank car lots the Ethyl Corporation paid the freight, does not alter the fact that for duty purposes the value of the motor fuel is still the fair market value when sold for home consumption in the United States, and that fair market value is not reduced by the freight which the Ethyl Corporation paid. And conversely if the defendant paid the freight this would not be added to the market value for duty purposes.

The plaintiff's claim is based on the contention that the defendant paid the Ethyl Corporation a packaging charge of \$5.50 per drum in addition to .0018c per cubic centimetre for the motor fuel.

But it is quite clear that if the defendant purchased this motor fuel and paid the freight that the value of the fluid for duty purpose would be .0018c per cubic centimetre. If the transaction had finished there, no question of any packaging charge would arise.

If the defendant took delivery in his own drums in his own truck at Carney's Point, N.J., he would pay only .0018c per cubic centimetre which is clearly the fair market value of Ethyl gasoline when sold for home consumption in the principal markets of the United States.

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It would only be when the Ethyl Corporation gave a credit on the cost of hauling the drums back or on the freight charges paid by the purchaser, that the cost of packaging is taken into consideration by the Ethyl Corporation.

Then the Ethyl Corporation would ascertain not the actual freight charges on the drums, but, as set out in Exhibit "E", would compute the total credit on the weight of the contents of the drums at the tank car rate from *either* North Baton Rouge, Louisiana, or Carney's Point, New Jersey, *although* all drum shipments would originate from Carney's Point, N.J., not to exceed of course the actual freight charge. The gross credit then is arrived at on a purely artificial basis.

From this amount termed a freight allowance a packaging cost of \$5.50 per drum (Exhibit "C") was deducted leaving a net freight allowance.

While it is termed a charge in some places, it is properly described in II (d) of the Memorandum (Exhibit "E") as, "The packaging cost will be at the rate...". In other words it is the Ethyl Corporation's estimate of what it costs the Corporation to do the filling.

It is clear from this that no packaging charge was made by the Ethyl Corporation.

It was merely an item of cost taken into account in a formula used to ascertain what credit on freight charges should be allowed. And properly so because the cost to the Ethyl Corporation of filling the drums should be considered in arriving at a credit on freight to be given.

All the examples set out in Exhibit "E" show this clearly.

The defendant paid that freight not to the Ethyl Corporation but to the Railway.

What the Ethyl Corporation was endeavouring to do was to equalize the cost to the purchaser between a shipment by tank car and a shipment of drums.

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And in doing so it gave a credit based on the items which should reasonably have been taken into consideration. But that is entirely different from imposing a packaging charge. In my opinion no packaging charge was imposed. Because of the conclusions which I have reached, it is not necessary for me to decide the remaining question.

The action will be dismissed with costs; the money in Court, paid out to the defendant.

*Judgment accordingly.*

1947  
 March 20  
 August 20

BETWEEN:

THE GREAT WESTERN GARMENT  
 COMPANY LIMITED ..... APPELLANT;

AND

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

*Revenue—Income War Tax Act R.S.C. 1927, c. 97—Excess Profits Tax Act 1940, Statutes of Canada, 1940, c. 32—Wartime Salaries Order, P.C. 1549, February 27, 1942—“Free of income tax”—Bonus—Payment of income tax as part of salary—“Rate of salary established and payable”—Appeals allowed.*

In June, 1941, appellant, by resolutions passed by its shareholders at a general meeting, fixed the salaries of certain of its officials at various amounts free of income tax. Respondent disallowed the amounts paid in 1943 and 1944 in excess of the salary and income tax for the base year commencing on November 7, 1940, and ending November 6, 1941, defined by the Wartime Salaries Order, Order in Council No. P.C. 1549, dated February 27, 1942, on the ground that the amounts disallowed were in excess of the amount permitted by s. 2 of the Wartime Salaries Order. The Company appealed. The Court found that the resolutions passed at the general meeting of the Company fixing the salaries were valid.

*Held:* That the payment of income tax by the appellant is not a bonus within s. 2 (d) of the Wartime Salaries Order.

2. That the “rate of salary established and payable” for each official by the resolutions passed by appellant was the number of dollars plus the tax payable by each official on those dollars and this was the standard or way of reckoning by which his salary was established each year.

3. That while the result of the resolutions passed by appellant was to increase materially the salaries paid the officials in 1943 and 1944 there was no increase in the "rates of salary" paid in 1943 and 1944 above the most recent rates established and payable to them prior to November 7, 1941, since the words "established and payable" in the Wartime Salaries Order refer to the "salary rate" and not to the amount of salary.

APPEALS under the provisions of the Income War Tax Act and Excess Profits Tax Act.

The appeals were heard together before the Honourable Mr. Justice O'Connor at Edmonton.

*G. H. Steer, K.C.* and *A. Smith* for appellant.

*I. Friedman* and *W. J. Hulbig* for respondent.

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

O'CONNOR J. now (August 20, 1947) delivered the following judgment:

These appeals are from assessments under the Income War Tax Act, R.S.C. 1927, chap. 97, and the Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32, in respect of the taxation years 1943 and 1944.

The Minister acting under paragraph 7 of the Wartime Salaries Order, Order in Council P.C. 1549, dated the 27th day of February, 1942, as amended; under subsection (2) of Section 6 of the Income War Tax Act and under subsection (b) of Section 8 of the Excess Profits Tax Act, 1940, in computing the amount of the profits and gains to be assessed, for the taxation year 1943 disallowed as an expense of the appellant, a sum in the aggregate amount of \$30,791.97, and for the taxation year 1943, a sum in the aggregate amount of \$26,868.34, representing in each case a portion of the salaries paid by the appellant to certain salaried officials. The appellant served notices of appeal on the Minister, who affirmed the assessments and then, being dissatisfied with the Minister's decision, brought its appeals from the assessments to this Court. The appeals were heard, together, in camera.

Resolutions were passed by the shareholders of the Company in June, 1941, fixing the salaries of these officials

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at various amounts free of income tax. The respondent disallowed the amount paid in 1943 and 1944 that was in excess of the salary and income tax for the base year defined by the order as the year commencing the 7th November, 1940, and ending the 6th day of November, 1941.

The respondent contends that the sums disallowed were in excess of the amount permitted by Section 2 of the said Wartime Salaries Order.

The respondent further contends that none of the proceedings at the meeting of shareholders conform to the constitution of the Company and the relevant Companies Act, and that the resolutions were not duly and validly passed.

Article 103 of the Articles of Association of the Company provides that directors may appoint one or more of their body to be managing director and Article 105 provides that his remuneration shall be fixed by the directors. Article 123(d) provides that the directors shall have the power to fix the salaries of the officers and servants of the Company.

“Special resolution” is defined by Section 2 of the Articles as a resolution passed by a majority of not less than three-fourths of the members of the Company \* \* \* and confirmed at a subsequent meeting of the shareholders held not less than fourteen days and not more than one month from the date of the first meeting.

Section 92 of the Articles provides that no director shall, as a director, vote in respect of any contract or arrangement entered into by or on behalf of the Company in which he is in any way interested.

There were six directors on the board. Four of these were elected by the common shareholders and were all engaged in the active management of the Company. The remaining two were nominated by the First Preferred shareholders and elected by the common shareholders. The First Preferred shareholders had no right to vote in general meeting unless there had been a default in dividends continuing for three years. There had been no such default in dividends. These two directors were not engaged in the active management of the Company.

Of the five officials of the Company whose salaries were increased by the resolutions of June 2, 1941, four were directors of the Company elected by the common shareholders and in charge of the management of the Company.

Notice of the annual general meeting to be held on the 2nd June, 1941, was sent by the Secretary to all ordinary shareholders of the Company who were the only shareholders entitled to vote.

Under the Articles of the Company set out above, the directors had the power to fix the salaries in question. These four directors were apparently unwilling to have the directors do so and the Secretary of the Company was instructed to send out a second notice to the ordinary shareholders, advising them that at the annual meeting the resolutions making these salaries free of income tax would be submitted.

The Secretary sent out the notices stating that at the annual meeting \* \* \* "the following special business will be submitted in the form of Special resolutions \* \* \*", and then followed the resolutions in question.

A total of 437 ordinary shares had been issued of which these five officials held only 178 shares. At the annual meeting all the ordinary shareholders were either present in person or by proxy with the exception of one company holding eight shares and that company was represented by its Vice-President, although no formal proxy was filed on its behalf.

The following resolutions were then submitted to the meeting and carried unanimously:

Mr. C. D. Jacox be and is hereby appointed Managing Director of the Company at the salary of ..... per year, as from January 1, 1941, free from income tax.

The salaries of the following officials of the Company, viz, Mr. W. A. McAulay, Mr. F. D. Sutcliffe, Mr. W. B. Shaw and Mr. R. W. Roscoe, as at present in effect be free from income tax and subject to adjustment from time to time at the discretion of the Managing Director, effective as from January 1, 1941.

The resolutions were not confirmed at any subsequent meeting of the shareholders.

On the passing of the resolutions, Mr. C. D. Jacox assumed the duties of managing director and the other

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officials continued in their present positions and the Company paid these officials in accordance with the resolutions, making the necessary entries in books of the Company and filed income tax returns exhibiting such payments as expenses deducted from income.

A meeting of the directors was held on the 2nd of March, 1942, at which all the directors were present. The auditors' statement for the year ending December 3, 1941, was read to the meeting and, on motion of the two directors nominated by the First Preferred shareholders, was duly passed. There was included in the statement (Exhibit 9) the item showing the total payments for wages and salaries of \$69,000 which included the income tax payments made pursuant to the resolution. Mr. Evans, one of the two directors, said that he and Dr. Allin (the other director) had previously been given full information and details as to what was being done in the way of salaries and were satisfied. That is borne out by the wording of the motion approving of the auditors' report which reads:

After some discussion, on motion of Mr. Evans seconded by Dr. Allin, the auditors report and the statement of accounts were accepted, both Mr. Evans and Dr. Allin expressed their gratification with the excellent results secured during the year 1941.

No salary rates in respect to these officials other than or further to those fixed by these resolutions of June 2, 1941, were fixed or established by the appellant and these rates were therefore the most recent salary rates established for and payable to the officials prior to the 7th November, 1941.

The Court was informed by counsel that by an agreement between the parties these appeals were to be heard on the basis that payment of the salaries pursuant to the resolution had been made by the appellant to these officials during the period in question.

The increase of the rate at which the income tax was assessed in 1943 and 1944 had the effect of increasing the amount of the salaries paid in accordance with the resolution over the salaries paid in the base year.

The first question is: Were the resolutions passed at the general meeting of the Company valid? The argument against the validity of these resolutions is that the Articles



of Association of the Company gave the board of directors the power of appointing one or more of their body to be a managing director or managing directors of the Company, and to fix his or their remunerations and the power to fix the salaries or emoluments of the other officials and that the Company has accordingly surrendered these powers and that the directors alone can exercise them.

It is not necessary, however, in this case to determine whether it is competent for the Company to override the powers conferred by the Articles on the directors where the board is ready and willing and able to act because that is not the position.

These resolutions had the effect of increasing the salaries of four of the six directors of the Company.

Each of the four directors was prohibited from voting by Section 92 of the Articles in respect of any contract or arrangement entered into by or on behalf of the Company in which he shall be in any way interested.

The second resolution constituted a contract with three of the directors which was within the prohibition of Article 92.

If there had been no remuneration attached to the office of managing director, the appointment of Mr. Jacox would be merely a delegation of their powers by the directors to him and would not constitute a contract between him and the Company within Article 92. *Imperial Mercantile Credit Association v. Coleman* (1). But there was remuneration attached and, therefore, a contract between the Company and Mr. Jacox within Article 92. Peterson, J., in *Foster v. Foster* (2) said:

In the *New British Iron Co., case* (1898) 1 ch. 324 the articles required the directors to possess a share qualification, and provided that the remuneration of the board should be an annual sum of 1,000£ to be paid out of the funds of the Company, and it was held that, although those provisions in the articles were only part of the contract between the shareholders *inter se*, the provisions were, on the directors being employed and accepting office of the footing of them, embodied in the contract between the Company and the directors \* \* \*

\* \* \* In my judgment, if a resolution is passed at a directors' meeting that one of the directors be appointed a managing director at a remuneration and that director is present and accepts the appointment, there is a contract between the Company and the director, and the director is not under article 93 able to vote in support of such a contract.

(1) (1871) 6 Ch. 558 at 567. (2) (1916) 1 Ch. D. 532 at 547.

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In my opinion, making the salaries of these four free of income tax formed part of one transaction in which all four were equally interested and that all four would be prohibited from voting.

When two or more directors are interested, it will not avail to split up the resolution and for each director to abstain from voting on the part in which he is interested.

*North Eastern Insurance Company* (1).

As stated by Lord Hatherley in *Imperial Mercantile Credit Association v. Coleman* (*supra*), these resolutions could not be split so that each could abstain from voting on the part in which he was interested because the Company is entitled to have the independent judgment of the whole board on every matter and an interested director cannot give an independent judgment.

While the directors had the power to increase their salaries, they were, in my opinion, by reason of Article 92, unable to exercise it.

But even if they were able to exercise this power, they were unwilling to do so and quite properly brought the matter before the shareholders.

While these directors were prohibited from voting as directors on such resolutions by Article 92, such a prohibition, however, would not prevent them from voting as shareholders at general meeting of the Company upon such resolutions. *North West Transportation Co. v. Beatty* (2), and *Burland v. Earle* (3).

In *Foster v. Foster* (*supra*) Peterson, J., at 551 said:

From a business point of view it seems to me that there are only two persons who are possible managing directors, and the board had been reduced to the position that it is unable, owing to internal friction and faction, to appoint anybody as a managing director. In those circumstances I should apply the decision of Warrington, J., in *Barron v. Potter* (1914) 1 Ch. 895, 903. The learned judge says: "If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for that purpose—there must be some power in the Company to do that itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling"—in this case unable—"to appoint additional directors under the power conferred on them by the articles, in my opinion, the Company in general meeting has power to make the appointment."

(1) (1919) 1 Ch. 198.

(3) (1902) A C. 94.

(2) (1887) 12 A.C. 589.

Applying that principle to this case I hold that, while the directors had the power under the Articles of Association to fix their own salaries as officials, they were unable, for the reasons I have already given, or were unwilling, to exercise such power, the Company in general meeting had the power to do so.

In addition, the four directors must have discussed and agreed to making these salaries free of income tax. By placing the resolutions before the general meeting, the directors in effect, recommended that this be done. The ordinary shareholders approved the resolutions unanimously. The officials acted on the faith of the resolutions. So did the Company, as shown by the entries in the books of the Company, and in the income tax return filed.

In these circumstances a resolution of the directors fixing these salaries free of income tax will be assumed to have been duly passed. See *Wilson v. Woollatt* (1), in which Masten, J.A., at 627, reviews the authorities on this question.

The resolutions in question were not required by the Articles to be special resolutions so that it was not necessary to have them confirmed by a subsequent meeting of the shareholders.

For the reasons I have given, I hold that these resolutions passed at the general meeting were valid.

The respondent contends that the result of these resolutions was to materially increase these salaries during the years that followed, and that such increases were directly opposed to the spirit of the Wartime Salaries Order which was made to prevent inflation. The employees undoubtedly received a much higher income as the result, and there was, therefore, a corresponding increase in the cost to the employer.

The resolutions, however, were passed eight months before the Wartime Salaries Order was made and the practice of making salaries income tax free had been inaugurated by the appellant as early as 1920.

The Company was not, therefore, attempting to evade the provisions of the Order. It quite properly desired to carry out the obligation it had undertaken.

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(1) (1928) 62 O.L.R., 620, C.A.

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The question is simply, can the resolutions be lawfully implemented within the provisions of the Salaries Order, the relevant parts of which are as follows:

2. Unless otherwise permitted by paragraphs 3 or 4 hereof, no employer shall, on or after November 7, 1941:

(a) increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941, or if no rate of salary for a particular salaried official were established and payable prior to November 7 because the said salaried official was not employed by the employer prior to the said date, increase the rate of salary above the rate of salary first payable to the said salaried official.

(b) \* \* \*

(c) \* \* \*

(d) pay as bonus (which, for the purpose of this sub-paragraph, shall include gratuities and shares of profits but shall not include cost of living bonus) a larger total amount to any one salaried official during any year following November 6, 1941, than the total amount paid to the said salaried official as bonus in the base year, provided that:

(i) where the salaried official has a contractual right evidenced in writing which existed at November 6, 1941, to receive such a bonus, defined as a fixed percentage of or in fixed ratio to his salary, the profits of the business, or the amount of sales output or turnover of the business, the employer may continue to pay the said bonus at the same fixed percentage or ratio as that contracted for previous to November 7, 1941.

The decision of the Minister shows that the respondent treated the amount paid for income tax as a bonus, and under section 2(d) disallowed the amount in excess of the salary and income tax for the base year defined by the Order, as the year commencing the 7th day of November, 1940, and ending the 6th day of November, 1941.

The statement of defence alleges that the amounts disallowed represent increases in the rates of salary paid to those officials in 1943 and 1944 respectively, above the most recent rates established and payable to them prior to the 7th November, 1941, as set forth in section 2(a) of the Order.

The next question is whether the payment of the income tax is a bonus within section 2(d) of the Order.

Bonus is not defined by the Order, but the meaning given by Webster's International Dictionary is, "Something given in addition to what is ordinarily received by, or strictly due to, the recipient". The Oxford Concise Dictionary defines bonus as, "Something to the good, into the

bargain (and as an example) \* \* \* gratuity to workmen beyond their wages."

In *Shelford v. Mosey* (1), Lord Reading describes the "bonus" in that case to be "nothing else but a euphemism for 'addition to wages' ". That, in my view, is equally true of "bonus" in section 2(d).

A bonus may be a mere gift or gratuity as a gesture of goodwill, and not enforceable. Or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled.

But in both cases it is something in addition to or in excess of that which is ordinarily received.

Here, on the contrary, "free of income tax" is not something in addition to or in excess of that which is to be received, but is part and parcel of the salary.

In my opinion the payment of the income tax is not a bonus within section 2(d) of the Order.

While the result of the resolutions was to materially increase the salaries in 1943 and 1944, the question is whether the Company increased the rate of salary above the most recent salary rate established and payable prior to November 7, 1941, prohibited by section 2(a).

Section 2(d) prohibits the payment "as bonus" of a larger total amount "to a salaried official" than the "total amount" paid as bonus in the base year. Section 2(a) does not deal with "total amounts" at all. It prohibits an increase in the "rate of salary" paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941.

The words "established and payable" refer to the "salary rate" not to the amount of salary.

Under section 2(a) it is the employer who is prohibited from increasing the rate. In this case the employer has not increased the rate, the increase in the amount results from an increase in the income tax rate.

Rate is not defined by the Order and therefore must be given its natural and ordinary meaning. The meaning given by the Oxford Concise Dictionary is:

Statement of numerical proportion prevailing or to prevail between two sets of things either or both of which may be unspecified, amount,

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(1) (1917) 1 K.B. 154 C.A.

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etc., mentioned in one case for application to all similar ones, standard or way of reckoning, (measure of) value, tariff charge, cost, relative speed, (going at the r. of six miles an hour;) can have them at the r. of 1/- a thousand; the death r. was 19 per mille; the r. of interest, wages, etc, is to be regulated; the high rr. charged by the railways; \* \* \*

The "rate of salary established and payable" for each official by these resolutions was the number of dollars plus the tax payable by each official on those dollars.

This was the "standard or way of reckoning" by which his salary could be ascertained each year.

In my view there was no increase in the "rates of salary" paid to those officials in 1943 and 1944 above the most recent rates established and payable to them prior to the 7th November, 1941.

Counsel for the respondent also relies on section 9 of the Order which reads:

No agreement providing for an increase in the rate of salary above the rate payable at November 6, 1941, shall be enforceable in respect of such increase except and to the extent that such increase is within the amount that may be permitted by paragraphs 3 or 4 hereof, and no action shall lie against any person for breach of contract for complying with the provisions of this Order or for refusing to pay any salary in excess of the amount permitted by this Order.

The resolutions, however, do not provide for any subsequent increase in rate of salary. They established a rate of salary prior to the 6th November, 1941, which was applicable both prior to and subsequent to that date.

In my opinion the amounts in question should not have been disallowed under section 7 because they were not in violation of section 2 of the Order.

The appeal will be allowed and the assessments will be referred back to the Minister for an adjustment of the figures consequential on the allowance of the appeal.

The appellant is entitled to the costs of the appeal.

*Judgment accordingly.*

BETWEEN:

JAMES M. McLEAN ..... APPELLANT;

AND

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

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*Revenue—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, Rules 2 and 3, s. 3, par. A, of First Schedule—Member of Canadian Military Forces in Western Hemisphere for part of a year entitled only to reduced rate of taxation for that time.*

*Held:* That a member of the Canadian Military Forces in the Western Hemisphere other than in Canada for part of a year and in the Canadian Active Service for the balance of that year is only entitled to the reduced rate of taxation, as per the Schedules in s. 3 of the First Schedule to the Income War Tax Act, in respect to the service pay and allowances received while he was in the Western Hemisphere other than in Canada.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Hamilton.

*J. M. McLean* for appellant.

*Harold Minden* and *J. G. McEntyre* for respondent.

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

O'CONNOR J. now (August 15, 1947) delivered the following judgment:

The appellant was a member of the Canadian Military Forces in the Western Hemisphere other than in Canada from 1st January, 1943, to 22nd May, 1943, and in the Canadian Active Service in Canada during the balance of the year.

His income during the year 1943, relevant to the issue here, was:

Pay and Allowances received while on duty in the Western Hemisphere other than Canada.....	\$ 992 11
Pay and Allowances received while in the Canadian Active Service in Canada .....	1,834 36
Net income from other sources .....	608 19
Total income .....	<u>\$3,434 66</u>

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If the appellant had not been a member of the Military Forces the tax payable in respect to such income would have been \$984.72.

The appellant filed a T.1 General Return under the Act, and a T.1 Armed Forces Supplemental Form, claiming that under Rules 2 and 3 of Section 3 of Paragraph A of the First Schedule to the Act, instead of paying the tax, otherwise payable in respect of the taxable income, of \$984.72, he paid under Rule 3, only tax on his total service pay and allowances received in 1943 and at one-half the effective rate of tax applicable to his total income and from this should be deducted the tax credit under Rule 2 of \$324.76.

The respondent under Rules 2 and 3 assessed the appellant on the following basis. The appellant was required to pay the tax of \$984.72, but that from this should be deducted a tax credit under Rule 2 of \$324.76. The appellant was entitled to a further credit equal to one-half the effective rate of tax applicable to his total income in respect to his service pay and allowances received only during the period in which he served in the Western Hemisphere other than in Canada.

The question depends on the construction to be placed on Rules 2 and 3 of Section 3, Paragraph A of the First Schedule to the Act, the relevant parts of which are:

Rule 2—The tax payable by any member of the Canadian Naval, Military and Air Forces in the Canadian Active Service Forces in Canada and in receipt of service pay and allowances (exclusive of subsistence allowances up to \$1.70 per day and marriage and dependents' allowances) at a rate of \$1,600 or more per annum shall be reduced by a credit from the tax otherwise payable of an amount equal to the tax payable on \$1,600 in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents' allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children):

Provided that if the taxable service pay and allowances of such member are in excess of \$1,600 per annum in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children) the tax credit to which the member of such forces would otherwise be entitled shall be reduced by the proportion which such excess bears to \$1,600 in the case of a single person without dependents (or to such amount appropriately increased by marriage and dependents' allowances



which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children);

Provided \* \* \*

Provided further that in the case of a member of the said forces who is in receipt of taxable service pay and allowances at a rate in excess of \$1,600 per annum in the case of a single person without dependents (or such amount appropriately increased by marriage and dependents' allowances which would be payable if he held the highest rank of warrant or non-commissioned officer in the Service to which he belongs but not including any allowance for more than six children) (or \$1,200 in the case of the members of the said Women's Forces) and who has been in the said forces for only a portion of the year, the credit from the tax otherwise payable shall be that proportion which the number of days during which he was in the forces bears to three hundred and sixty-five, of the appropriate credit to which he would have been entitled if he had been in receipt of service pay and allowances throughout the year.

Rule 3—Notwithstanding any other provision in this Act contained, any member of the Canadian Naval, Military and Air Forces in the Western Hemisphere other than in Canada, shall be dealt with in the same manner as the persons referred to in Rule 2 of this section, except that any such person, in lieu of paying the tax otherwise payable in respect of his total income, shall in respect of his service pay and allowances be subject to tax at one-half of the effective rate of tax applicable to his total income.

The questions are:

*First*—are the pay and allowances mentioned in Rule 3 those received during the time the member was in the Western Hemisphere other than in Canada, or do they also include the pay and allowances received by the member in Canada?

*Second*—does the applicant pay the tax imposed by the general taxing sections of the Act less the credit allowed by Rule 2, and on his service pay and allowances at one-half the effective rate of tax applicable to his total income, or in lieu of paying the tax otherwise payable under the Act in respect to his total income, does he *only* pay on his service pay and allowances and then only at one-half the effective rate of tax applicable to his total income less the tax credit allowed by Rule 2?

Under the Act, in my opinion, there are four groups of members of the Canadian Naval, Military and Air Forces.

(1) The income, including service pay and allowances of those members of the Forces in Canada who are not in the Canadian Active Service, is subject to taxation.

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(2) The income, including service pay and allowances of those members in the Canadian Active Service who are in Canada, is subject to taxation, but under Rule 2 the tax they pay is "reduced by a credit from the tax otherwise payable", ranging from "an amount equal to the tax payable on \$1,600" of pay and allowances, on up.

(3) Under Rule 3 the income, including pay and allowances of all members of the Forces in the Western Hemisphere other than in Canada, is subject to taxation because they, under Rule 3, "shall be dealt with in the same manner as the persons referred to in Rule 2 of this section". And the persons under Rule 2 are given "a credit from the tax otherwise payable". They are then subject to the general taxation provision and receive a credit on their tax, depending on the amount of their pay and allowances as provided in Rule 2. But there is one exception under which they get additional relief. That is, that they "shall in respect of his service pay and allowances be subject to tax at one-half of the effective rate of tax applicable to his total income".

(4) Under Section 4(t)(i) the service pay and allowances of members of the Forces while in the Canadian Active Service Forces and Overseas on the strength of an Overseas Unit outside of the Western Hemisphere and certain others described in subsections (ii) and (iii) is not liable to taxation at all. Their income other than pay and allowances is taxable.

A member of the Forces could be, and no doubt was, in all four groups in the course of one year. But as the Act does not provide otherwise, I come to the conclusion that each exemption would only be applicable to the pay and allowances during the time the member was in that particular group.

Rule 3 is clearly an exempting section and not a taxing section and must, therefore, be construed strictly. *Wylie v. City of Montreal* (1).

In my opinion the appellant is only entitled to the reduced rate of taxation in respect to the service pay and allowances received while he was in the Western Hemisphere other than in Canada.

While Rule 3 is difficult and awkward, it must be given a reasonable construction. It is correct that the words "in lieu of paying the tax otherwise payable", appear to indicate that instead of paying the general tax the member is to pay only a tax on his service pay and allowances at a reduced rate. But that meaning can only be given if these words are taken out of their context. The rule *first* provides that the member "shall be dealt with in the same manner as the persons referred to in Rule 2." And as I have already pointed out those persons pay a tax on their income including pay and allowances and that tax \* \* \* shall be reduced by a credit from the *tax otherwise payable* \* \* \*" So that under Rule 3 a member pays a tax on his income including pay and allowances and receives the tax credit provided by Rule 2. Then because he is away from Canada the Rule provides that he is to receive a further exemption, i.e., his pay and allowances are taxed at one-half the effective rate applicable to his total income.

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If the appellant's contention were correct all private incomes of members in the Western Hemisphere other than in Canada would be exempt from tax. That would be an even greater exemption than given to the fourth group (*supra*) i.e., those serving overseas.

In fairness to the appellant I should add that while he contends that wording of the section places a tax only on pay and allowances and then at one-half the rate applicable to the entire income, he does not suggest that that was the intention of Parliament. But he does contend vigorously that that is what Parliament has done.

I do not agree with either of the appellant's contentions.

While the rule directs that the pay and allowances be taxed at one-half the effective rate of tax applicable to the total income, the respondent has computed the tax at the full rate and has then given a tax credit equal to one-half the rate applicable to the total income on the pay and allowances. This, of course, produces the same result.

The proper construction of the section was admitted by counsel to be difficult. The appellant is a solicitor and issued the Statement of Claim himself, and did not ask for

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costs in the Claim. In addition he appeared on the appeal, so that if the appeal had been allowed, no costs could have been allowed.

For the reasons I have given, the appeal will be dismissed and under the circumstances without costs.

*Judgment accordingly.*

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 Aug. 18

BETWEEN:

BENNETT AND WHITE CONSTRUCTION CO. LTD. } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

*Revenue—Income—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, s. 6(1)(a)—“Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income” —Commissions paid to guarantors of appellant for loans from bank not deductible when company engaged in construction business—Capital or income—Appellant’s loans are borrowed capital used in same way as its own capital—Commissions are expenditures incurred in relation to the financing of the business—Commissions are paid in order to borrow additional capital and so are part of financial arrangements of appellant.*

Appellant company is engaged in the construction business. From time to time appellant obtained loans from its bank in order to carry on its business operations. The bank required that such loans be guaranteed by directors of appellant. Appellant paid interest to the bank on the advances obtained and also paid to the guarantors by way of commission a sum equal to the interest payments. Appellant sought to deduct from income for the years 1941 and 1942 the amounts paid as commissions. The respondent refused to allow such deductions and appellant appealed to this Court.

*Held:* That the money borrowed by appellant is not temporary accommodation but is borrowed capital used in the same way as appellant’s capital and the commissions are expenditures incurred in relation to the financing of appellant’s business and the financial arrangements are quite distinct from the activities by which appellant earns its income and, therefore, are not expenditures incurred in earning the income within s. 6(1)(a) of the Act, and consequently are not deductible expenses.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Vancouver, B.C.

*J. L. Lawrence and A. W. Mercer* for appellant.

*L. St. M. Dumoulin and W. J. Hulbig* for respondent.

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

O'CONNOR J. now (August 18, 1947) delivered the following judgment:

This is an appeal from the assessments for income and excess profits tax for the taxation years 1941 and 1942.

The Company is engaged in the construction business. In 1935 the Company's bank refused to make advances to it unless one of the directors guaranteed the repayment of such advances. One of the directors then gave the bank the guarantee demanded and the Company paid him for so doing a commission equal to the interest paid by the Company to the bank in the Company's fiscal year.

From 1935 to 1942 the bank refused to make any advances to the Company without a guarantee of one or more of the directors of the Company and the Company adopted that method of financing its business and continued it during the whole of that period. The shareholders of the Company approved this course each year as shown by the Minutes of the annual meetings. The guarantee is on the usual bank form, and provides that it can be terminated at any time but is to remain in full force and effect until terminated. When an amount above the amount of the existing guarantee was required, the existing guarantee was withdrawn and a new guarantee for the larger amount was given.

Since the incorporation of the Company the paid-up capital of the Company was increased and it was also reduced. Preference shares were issued and redeemed and new Preference shares issued.

The Company's business was greatly increased by war contracts in 1941 and 1942 and the borrowings from the bank were substantial. The indebtedness of the Company to the bank fluctuated from day to day. The fluctuations would sometimes be as much as \$100,000 to \$200,000 either way.

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In 1941 Mrs. Mabel Bennett, J. G. Bennett and A. G. Bennett guaranteed to the bank that they would pay all sums advanced to the Company up to \$370,000 with interest at 6 per cent. During that year the Company paid the bank interest in the sum of \$20,813 and paid a similar amount to the guarantors. In 1942 the Company paid the same guarantors the sum of \$23,455.07 for such guarantee.

The evidence showed that if the Company had been limited to its own capital and had not borrowed from the bank, that it would have only been able to do 25 per cent of the work that was done in each of the years in question. By borrowing the money from the bank it was able to greatly increase the work done each year. The additional work increased the income of the Company. The money borrowed was used in the same way as the capital of the Company was used, i.e., to meet pay rolls and to purchase materials and equipment for the works.

These commissions paid the guarantors were charged as expenses against income in the years 1935 and 1940 and were allowed by the respondent.

The commissions paid the guarantors were charged as expenses against income in the years 1941 and 1942 and were disallowed by the respondent on the grounds that (1) such amounts were not disbursements or expenses wholly necessarily and exclusively laid out or expended for the purpose of earning the income within the meaning of Section 6(1)(a) of the Income War Tax Act, and by an amendment at the trial on the further grounds that (2) the amounts paid were outlays or payments on account of capital within the meaning of Section 6(1)(b) of the said Act.

So far as relevant to the present purpose Section 6 reads as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

- (a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
- (b) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence except as otherwise provided in this Act.

The authorities cited by counsel have been referred to and discussed by Romer L.J., p. 16 and by Findlay J.,

at p. 11 in the case of *European Investment Trust Company Limited and Jackson* (1), and by Duff C.J., in *Montreal Light, Heat and Power Consolidated v. Minister of National Revenue* (2), and by Lawrence J., in *Ascot Gas Water Heater Limited v. Duff* (3).

The effect of all these decisions is that the question in each case is a question of fact.

In addition the decisions clearly differentiate between those companies engaged in financial operations and all others.

In the *Ascot Gas Water Heater case (supra)*, Lawrence J., held, after reviewing the authorities, that the only true principle was that laid down by Findlay J., in the *European Investment Trust case (supra)* at p. 11:

Now, here it seems to me that the principle may be stated in this way: if you get a company dealing with money, buying or selling stocks or shares, Treasury bills, bonds, all sorts of things, and if you get that company getting, as such companies constantly do get, temporary loans from their bank—accommodation, I suppose, for sometimes twenty-four hours, or even less, sometimes for a good deal longer—if you get that sort of thing, then the interest on that money, the hire, so to speak, paid for that money, may properly be regarded as an expenditure of the business, an outgoing to earn the profits. On the other hand, if the truth of the thing is that by the payment of the interest the Company does not obtain mere temporary accommodation, day to day accommodation of that sort, but does in truth, add to its capital and get sums which are used as capital and nothing else, then I think that in that case all the authorities show that that deduction cannot properly be made.

Lawrence J. points out that in the Court of Appeal nothing appears to have been said about the principle applicable.

The difficulty of drawing a line between capital and revenue expenditures and the reason that no precise rule has been formulated are set out in *Atherton v. British Insulated and Helsby Cables Limited* (4), Scrutton L.J.:

Obviously a case which may result in a definition by this Court of the line between capital and revenue expenditure must require very careful consideration by this Court, and the first thing that it must do is to bear in mind the warning of Lord Macnaghten in *Dovey v. Cory*, (1901) A.C. 477, at page 488: "I do not think it desirable for any tribunal to do that which Parham has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more."

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

(3) (1940-42) 24 T.C. 171.

(2) (1942) S.C.R. 89 at 92

(4) (1924-26) 10 T.C. 155 at 185.

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In *Montreal Coke and Manufacturing Company v. Minister of National Revenue* and *Montreal Light, Heat and Power Consolidated v. Minister of National Revenue* (1), the same authorities were cited (page 131) including *Scottish North American Trust Company Limited v. Farmer* (2), and in the judgment there is this statement, p. 135:

Reference was made in the course of the argument for the appellants to a number of reported cases, chiefly on the analogous provisions of English, Dominion and Indian revenue statutes. In some of these cases attempts were made to formulate principles of discrimination among different kinds of expenditure, permissible or prohibited as deductions. They illustrate the diversity of the problems which may arise. Their Lordships do not on the present occasion find it necessary to discuss these authorities as, in their opinion, the particular expenditure with which they have to deal falls clearly within the statutory prohibition against deduction.

Lord MacMillan said at p. 133:

Expenditure to be deductible must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts. These operations involve outgoings as well as receipts and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to those businesses that they look for their earnings. Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt, the way in which they finance their businesses will, or may, reflect itself favourably or unfavourably in their annual accounts, but expenditure incurred in relation to the financing of their businesses is not, in their Lordships' opinion, expenditure incurred in the earning of their income within the statutory meaning. The statute in section 5 (b) above quoted significantly employs the expression "capital used in the business to earn the income", differentiating between the provision of capital and the process of earning profits.

In this case the Company is not engaged in financial operations but is engaged in the construction business.

The method as outlined was adopted by the Company to finance its business, and it has continued to operate on that basis ever since.

In view of that, the borrowings cannot be termed "temporary accommodation" but are obviously borrowed capital used in the same way as its own capital. The interest paid to the bank each year on these borrowings has been claimed by the appellant and allowed by the respondent under

(1) (1944) A.C. 126.

(2) (1911) 5 T.C. 693.



Section 5(b) as “interest on borrowed capital used in the business to earn the income”. That being the only section under which it could be allowed. In statement (2) attached to the Auditors’ Report for the year 1941 interest in exchange of \$43,998.96 is shown and for 1942, \$49,706.88. The evidence showed that these items included both the interest paid to the bank on the borrowings and the commissions paid to the guarantors, and were lumped together for convenience. And as Lord MacMillan pointed out, Section 5(b) significantly employs the expression “capital used in the business to earn the income”, thus differentiating between the provisions of capital and the process of earning profits.

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It was contended that, as the borrowings could not be obtained without the guarantee and the guarantee could only be given if the commissions were paid, the commissions were necessarily laid out to earn the increased income. But the commissions were paid in order to borrow this additional capital and are therefore part of the “financial arrangements” of the Company. The increase in income resulted from increase in capital.

The commissions were expenditures incurred in relation to the financing of the business, and in the language of Lord MacMillan “their financial arrangements are quite distinct from the activities by which they earn their income”.

These commissions were not, in my opinion, expenditures incurred in the earning of the income within Section 6(1)(a).

For these reasons I am of the opinion that the assessments in question were properly made.

The appeal must be dismissed with costs.

*Judgment accordingly.*

1947

June 4 & 5  
August 15

BETWEEN:

LEO R. TISDALE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Negligence—Limitation on amount of damages recoverable by passenger in motor vehicle injured by joint negligence of owner or driver of that vehicle and driver of another vehicle—Negligence Act R.S.O. 1937, c. 115, s. 2(2).*

Suppliant, a passenger in a car, was injured as the result of the joint negligence of the driver of that car and of a servant of the respondent acting within the scope of his duties or employment.

*Held:* That suppliant cannot recover from respondent that portion of his damages caused by the owner or driver of the motor vehicle in which he was a passenger.

PETITION OF RIGHT by suppliant to recover damages from the Crown for injuries suffered by suppliant because of the alleged negligence of a servant or employee of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor at Windsor.

*B. H. Furlong, K.C.* for suppliant.

*M. C. Meretsky* for respondent.

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

O'CONNOR J. now (August 15, 1947) delivered the following judgment:

The suppliant claims damages in respect of injuries suffered as a result of a collision which took place at 7.30 p.m., on the 22nd November, 1945, at the west end of a curve on No. 3 Highway, four miles west of Delhi, in the Province of Ontario, between a Packard motor vehicle, owned and driven easterly by M. H. Parsons, in which the suppliant was a passenger, and a Diamond T truck which the respondent admits was owned by the

Crown and driven westerly by one Dupuis, a member of the Military Forces of His Majesty in right of Canada, while acting within the scope of his duties or employment.

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The evidence showed that it had been raining. The weather turned colder and the rain turned to snow. The highway was slippery and covered with snow. The witnesses told of scraping the snow from the highway to ascertain the edges of the pavement. It snowed very hard and developed into a blizzard.

The truck was coming out of the west end of the curve and the Packard entering the curve at the same point.

The driver of the Packard estimates his speed at 10 to 12 miles per hour. His passengers say he was driving slowly, not more than 15 miles per hour. They swear the Packard was at the extreme south edge of the highway at the time of impact.

The driver and co-driver of the truck estimate their speed at 10 to 12 miles per hour, and say the truck was almost at the north edge of the highway at the time of impact.

On this evidence I am somewhat in the position of the eminent English judge who said he spent most of his time trying running down actions involving two stationary vehicles each on the proper side of the highway and the horn of each blowing violently.

Rohrer, an independent witness, himself having had an accident, was sitting in his car on the north side of the highway almost at the point of impact. He saw the Packard coming towards him and he saw the truck through the rear view mirror. After the impact he got out of his car and examined the position on the highway of the Packard and the truck. He swore that the impact took place in the centre of the highway. I accept his evidence.

I find that both drivers were negligent. They were driving too fast having regard to the blizzard, the curve and the conditions of the highway. Neither driver was keeping a proper lookout.

The suppliant was injured by the joint negligence of Parsons and the driver of the respondent's truck, and the fault was in equal degree.

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The suppliant was driven into the windshield by the force of the impact, and rendered unconscious for a short time. His head was cut and a bone was broken in his instep. He was absent from his work from the 22nd November, 1945, to the 30th of January, 1946. In October, 1945, he had earned \$340.68, which included overtime during the month. In February, 1946, he earned \$235.07, but he stated that his foot was still troubling him and he was unable to work overtime. After resuming work he continued to take treatments each week-end at Mount Clemens for his foot until the end of February, 1947, at an average cost of \$10 per week. He stated at the trial that he was still suffering pain and discomfiture from his foot. He did not, however, appear to have consulted a doctor after February, 1946. No medical evidence was given as to whether the pain is being caused by the broken bone or from any other cause.

I, therefore, assess his damages on the basis that he has had only a partial disability which is not permanent.

I award special damages as follows:

Doctor's bill .....	\$ 50 00
X-ray account .....	15 00
Loss of wages .....	650 00
Expenses at Mount Clemens .....	150 00
	<hr/>
	\$865 00

I award general damages of \$1,500.

The suppliant cannot recover from the respondent that portion of his damages caused by the negligence of the owner or driver of the motor vehicle in which he was a passenger under the provisions of Section 2(2) of the Negligence Act, R.S.O. 1937, Chap. 115. *Verroche v. Russell and Niagara, St. Catharines and Toronto Railway Company* (1), and affirmed on appeal at p. 860.

The suppliant is, therefore, entitled to recover one-half of \$2,365, viz., \$1,182.50 and the costs of the action.

*Judgment accordingly.*

BETWEEN:

RODERICK W. S. JOHNSTON . . . . . APPELLANT;

AND

MINISTER OF NATIONAL  
REVENUE . . . . . RESPONDENT.

1947  
June 18  
August 23

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, Rules 1 and 2 of s. 1, of par. A of First Schedule—Onus on taxpayer to show assessment incorrect—Appeal dismissed.*

*Held:* That an assessment for income tax is valid and binding unless an appeal is taken from such assessment and the Court determines that such was made on an incorrect basis and where an appellant has failed to show that the assessment was incorrect, either in fact or law, the appeal must be dismissed.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Toronto.

*C. H. A. Armstrong, K.C.* for appellant.

*E. C. Bogart, K.C.* and *E. S. MacLatchy* for respondent.

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

O'CONNOR J. now (August 23, 1947) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C., 1927, chap. 97, from an assessment for the year 1944.

The wife of the appellant was a resident of Canada, and had a separate income, other than an earned income, in excess of \$660 in the taxation year. The appellant had three children under 18 years of age who were wholly dependent on him for support during the taxation year.

The relevant parts of the Income War Tax Act are parts of Rules 1 and 2 of Section 1 of Paragraph (A) of the First Schedule:

Section 1. Normal Tax

*Rule 1.*—A normal tax equal to seven per centum of the income shall be paid by every person whose income during the taxation year exceeded \$1,200 and who was during that year:

(a) a married person who supported his spouse and whose spouse was resident in any part of His Majesty's dominions or in a country contiguous

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to Canada, or, residing elsewhere, was a subject or citizen of a country associated or allied with Canada in the conduct of the war which commenced in September, nineteen hundred and thirty-nine, and was prevented by reason of such war, or prohibited by law, from entering or landing in Canada;

(b) a person with a son or daughter wholly dependent upon him for support, if the son or daughter was, during the taxation year,

- (i) under eighteen years of age; or
- (ii) eighteen years of age or over and dependent by reason of mental or physical infirmity; or
- (iii) under twenty-one years of age and a student at a secondary school, university or other educational institution;

and resident in any part of His Majesty's dominions or in a country contiguous to Canada, or, residing elsewhere, was a subject or citizen of a country associated or allied with Canada in the conduct of the war, which commenced in September nineteen hundred and thirty-nine, and was prevented by reason of such war, or prohibited by law, from entering or landing in Canada;

(c) an unmarried person or a married person separated from his spouse who maintained a self-contained domestic establishment and actually supported therein a person wholly dependent upon him and connected with him by blood relationship, marriage or adoption, or;

(d) an unmarried minister or clergyman in charge of a diocese, parish or congregation who maintained a self-contained domestic establishment and employed therein on full-time a housekeeper or servant.

*Rule 2.*—If, during a taxation year, a married person described by sub-paragraph (a) of Rule 1 of this section and his spouse each had a separate income in excess of \$660, each shall be taxed under Rule 3 of this section: Provided that a husband does not lose his right to be taxed under Rule 1 of this section by reason of his wife being employed and receiving any earned income.

Rule 3 of Section 2—Graduated Tax, provides that a taxpayer may deduct \$150 from the graduated tax otherwise payable by him if he is a married person or has equivalent status, as provided by subparagraphs (a) to (d) which are similar to subparagraphs (a) to (d) of Rule 1 of Section 1. Rule 6 of Section 2 provides that if a married person described by subparagraph (a) of Rule 3 of that section and his spouse each had a separate income in excess of \$660, neither of them shall be entitled to the deduction from the graduated tax permitted by Rule 3 of that section, provided further that the husband does not lose his right to the deduction if the income of the wife is an earned income. In any case the wife is treated as an unmarried person.

The determination of the question under Rules 1 and 2 of Section 1 also determines the application of subpara-

graphs (i) and (ii) of paragraph (d) of Section 7A(1) which deal with deductions from taxes allowed.

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If the taxpayer is a person described in (a) of Rule 1 of Section 1 and described in (a) of Rule 3 of Section 2, that is a married person who supported his spouse, a resident of Canada, then Rule 2 of Section 1 and Rule 6 of Section 2 are applicable, and no further question arises.

The first question is whether the taxpayer is a person described in (a) of Rule 1, Section 1, and in (a) of Rule 3, Section 2, i.e., one who supports his wife.

If he is not a person described in (a) Rule 1, Section 1, and (a) Rule 3, Section 2, then the second question arises as to whether or not he is within (b) of Rule 1, Section 1, and within (b) of Rule 3, Section 2.

Instead of calling evidence, counsel agreed that no evidence would be given but agreed to the facts set out in the following admission of facts:

For the purpose of this Matter, and without prejudice to the admission of the facts contained in paragraphs numbered 1, 2, 3, 4 and 6 of the Statement of Claim, it is further admitted that in the year 1944:

- (1) The Appellant and his spouse occupied the same dwelling.
- (2) The Appellant's income exceeds the income of his spouse.
- (3) The Appellant and his spouse both contributed to the maintenance of a common household in such dwelling, the operation of which was managed by the Appellant's spouse.
- (4) The whole income of the Appellant's spouse was expended for her personal expenses and as a contribution to the expenses of such common household.

These facts do not show the wife's income or the respective contributions made by each or the total amount contributed to the maintenance of the household.

These facts agreed upon do not, in my opinion, establish that the appellant supported his wife or that he did not do so. No finding of fact can be made so that the case cannot be dealt with on the merits.

It is merely a question of whether the onus is on the appellant or on the respondent.

Whether the taxpayer has been assessed on a correct basis or on an incorrect basis, the assessment is valid and binding unless an appeal is taken and the Court determines that the assessment has been made on an incorrect basis.

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On the appeal then the onus is on the appellant to establish from the "facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal" in the language of Section 60(2) of the Act, that the assessment is incorrect.

If such facts or statutory provisions and reasons are not submitted to the Court, the assessment cannot be found to be incorrect.

The appellant has failed to show that the assessment was incorrect, either in fact or in law, and the appeal must be dismissed with costs.

*Judgment accordingly.*

1944  
 May 29, 30  
 1947  
 August 28

BETWEEN:  
 EIKICHI NAKASHIMA ..... SUPPLIANT,  
 AND  
 HIS MAJESTY THE KING ..... RESPONDENT.

AND

BETWEEN:  
 TADAO WAKABAYASHI ..... SUPPLIANT,  
 AND  
 HIS MAJESTY THE KING ..... RESPONDENT.

AND

BETWEEN:  
 JITARO TANAKA AND TAKEJIRO  
 TANAKA ..... SUPPLIANTS,  
 AND  
 HIS MAJESTY THE KING ..... RESPONDENT.

*Crown—Petition of right—Orders in Council P.C. 1665 of March 4, 1942, P.C. 2483 of March 27, 1942, P.C. 469 of January 19, 1943—Consolidated Regulations respecting Trading with the Enemy (1939)—War Measures Act, R.S.C. 1927, c. 206, s. 3—Custodian not servant or agent of the Crown—Decision of Governor in Council as to necessity or advisability of an order under the War Measures Act not open to review by the Court.*



Suppliants, who were persons of Japanese origin evacuated from a protected area west of the Cascade Mountains, brought petitions of right claiming that the Custodian, in whom their properties had been vested as a protective measure and subject to his control and management, had no right to sell them, notwithstanding Order in Council P.C. 469 of January 19, 1943, which purported to authorize such power of sale, the validity of which was challenged. Question of law whether petition of right lies.

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*Held:* That the Custodian is not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown does not lie.

2. That under the War Measures Act Parliament has left the decision as to the necessity or advisability of an order for the security, defence, peace, order and welfare of Canada, not to the Court, but to the Governor in Council, and once he has made his decision that such order is necessary or advisable for any of the purposes mentioned, that is the end of the matter. The Court has no right to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an order so made.
3. That Order in Council P.C. 469, of January 19, 1943, was validly enacted and the Custodian has the lawful right to liquidate, sell, or otherwise dispose of the properties of the suppliants vested in him.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*J. A. MacLennan* for suppliants.

*F. P. Varcoe K.C.* and *D. W. Mundell* for respondent.

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

THE PRESIDENT now (August 28, 1947) delivered the following judgment:

In each of these proceedings it was ordered that the following question of law be set down for hearing and disposed of before the trial, namely,

Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the respondent for any of the relief sought by the suppliant in the said Petition.

The suppliants are all persons of Japanese origin who resided and owned property in Vancouver, British Columbia, prior to their compulsory evacuation therefrom in

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1942. The first suppliant is a British subject by naturalization, the second a British subject by birth, and the suppliants in the third petition are Japanese nationals. The questions of law were heard together, the circumstances being such that the answer in any one case will be equally applicable in the others.

It will be desirable to set out the sequence of events before dealing with the contentions made on the suppliants' behalf. By Order in Council P.C. 365, dated January 16, 1942, the Defence of Canada Regulations (Consolidation) 1941 were amended by substituting a new Regulation 4 for the one previously in force by which the Minister of National Defence with the concurrence of the Minister of Justice was empowered, "if it appears necessary or expedient so to do in the public interest and for the efficient prosecution of the war", to make an order declaring a protected area and to make certain orders with respect to such area including that of requiring "all or any enemy aliens to leave such protected area." By an Order, dated January 29, 1942, made pursuant to this authority, the portion of British Columbia lying west of the Cascade Mountains (more particularly described in the Order) was declared to be a protected area. By Order in Council P.C. 1486, dated February 24, 1942, the power of requiring persons to leave a protected area was extended to include persons who were not alien enemies and the Minister of Justice was given power "to require any or all persons to leave such protected area". And on February 26, 1942, the Minister made what may be called the Japanese evacuation order which provided, *inter alia*, that "every person of the Japanese race shall leave the protected area aforesaid forthwith." This applied to persons of Japanese origin regardless of whether they were Japanese nationals or British subjects either by birth or naturalization. The suppliants were all residing within the protected area and subject to the evacuation order. The next relevant order was Order in Council P.C. 1665, dated March 4, 1942, by which the British Columbia Security Commission was established and charged with the duty of planning, supervising and directing the evacuation. We are concerned only

with section 12 of this Order under the heading "Custody of Japanese Property", which provides as follows:

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Custody of Japanese Property

12. (1) As a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race resident in such area (excepting fishing vessels subject to Order in Council P.C. 288 of the 13th January, 1942, and deposits of money, shares of stock, debentures, bonds or other securities), delivered up to any person by the owner pursuant to the Order of the Minister of Justice dated February 26, 1942, or which is turned over to the Custodian by the owner, or which the owner, on being evacuated is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations respecting Trading with the Enemy, 1939; provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

(2) Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interest by the Custodian, the Regulations respecting Trading with the Enemy, 1939, shall apply *mutatis mutandis* to the same extent as if such property, rights and interests belonged to any enemy within the meaning of the said Regulations.

(3) The property, rights and interests so vested in and subject to the control and management of the Custodian, or the proceeds thereof, shall be dealt with in such manner as the Governor in Council may direct.

Then by Order in Council P.C. 2483, dated March 27, this provision was rescinded and the following substituted:

12. (1) Subject as hereinafter in this Regulation provided, as a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race (excepting fishing vessels subject to Order in Council P.C. 288 of January 13, 1942, and deposits of money, shares of stock, debentures, bonds or other securities) delivered up to any person by the owner pursuant to an order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations Respecting Trading with the Enemy (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.

(2) The Custodian may, notwithstanding anything contained in this Regulation, order that all or any property whatsoever, situated in any protected area of British Columbia, belonging to any person of the Japanese race shall, for the purpose of protecting the interests of the owner or any other person, be vested in the Custodian, and the Custodian shall have full power to administer such property for the benefit of all such interested persons, and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby.

(3) For the purposes of the control and management of such property by the Custodian, the Consolidated Regulations Respecting Trading with

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the Enemy (1939), shall apply *mutatis mutandis* to the same extent as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

In this state of the law the suppliants left the protected area. But before they did so they had in each case signed a document, Form "JP", giving particulars of their property in the protected area, in which the following statement was made:

I, the undersigned, hereby voluntarily turn over to the Custodian all my property in the protected area as set out above, except fishing vessels, deposits of money, shares of stock, debentures, bonds or other securities, if any.

Then, after the suppliants had left, by Order in Council P.C. 469, dated January 19, 1943, it was provided *inter alia*:

Wherever, under Orders in Council under the War Measures Act, chapter 206 of the Revised Statutes of Canada 1927, the Custodian has been vested with the power and responsibility of controlling and managing any property of persons of the Japanese race evacuated from the protected areas, such power and responsibility shall be deemed to include and to have included from the date of the vesting of such property in the Custodian, the power to liquidate, sell, or otherwise dispose of such property; and for the purpose of such liquidation, sale or other disposition the Consolidated Regulations Respecting Trading with the Enemy (1939) shall apply *mutatis mutandis* as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

The next fact of importance is that on June 19, 1943, the Custodian advertised certain properties for sale by tender, including those of the suppliants. It was this advertisement that led to the launching of the petitions of right.

The suppliants object to the sale, liquidation or other disposition of their properties and deny the right of the Custodian to take any such action against their wishes and desires. The petitions set forth a number of contentions and each concludes with a prayer for certain declarations. The contentions are that the suppliants are entitled to rely upon the terms of Orders in Council P.C. 1665 and P.C. 2483 providing that their properties should be and remain in the possession of the Custodian and under his management and control for the protection of the suppliants for the period of their enforced evacuation; that, in the alternative, the Custodian acquired possession of the properties upon trust requiring him to hold them in trust for the protection of the suppliants and under his management and control upon a condition requiring him to return

them to the suppliants when the area ceases to be a protected area; that, in the further alternative, the properties are under the control and management of the Custodian upon trust on a condition requiring him to return them to the suppliants after the end of the war or to retain and hold them for their protection and benefit until otherwise authorized or directed in accordance with any Treaty of Peace between Canada and Japan; that in the further alternative, the Orders in Council P.C. 1665, P.C. 2483 and P.C. 469 are invalid and unconstitutional and *ultra vires*, or that if the first is valid and constitutional the others are not. The suppliants seek a number of declarations, namely, that the Custodian is not entitled to sell, liquidate or otherwise dispose of the properties against their wishes; that the Orders in Council referred to, or one or more of them are or is invalid, unconstitutional and *ultra vires* or, in the alternative, do not authorize or empower the Custodian to sell, liquidate or otherwise dispose of the properties without their consent; and that the Custodian is a trustee of the properties for them as set out in the petitions. Then there is a request for a mandamus compelling the Custodian to carry out the terms of his trust and an injunction to restrain him from selling, liquidating or otherwise disposing of the properties. Essentially, the purpose of the petitions is to prevent the Custodian from selling the properties: the essence of the claim is that he has no valid power to do so.

The proceedings are by way of petition of right against the Crown as though the properties were in the possession of the Crown and on the assumption that, although they are vested in the Custodian, he holds them as the servant or agent of the Crown.

The first objection taken is that any relief sought is in respect of the Custodian; that the Custodian is not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown does not lie; and that no cause of action against the Crown is shown.

The cases lay down a number of tests to be applied in determining whether a body is a servant or agent of the Crown or is independent of it. In *Fox v. Government*

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of Newfoundland (1) it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of the various boards of education in Newfoundland were not debts or claims due to the Crown or to the Government or revenues of Newfoundland. At page 672, Sir Richard Couch said:

The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

The determining test in this case was the possession of a discretionary power independent of the Government. The above statement was approved by the Judicial Committee in the leading case of *Metropolitan Meat Industry Board v. Sheedy* (2). In that case the Meat Industry Act, 1915, of New South Wales provided for the maintenance and control of slaughter houses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board for tolls and fees to be levied by it was not paid into the general funds of the State, but to its own fund, out of which the expenses of carrying the Act into effect were to be met. The question for determination was whether an amount due to the Board by a company which had gone into liquidation was a debt due to the Crown and as such entitled to priority over the claims of other unsecured creditors. It was held that the Board was not acting as a servant of the Crown and the amount owing to it was not a debt due to the Crown. At page 905, Viscount Haldane said:

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without

(1) (1898) A.C. 667.

(2) (1927) A.C. 899.

consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

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Undoubtedly, the governing factor in deciding that the Board was not a servant of the Crown but an independent body was that, although it was subject to governmental control in several respects, it had wide powers which were to be exercised at its own discretion and without consulting any direct representative of the Crown. Another indication of its independence was that it had control over its own revenues and their expenditure. An important Canadian case on the subject is the judgment of the Supreme Court of Canada in *City of Halifax v. Halifax Harbour Commissioners* (1). There the question was whether the Halifax Harbour Commissioners who occupied the Crown property of Halifax Harbour were assessable for business tax as an "occupier" within Section 357 (1) of the Halifax City Charter (1931). Duff C.J., speaking for the Court, carefully scrutinized the nature of the powers and duties of the Commissioners, and summarized the controls and supervision to which they were subject. He pointed out that in the exercise of all their powers the Commissioners were subject to the control of the Crown and concluded that they were performing Government services and were occupying the property in question in and for the services of the Crown and were, therefore, not assessable for business tax. The Commissioners had none of the free discretionary powers that are necessary to independence, as laid down in *Metropolitan Meat Industry Board v. Sheedy* (*supra*), and the case was, therefore, readily distinguishable from it. In coming to its decision the Court applied a number of tests in addition to those already referred to. For example, it inquired into such questions as the ownership of the occupied property, namely, whether it belonged to the Crown or the occupant, and the nature of the functions of the occupant, that is, whether they were those ordinarily performed in the course of government. Then reference may also be made to the recent judgment of the Judicial Committee of the Privy Council in *Montreal v. Montreal Locomotive Works* (2), in which Lord Wright

(1) (1935) S.C.R. 215.

(2) (1947) 1 D.L.R. 161.

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stresses the difficulty which is inherent in deciding whether a person is a servant or not, and points out that the presence or absence of control by itself is not always conclusive and suggests other tests as well, which are not applicable in the present case. *Vide* also the judgment of the Supreme Court of Canada in *Regina Industries Ltd. v. Regina* (1).

This leads to an examination of the position of the Custodian under the Consolidated Regulations respecting Trading with the Enemy (1939), as enacted by Order in Council P.C. 3959, dated August 21, 1940, as amended by Order in Council P.C. 5353, dated October 3, 1940, hereinafter called the Consolidated Regulations. By Section 6 the Secretary of State is appointed as the Custodian to receive, hold, preserve and deal with such property, as may be paid to or vested in him under the regulations. In my opinion, nothing turns on the fact that a Minister of the Crown is appointed as Custodian, for anyone else might just as validly have been appointed. By section 21 all enemy property in Canada vests in the Custodian and is subject to his control. The Consolidated Regulations give him very wide discretionary powers over such property; for example, by section 21 (2) he may deal with the interest of the enemy in it as he may in his sole discretion decide; under section 23 he may have it transferred into his own name; by section 38 he may, where he considers it advisable to do so, liquidate it; or by section 39, at his discretion, relinquish it; or by section 40 dispose of it either publicly or privately, as he in his discretion shall think proper; the property held by him is by section 49 rendered free from attachment or execution and by section 50 he is made not liable for any charge against it. These references are sufficient to show the great width of the Custodian's discretionary powers and his freedom from governmental control in dealing with the property vested in him. In the matter of litigation, by section 27 provision is made for proceedings by and against the Custodian under certain conditions and under section 36 he may take action to recover money payable to him under the regulations. It is to be noted that the right of action is that of the Custodian, not that of the Crown;

(1) (1947) 3 D.L.R. 81.



indeed, he may himself have to take proceedings as Custodian against the Crown as has happened in this Court. Then under the regulations the Custodian is given very wide administrative powers involving the free exercise of discretion. By section 43 (1) he shall establish an office or offices for the administration of the regulations and is empowered to select officers, clerks and advisers and to pay them such remuneration as he may determine. This is a most unusual power and indicative of the independent character of the Custodian's office. This is not in the least diminished by the special provision for a special purpose in section 43 (2) that the Custodian's office shall be deemed to be a Department of Government of Canada and the Custodian the head of such Department, for the purposes of the Canada Evidence Act. Furthermore, the Custodian is given full control over his own funds. By section 42 he may deposit moneys paid to or received by him in any bank. They are not paid in to the Consolidated Revenue. By section 44 (1) he is empowered to make certain charges against released property and by section 44 (2) he may retain out of the proceeds of all property vested in him sufficient moneys to pay the expenses incurred in the administration of the regulations. He is not dependent at all for the administration of the regulations on any appropriations by Parliament. These references to the regulations sufficiently show the independence with which the law has endowed the Custodian. It is true that he is subject to control by the Governor in Council, but such control is not executive but of a legislative nature of the same kind as that which Parliament itself might exercise, which is a very different thing from the control which the Crown, meaning thereby His Majesty acting on advice in his executive capacity, exercises over its servants. If the Custodian is not the servant or agent of the Crown, it must follow that a petition of right cannot lie against it in respect of his acts and it was so held by this Court in *Ritcher v. The King* (1). There Angers J. expressed the opinion that the Custodian did not hold enemy property as an agent or servant of the Crown and that no petition of right could lie against the Crown in respect of any claim asserted in respect

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(1) (1943) Ex. C.R. 64.

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of his actions. I am of a similar opinion in the present case. It seems clear to me, in view of the wide discretionary powers of the Custodian over the property vested in him, his freedom from governmental control in the management of his office and the appointment and remuneration of members of his staff, and his complete control over his funds and their expenditure, that it was intended by the Consolidated Regulations that the Custodian should not be a servant or agent of the Crown but an independent person. It was important and proper that this should be so in order that the properties vested in him should be held by him neither for the former owners nor for the Crown but independently in a state of suspense until their final disposition should be determined pursuant to appropriate legislative enactment in the light of the turn of events on the conclusion of the emergency that made their vesting necessary or advisable. That being so, it follows that the course taken by the suppliants in lodging petitions of right against the Crown in respect of an intended sale of the suppliants' properties by the Custodian was erroneous, and that since no cause of action against the Crown is shown the answer to the question of law herein must be in the negative. If the suppliants have any cause of action it could only be against the Custodian; as to which, the Court expresses no opinion in the absence of the Custodian, who is not a party to these proceedings.

Counsel for the suppliants sought to save himself from this conclusion by arguing that the Custodian was not in the same position with regard to Japanese evacuee property as with regard to alien enemy property. His contention was that the suppliants were not alien enemies within the meaning of the Consolidated Regulations, which is true, and that they do not apply in the present case except only for limited purposes, since under Order in Council P.C. 1665 of March 4, 1942, and Order in Council P.C. 2483 of March 27, 1942, Japanese evacuee property is vested in the Custodian "as a protective measure only" and made subject only "to the control and management of the Custodian" and that at the time of the vesting the Custodian had no right of sale. In my opinion, even if this were conceded, it would not alter the character of the

Custodian's powers and duties. His discretionary powers might be more limited in scope than in the case of alien enemy property, but the difference would be one of degree rather than of kind. He would still have very wide free discretionary powers in the field of control and management. And, if Order in Council P.C. 469 of January 19, 1943, is valid, there would be no difference at all in the scope of the Custodian's discretionary powers as between alien enemy property on the one hand and Japanese evacuee property on the other.

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Counsel for the suppliants also took the position that, even if the Custodian were not a servant or agent of the Crown, the filing of a petition of right would, nevertheless, be the correct procedure for the relief sought on the ground that although the properties were vested in the Custodian, he derived his title to them from the Crown, and he relied upon a number of cases in support of his view including *Attorney General for Ontario v. McLean Gold Mines* (1). There two mining claims in Ontario granted by the Crown were forfeited, under the Mining Tax Act, for default in the payment of taxes, and were granted to another person. Assignees of the original grantee brought an action against the Attorney General, the Minister of Mines, and registered owners under the new grant, alleging defects in the forfeiture proceedings, and claiming a declaration that they were the true owners, a declaration that the forfeiture certificates were void and an order that they should be substituted as owners in the register of titles. It was held that as the plaintiffs' claim impugned the title accruing to the Crown on the forfeiture it could not be made by action, but only by petition of right. In my opinion, this judgment has no applicability in the present case, since the title to the suppliants' property was never in the Crown and the Custodian's title could not, therefore, have been derived from it. To contend that because the suppliants' properties were vested in the Custodian by an Order in Council, passed under the War Measures Act, he derived his title to them from the Crown shows a misconception of the nature of the source of the Custodian's title. It did not come from the Crown pursuant to an executive act of the Crown. Both the divesting from the former Japanese owners and

(1) (1927) A.C. 185.

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the vesting in the Custodian were pursuant to an Order in Council passed by the Governor in Council as a legislative enactment under the legislative power devolved upon him by Parliament and having the same force as if it had been enacted by Parliament itself. The source of the Custodian's title is legislative, not executive. It was not a case at all of the title having first been in the Crown and then transferred to the Custodian. It was never in the Crown, and the Custodian did not derive any title from it.

Under the circumstances, since the Custodian is not the servant or agent of the Crown and no cause of action against the Crown appears I must hold that the proceedings by way of petition of right were erroneously taken. In my opinion, this ends the matter and is a sufficient reason for answering the question of law in the negative.

I was urged, however, by counsel for the suppliants to deal with his attack on the validity of the Orders in Council on the ground that it could be made only by way of petition of right. I do not agree with this or with the other grounds advanced for dealing with the question. But since it is of great importance and has some bearing, as already suggested, on whether there is any difference in kind between the powers of the Custodian in the present case and those which he possesses as Custodian of alien enemy property, I shall deal with the question, although with considerable doubt as to whether it can properly be raised in these proceedings.

Counsel for the suppliants confined his attack on the validity of the Orders in Council to the extent to which they purport to authorize the Custodian to liquidate, sell or otherwise dispose of the properties of Japanese evacuees vested in him. The argument ran as follows. It was conceded that the order for the evacuation of persons of Japanese origin from the protected area was valid as a war measure, whether such persons were Japanese nationals or British subjects. It was also conceded that Orders in Council P.C. 1665 and P.C. 2483 were valid in so far as they vested the properties in the Custodian for his control and management; since the Japanese on their evacuation had to leave their properties, it was said to be the duty and responsibility of the Government to look after them,

so that the vesting of them in the Custodian for control and management for the protection of the former owners was necessarily incidental and ancillary to the evacuation and, as such, a valid war measure. But this was the limit of counsel's concessions. While the terms of Order in Council P.C. 469, cited above, were the main object of counsel's attack he made it clear that if they were to be regarded as merely declaratory and the power of control and management conferred by Orders in Council P.C. 1665 and P.C. 2483 construed as including the power of sale, then his attack extended also to these Orders in Council to the extent that they purported to confer such power. It was the authorization of the power of liquidation, sale or other disposition of the properties that was objected to as being beyond the powers of the Governor in Council even under the War Measures Act. It was admitted that the power of control and management might conceivably include the right to sell the properties if such sale was necessary to protect them or the former owners, but not otherwise, and there could be no such necessity in the present case where, as alleged in the petitions, the properties are rented and the rentals are sufficient to maintain them in good standing and condition. Counsel urged that there was a vital difference between the right to authorize control and management and the right to authorize sale; the former was *intra vires*, the latter was not. The validity of the Orders in Council vesting the properties of the evacuated Japanese in the Custodian for his control and management could be justified, so counsel argued, only on the basis that such vesting was for the protection of the former Japanese owners and was ancillary to their evacuation, but that no such justification was possible for an Order in Council authorizing the sale of properties already in the custody of the Custodian and subject to his control and management. The argument went on that only that which was ancillary to the evacuation was *intra vires* and that, while control and management of the properties was ancillary, sale of them was not. Counsel urged vigorously that Orders in Council under the War Measures Act must be for war objects; that the authorizing of the sale of the properties had nothing to do with the evacuation, or the attainment

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of the objects of the war or national security, was not a war measure at all and, therefore, not within the competence of the Governor in Council; that the Court had the right to question the validity of Orders in Council under the War Measures Act; and that it ought to intervene in an obvious case such as this and declare that the Order in Council authorizing the liquidation, sale or other disposition of the properties in question was not a war measure at all, but an unwarranted invasion of property and civil rights and, consequently, *ultra vires*.

With the propriety of the action of the Custodian in advertising the suppliants' properties for sale the Court can have no concern in these proceedings. The sole question is whether he had the right to do so and that in turn depends on whether the Order in Council authorizing the power of sale is within the competence of the Governor in Council. Order in Council P.C. 469 of January 19, 1943, was expressly declared to be made under the authority of the War Measures Act, R.S.C. 1927, chap. 206, and contained a number of recitals including the following:

That the evacuation of persons of the Japanese race from the protected areas has now been substantially completed and it is necessary to provide facilities for liquidation of property in appropriate cases.

Although the Order in Council was passed under the authority of the War Measures Act and the Governor in Council has declared that it is a necessary measure, the Court is invited by counsel for the suppliants to declare that it is not a war measure and is, therefore, not validly enacted. Whether the Court can assert an opinion contrary to that declared by the Governor in Council is the matter to be determined. The question has, I think, been completely answered by the authorities.

The War Measures Act, first enacted in 1914, Statutes of Canada, 1914, 2nd Session, chap. 2, was not repealed after the end of the first world war, and was carried into the 1927 Revision with only minor changes made by the Commissioners and some re-arrangement of its sections. The first portion of section 3, previously section 6, provides as follows:

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;

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The validity of the War Measures Act itself depends on whether it falls within the jurisdiction of the Canadian Parliament under the opening words of section 91 of the British North America Act, which empowers it to make laws for the peace, order and good government of Canada. It was considered *intra vires* by the Supreme Court of Canada in *Re George Edwin Gray* (1), and its validity was settled by the Judicial Committee of the Privy Council in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press* (2). It was not challenged in the present case.

Under the circumstances, the question whether Order in Council 469 is *intra vires* the Governor in Council is really a question of construction of the War Measures Act and an ascertainment of whether its requirements have been complied with. If the answer to this question is in the affirmative, then it is clear that the Court has no right to question the decision of the Governor in Council as to the necessity or advisability of the measure. That was the conclusion of the Supreme Court of Canada in *Reference re Chemicals Regulations and Administrative Orders* (3) in which, although the primary question was as to the power of the Governor in Council to delegate authority to subordinate agencies, the nature and extent of the powers of the Governor in Council under the War Measures Act were also dealt with. The Court made it clear that the authority vested in the Governor in Council is legislative in character and of the same nature and subject to the same limitation as that possessed by Parliament itself. Duff C.J., at page 9, said:

The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the War Measures Act may have the effect of an Act of Parliament.

And Rinfret J., as he then was, at page 17, expressed the same view:

The powers conferred upon the Governor in Council by the War Measures Act constitute a law making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by

(1) (1918) 57 Can. S.C.R. 150. (3) (1943) S.C.R. 1.  
 (2) (1923) A.C. 695.

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reasons of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in *The Queen v. Burah* (1878) 3 App. Cas. 889. Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

The conditions of a valid enactment under the War Measures Act prescribed by the Act itself are two; first, there must be in existence a real or apprehended war, invasion or insurrection; and secondly, the Governor in Council must by reason of such real or apprehended war, invasion or insurrection deem the enactment necessary or advisable for the security, defence, peace, order and welfare of Canada. It is to be noted that the objects specified are not confined to the prosecution of the war. Once the conditions prescribed by the Act have been complied with it is not open to the Court to question the validity of an Order in Council under the War Measures Act on the ground that the enactment was not in fact necessary or advisable for the objects specified. At page 12, Duff C. J. put the proposition in these terms:

The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor in Council (not the courts) deems necessary or advisable.

And, as Rinfret J. said, at page 19:

For a court to review the enactment would be to assume the role of legislator.

The matter is, I think, conclusively settled by the *Reference re Persons of Japanese Race* (1). There Rinfret C. J., speaking also for Kerwin and Taschereau JJ. and referring



to the Orders in Council that were the subject of the reference, said, at page 277:

The Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.

And, at page 285, Rand J. made it clear that it was not for the courts to substitute their view of any such necessity or advisability for that of the Governor in Council. And when the matter came before the Judicial Committee of the Privy Council (1), Lord Wright, at page 586, said:

It is not pertinent to the judiciary to consider the wisdom or propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers. The same thought was forcefully expressed by the English Court of Appeal in *R. v. Comptroller of Patents* (2). In that case His Majesty in Council was given power by the Emergency Powers (Defence) Act, 1939, to make such orders as appeared to him necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community, and under this power a regulation was passed enabling the Comptroller of Patents to suspend the trade mark rights of British subjects operating enemy owned patents. The regulation was objected to on the grounds that it was outside the war purposes to which the power conferred by the Emergency Powers (Defence) Act, 1939, was confined. The contention was thus very similar to that put forward for the suppliants in the present case. It did not prevail. Scott L. J. said, at page 681:

the effect of the words "as appears to him to be necessary or expedient" is, in my opinion, to give to His Majesty in Council, as the authority for passing the delegated legislation, a complete discretion entrusted to him by Parliament to decide what regulations are necessary for the purposes named in the subsection. If so, it is not open to His Majesty's Courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made.

And Clauson L. J., at page 683, put it very clearly:

the criterion whether or not His Majesty had power to make a particular regulation is not whether that regulation is necessary or expedient for the purpose named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the particular regulation.

(1) (1947) 1 D.L.R. 577.

(2) (1941) 2 All E.R. 677.

1947 And then said, at page 684:

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If my view as to the construction of the Act and the effect of it is correct, it is quite clear that it is wholly irrelevant to discuss before this court whether the regulation was in fact necessary or expedient for securing the public safety and so forth. It is a wholly irrelevant matter and with that we have nothing to do. His Majesty has formed the view that it was necessary or expedient. So far as this court is concerned, in my judgment, there is an end to the matter.

In the present case, the two conditions of jurisdiction prescribed by the War Measures Act have both been satisfied. It is, therefore, not open to the Court to question the validity of the Order in Council empowering the Custodian to sell the properties vested in him on the ground that such sale was not necessary for the purposes mentioned in the War Measures Act. Parliament has left the decision as to the necessity or advisability of such an order for the security, defence, peace, order and welfare of Canada, not to the Court, but to the Governor in Council, and once the Governor in Council has made his decision that the order is necessary or advisable for any of the purposes mentioned that is the end of the matter. The Court has no right to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an order so made. The only authority that can validly challenge the exercise by the Governor in Council of the legislative powers entrusted to him is Parliament itself. If Parliament considers that he has acted erroneously the corrective power is in its hands—it does not lie with the Courts.

It was, therefore, within the power of the Governor in Council to pass Order in Council P.C. 469 of January 19, 1943, embodying the terms against which the suppliants protest and they were validly enacted. The Custodian has, therefore, the lawful right to liquidate, sell, or otherwise dispose of the property vested in him, including the properties of the suppliants.

Only a brief reference need be made to another argument advanced on behalf of the suppliants. It was contended that they had handed their properties over to the Custodian voluntarily on the strength of the first two Orders in

Council under which they were to be vested in him as a protective measure only for his control and management; that this fact constituted a contract with the Crown under which rights had accrued to the suppliants that the Crown would hold the properties for them pursuant to the Orders in Council: and that it was not competent for the Governor in Council to authorize the Custodian to sell the properties since this would affect accrued rights and would amount to a breach of contract. Apart altogether from my view that counsel for the suppliants has taken too narrow a view of the words "as a protective measure only" in the Order in Council I find no merit in law in his argument based on contract and accrued rights. In my view, there was no contract, express or implied, between the suppliants and either the Crown or the Custodian by reason of the signing of the "JP" forms. The properties became vested in the Custodian not by any contract but pursuant to the Orders in Council and would have vested in the Custodian whether the suppliants had signed the forms referred to or not. Moreover, I repeat, the vesting was the result of a legislative enactment, not of an executive act. The Crown never held the properties and no rights against the Crown had ever accrued to the suppliants in respect of them.

Since the suppliants' whole case depends on the assumption that the Custodian is the servant or agent of the Crown and has no right to sell the suppliants' properties and such assumption is unsound their case falls to the ground. It is, therefore, unnecessary in these proceedings to deal with a number of matters referred to in the pleadings and raised in argument such as whether the Crown or the Custodian is a trustee of the properties in question and, if so, for whom and subject to what conditions, or whether declaratory orders of the kind sought for can or should be given. If, as I have held, the Custodian does not hold the properties of the suppliants as the servant or agent of the Crown, such questions cannot arise as against the Crown, and so far as the Custodian is concerned they cannot be dealt with in these proceedings since he is not a party to them.

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In the result the answer to the question of law submitted to the Court is—No. That being so, there is no object in proceeding to the trial of the petitions and the judgment of the Court must be that the suppliants are not entitled to any of the relief sought by them in their petitions of right. In each case, the respondent is entitled to costs.

*Judgment accordingly.*

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 Aug. 23

BETWEEN:

BRITISH COLUMBIA BRIDGE & } SUPPLIANT;  
 DREDGING COMPANY LIMITED, }

AND

HIS MAJESTY THE KING, . . . . . RESPONDENT.

*Crown—Public Work—Claim by suppliant for expenses incurred during stand-by period ordered by Deputy Minister of Public Works while contract entered into between suppliant and His Majesty in force—Public Works Act R.S.C. 1927, c. 39 s. 36—“Addition of Works” as set forth in specification forming part of contract.*

Suppliant and respondent represented by the Minister of Public Works for Canada, entered into a contract whereby suppliant agreed “to perform, complete and finish . . . to the satisfaction of the Minister . . . or as may hereafter be directed by the engineer or officer in charge of the work”, all the work required for the dredging and clearing of an obstruction in Seymour Narrows, British Columbia, known as Ripple Rock, suppliant to be paid the cost of such work plus a fixed fee. Specification 21 of the specifications attached to the contract and forming part of it states “The engineer shall have the power to add to . . . or alter the work herein specified . . . without violating the contract”.

After operations had been carried on for a time a new method for completing the work was submitted to the Chief Engineer and his assistants and approved at a meeting between the Deputy Minister of Public Works, the Chief Engineer and the engineers under him in the Department of Public Works and the officials of suppliant company. The Deputy Minister of Public Works instructed suppliant to maintain intact that part of its organization known as the Ripple Rock Division while awaiting instructions to resume work. Later such instructions were given and work resumed under the original contract.

Suppliant claims in its Petition of Right payment by respondent of the expenses incurred by suppliant during the “stand-by” period. The bulk of these expenditures had been passed and approved by the

proper officers of the Department of Public Works. Respondent contends that the "stand-by" was not work under the contract and that the officials of the Department of Public Works had no authority to order the same by virtue of the Public Works Act, R.S.C. 1927, c. 39, s. 36.

*Held:* That the "stand-by" was so connected with the work to be performed that it can reasonably be held to constitute an "addition of works" to the work to be performed under the contract which the engineer had power to add under s. 21 of the specifications.

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PETITION OF RIGHT by suppliant claiming payment by respondent of certain expenses incurred by suppliant under a contract entered into between suppliant and His Majesty represented by the Minister of Public Works for Canada.

The action was tried before the Honourable Mr. Justice O'Connor at Vancouver.

*Knox Walkem, K.C.* for suppliant.

*F. A. Sheppard, K.C.* and *W. S. Owen, K.C.* for respondent.

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

O'CONNOR J. now (August 23, 1947) delivered the following judgment.

The suppliant claims the sum of \$28,529.34, the cost of work done under a contract, dated 16th May, 1942, between the suppliant and His Majesty represented by the Minister of Public Works of Canada. Under the contract the suppliant agreed to perform all the works required to deepen, dredge out and clear to a depth of thirty feet L.W.S.T. the obstruction in Seymour Narrows, British Columbia, known as Ripple Rock and to construct a rock fill across Maude Island Passage. In consideration whereof the respondent agreed to pay the suppliant the cost of the work as contained in the definition of "cost" in Schedule "B" to the contract, plus a fixed fee.

Part of the claim consisting of \$2,811.06 is made up of items charged as part of the cost of the work during the actual operation and which were not approved by the officials of the Department of Public Works.

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The main claim of \$21,021.55 is the cost incurred during a stand-by period which was directed by the officials of the Department of Public Works who have approved the expenditure.

The work under the contract required the operations to be carried on in the rapid and dangerous tidal waters of Seymour Narrows. The difficulty was to maintain the drill barge in position at Ripple Rock because of the current which, on occasions, reaches 17 knots per hour. The respondent in a letter, which is attached to and forms part of the contract (Exhibit 1) outlined the procedure it contemplated, which consisted of the construction of six reinforced concrete block anchors, the bow and stern anchors to be 150 tons, the four side anchors to be 75 tons each. These anchors would hold a specially constructed drill barge from which the rock would be drilled. The letter states that the position of the anchors would allow the barge to be shifted clear of the rock during the time that the turbulence of waters over it made staying there too dangerous. The barge was specially constructed at a cost of \$160,000 and was insured. The suppliant paid the construction costs, the insurance premiums and all the expenditures required under the contract, and was reimbursed by the respondent, with the exception of the items claimed in this action. No question arises in these proceedings as to the fee, or any part of it, of the suppliant.

The drill barge was anchored near Ripple Rock and the work commenced. It was found that while the fore and aft lines held, the strain on the side lines caused vibrations which in turn caused them to heat and to crystallize and break. The Deputy Minister of Public Works inspected the drilling after it had been under way for some time, and was advised of the difficulty. He instructed the suppliant to try again the method which was then being used and if the side lines continued to break, to inform him and a decision would then be made as to the method of anchoring. Four days later the side lines parted again, and the President of the suppliant Company telephoned the Deputy Minister and advised him of this. The President of the suppliant Company also advised the Deputy Minister that in his opinion this method of mooring was dangerous and too expensive, and he proposed a new

method of anchoring the drill barge to the land by means of an overhead cable which would not impede shipping. The suppliant was instructed to move all the equipment to a safe place in Vancouver harbour, and the President and Chief Engineer were instructed to go to Ottawa. At that time only a few weeks were left in the season during which the work could be done. The extreme tides, snow and fog made it impossible to proceed with the work from the latter part of October until February in each year. The work was described by the President as seasonal work and this would be known and contemplated at the time the contract was entered into.

The new method described as a suspension type cable was submitted to the Chief Engineer and his assistants. After they had examined it for 10 days, the method was approved at a meeting between the Deputy Minister, the Chief Engineer and the Engineers under him in the Department, and the officials of the suppliant Company.

The Deputy Minister stated that the Department would decide whether to go ahead with the work or not on this method, and gave the officials of the suppliant Company definite instructions to return to Vancouver and to maintain intact that part of the suppliant organization known as the Ripple Rock Division. They were also instructed to have the drill barge docked and placed in good condition and to maintain the rented equipment and keep it on rental until further advised, and to keep all key men such as engineers and accountants, so as to be ready to resume work immediately the decision was reached. And in the meantime to place watchmen and to maintain insurance on all the equipment. The officials of the Department asked for an estimate of what this would cost and were advised that it would cost \$5,700 per month, which included the rental of a special tug from Portland, Oregon. The Department officials approved these expenditures. Apparently both sets of officials expected the instructions to resume work to be given at once. But it was realized that there might be a short delay because, while the Portland tug was to be kept on, it was agreed that if the decision had not been reached within 30 days that the tug should be released. At the end of that period the Department instructed the suppliant to release the tug and it was sent back to Portland.

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The suppliant was able to further reduce the expenses so that they only averaged \$1,800 per month during the stand-by period.

It is clear from this that the Deputy Minister regarded the removal of this obstruction as something urgently required, no doubt because the war in the Pacific had greatly increased the traffic in the channel in question. He expected the Government to authorize an additional expenditure for this work within a short period. He was then faced with the problem of either paying these expenses which are comparatively small in view of the total cost of the operation or of breaking up the organization and losing the key men and equipment. This would have resulted in loss and delay when the time came to replace them.

The further expenditure was not authorized until October, 1944, probably because other expenditures for the war were even more urgent.

Instructions were then given to the suppliant to resume the work under the new method. As there were only a few weeks left in the season in which it was possible to operate at all and the overhead anchorage had to be installed first, a further stand-by period of five months was arranged. No question arises as to the payment of the cost during this period because such cost has been repaid to the suppliant. Work was resumed under the new method in the Spring of 1945.

The President of the suppliant Company stated that he had been prepared at the time he suggested the new method (October 1943) to carry on under the old method but that in his opinion it was dangerous and much more costly to the respondent than it would be under the new method. No new contract was entered into between the parties. In his examination for discovery the Deputy Minister stated that the contract (Exhibit 1) was a subsisting contract all the way through. In addition the evidence establishes that both the officials of the suppliant Company and the officers of the Department believed these expenditures to be properly part of the "cost" under the contract and both acted accordingly. And the items in this part of the claim of the suppliant were approved by the Resident Engineer in charge of the actual operation; the District Engineer



and the Chief Engineer of the Department and by the Department of Public Works.

In the examination of the Deputy Minister he stated:—

Q. (27) The items which were subsequently disallowed had been, in fact, approved by the resident engineer?

A. Right and approved by us.

This fact was not disputed.

In addition a Treasury Official checked the items on each progress estimate rendered monthly during the period in question and certified that the amount claimed was in accordance with the contract.

It is not disputed that the suppliant acted in good faith and on the express orders of the officials of the Department of Public Works, nor that the respondent received the benefits of these disbursements.

No question arises as to the fee of the suppliant fixed under the contract, the issue is solely over the money paid out by the suppliant for insurance premiums on the respondent's property; for wages for watchmen guarding the respondent's property and for rental of equipment paid for by the suppliant and wages for key personnel.

The respondent having obtained the benefits resulting from these disbursements refuses to repay on the ground that the "stand-by" was not work under the contract and the officials of the Department of Public Works had not the authority to order the same.

Under the contract the suppliant agreed—

. . . to perform, complete and finish, in every respect, to the satisfaction of the said Minister in a good and workmanlike manner, agreeably to the true intent and meaning of the specification hereto annexed, marked "A", and forming part of these presents, and to the extent and in the situation described, or as may hereafter be directed by the Engineer or Officer in charge of the work.

All the works required to deepen, dredge out and clear wholly and entirely of all obstacles and materials whatsoever to a depth of thirty (30) feet L.W.S.T. the obstruction in Seymour Narrows, Province of British Columbia, known as "Ripple Rock" . . .

"Cost" is defined in Schedule "B" and includes:—

Section (k). Such other items of cost as shall be properly and reasonably incurred by the Contractor solely for the purposes of the work; provided that any such items shall have been approved by the Engineer.

Attached to the contract and forming part thereof are these Specifications, Tenders and General Conditions, and

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Dredging Specifications. In the Tenders and General Conditions Section 21 and Section 22 are as follows:—

21. Alterations. The Engineer shall have the power and right . . . to add to, omit, change, modify, cancel or alter the works and material herein specified or shown on the drawings without rendering void in any way or vitiating the contract.

22. Meaning of Terms etc., alterations, deductions, omissions, modifications or deviations are to be understood as applying . . . the additions of works neither shown nor described etc., and for these or similar matters alone, will any sum be allowed to the contract or deducted from the contract, and then only upon the written order of the Engineer.

The respondent contends that what was done during this stand-by period was not part of the work to be performed under the contract. And, therefore, the Chief Engineer would not by reason of Section 36 of the Public Works Act have power to add work that was not work to be performed under the contract. Section 36 of the Public Works Act is as follows:—

36. Whenever any works are to be executed under the direction of any department of the Government, the minister having charge of such department shall invite tenders by public advertisement for the execution of such works, except in cases

(a) of pressing emergency in which delay would be injurious to the public interest; or

(b) in which from the nature of the work it can be more expeditiously and economically executed by the officers and servants of the department; or

(c) where the estimated cost of the work is less than five thousand dollars and it appears to the minister, in view of the nature of the work, that it is not advisable to invite tenders.

2. Whenever in case of any work tenders are required to be or are invited, the minister having charge of the department concerned shall submit all tenders received therefor to the Governor in Council and the contract for the work shall be awarded under the direction of the Governor in Council. R.S., c. 39, s. 36.

The officials of the Department of Public Works could not by reason of the provisions of Section 36 have added to the work under the contract, work that had no connection with the work to be performed under the contract. They could not for example have added as work under this contract the construction of a canal through Seymour Narrows, nor a bridge over the Narrows. If they had directed such work the suppliant could not recover because of the provisions of Section 36 of the Public Works Act. All persons dealing with officers of the Crown must be taken to have a knowledge of the statute. *Queen v. Woodburn* (1).

The work under the contract was to be performed in the dangerous tidal waters of Seymour Narrows. It is clear from the letter of the suppliant attached to the contract and from the evidence that the work to be performed was highly dangerous and of an experimental nature. It was known by both parties that the work could not be carried on from October to February each year due to the extreme tides. The letter sets out the fact that during some tides in each day the current would be too fast and it would be impossible to drill. And the digging would be even more difficult than the drilling. The drilling was stopped because of the difficulty encountered and the Engineers of the Department of Public Works considered the new method of anchorage proposed by the suppliant. Eventually this method was adopted and the drilling resumed after a second stand-by period. The expenditures made during the second stand-by period have all been repaid by the respondent. It is clear that the respondent in paying those disbursements considered that "stand-by" as "work" to be performed under the contract.

In addition it was known to be seasonal work and that a "stand-by" period of four months or so each winter would be necessary.

I am of the opinion that in the circumstances, the "stand-by" was so connected with the work to be performed that it can reasonably be held to constitute an "addition of works" to the work to be performed under the contract which the Engineer had power to add under Section 21 of the Specifications. And I so hold.

The Tenders and General Conditions are headed "For Bulk Sum". This contract is not on that basis but on the cost plus fixed fee basis and that must be taken into account in considering Clauses 38 and 7. Clause 38 provides that no claim for extras will be entertained by the Department of Public Works on account of unforeseen difficulties in carrying out the work provided. The claim here is clearly not a claim for extras of that kind.

Clause 7 provides that no claim for extra work or materials will at any time be recognized or entertained by the Department unless the contractor has first obtained a written order therefor from the Engineer.

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That the Engineer has done so is quite clear because the Department has not only recognized and entertained the claim, but has approved payment of the claim. The Deputy Minister's evidence was that the claim had been "approved by us".

For these reasons I hold that the suppliant is entitled to the amount claimed under this head of \$21,021.55.

The balance of the claim of the suppliant for the sum of \$2,811.06 is in connection with a number of items which the officials of the Department of Public Works refused to approve. I have considered the evidence of the President of the suppliant Company and that of Mr. Robert Henderson, the Resident Engineer, who was in charge of the work at Ripple Rock, and I come to the conclusion that of these items, the suppliant is entitled only to item referred to as No. 9 for \$200.95, which Mr. Henderson stated was owing.

The contract expressly provides that the respondent is to pay the suppliant the cost of the work on the written certificate of the Engineer or Officer in charge. The Engineer has refused to approve the other items and his certificate is a condition precedent to payment. *O'Brien v. Queen* (1).

The suppliant is, therefore, entitled to \$21,222.50 and costs.

*Judgment accordingly.*

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 May 30  
 August 20

BETWEEN:

MEYER GOOTSON, ..... SUPPLIANT;

AND

HIS MAJESTY THE KING, ..... RESPONDENT.

*Crown—Action for damages resulting from alleged negligence of servant of Crown acting within scope of duties or employment—Servant of Crown driving motor vehicle lawfully when overtaken with sudden illness causing him to lose control of vehicle—No negligence on part of superior officers—Action dismissed.*

Suppliant was injured by being struck by a motor car operated by one Joyes, a servant of the Crown, acting within the scope of his duties or employment at the time, who immediately prior to the accident

was driving the vehicle at a reasonable rate of speed and under control. Joyes suddenly became unconscious and fell down on the floor of the car. The car, without guidance, ran over a sidewalk and injured the suppliant. The Court found that there was no negligence on the part of Joyes in operating the car nor was there negligence on the part of his superior officers in permitting Joyes to drive a motor vehicle.

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*Held:* That this action must be dismissed since the driver of the car by reason of the seizure was rendered incapable of appreciating the duty to take care and was unable to discharge that duty; the action being founded on negligence it is necessary in order to create liability for an act, not wilful or intentional, to show not only that it is negligent but also that it was the conscious act of the defendant's volition.

PETITION OF RIGHT by suppliant to recover damages from the Crown for injuries suffered by suppliant because of the alleged negligence of an officer or employee of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor at London.

*M. Lerner* for suppliant.

*Alex Fergusson* for respondent.

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

O'CONNOR J. now (August 20, 1947) delivered the following judgment:

In a Petition of Right the suppliant claims damages from the respondent in respect of injuries suffered by him incurred when a motor vehicle owned and driven by Chester Joyes alleged by the suppliant to be a servant of the Crown and while acting within the scope of his duties or employment, crushed the suppliant against a building in the City of London, in the Province of Ontario.

The respondent denies that Chester Joyes was operating the motor vehicle within the scope of his duties or employment and alleges that the said Joyes was suddenly taken ill and as a result of such illness the motor car went out of control and struck the suppliant. The respondent pleads that in the circumstances this was a result from an inevitable accident and not from any negligence on the part of any person involved therein.

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On the 18th January, 1946, Joyes was employed as an investigator by the Department of Veterans Affairs in "F" district with Headquarters at London, Ontario. He was paid monthly and he was allowed 9c per mile for the first 4,000 miles in any one fiscal year and then 8c per mile for the use of his own car. He reported with the other investigator every Saturday morning at the office of the Department of Veterans Affairs in Queen's Park and each received his instructions for the following week. He would be given a letter or a form on each case that he was instructed to investigate. He would then call on the veterans and make an investigation in accordance with his instructions and make a report in writing to the Chief Investigator, which would be turned in on the following Saturday morning at which time he would be given his assignment for the following week. Mr. Williams, Chief Investigator, stated that the investigators were not under close supervision but each was on his own. Mr. Ernest Chesham in charge of the General Division at London, stated that when Joyes went out he was on his own and would be allowed a certain amount of latitude. Each investigator was allotted a certain area. Joyes was given an area outside of London itself, described as west of No. 4 highway. Exhibit "B" shows a list of the cities, towns and villages in "F" district and in the third column the initials "C.J." show those that were allotted to Joyes.

On the 23rd of March, 1946, when Joyes was reporting and receiving instructions on Saturday morning, he was observed to spin around once or twice and fall down. Dr. Rogers, the District Medical Officer of the Department of Veterans Affairs for "F" district was called. He saw Joyes on that occasion and saw him again on Monday, March 25th, 1946. He made a memorandum for his file (Exhibit 7) which is as follows:—

343 Richmond Street,  
 London, March 25th, 1946.

Memo for file.

Re: Joyes, Chester—A-34004.

The above named who was discharged from the Army on January 11th, 1946 and was taken on the Investigation Division of this Department on January 18th, 1946 had an epileptiform seizure on the morning of March 23rd on the Third Floor here at 343 Richmond Street. The period of confusion following the seizure cleared well in an hour. He had over 5 years' service in the Army. There is no history of any

seizures either in the Army or previously. He tells me that he never appeared on sick parade, and that he has driven a car for the last 20 years and did considerable driving, motorcycles and cars, in the Army. He was doing considerable investigating work in the Army. He did everything from investigating A.W.L.'s to murder charges. The only history of illness appears to have been diphtheria in childhood and appendectomy in 1935. There is no history of any injuries. It is expected he will be driving his own car while doing investigation work for this Department.

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The question is whether or not this man might be continued in the Service of our Investigation Division and in such case whether or not he might be permitted to drive a car.

The history leading up to this seizure was that after some roast beef on Friday, which he thinks was probably not good, he did not feel very comfortable and this discomfort continued the next morning. After going home from here following the seizure, he says he vomited up what appeared to be the meal of the previous evening and has since felt very well.

I have asked this man to go out to Westminster Hospital on Wednesday afternoon and hope that he can be seen by Dr. Stuart Fisher for his further advice.

S. O. ROGERS, M.B.  
 Medical Assistant to D.A.

SOR/P

Would suggest admission to Dr. Turnbull's Clinic for a short period of observation.

STUART M. FISHER

29/3/46.

Dr. Rogers' evidence confirmed what he had already set out in this memorandum. He stated in his evidence, in addition, that at the time he had thought of seizure, both epileptic and otherwise and he had looked at every possible form of seizure. He stated and this is also set out in the memorandum, that there was no history of any previous attacks and no record of any sickness during Joyes' five years in the Army.

He said that in his opinion the seizure might have been caused by the circumstances outlined by Joyes, but he questioned this to a degree that was at least sufficient to warrant him sending Joyes to the hospital. He stated that persons suffering from seizures are very reluctant to admit them, and it is most difficult to get their true story. He further stated that in the circumstances the first attack was no warning of the second attack. Dr. Rogers stated that subsequent to the accident Joyes had given him a detailed description from the cramp to the final bump. He stated that the story did not jibe with the eye-witnesses,

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but he thought that his story was possible. He agreed that there was great similarity in Joyes' story of both attacks.

Joyes was admitted to Westminster Hospital of the Department of Veterans Affairs on the 1st April, 1946. The case history (Exhibit 8) states under Admission Note:

Provisional Diagnosis: Psychoneurosis.

Under the heading of "Complaints" there is this entry:—

Says he feels all right now. He has a rash on his arm which itches which comes from an infected bite. He also has an infected hair follicle on shafts penis. Says that 10 days ago he had cramps high up in abdomen associated with some diarrhoea for a period of about 20 hours. He vomited and felt better. Said he was eating out the night before and the meat did not taste right and an hour or so after the cramps started. It was evidently suggested by Dr. S. O. Rogers that he see Dr. Fisher and he did so for a check up on March 30 and was sent to Westminster hospital with the label of psychoneurosis.

He was given a physical examination and the results apparently did not disclose anything. The history (Exhibit 8) states that "Neurological Examination is negative", and the report of C. A. Bright, M.D., stated, "I see no obvious psychiatric disability". There was also a urinalysis, and a blood serology was made.

Joyes remained in hospital from the 1st to the 17th of April, 1946 and was then discharged.

Dr. Rogers stated that, when he received Dr. Turnbull's report (Exhibit 9) which he stated was negative as to findings of epilepsy or whatever caused the attack, he advised Mr. Williams, the Chief Investigator, that Joyes could go back on the job. Williams, in his evidence, stated that he asked if Joyes were to be permitted to go on with his work and was told that he could assign him work.

There was no evidence to show whether or not Dr. Turnbull had a copy of Dr. Rogers' memorandum (Exhibit 7) at the time he prepared the report (Exhibit 9). He had, of course, the case history sheet (Exhibit 8) as shown by his notation thereon. In his evidence Dr. Turnbull said the fact that there was no record of illness or even of Joyes being on sick parade during six years in the Army, would make it exceptional for the seizure to have been an epileptic fit.

Joyes then continued to work as an investigator.



The facts as to the collision between the motor vehicle and the suppliant were proven beyond any doubt by a number of witnesses.

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At 12.04 noon on the 13th June, 1946, Joyes drove north on Egerton street in London at 15 m.p.h. Police Constable Fickling stated that the weather was clear, visibility was good and the pavement dry. Joyes was seen to fall sideways and disappear. The car continuing at the same speed, appeared to wobble and crossed the road mounting the curb at the north-west corner of Egerton and Grafton streets. It crossed the sidewalk on the east side of Egerton street and proceeded at a north-east angle across a lawn and through a hedge and mounted a step at the entrance to a store. Mrs. Poad, one of the witnesses, stated that from the time Joyes fell sideways, she saw no signs of the car having been guided or of the brakes having been applied. The car travelled in this way from the right hand side of Egerton street across to the curb of the north-west corner of Egerton and Grafton streets and then according to the police measurements, it travelled to the point of impact which was 102 feet north of the north curb line on Grafton street and 24 feet west of the west curb on Egerton street. At that instant the suppliant was entering the store with one foot on the cement step. The car struck him and pinned his leg between the bumper and the store.

The witnesses stated that they ran over and released the suppliant. He was removed subsequently to the hospital and his leg was amputated 4 inches below the body. After four months in hospital, he returned home and at the time of the trial the stump had not healed but was still running, and he was still taking treatments. His medical and hospital expenses to the date of the trial were \$3,419.25.

Charles Skeggs, one of the eye-witnesses said that he opened the door of the car and found Joyes and thought he was dead until he felt his pulse. His face was bluish red as if he were unable to breathe. He thought that Joyes had taken a fit. Mrs. Poad said that Joyes' entire body was on the floor of the car with his head near the right hand door and that she watched the men take Joyes out of the car and his face was purple and he was foaming at the mouth, and seemed to have a bump on his forehead. He said, "What happened", and then lapsed back into

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unconsciousness. Constable Fickling said that when he arrived at 12.13 noon both the suppliant and Joyes were lying on the lawn. Joyes was unconscious and was still unconscious when the ambulance took him away 10 minutes after the constable arrived.

Joyes was then taken to the Victoria hospital at London and examined. The report of the Superintendent, L. J. Crozier, M.D., (Exhibit 10 dated June 13, 1946) states in part:—

Patient was driving car yesterday when he took a severe pain in the stomach causing him to hit curb, knocked him against side of car and patient was knocked unconscious. Brought to hospital after he regained conscious. Took dose of salts yesterday morning. Never had cramps like this before. Past history negative . . . Diagnosis: Traumatic Asphyxia. He was treated medicinally and discharged from hospital on June 16th, 1946. Man's statement attached.

On the 15th June, 1946, Joyes prepared a travelling expense account showing the mileage and meals for the 11th, 12th and 13th June, 1946, totalling \$33.81. This account (Exhibit C) purports to show that he left London at 8.15 a.m., and arrived Lucan 9.00 a.m., and Exeter 10.30 a.m., and left there at 11.00 a.m., and reached London at 12.15 p.m. The total mileage for the day was 75 miles including 3 miles in London on arrival at 12.15 p.m.

On the back of Exhibit C is a list showing the numbers, names, certain categories of the veterans who had been interviewed and the date on which each had been investigated. Attached to Exhibit C and made part of it is Joyes' Travelling Expense Account, dated 8th June, 1946.

Joyes said that on the 13th June, 1946, he was employed by the Department of Veterans Affairs as an investigator and was using his car in that work. He stated that he was on his way from his home to the Department of Veterans Affairs' office to pick up some paper in connection with a case that he was investigating. On cross-examination he stated that he had gone from Lucan to Exeter to London and after lunch in the downtown area of London, had dropped off at his home.

John Williams, the Chief Investigator, produced the files of three veterans listed on the back of Exhibit C. The first was A. 58374—Maslen, R. A., shown by Joyes as having been investigated on 12th June, 1946. Williams stated that this case had not been referred to the Investi-

gation Department until 14th June, 1946, so that no report could possibly have been asked for before that date.

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Joyes' account (Exhibit C) showed that he had investigated R. 52264—Bell, L. T., on the 13th June, 1946. This file produced by Williams showed that an investigation had been made by another investigator on July 10th, 1946, and that no report had been received from Joyes.

Joyes' account showed that he had investigated R. 169539—Baynes, J. M., on the 13th June, 1946. The file produced by Williams showed that Joyes himself had investigated J. M. Baynes on June 5th, 1946, and Joyes had reported on June 7th, 1946. Williams stated that no further investigation had ever been asked for. On the back of the Travelling Expense Account, dated 8th June, 1946, part of Exhibit C, on the sixth line from the bottom, the name of J. M. Baynes appears and opposite this is the 5th June, 1946, which shows that Joyes had already charged his travelling expenses for this investigation.

A cheque was issued to Joyes by the Department dated 21st June, 1946 for \$33.81 in payment of the travelling expenses claimed under Exhibit C.

The evidence showed that following the accident Joyes had neither been dismissed nor had he resigned from the position. He just did not return to work.

Dr. Wilcox, London, was called on behalf of the suppliant. He stated that "epileptiform seizure" was a good word to apply to the attack as he had heard it described. In his opinion the attack could not have come from food poisoning and the attack served as a warning of epilepsy. He stated that there appeared to be confusion in the provisional diagnosis as shown on the case history sheet, (Exhibit 8) that is psychoneurosis. He further stated that there were four routine examinations which should have been made so as to exclude epilepsy first and that as these examinations had not been made the possibility of epilepsy had not been ruled out. Referring to the statements of the witnesses that after the accident Joyes was frothing at the mouth, he stated that this was characteristic of a post epileptic state.

While the case history sheet (Exhibit 8) states that Joyes saw Dr. Fisher, this was not so according to the

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evidence. Nor was it known where the provisional diagnosis of "psychoneurosis" came from.

Both Dr. Rogers and Dr. Turnbull spoke of there being no record of Joyes having been ill during his 5-6 years in the Army. I am not clear as to whether they based this information on the official records or whether it was something that Joyes told them. In any event it was quite clear from their evidence that they believed it to be so.

The suppliant must show 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. The Petition of Right claims damages against the Crown arising out of the injury to the suppliant resulting from the negligence of Chester Joyes, a servant of the Crown while acting within the scope of his duties or employment. The Petition of Right sets out the particulars of the negligence of the said Chester Joyes, in part, as follows:—

- (a) Driving said motor vehicle on that part of the street provided for pedestrians;
- (b) Allowing said motor car to go out of control;
- (c) Permitting said motor car to operate on a highway with no supervision of a driver and therefore, run amuck on the street.

It is, therefore, the negligence of Joyes on which the claim is based.

The negligence of the servant is not attributable nor imputed to the Crown because of the maxim "The King can do no wrong". But under Section 19 (c) of the Exchequer Court Act, chap., 28 of the 1938 Statutes, a liability is imposed against the Crown for the negligence of its servant while acting within the scope of his duties or employment. The liability under Section 19 (c) was defined by Rand, J., in *The King v. Anthony* (1); as:—

I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondet superior*, and not to impose duties on the Crown in favour of subjects: *The King v. Dubois*, (1935) S.C.R. 378 at 394 and 398; *Salmo Investments Ltd. v. The King*, (1940) S.C.R. 263, at 272 and 273. It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words

(1) (1946) S.C.R. 569 at 571-2.

"while acting" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

Was Joyes at the time of the accident a servant of the Crown acting within the scope of his duties or employment? The evidence establishes that he was a servant of the Crown on the 13th June, 1946.

The evidence that at the time of the accident he was acting within the scope of his duties or employment consists of Joyes' statement that after he reached London he got his lunch in a downtown area of London and after having dropped out to his home, he drove towards the office of the Department in order to pick up some "paper he required in connection with an investigation".

Williams' evidence was that Joyes had completed his investigation of Baynes on the 5th June, 1946, and had made his report on 7th June, 1946. The inference to be drawn from Williams' evidence was that there was no need of Joyce calling on Baynes again and that he had not done so. While that may well be true, the difficulty is that Williams did not give evidence as to his instructions to Joyes for the week in question. In addition the evidence showed that once he received his instructions, there was no supervision and that he was "on his own" that is, he could come and go as he saw fit. In addition if he should not have called on Baynes again either his travelling expense account was not checked in any way or it was in order for him to call again if he desired to do so. There is before me Joyes' statement and there is no positive evidence that refutes it. The latitude given the investigators leaves the respondent in a position where it is difficult to refute Joyes' statement.

I accept Joyes' statement and I hold that Joyes was at the time of the accident acting within the scope of his employment.

The next question is whether the injuries suffered by the suppliant resulted from the negligence of Joyes. I agree with the contention of counsel for the suppliant that on the facts that have been proven, the doctrine of *res ipsa loquitur* is applicable; certainly from the proved facts an inference of negligence of Joyes arises. The evidence called by the suppliant, however, shows con-

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clusively that immediately prior to the accident Joyes was driving at a very reasonable rate of speed 15 m.p.h., and the motor vehicle was under control. He suddenly became unconscious and fell down on the floor of the car and the car, left without any guidance, ran over the west sidewalk and injured the suppliant. Joyes was still unconscious when he was taken away in the ambulance.

The law applicable in those circumstances is laid down in *Slattery v. Haley* (1). The judgment of the Court of Appeal is summarized in the head note as follows:—

The use of the highway was lawful, and the only ground of liability was negligence—failure to discharge the duty of taking care. The sudden illness which overtook the defendant excused his failure to discharge that duty. The thing which caused the injury was something which he could not control.

To create liability for an act which is not wilful and intentional, but merely negligent, it must be shewn to have been the conscious act of the defendant's volition.

Middleton, J., at page 99 said:—

I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shewn to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being. Failing this the occurrence is "a mere accident", "a pure accident", or, as it is often, but not accurately, put "an inevitable accident."

This statement of the law was agreed with in the recent case of *Buckley and The Toronto Transportation Commission v. Smith Transport Limited* (2).

It is clear from the facts in this case that Joyes was incapable by reason of the seizure, of appreciating the duty to take care and unable to discharge it.

The inference of negligence arising from the proven facts has, therefore, been rebutted and the onus is then on the suppliant to show that the injuries resulted from the negligence of some servant of the respondent while acting within the scope of his employment. That negligence could only be that Joyes was driving with the knowledge of the possibility of an attack of unconsciousness. Or that some other servant of the Crown with the knowledge of such possibility of an attack, permitted Joyes to drive in the service of the respondent.

(1) (1922) 52 O.L.R. 95.

(2) (1946) O.R. 798 at 805.

While that negligence has not been pleaded, I am of the opinion that these questions should be dealt with:—

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*First as to Joyes.* There is no evidence of any attack prior to the 23rd March, 1946. When that attack took place he was instructed by Dr. Rogers to report to Westminster hospital. Joyes was not compelled to do so but he knew that he would not be allowed to drive his car again in the work of the Department until the medical officers of the Department advised the Chief Investigator that it was in order for him to do so. After all the examinations and tests and 16 days in hospital, he was discharged from hospital. It is perfectly clear that he would know the reason for these tests and for the hospitalization. Dr. Rogers got the report from Dr. Turnbull (Exhibit 9) and he advised Williams that Joyes could go back on the job, and Williams in turn advised Joyes who commenced his duties. Joyes knew that he was able to resume his work because the medical officers had advised Williams that it was in order for him to drive a car. Knowing the examinations and the hospitalization he had undergone and that the medical advice had been that he could drive again, it is clear that Joyes was not driving with the knowledge of a possibility of an attack of unconsciousness. While I so find, I point out that I do so only on the evidence that was given before me at this trial.

Did any servant of the respondent, having knowledge of the possibility of Joyes having an attack of unconsciousness, permit Joyes to drive in the service of the respondent?

Undoubtedly Williams had notice and warning of the attack of March 23rd, and he subsequently permitted Joyes to drive in the service of the respondent. The evidence is quite clear that before he did so he obtained the opinions of the medical advisers of the Department that it was all right for Joyes to drive. There is no doubt that he knew that Joyes was in hospital for 16 days and that he was tested for the express purpose of finding out whether another attack was a possibility. Williams did not permit Joyes to drive until he had received the advice of the medical officers. On those facts he took proper

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and reasonable precautions and in view of the medical opinions which he received, he did not have a knowledge of the possibility of Joyes having an attack of unconsciousness when he permitted Joyes to resume his work and drive a car in the service of the respondent.

Next as to Dr. Rogers and Dr. Turnbull. The contention of the suppliant is that knowing that the first attack in March might have been caused by epilepsy, the proper tests were not made to eliminate the knowledge of the possibility of a recurrence. So they had this knowledge at the time they advised Williams that it was in order for Joyes to resume driving.

In my opinion they were not negligent.

Dr. Wilcox may be quite correct in his opinion of what should have been done. But it is clear that these medical officers had a different opinion. And it is only a matter of opinion. The medical authorities at the second hospital (Victoria) did not make these tests. And it must be kept in mind that Dr. Wilcox formed his opinion after the second attack. He knew then that, after the attack, Joyes was foaming at the mouth, which Dr. Wilcox stated was characteristic of post-epileptic state. He also knew that Joyes told the Victoria hospital that he had never had a previous attack, and that this was untrue. But that was not known at the time of the first attack.

Even if they had been negligent and I find they were not, I am inclined to the opinion that a claim based on that negligence would still be rejected on the principle of remoteness both as to liability and damages.

The result is that, much as the injury to the suppliant is to be regretted, the suppliant is not entitled to the relief against this respondent, sought by the Petition of Right. The claim will, therefore, be dismissed but under the circumstances, without costs.

*Judgment accordingly.*

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BETWEEN :

IMPERIAL OIL LIMITED,.....APPELLANT,

AND

MINISTER OF NATIONAL REVENUE, RESPONDENT.

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 Oct. 30  
 1947  
 Oct. 31

*Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a)—Meaning of words “for the purpose of earning the income”—Payment of damages and costs for negligence deductible when liability really incidental to business.*

Appellant sought to deduct amount paid in settlement of damage claims arising out of a collision at sea between one of its oil tankers and another vessel, causing the latter vessel to sink, the collision resulting from negligence on the part of the appellant's seamen. The deduction was disallowed and the amount included in the appellant's assessment, from which it appealed. The appeal was allowed.

*Held:* That if a particular disbursement or expense is not within the express terms of the excluding provisions of section 6 (a), its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice.

2. That the words “disbursements or expenses . . . . laid out or expended for the purpose of earning the income” in section 6 (a) mean “disbursements or expenses . . . . laid out or expended as part of the process of earning the income”.
3. That it is never necessary to show a causal connection between an expenditure and a receipt.
4. That where income is earned from certain operations, all the expenses wholly, exclusively and necessarily incidental to such operations must be deducted as the total cost thereof in order that the amount of the profits or gains from such operations that are to be assessed may be computed. Such cost includes not only all the ordinary operations costs but also all moneys paid in discharge of the liabilities normally incurred in the operations. When the nature of the operations is such that the risk of negligence on the part of the taxpayer's servants in the course of their duties or employment is really incidental to such operations, with its consequential liability to pay damages and costs, then the amount of such damages and costs is properly included as one of the items of the total cost of such operations and may properly be described as a disbursement or expense that is wholly, exclusively and necessarily laid out as part of the process of earning the income from such operations.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*H. C. F. Mockridge* for appellant.

*T. N. Phelan K.C.* and *E. S. MacLatchy* for respondent.

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

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THE PRESIDENT now (October 31, 1947) delivered the following judgment:

The issue in this appeal under the Income War Tax Act, R.S.C. 1927, chap. 97, is whether in computing the amount of its profits or gains to be assessed for the year 1930 a deduction of \$526,995.35 should be allowed, this being the amount which the appellant was obliged to pay in settlement of damage claims arising out of a collision at sea between its motorship *Reginalite* and the steamship *Craster Hall* owned by the United States Steel Products Company. Although the collision occurred on June 19, 1927, the total amount of the appellant's liability was not ascertained until 1930 when it was charged by it to profit and loss in that year. On the notice of assessment for 1930, dated December 24, 1942, this deduction was disallowed and the amount, together with other items, was added to the taxable income declared by the appellant on its income tax return. An appeal from the assessment, confined to this item, was taken to the Minister who affirmed the assessment on the ground that the amount paid was not an expense wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of section 6 (a) of the Act. Being dissatisfied with the Minister's decision the appellant now brings its appeal from the assessment to this Court.

The appellant's business is described on its return as the manufacturing and marketing of petroleum products. In addition to producing and refining petroleum it is engaged in the transportation of petroleum and petroleum products. It has a fleet of 20 oil tankers plying on the Great Lakes and in coastal and ocean going operations. These are handled under the supervision of its marine department. This was first established in 1912 when only Great Lakes vessels were operated, but in 1921 it was expanded and ocean going tankers were acquired. The greater part of the crude oil refined in Canada by the appellant comes from South America and is carried from there to Canadian ports in oil tankers. In 1927, it had 9 ocean going oil

tankers in operation including the *Reginalite*. For the most part they carried its own oil but also, on occasion, oil for others on voyage charters. Its marine operations were an important and profitable part of its business.

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The facts relating to the collision and the payment of damages are not disputed. On June 19, 1927, the appellant's vessel, the motorship *Reginalite* had loaded a cargo of bunker fuel oil and commercial Diesel oil for the International Petroleum Company Limited and was leaving the harbour of Talara in Peru bound for a port in Chile. The steamship *Craster Hall* was lying at anchor at the customary anchorage for vessels outside the harbour proper and was apparently swinging at her anchor slightly out into the channel. The *Reginalite* was headed out to sea and as she approached the *Craster Hall* the men on her bridge observed that she inclined to swing towards the *Craster Hall*. An endeavour was made to correct this swing but it was not successful and she continued to swing. Then although the engines were reversed and the anchors dropped she collided with the *Craster Hall*, which later sank and became a total loss. The *Reginalite* suffered practically no damage. The owners of the *Craster Hall* took proceedings in the United States against both the appellant and the *Reginalite*. The damages originally claimed were estimated at \$2,000,000. Negotiations for settlement continued from 1927 to 1930 when the claims were finally settled for \$526,995.35, including fees, as shown by a statement of particular average (Exhibit 3) and a summary of disbursements (Exhibit 4). It is admitted that the collision was due to fault on the part of the *Reginalite* and that the amount paid was for damages resulting therefrom. The summary (Exhibit 4) shows some disbursements made prior to 1930. The appellant did not charge disbursements to profit and loss in the year in which they were made if the claim for damages was not settled in such year, but carried them forward in a suspense account until the claim was settled and then charged the full amount of the settlement to profit and loss in the year in which the settlement was made. The same practice was followed in the present case. While there may be some question as to the correctness of such

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practice as a matter of law, no argument was made on it and I proceed on the assumption that the amount claimed as a deduction, if deductible at all, was deductible in 1930, the year in which the total amount of the appellant's liability was ascertained.

Thorson P.

The issue turns upon whether the amount sought to be deducted is excluded from deduction by section 6 (a) of the Act, which provides:

6. In computing the amount of the profits or gains to be assessed a deduction shall not be allowed in respect of

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

The profits or gains to be assessed are the net profits or gains described in section 3 as being taxable income, subject to section 6 with which section 3 must be read. The principles for the computation of such profits or gains are not defined in the Act but are stated in judicial decisions. In *Gresham Life Assurance Society v. Styles* (1) Lord Halsbury L.C. said:

Profits and gains must be ascertained on ordinary principles of commercial trading,

The same view has often been expressed; for example, in *Usher's Wiltshire Brewery, Limited v. Bruce* (2) Earl Loreburn approved the statement that:

profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it,

and then pointed out that this was subject to the limitations prescribed by the Act, one of which was the rule in the English Act corresponding to section 6 (a).

The section is couched in negative terms. It is not primarily concerned with what disbursements or expenses may be deducted and does not define them, so that their deductibility is determinable only by inference. But it is concerned with and does define the disbursements or expenses whose deduction is not allowed. It is a specific instruction to the Minister that in his assessment operation he is not to allow the deduction of disbursements or expenses that are "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". The section directs that such disbursements or expenses are not to be deducted, even although they might be

(1) (1892) A.C. 309 at 316.

(2) (1915) A.C. 433 at 444.

deductible according to ordinary principles of commercial trading or, as it has been suggested "well accepted principles of business and accounting practice". The range of deductibility according to such principles may be wider than that which is inferentially permitted under the section. To that extent they must give way to the express terms of the section, which must, of course, prevail. The result is that the deductibility of disbursements or expenses is to be determined according to the ordinary principles of commercial trading or well accepted principles of business and accounting practice unless their deduction is prohibited by reason of their coming within the express terms of the excluding provisions of the section. These provisions were, no doubt, inserted in the interests of the revenue as a protecting safeguard against deductions which might otherwise be made but, while it is necessary to enforce the prohibitions of the section, it is not proper to go beyond its express requirements. The section ought not, in my opinion, to be read with a view to trying to bring a particular disbursement or expense within the scope of its excluding provisions. If it is not within the express terms of the exclusions its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice.

Counsel for the appellant argued that the transporting of petroleum and petroleum products was part of the appellant's business, that the income from its marine operations was part of the income earned by it, that the ordinary risks and hazards of that business must be accepted as part thereof including the possibilities of loss inherent in it, that the risk of collision at sea was an ordinary hazard of a shipping company and that negligence on the part of its seamen resulting in damage to another ship was a contingency that was to be expected, and that, while the amount of damage done in the present case was large, the accident was not extraordinary or unusual. His contention was that, under the circumstances, the amount which the appellant had to pay was a proper expense wholly and exclusively incurred in the course of and for the purpose of the marine operations portion of its business

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and the earning of income therefrom, and representing a liability inherent in such business which it was obliged to meet, that it was not a capital item but an operating one, that it was properly deductible as a matter of accounting practice and that it was not excluded from deduction by section 6 (a). I think that counsel's position was well taken, both on the facts and as a matter of law.

The case is of considerable importance in view of the fact that there are no Canadian decisions on the question whether the amount of damages paid by a taxpayer on account of the negligence of his servants, such as that sought to be deducted by the appellant, is a deductible item of expenditure under section 6 (a). Counsel had, therefore, to rely upon decisions in other jurisdictions.

The leading English authority is *Strong & Co., Limited v. Woodfield* (1). There the appellants were a brewery company who owned an inn and conducted it through a manager. A customer sleeping in the inn was injured by the falling of a chimney upon him, and the appellants had to pay £1490 in damages and costs because the fall of the chimney was due to the negligence of their servants, whose duty it was to see that the premises were in proper condition. The appellants sought to deduct this sum from the amount of their profits and gains assessable to income tax. The Commissioners thought that the deduction could not be allowed but stated a case for the opinion of the Court and Phillimore J. allowed it. His judgment was reversed by the Court of Appeal and an appeal from their decision was dismissed by the House of Lords. Section 100 of the Income Tax Act, 1842, (5 & 6 Vict. chap. 35), provided by Schedule D, First Case, Third Rule, as follows:

In estimating the Balance of Profits and Gains chargeable . . . , no Sum shall be set against or deducted from, or allowed to be set against or deducted from, such Profits or Gains . . . , on account of Loss not connected with or arising out of such Trade, Manufacture, Adventure or Concern . . .

and by Schedule D, First and Second Cases, First Rule, as follows:

In estimating the Balance of the Profits or Gains to be charged . . . , no Sum shall be set against or deducted from, or allowed to be set against or deducted from such Profits or Gains, for any Disbursements or

(1) (1905) 2 K.B. 350; (1906) A.C. 448.

Expenses whatever, not being Money wholly and exclusively laid out or expended for the Purposes of such Trade, Manufacture, Adventure or Concern . . .

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In the course of his speech in the House of Lords, Lord Loreburn L.C., with whose views the majority of the other Lords concurred, summarized the English law on the subject, at page 452, as follows:

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In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which the house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders. Accordingly I think that this appeal must be dismissed.

The reason for disallowing the deduction was "that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders". The decision turned on whether the loss was or was not really incidental to the business. If it had been it seems clear beyond doubt that the deduction would have been allowed. The case is, therefore, strong authority for the statement that if a trader has to pay damages for the negligence of his servants under such circumstances that the loss is really incidental to his trade then the amount so paid is deductible.

The same principle runs through the other cases cited. Two Australian cases were referred to. In *Todd v. Commissioners of Taxation* (1) a ferry company paid damages to passengers in respect of injuries received and claimed it as a loss incurred in the production of the company's income. Section 16 (1) (e) of the Income Tax (Management) Act,

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1912, of New South Wales required the Commissioners to deduct from the income of the taxpayer the following moneys and expenses, namely,

(e) Losses, outgoings, including commission, discount, travelling expenses, and expenses actually incurred in New South Wales by the taxpayer in the production of his income;

The Commissioners having disallowed the deduction, an appeal was taken and Murray D. C. J. allowed it. At page 7, he said:

The question is whether this is a loss incurred by the taxpayer in the production of his income. These words mean as I suggested just now, what is more fully expressed by the words "loss incurred by the taxpayer in the course of the production of his income."

The course of the production in this case is partly disembarking and embarking passengers. This was a loss that happened quite accidentally. There was misconduct on the part of some employee; but so far as the company is concerned, it was purely accidental; and it did occur as a loss which might reasonably be contemplated to happen at some time or other in the course of events which were a necessary incident to the production of the income; because part of the carrying of passengers, for which they pay, is their embarkation and disembarkation.

Therefore, I think that this is a loss which does come within the words of the section.

The other Australian case was *Herald and Weekly Times Limited v. Federal Commissioner of Taxation* (1), a decision of the High Court of Australia. There the appellant, the proprietor and publisher of an evening newspaper, claimed to deduct from its assessable income moneys paid by way of compensation, either before or after judgment, to persons claiming damages in respect of libels published in that paper, and amounts representing the costs of contesting the claims or of obtaining advice in regard thereto. There section 23 (1) (a) of the Income Tax Assessment Act, 1922-1929, of the Commonwealth of Australia, provided:

23. (1.) In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted—

(a) all losses and outgoings (not being in the nature of losses and outgoings of capital) including commission, discount, travelling expenses, interest and expenses actually incurred in gaining or producing the assessable income;

And section 25 (e) provided:

25. A deduction shall not, in any case, be made in respect of any of the following matters:—

(e) Money not wholly and exclusively laid out or expended for the production of assessable income;



The Commissioner disallowed the deduction and the Supreme Court of Victoria dismissed an appeal from his ruling (1), Mann J. being of the opinion that although the expenditure was an unavoidable consequence of the business of publishing the newspaper it was not in any sense a productive expenditure directly or indirectly, and that the sums paid were not "wholly and exclusively laid out or expended for the production of assessable income." The High Court of Australia reversed this judgment and allowed the deduction. At page 118, Gavan Duffy C.J. and Dixon J. said:

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None of the libels or supposed libels was published with any other object in view than the sale of the newspaper. The liability to damages was incurred, or the claim was encountered, because of the very act of publishing the newspaper. The thing which produced the assessable income was the thing which exposed the taxpayer to the liability or claim discharged by the expenditure. It is true that when the sums were paid the taxpayer was actuated in paying them, not by any desire to produce income, but, in the case of damages or compensation, by the necessity of satisfying a claim or liability to which it had become subject, and, in the case of law costs, by the desirability or urgency of defeating or diminishing such a claim. But this expenditure flows as a necessary or a natural consequence from the inclusion of the alleged defamatory matter in the newspaper and its publication.

Counsel also relied upon a number of South African decisions. There the relevant sections of the Income Tax Act, 1925, of the Union of South Africa, being Act No. 40 of 1925, provided that certain deductions from income for the purpose of determining taxable income should be made, as follows:

11. (2) The deductions allowed shall be—

(a) expenditures and losses actually incurred in the Union in the production of the income, provided such expenditure and losses are not of a capital nature.

And also that certain deductions should not be made, as follows:

13. No deduction shall, as regards income derived from any trade, be made in respect of any of the following matters:—

(b) any moneys not wholly or exclusively laid out or expended for the purposes of trade.

The first case referred to was *Income Tax Case No. 8 (2)*. There a tramway company in the course of its business found it necessary to pay compensation for injuries to persons and properties resulting from collisions, from

(1) (1932) V.L.R. 317. (2) (1923) 1 S.A. Tax Cases 57.

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accidents in connection with broken trolley wires and excavations made in the roadway, and from accidents due to passengers alighting while the trains were still in motion. The Company also incurred expenditure in obtaining legal advice in respect of such claims. The Commissioner disallowed a claim to deduct these expenses but his decision was reversed. Ingram P. held, on the facts, as follows:

It appeared from the evidence that in the carrying on of an undertaking of this character expenditure in compensation up to a certain amount is inevitable, and that this is so even where every precaution may be taken to guard against accident or the negligence of the servants of the company. It is a recurrent loss which has to be taken into consideration as a factor in the undertaking itself and having a direct bearing on the profit earning capacity.

and then said, at page 58:

In the case of *Lockie Bros. v. Commissioner for Inland Revenue* (1), Mason J., interpreted the words "losses and outgoings actually incurred in the production of the income" as meaning "expenditures incurred in the course of and by reason of the ordinary operations undertaken for the purpose of conducting the business". When applying this construction each case must, of course, depend on its own merits, and in certain instances the dividing line may not be easy to demarcate; but in this particular case these items, on the evidence placed before us, certainly seem to be in the nature of such expenditure. The occurrences they represent were not extraordinary or abnormal. They were incidental and pursuant to the course of the operations which produced the profits and formed a necessary risk undertaken to earn the profits. Such being the case they were losses incurred on income account \* \* \*. As regards the fees paid to attorneys in connection with claims arising out of such damages, such expenditure must be equally as inevitable as the actual damages and compensation to which it relates, and is also attributable to the ordinary operations of the company.

A similar view was expressed in *Income Tax Case No. 49* (2). There the appellant sold petrol lamps, each subject to a guarantee. One of the lamps so sold exploded and caused injuries to the purchaser for which the appellant had to pay damages and costs. His claim for the deduction of the amounts so paid was disallowed by the Commissioner but on appeal it was held that the expenditure was incurred in the course of the appellant's business and arose out of it and was, therefore, to be regarded as having been incurred in the production of income. So also in *Income Tax Case No. 233* (3). There the appellants carried on business in partnership as stevedores. In the course of such business they were unloading cargo from a vessel and while a portion

(1) (1922) T.P.D. 42.

(3) (1932) 6 S.A. Tax Cases 259.

(2) (1926) 2 S.A. Tax Cases 122

of the cargo was being transferred in a net attached to a crane an article fell out of the net and killed a passer-by. The heirs of the person killed claimed damages from the appellants on the grounds that the accident was due to the negligence of their servants. On the advice of counsel they settled the claim and sought to deduct the amount paid. It was held on an appeal from the Commissioner that damage or loss of this kind must be regarded as incidental to a business such as stevedoring and therefore as a legitimate expense in connection with the earning of the appellants' income as stevedores. Dr. Nathan P. expressed the view that the principle was that laid down by the Lord Chancellor in *Strong v. Woodfield* (*supra*), namely, that a loss can be deducted only if it is really incidental to the trade, and held that in the present case the loss was really incidental. His statement is an illuminating one. At page 260, he said:

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Now in this particular case we have come to the conclusion on the evidence, that damage or loss of this kind must be regarded as incidental to the business of stevedoring. It is true that there may be only isolated cases, just as it is possible that many cases of accident in the case of the railways are settled without litigation, but in this particular case we find that in the business of loading and unloading it is a very likely and indeed almost foreseeable consequence, if not an inevitable consequence, that packages or other articles may fall out of nets handled by stevedores and injure passers-by, just as in the case of a builder bricks or similar articles may fall from the buildings during the course of building operations and injure passers underneath. That being the case, if such an injury is incidental to the business of stevedoring, as we find it is, then without going into remote questions of liability such as whether the man in question was guilty of contributory negligence, we find, broadly speaking, that this was a legitimate expense in connection with the earning of the income of the appellants.

And the same principle is further illustrated by *Port Elizabeth Electric Tramway Company, Ltd. v. Commissioner for Inland Revenue* (1). There the appellant carried on business as a tramway company. The driver of one of its tramcars lost control of it while it was descending a steep gradient and it ran into a building with the result that the driver suffered injuries from which he subsequently died. The appellant had to pay compensation to his widow under the Workmen's Compensation Act and also incurred costs in the litigation. It sought to deduct the amounts so paid. The Commissioner disallowed the claim and his decision

(1) (1935) 8 S.A. Tax Cases 13.

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was affirmed by the Special Court but, on a case being stated to the Cape Provincial Division of the Supreme Court, the decision was in part reversed. Watermeyer A.J.P. said, at page 16:

Income is produced by the performance of a series of acts, and attendant upon them are expenses. Such expenses are deductible expenses, provided they are so closely linked to such acts as to be regarded as part of the cost of performing them.

And at page 17:

All expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it.

And then held that, since the employment of drivers was necessary in carrying on the business of the tramway company and such employment carried with it as a necessary consequence a potential liability to pay compensation if such drivers should be injured in the course of their employment, the payment made by the company to the widow should be regarded as part of the company's operation for the purpose of earning income and, therefore, deductible under the Act. Then, for reasons which I find hard to follow, he disallowed the deduction of the costs.

If the present case were being determined under the law in force in any of the jurisdictions referred to I have no doubt that the deduction sought by the appellant would be allowed. The issue of fact is whether the payment made was in respect of a liability for a happening that was really incidental to the business. In my view, there is no doubt that it was. The undisputed evidence is that the transportation of petroleum and petroleum products by sea was part of the marine operations of the appellant and part of the business from which it earned its income, that the risk of collision between vessels is a normal and ordinary hazard of marine operations generally, and that, while the amount of the appellant's liability in the present case was unusually large, there was nothing abnormal or unusual about the nature of the collision itself. Negligence on the part of the appellant's servants in the operation of its vessels, with its consequential liability to pay damages

for a collision resulting therefrom, was a normal and ordinary risk of the marine operations part of the appellant's business and really incidental to it.

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That being so, the question is whether the law under section 6 (a) of the Income War Tax Act is so fundamentally different from that of the other jurisdictions referred to as to exclude deductibility of the amount claimed. I have come to the conclusion that it is not. The kind of disbursement or expense that is deductible under the corresponding section in England was defined by Lord Davey in *Strong & Co., Limited v. Woodfield* (1) in terms frequently cited:

It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

The citation should start further back in order to explain what is meant by the last sentence for, obviously, a disbursement by itself cannot accomplish the purpose of earning profits. Lord Davey gave the necessary explanation when, in speaking of disbursements "for the purpose of the trade", he said:

These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements are such as are made for that purpose.

What is meant is that the disbursement must be made for the purpose of enabling a person to earn the profits in the trade. Lord Davey's statement was approved by the Lord President (Clyde) of the Scottish Court of Session in *Robert Addie & Sons' Collieries, Limited v. Commissioners of Inland Revenue* (2) where the following test was laid down:

What is "money wholly and exclusively laid out for the purpose of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question. Is it a part of the Company's working expenses: is it expenditure laid out as part of the process of profit earning?

This test was adopted by the Judicial Committee of the Privy Council in *Tata Hydro-Electric Agencies, Bombay v. Income Tax Commissioner, Bombay Presidency and Aden* (3) and applied to the construction of section 10 (2)

(1) (1906) A.C. 448 at 453.

(3) (1937) A.C. 685 at 696.

(2) (1924) S.C. 231 at 235.

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of the Indian Income-Tax Act which provided that the profits and gains of any business carried on by the assessee were to be computed after making allowance for

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

This wording is indistinguishable in principle from that of section 6 (a). The test in the *Addie* case (*supra*) was, therefore, just as applicable to the Canadian Act as it was to the Indian one and it was adopted as being so applicable by the Supreme Court of Canada in *Minister of National Revenue v. Dominion Natural Gas Co. Ltd.* (1). In that case the respondent company had incurred legal expenses in defending its right to supply gas in the City of Hamilton and sought to deduct such expenses from its income. The Supreme Court of Canada, reversing the judgment of this Court, held that it was not entitled to do so. All the judges were agreed that the expenditure did not meet the test laid down by Lord President Clyde in the *Addie* case (*supra*). Duff C. J., for himself and Davis J, held the legal expenses to be not deductible on two grounds; one, that they were not expenses incurred in the process of earning "the income", and the other, that the expenditure was a capital expenditure incurred "once and for all" for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". Crocket J. considered the test laid down in the *Addie* case (*supra*) and approved in the *Tata* case (*supra*) binding and held that the expenditure did not fall within it. Kerwin J., speaking for Hudson J. as well, also held that the test referred to was applicable and that the payment of the costs was not an expenditure laid out as part of the process of profit earning. His view was that it was a "payment on account of capital" made "with a view of preserving an asset or advantage for the enduring benefit of a trade". Apart from the decision as to the non-deductibility of the kind of item of expenditure considered in that case, with which we are not here concerned, I think it is clear that, by its adoption of the test in the *Addie* case (*supra*) as being applicable in the construction of section 6 (a), the Supreme Court of Canada decided that the words "for the purpose of earning the income" in section 6 (a) have substantially

the same meaning as the words "for the purposes of the trade" in the corresponding rule under the English Act. It is interesting to note that just as Lord President Clyde read the words "for the purposes of the trade" as meaning "as part of the process of profit earning", so Duff C.J. read the words "for the purpose of earning the income" as meaning "in the process of earning the income". With respect I suggest that his paraphrasing would have been more precise, and more in line with the statement in the *Addie* case (*supra*), if he had read them as meaning "as part of the process of earning the income". Moreover, that would have been more in accord with the judgments delivered by Crocket J. and Kerwin J. who adopted the test in the *Addie* case (*supra*) without any paraphrasing of it. Under the circumstances, I think it may fairly be said that the words "disbursements or expenses \* \* \* laid out or expended for the purpose of earning the income" in section 6 (a) mean "disbursements or expenses \* \* \* laid out or expended as part of the process of earning the income". Leave to appeal to the Judicial Committee of the Privy Council from the decision of the Supreme Court of Canada in the *Dominion Natural Gas Company* case (*supra*) was refused. But, a few years later the Judicial Committee was called upon to consider section 6 (a) and particularly the words "for the purpose of earning the income" in *Montreal Coke and Manufacturing Co. v. Minister of National Revenue* (1). In that case the appellant had redeemed certain bonds prior to their maturity and issued other bonds at reduced rates of interest, with a resulting increase in its net revenues, and sought to deduct the expenses of these financial operations from its income. The Judicial Committee, affirming the judgment of the Supreme Court of Canada, which in turn by a majority had affirmed the judgment of this Court, held that such expenses were not deductible. At page 133, Lord Macmillan said:

If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction.

And later, on the same page, gave the reasons for not allowing the deduction of the expenses of the financial

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operations, even although they resulted in an increase of income, as follows:

If the statute permitted the deduction of expenditure incurred for the purpose of increasing income the appellants might well have prevailed, but such a criterion would have opened a very wide door. It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining annual net profit or gain. The statutory criterion is a much narrower one. Expenditure, to be deductible, must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts. These operations involve outgoings as well as receipts, and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to those businesses that they look for their earnings. Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt the way in which they finance their business will, or may, reflect itself favourably or unfavourably in their annual accounts, but expenditures incurred in relation to the financing of their business as not, in their Lordships' opinion, expenditure incurred in the earning of their income within the statutory meaning.

The argument of counsel for the respondent against allowing the deduction claimed by the appellant was strongly and clearly put. It can be summarized briefly. His first contention was that the test of the deductibility of an expenditure is whether it was wholly, exclusively and necessarily laid out for the purpose of earning the income, that each expenditure has to be isolated and the question asked, what income did it wholly, exclusively and necessarily earn? And he answered his own question with regard to the expenditure under review by saying that it did not earn income either in 1927 when the collision occurred or in 1930 when the amount of the appellant's liability was finally ascertained and paid, and that since it did not earn any income it was not deductible. Counsel also took the position that there was a radical and fundamental difference between the wording of section 6 (a) and that of the corresponding section in the English Act, and that there was a larger measure of deduction under the English Act than under the Canadian one. In this connection he went so far as to urge that the decision of the Supreme Court of Canada in the *Dominion Natural Gas Company* case (*supra*) in applying the test in the



*Addie* case (*supra*) to section 6 (a) was wrong, that the statement of Duff C.J. in that case to the effect that the words "for the purpose of earning the income" in section 6 (a) meant "in the process of earning the income" was inconsistent with the language of the section and had been overruled by the Judicial Committee in the *Montreal Coke Company* case (*supra*) and that the definition given by him must be disregarded in the light of Lord Macmillan's statement that, to be deductible, an expenditure "must be directly related to the earning of income". From this premise counsel then argued that the expenditure was not primarily for the purpose of earning income but primarily for the purpose of settling a legal liability, that the liability was for the negligence of the appellant's servants which could not be related to the earning of its income, that the expenditure was not laid out for the purpose of earning profit at all but solely to satisfy a legal liability and thus keep the sheriff away from the appellant's door and that since this was the true purpose of the expenditure it could not be regarded as being directly related to the earning of the income. Then, in addition, counsel took a position similar to that taken by Collins M.R. in the Court of Appeal in *Strong & Co., Limited v. Woodfield* (*supra*) that the expenditure was not deductible because it was not laid out for the purpose of earning profits but was made out of profits after they were earned.

I am unable to accept any of the contentions thus put forward. In my judgment, counsel assigned a much narrower range of permissible deductibility under section 6 (a) than its language warrants. For example, while the section by implication prescribes that the expenditure should be made for the purpose of earning the income it is not a condition of its deductibility that it should actually earn any income. The view that an item of expenditure is not deductible unless it can be shown that it earned some income is quite erroneous. It is never necessary to show a causal connection between an expenditure and a receipt. An item of expenditure may properly be deductible even if it is not productive of any income at all and even if it results in a loss: *Commissioners of Inland Revenue v. The Falkirk Iron Co., Ltd.* (1). I

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(1) (1933) 17 T.C. 625.

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might say, in passing, that, in my opinion, there is no need of a specific provision in the Act permitting the deduction of losses sustained as part of the process of earning the income, such as is contained in some of the Acts in the other jurisdictions. Nor does the statement of Lord Macmillan in the *Montreal Coke Company* case (*supra*) that "expenditure, to be deductible, must be directly related to the earning of income" imply any causal connection between expenditure and income. It is a mistake to take a sentence out of a judgment and construe it as if it were a sentence in a statute. It is no such thing, and has no binding effect apart from its context. By itself, the sentence referred to is not a precise statement of what is intended, with the result that the inference of the suggested causal connection might possibly be drawn from it, but when it is read with its context there is no doubt as to its meaning. Lord Macmillan was not concerned at all with any causal connection between expenditure and income. He was dealing with the statutory criterion for the deductibility of expenditures set in section 6 (a) through the use of the words "for the purpose of *earning* the income" and drew a sharp distinction between two classes of expenditures, namely, those connected with the financial operations of the appellants and those connected with their business. If causal connection between expenditure and income were a condition of deductibility the former would be no less entitled to deduction than the latter for the appellants received income from their financial operations as well as from their business. But since it was only through their business that they *earned* income, Lord Macmillan concluded that under section 6 (a) only the latter class of expenditures could be deducted; those connected with the appellants' financial operations, not being related to the business from which alone the appellants *earned* income, were held to be excluded from deduction. Lord Macmillan meant no more than this. He did not, in my view, lay down any new test of what is meant by the words "for the purpose of earning the income" different from that used in the *Dominion Natural Gas Company* case (*supra*) through the application of the test in the *Addie* case (*supra*). It

would, indeed, be strange if he had done so, for he had delivered the judgment of the Judicial Committee in the *Tata* case (*supra*) in which he applied the test in the *Addie* case (*supra*) to the section of the Indian Income Tax Act corresponding to section 6 (a) and indistinguishable in principle from it. There is, therefore, no substance in the argument that the *Montreal Coke Company* case (*supra*) overruled the *Dominion Natural Gas Company* case (*supra*). I can find nothing in Lord Macmillan's judgment that is inconsistent with it. Its authority that the test in the *Addie* case (*supra*) is applicable in the construction of section 6 (a) remains unimpaired. The result is that the law as to the deductibility of an expenditure such as that sought to be deducted by the appellant is the same under section 6 (a) as under the corresponding sections of the English, Australian and South African Acts.

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Even apart from the decisions it is a reasonable interpretation of section 6 (a) that it should be so, even although there are some differences of language. It is obvious that the words "for the purpose of earning the income" in section 6 (a), as applied to disbursements or expenses, cannot be construed literally, for the laying out or expending of a disbursement or expense cannot by itself ever accomplish the purpose of earning the income. As Watermeyer A. J. P. pointed out in *Port Elizabeth Electric Tramway Company v. Commissioner for Inland Revenue* (*supra*), income is earned not by the making of expenditures but by various operations and transactions in which the taxpayer has been engaged or the services he has rendered, in the course of which expenditures may have been made. These are the disbursements or expenses referred to in section 6 (a), namely, those that are laid out or expended as part of the operations, transactions or services by which the taxpayer earned the income. They are properly, therefore, described as disbursements or expenses laid out or expended as part of the process of earning the income. This means that the deductibility of a particular item of expenditure is not to be determined by isolating it. It must be looked at in the light of its connection with the operation, transaction or service in respect of which it was

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made so that it may be decided whether it was made not only in the course of earning the income but as part of the process of doing so.

It is no answer to say that an item of expenditure is not deductible on the ground that it was not made primarily to earn the income but primarily to satisfy a legal liability. This was the kind of argument that was expressly rejected by the High Court of Australia in the *Herald & Weekly Times, Ltd.* case (*supra*), and it should be rejected here. In a sense, all disbursements are made primarily to satisfy legal liabilities. The fact that a legal liability was being satisfied has, by itself, no bearing on the matter. It is necessary to look behind the payment and enquire whether the liability which made it necessary—and it makes no difference whether such liability was contractual or delictual—was incurred as part of the operation by which the taxpayer earned his income. Where income is earned from certain operations, as it was by the appellant from its marine operations, all the expenses wholly, exclusively and necessarily incidental to such operations must be deducted as the total cost thereof in order that the amount of the profits or gains from such operations that are to be assessed may be computed. Such cost includes not only all the ordinary operations costs but also all moneys paid in discharge of the liabilities normally incurred in the operations. When the nature of the operations is such that the risk of negligence on the part of the taxpayer's servants in the course of their duties or employment is really incidental to such operations, as was the fact in the present case, with its consequential liability to pay damages and costs, then the amount of such damages and costs is properly included as one of the items of the total cost of such operations. It may, therefore, properly be described as a disbursement or expense that is wholly, exclusively and necessarily laid out as part of the process of earning the income from such operations. It cannot be said, under the circumstances, that the payment of such damages and costs is made out of profits. It is no such thing. Being an item of the total cost of the operations

it must be deducted, along with the other items of cost, before the amount of the profits from the operations can be ascertained.

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For the reasons given I have no hesitation in finding that the amount sought to be deducted by the appellant would properly be deductible according to the ordinary principles of commercial trading and well established principles of business and accounting practice as an item in the total cost of its marine operations, and that it falls outside the excluding provisions of section 6 (a). The amount was, therefore, improperly added to the assessment and it should be amended accordingly. The appeal must, therefore, be allowed with costs.

*Judgment accordingly.*

BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada, .....

PLAINTIFF,

AND

ACADIA SUGAR REFINING COMPANY LIMITED and THE EASTERN TRUST COMPANY, Trustee for certain Bondholders, .....

DEFENDANTS.

1944  
June 19-22  
1947  
Oct. 10

*Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 2 (g), 9, 23, 26, 27, 31—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 19 (b), 47—Annual value of leasehold interest—Onus of proof of value—Dangerous use of expropriated premises—Claim for damage to property injuriously affected by construction of any public work may include damage through use of expropriated property—Applicability of English decisions under Lands Clauses Consolidation Act, 1945—Measure of damages is depreciation in value of lands injuriously affected.*

The plaintiff expropriated a two year leasehold interest in part of the defendant's sugar refining plant at Woodside on the eastern side of Halifax Harbour for defence purposes and stored explosives on the premises with the result that the defendant could not continue its ordinary insurance and took out a policy of War Risk Insurance. The action was taken to have the amount of the defendant's compensation determined by the Court.

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*Held:* That the annual value of property expropriated for a term of years is the net value of the rent at which it might reasonably be let, having regard to the value of the property to the owner, or, in other words, the net value of the rent which a tenant, in a position similar to that of the landlord, "would have been willing to pay for the land sooner than fail to obtain it". Such a defence contemplates that all the factors of value that the owner of the premises and the "hypothetical" tenant would be likely to consider will be taken into account.

2. That the onus of proof of value in expropriation cases is on the former owner of the property whose value it is sought to establish.
3. That where part of the owner's land has been expropriated his right to compensation for the injurious affecting of his remaining land is not limited to the loss or damage resulting from the construction of the public work on the land taken but extends to that resulting from the use of such land.
4. That if land is expropriated under the Expropriation Act and its actual or anticipated use is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land.
5. That the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected.

INFORMATION by the Crown to have the amount of the defendant's compensation for the value of the expropriated leasehold interest and the amount of the damage to its remaining property injuriously affected by the storage of explosives determined by the Court.

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

*F. D. Smith K.C.* and *W. E. Mosley* for plaintiff.

*Hon. S. A. Haydon K.C.* and *G. S. Cowan* for defendant.

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

THE PRESIDENT now (Oct. 10, 1947) delivered the following judgment:

The information exhibited herein shows that a leasehold interest in the lands described in paragraph 2 was expropriated by His Majesty for defence purposes for the

defence of Canada under the Expropriation Act, R.S.C. 1927, chap. 64. There were two expropriations, each being effected by the deposit of a plan and description of the lands in the office of the registrar of deeds for the County of Halifax in Nova Scotia pursuant to section 9 of the Act. The first deposit was made on October 5, 1942, and the second on December 16, 1942. The second plan and description included lands which had been omitted from the first. The lands belong to the first named defendant, hereinafter called the defendant, subject to a mortgage in favour of the second named defendant, as set out in paragraph 3. The leasehold interest that was expropriated was for the term of two years commencing on October 1, 1942, and ending on September 30, 1944. The parties have not been able to agree as to the amount of compensation money to which the defendant is entitled and come to this Court for adjudication thereon. The mortgage is not in arrears so that the defendant, the mortgagor, is entitled to the full amount of any award made.

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Prior to the commencement of the action, namely, by letter dated March 6, 1943, the plaintiff offered the defendant the sum of \$20,000 per annum as compensation for the expropriated leasehold interest and repeated this tender in the Information.

The defendant's claim for compensation is twofold. For the expropriated leasehold interest it claims at least \$60,000 per annum. And it also claims an additional sum of \$19,326.25 as the amount of premiums paid for War Risk Insurance.

The first issue is whether the defendant is entitled to more than \$20,000 per year for the expropriated leasehold interest.

The expropriated leasehold interest was in respect of only a part of the defendant's large sugar refining plant located at Woodside on the eastern side of Halifax Harbour to the south of Dartmouth and between it and the Eastern Passage. The part that was affected included the raw sugar shed, the wharf in front of it, a number of smaller buildings, such as a bag plant, an oil storage shed, a fire pump house, a tool shed, a stevedores' rest room, a vacant lot and a roadway to the Eastern Passage Road.

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The standard by which the amount of compensation money to which the former owner of expropriated property is entitled is to be measured is fixed by section 47 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads:

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The general principles applicable to the determination of the value of expropriated property were discussed by this Court in *The King v. W. D. Morris Realty Limited* (1), in which some of the leading authorities were reviewed. In *In re Lucas and Chesterfield Gas and Water Board* (2) Fletcher Moulton L.J. said:

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.

This case was approved by the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company v. Lacoste* (3), where Lord Dunedin, at page 576, laid down two propositions relating to the value of the expropriated land:

(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.

The principle that the owner of expropriated property is entitled to have its fair market value based upon the most advantageous use to which the property is adapted or could reasonably be applied is, in my view, correctly stated in Nichols on Eminent Domain, 2nd Edition, para. 219, page 665, as follows:

In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value

(1) (1943) Ex. C.R. 140.

(3) (1914) A.C. 569.

(2) (1909) 1 K.B. 16 at 30.



for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

This is, of course, subject to the rule that it is only the present value as at the date of the expropriation of the future advantages of the property that is to be considered: *The King v. Elgin Realty Company Limited* (1).

Ordinarily, of course, the most advantageous use to which the property in question could be put would be as part of the defendant's sugar refining plant, but we are concerned with the situation as it existed at the date of the expropriation. The fact is that the defendant, under the force of war circumstances, decided to cease its sugar refining operations at Woodside. On June 5, 1942, the last sugar was taken out of the raw sugar shed and when the last refined product was disposed of the plant was shut down except for certain machine shop work which the defendant continued to do, employing only a small number of its former workmen. The likelihood of resumed sugar refining operations, for an indefinite period of time at any rate, was very slight. Apart from the machine shop operations, the defendant's plant lay idle.

The defendant then sought out storage business. Indeed this was regarded by it as the best use to which the raw sugar shed could be put, having regard to the wharf and railway facilities that were available. The likelihood that better use could be made of the plant at Woodside for storage purposes than could be made of that of the defendant's subsidiary at Saint John was one of the reasons for closing the former rather than the latter. A certain amount of distressed cargo storage was available. The evidence shows that one cargo was taken from the vessel *S.S. Hoyanger* and stored from June 24, 1942, to August 2, 1942, a total of 44 days, and then taken away by another vessel *S.S. Port of Halifax* which loaded from August 2, 1942, to August 7, 1942. It was also shown that a number of enquiries were made of the defendant as to whether it could take cargoes into storage. It is clear that a considerable amount of such storage business would have been available to the defendant if there had been no expropriation. There was a good deal of congestion in

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(1) (1943) S.C.R. 49.

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the harbour at Halifax during the year 1943, although at the end of the year it had eased off considerably. The defendant sought to make much out of the net revenues it might have received from distressed cargo and storage business. But, in my opinion, its estimate of such revenues, in addition to being speculative, was not supported by the evidence as a whole and was greatly exaggerated. Moreover, some of it would have been attributable to the use of equipment, such as tractors, which was not expropriated. Furthermore, it is always well to keep in mind that a distinction must be drawn between income from expropriated property and income from the business conducted upon it. Nichols on Eminent Domain, 2nd Edition, page 1173, puts the rule as follows:

If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill, and good management with which the business is conducted, that it furnishes no test of the value of the property. It is accordingly well settled that the evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive; but evidence of the character and amount of the business conducted upon the land may be admitted as tending to show one of the uses for which the land is available.

This rule has been uniformly adopted and applied in this Court. It would not be possible, in my opinion, to fix the amount of the possible returns from this source of business that would properly be attributable to the premises. In any event, the defendant's estimate cannot be accepted as an independent test of value. All that can be said is that the capacity of the premises for enabling the owner to earn income from this source of business is an important factor that must be taken into account in any estimate of the value of the expropriated leasehold, for this would certainly affect the amount of the rent which a prospective tenant would be willing to pay for it.

The defendant also sought to show the value of the property in respect of which the leasehold interest was taken by evidence of the replacement cost of the buildings thereon less an allowance for depreciation. While such evidence is not an independent test of value it does not follow that it should be disregarded. It is a factor to be taken into account. In the statement of defence the

defendant alleged that at the date of expropriation the lands in question had an appraised replacement value of approximately \$350,000. The evidence given by witnesses for the defendant showed a replacement value, as at the date of the expropriation, for the wharf, the various buildings, and stone and common fill and cribwork, amounting to \$320,864. This was reduced by admitted allowances for depreciation to a total of \$297,153.38. But, there was added to this latter amount a further sum of \$50,707, according to the written argument for the defendant, to cover the so-called value of the roadway, the vacant lot, the land on which the buildings were built, as to which I do not recall any evidence as to its value except an unsupported estimate in Exhibit R, and certain equipment in the nature of fixtures. This would make a total of \$347,860.38. In my view this appraisal of value even on the basis of replacement cost less depreciation is very considerably too high. The figures for the reconstruction cost of the wharf given by Mr. Morgan for the defendant, namely, \$97,598 are very much higher than those given by Mr. Walkey for the plaintiffs, namely, \$36,000. It is true that Mr. Morgan reduced his figure by \$10,504.70 covering part of the dock not included in the expropriation and that his figure included the cost of the crib under the raw sugar shed and the north crib, amounting to \$19,694.91. The deduction of these two amounts left a total of \$67,398.69 against which Mr. Walkey's figure is to be compared. Mr. Morgan expressed the opinion that the wharf at the date of expropriation was probably worth 65% of its original value. But Mr. Walkey who examined the wharf on July 25, 1942, in view of its condition, refused to place a value on it because it was unsafe for any type of traffic and from an engineer's point of view had no value. Mr. Bennett, who inspected the wharf on September 18, 1942, expressed the opinion that its usefulness was greatly reduced and that it might be considered a hazard, that there were sections that were liable to collapse, that it was not in a safe condition for the mooring of large vessels or for the handling of heavy freight, and that, although he would not say it had no value, the structure was in such a condition that a new structure was warranted rather

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than repairs to the old. It would not be unreasonable, in my opinion, under the circumstances, to reduce the defendant's estimate of the value of the wharf by at least \$25,000. Then I have come to the conclusion that the defendant's figures in respect of the raw sugar shed are very much too high. The building was 28 years old and far from being in good condition. In addition to the defects admitted by the defendant, there were several large cracks in the walls, through which the water leaked and by which the steel was exposed for corrosion. Moreover, the construction was not in accordance with modern methods. Mr. O'Leary allowed only a deduction of \$17,300 to repair the defects mentioned by him and took the view that there should be no allowance for depreciation beyond this. On the other hand, Mr. Mackenzie, with whose evidence I was much impressed, thought that, having regard to the nature and condition of the building and its construction there should be a depreciation allowance of 1½% per annum. This would be a reduction of \$84,000 from replacement cost rather than \$17,300. I have no hesitation in accepting his opinion on this matter. Then it should be noted that a number of the buildings, such as the bag plant, the fire pump house, and the tool shed, although valuable in connection with the ordinary purpose of the sugar refining plant, had little, if any, value in connection with the use of the raw sugar shed for storage purposes. Also, some of the buildings continued to be used by the defendant for its own purposes. There are also some other items in respect of which a deduction from the figures given for the defendant ought to be made. For example, the defendant's estimate of the replacement cost of the cribwork includes an item of \$5,207 already included in the replacement cost of the wharf. And the estimate of \$74,650 for the replacement cost of the stone and common fill is based upon assumptions rather than known facts as to quantities and also upon a higher cost of material than that given by the plaintiff's witnesses. Then no real evidence was given as to the value of the land. On the whole of the evidence and without reviewing it in detail, I am of the view that if the value of the property in question on the basis used by the defendant

had to be estimated, it ought not to be placed higher than \$250,000. This amount would, I think, be the highest estimate of value that could reasonably be made of the property in respect of which the leasehold interest was taken.

The number of Canadian cases dealing with the expropriation of leasehold interests and the principles applicable to the ascertainment of their annual value is very small. In *The King v. Brown et al* (1) the Crown expropriated a leasehold interest in certain lands in Regina for the purpose of temporary military barracks for a term of 18 months and offered to pay \$1,200 per month, plus taxes, insurance, light and heat and then before the term had expired filed an abandonment under what was then section 23 (new section 24) of the Expropriation Act. The owners claimed \$2,500 per month net to them. Apart from the question of damages in respect of the abandonment, with which we are not here concerned, the matter before the Court was the value of the leasehold interest. Audette J., on the basis of a valuation of the property at \$240,000 held that the amount offered by the Crown of \$1,200 net per month was most reasonable yielding to the owners a net income of 6%. The case does not lay down any principle of general application and is helpful only in that the Court, under the facts of the case, considered that a return of a net 6% on the value of the premises was a reasonable rental. In a previous case, *The King v. McCarthy* (2), the question was dealt with indirectly. There the Government for the purposes of its shipyard at Sorel had expropriated certain property but had abandoned part of it and the Court was required to pass on the compensation for the use and occupation of such part for the period of its expropriation. The situation was to such extent comparable to what it would have been if a leasehold interest for the term of the period of use and occupation had been expropriated and Audette J. dealt with it on such basis. At page 432, he said:

In renting property the owner should get more than 5% upon the value of the land, since out of such revenue he has to find a fair revenue over and above taxes, etc., and other known incidentals. It is often contended that the landlord should at least receive from the tenant 10% on the value of the property leased to allow him a fair return free of

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(1) (1920) 20 Ex. C.R. 30.

(2) (1919) 18 Ex. C.R. 410.

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taxes, etc. I am of the opinion that if 8% were allowed on \$7,158.15 from the 18th December, 1915, to the 24th January, 1919, namely, three years and 38 days, making the sum of \$1,777.57, that it would represent a fair and just compensation to the defendant for the loss of use and occupation of their premises during the period in question.

This is tantamount to a finding of the value of a leasehold interest in the property for the term of the period in question. Again, this case is helpful only by way of illustration.

In my view, valuable assistance is obtainable from a number of English decisions dealing with the annual value of land. For certain purposes such annual value has been defined by statute. For example, by section 1 of the Parochial Assessments Act, 1836, 6 & 7 Wm. IV, chap. 96, the net annual value of land was defined as "the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent". While this definition is contained in an Act for the establishment of a "uniform mode of rating for the relief of the poor in England and Wales", which had not previously existed, it can, I think, be accepted as a fair statement of how the annual value of premises ought, in the absence of a specific statutory provision otherwise, to be ascertained for other purposes. This view is expressed in Stroud's Judicial Dictionary, 2nd Edition, page 86, the author adding the opinion that to such definition it may now be added that "in estimating such lettable value regard is to be had to the worth of the premises as used for the purposes for which, or in the manner in which, they are, for the time being, occupied". The cases support the author's view as to the diversity of the uses of the definition and its general prima facie applicability; for example, *In re Elwes* (1); *Dobbs v. Grand Junction Waterworks Company* (2); *Walker v. Brisley* (3). I think it may properly be adopted in the present case.

The annual value of property expropriated for a term of years must, as in the case of other expropriated property,

(1) (1858) 28 L.J. Ex. 46.

(3) (1900) 2 Q.B. 735.

(2) (1883) 53 L.J.Q.B. 50.

be its value to the owner. In *Pastoral Finance Association, Limited v. The Minister* (1) Lord Moulton described value to the owner as the amount which a prudent man, in a position similar to that of the owner, "would have been willing to give for the land sooner than fail to obtain it." A similar statement is applicable to the annual value of a leasehold interest.

I think it may, therefore, be stated generally that the annual value of property expropriated for a term of years is the net value of the rent at which it might reasonably be let, having regard to the value of the property to the owner, or, in other words, the net value of the rent which a tenant, in a position similar to that of the landlord, "would have been willing to pay for the land sooner than fail to obtain it". Such a definition contemplates that all the factors of value that the owner of the premises and the "hypothetical" tenant would be likely to consider will be taken into account. It is obvious, of course, that the definition, although seemingly a simple one, is not easy of application in the case of premises that are not ordinarily the subject of letting but an effort must, nevertheless, be made to apply it.

Where there is a known and proved rate of interest return on the value of property as the measure of the net yearly rental that might reasonably be expected from it the annual value of such property can be ascertained as a matter of arithmetic calculation once the value of the property is determined. This was done by O'Connor J. in *The King v. City of Toronto* (2), but it is obvious that this method is not an exclusive test of the annual value of a specific property and cannot be used at all where there is no governing rate of interest return in the locality where the expropriated property is situate. On the evidence it is not applicable in the Halifax area. No evidence of any current rates of rental returns on any kind of property was given on behalf of the defendant. Mr. De Wolf, for the plaintiff, knew of no building in Halifax or Dartmouth of the type of the defendant's property. He did, however, refer to the Market Building, which was rented at 27 cents per square foot giving a gross return of 6% per annum. Mr. Clark, also for the plaintiff, stated that there

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(1) (1914) A.C. 1083 at 1088.

(2) (1946) Ex. C.R. 424.

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were no comparable buildings in Halifax or Dartmouth outside those of the National Harbour Board and that there were no accepted rates of rentals in Halifax for buildings of this type. He mentioned that the prevailing rate relating to residences was a net rental return of 6%.

It is well established that the onus of proof of value in expropriation cases is on the former owner of the property whose value it is sought to establish: *The King v. Kendall* (1). In my opinion, the defendant has not discharged this onus in the present case. No evidence has been adduced that would warrant my holding that the annual value of the expropriated leasehold interest was in excess of \$20,000 per year. That amount, on a valuation of the property at \$250,000 would produce a gross return of 8%. The defendant is on a fixed assessment of a very low amount and the other costs to it are not large, so that the net return would, I think, substantially exceed 6%. Under all the circumstances, I have come to the conclusion that, in the absence of proof that a larger amount than \$20,000 per year could reasonably have been expected by the defendant, such amount could fairly be regarded as an adequate gross amount from which a fair annual value of the expropriated leasehold interest could be obtained. I find, therefore, that the amount of compensation money to which the defendant was entitled for the expropriated leasehold interest was the sum of \$20,000 per year as offered by the plaintiff. This amount has been paid in full to the defendant as follows, namely, \$20,000 on January 7, 1944, and \$20,000 on March 23, 1944, one payment some months after the expiry of the first year and the other several months before the expiry of the second one. Under the circumstances, I see no occasion for the payment of interest on these amounts.

The claim for the amount of premiums paid for War Risk Insurance may now be considered. The facts are not disputed. For a short period of time, commencing December 1, 1942, and ending January 21, 1943, certain explosives, consisting of depth charges, practice shells and star shells were stored in the raw sugar shed. The evidence shows that such storage was dangerous. Then an insurance inspector, after an inspection of the defendant's



premises on December 16, 1942, reported to his principals the change of occupancy and the storage of explosives, with the result that the companies which had carried the insurance on the defendant's buildings at Woodside refused to continue to do so except subject to an endorsement on the policies excluding liability for loss or damage by explosion or fire caused thereby. Rather than continue the insurance subject to such limitations of risk the defendant decided to take out a policy of War Risk Insurance. Under the scheme of war risk insurance in force under the War Risk Insurance Act, 1942, Statutes of Canada, 1942, chap. 35, and the regulations made thereunder it was not possible for any one to insure only one of his several properties. If he wished to insure under the scheme he had to take out a policy covering all his properties, and if the insurer was a company it had to bring in not only all its own properties but also those of its subsidiaries. The defendant, therefore, had to insure not only its plant at Woodside but also that of its subsidiary at Saint John. The insurance was for one year commencing December 24, 1942. The total premium for all the properties covered was \$19,326.35, of which \$8,477.06 was attributable to the defendant's property at Woodside. The defendant claims the whole premium alleging that its payment was the result of the extra hazard created through the storage of the explosives.

The claim is not specifically pleaded as a claim for damage to the defendant's unexpropriated property on the ground that it has been injuriously affected by the use made of the property in respect of which the leasehold interest was taken, but that is what it must be if there is any claim at all. In my view, no amendment to the pleadings is necessary for all the necessary facts upon which to base such a claim, if it exists as a matter of law, are sufficiently alleged. But if an amendment is thought necessary or desirable to plead the claim specifically leave to make such amendment is granted.

It is well settled that the owner of land expropriated for public purposes is not entitled to compensation either for the value of the land taken or for damage on the ground that his land has been injuriously affected unless he can

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show a statutory right to such compensation. In Canada such right is conferred by paragraphs (a) and (b) of Section 19 of the Exchequer Court Act, which read as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

- (a) Every claim against the Crown for property taken for any public purpose;
- (b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

These paragraphs date back in the same form to paragraphs (a) and (b) of section 16 of an "Act to amend The Supreme and Exchequer Courts Act", Statutes of Canada, 1887, chap. 16. The words "injuriously affected by the construction of any public work" are also found in a number of sections of the Expropriation Act, for example, sections 23, 26, 27 and 31. It would seem at first sight that the defendant could have no claim for compensation under section 19 (b) of the Exchequer Court Act since it could not be shown that any of its property had been injuriously affected by the construction of any public work but at most only that the injurious affecting was the result of use of the premises in which the Crown had taken a leasehold interest. But the weight of judicial opinion expressed in English decisions under the Lands Clauses Consolidation Act, 1945, and their applicability in the construction of the Canadian legislation leads to a wider view of the defendant's rights. The steps by which the Courts have reached the construction to be placed on section 19 (b) of the Exchequer Court Act may well be stated.

It has long been held in England that a distinction must be drawn between the rights of two classes of owners to claim compensation for damage to their land on the ground that it has been injuriously affected by the execution of works or the exercise of other statutory powers on other land. The owner has no right to compensation for such damage if it results only from the authorized legal user of land taken from some one other than himself; but the case is otherwise where the injurious affecting of his land is the result of the exercise of the statutory powers on land that was taken from himself and formerly held with his remaining land. In such case the owner is entitled to

compensation for the injurious affecting of his remaining land even when it results from the lawful user of the land taken from him. The first decision making this distinction was *In re The Stockport, Timperley and Altringham Railway Company* (1), now regarded as the basic case on the subject. There the owner of land taken by a railway company for the construction of a railway thereon also owned adjoining land on which his cotton mill was located. The jury called upon to fix the amount of the owner's compensation found a certain sum for the value of the land taken, another for the damage by severance and a third for the damage resulting from the following fact, namely, that the railway company proposed to build its railway so close to the cotton mill that by reason of the proximity of the railway line and the danger of fire from the trains using it the building was less suitable for a cotton mill, was not insurable except at an increased premium and was rendered of less saleable value. It was held that the jury had rightly included such damage in their verdict. Crompton J. made it clear that it was only because part of the owner's land was taken that his right to compensation for the injurious affecting of his remaining land was not limited to the loss or damage resulting from the construction of the public work on the land taken but extended to that resulting from the use of such land. If no part of his land had been taken he would have had no right to compensation against the railway company for an authorized use of lands taken from some one else, even although the value of his property had been depreciated thereby. This is settled law. In *Hammersmith and City Railway Company v. Brand* (2) it was held by the House of Lords that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company v. Hunter* (3) it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on

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(1) (1864) 33 L.J.Q.B. 251.

(3) (1870) 2 Sc. App. 78.

(2) (1869) 4 E. &amp; I. App. 171.

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the land over which the railway ran. These two cases were distinguished from the *Stockport Case* (*supra*) and the latter decision approved without specific mention of it by the House of Lords in *Duke of Buccleuch v. Metropolitan Board of Works* (1), where Lord Chelmsford said:

In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damages caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains.

In that case the plaintiff was the owner of a long leasehold interest in premises extending to the Thames River. The defendant under statutory powers took part of the land nearest the river and constructed the Thames Embankment which separated the remainder of the premises from the river and the embankment became used as a public highway with resulting loss of privacy to the plaintiff and increasing dust and noise from the use of the highway, causing a depreciation in value of the plaintiff's remaining premises. It was held that the arbitrator could properly take these factors into account in making his award of compensation for the land and the injurious affecting of the remainder. The question came before the House of Lords again in *Cowper Essex v. Local Board for Acton* (2). There part of the appellant's lands were taken for the purpose of sewage works. Evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. It was held that since part of the appellant's land had been taken for the sewage works, compensation might be awarded for damage to be sustained by reason of the injurious affecting of his other lands, not only by the construction of the sewage works but also by their use. At page 161, Lord Halsbury L.C. said:

Two propositions have now been conclusively established. One is, that land taken under the powers of the Lands Clauses Act, and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not

(1) (1872) 5 E. & I. App. 418 at 458.

(2) (1889) 14 A.C. 153.

less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

Lord Halsbury explained this seeming contradiction by saying, at page 162:

The injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor from whom such portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

The decision of Crompton J. in the *Stockport Case* (*supra*) was expressly approved.

The same view was taken by this Court in an early case, *The Straits of Canseau Marine Railway Company v. The Queen* (1). There part of the plaintiff's land was expropriated for a railway. The tracks were in such close proximity to the plaintiff's works that such works as well as ships in the course of repair upon them would be in danger of fire from locomotives when the railway was put in operation. This would result in the plaintiff's having to pay higher rates of insurance and ships being deterred from using the plaintiff's marine railway. It was held that the Court ought to take these factors into account in fixing the plaintiff's compensation. At page 122, Burbidge J. said:

Where lands are taken and others held therewith are injuriously affected the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the damage occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user.

Then came the decision of the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham v. The King* (2) which followed the *Cowper Essex Case* (*supra*) and again approved the *Stockport Case* (*supra*). The facts were that prior to the expropriation the appellants owned lands situated both on the east and west sides of a public road and a railway. On the west side they had a school; on the east side directly opposite the school their land consisted of two small promontories of land on the margin of a public harbour on which they had a

(1) (1889) 2 Ex. C.R. 113.

(2) (1922) 2 A.C. 315.

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bathing house and wharf, both of which were used in connection with the school. The two promontories on the east side were expropriated and on land wholly east of the railway but including the promontories the Crown made a large railway shunting yard. In addition to the claim for compensation for the value of the land taken a claim was made for damages on the ground that the appellant's lands on the west side of the road and railway were injuriously affected by the use of the property east of the railway as a shunting yard. In this Court Cassels J. rejected this claim. As I read his judgment (1), he took the view on the facts that since the shunting yard consisted almost entirely of lands other than those taken from the suppliants, only the small promontories being included therein, the injury to their other lands was caused by the operation of works on lands other than lands taken from them, and, following the English decisions, by which he thought he was bound, dismissed the claim. The Supreme Court of Canada, subject to an additional allowance due to an error of computation adopted his reasoning and conclusion and dismissed the appeal from his judgment (November 2, 1920, unreported). The Judicial Committee reversed the decision of the Canadian Courts. The judgment, delivered by Lord Parmoor, is important for a number of reasons. In the first place, it decided that English decisions under the Lands Clauses Act are applicable in the construction of the sections of the Exchequer Court Act and the Expropriation Act now under review. This opinion had already been expressed in a number of Canadian cases. But for this fact it might well have been held—and I must say that I would have been inclined to such view—that the English decisions to which reference has been made are not applicable to the sections of the Canadian Acts under review on the ground that sections 49, 63 and 68 of The Lands Clauses Consolidation Act on which they were based give wider rights of compensation to the owner of land part of which has been taken under statutory powers than the Canadian legislation does, and that under the Canadian Acts such an owner's claim for damage to his property on the ground that it has been injuriously affected by the construction of a public work

(1) (1919) 18 Ex. C.R. 385.

is limited to damage done by the construction of a public work on the land taken and does not extend to or include damage resulting from the use of such land. Such arguments were made before the Judicial Committee and rejected. It must, therefore, be assumed that the words "construction of a public work" in section 19 of the Exchequer Court Act and in the Expropriation Act ought not to be given the construction which at first sight they seem to warrant but should receive the same interpretation as has been accorded in the English decisions to the corresponding sections of the English Acts ever since the decision in the *Stockport Case* (*supra*), the authority of which is now unquestioned. In differing from the Courts below Lord Parmoor went further than the previous English decisions had gone by extending the principle underlying them to a case such as the one before the Committee and holding that the owner of land was entitled to compensation where the injurious affecting of his land was caused not by the use of land taken from him, but by the use of land taken partly from him and partly from others, even where the lands taken from him are only a small part of the total lands put to adverse use. The right to compensation exists even in such a case, the difficulty involved being only a matter of assessment of the resulting damage. At page 326, he put the position as follows:

No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shown to arise from the apprehended legal use of the lands taken from them.

In the English cases in which the owner was held entitled to damages for the injurious affecting of his lands by the use of other lands taken from him there had been the construction of a public work on such other land, but in the present case there was no construction of any public work. The leasehold interest in part of the defendant's land was expropriated for a public purpose for the defence of Canada. But it seems to me that this should make no difference. The English cases granted compensation for loss from the use of the lands taken regardless of whether there was any loss from the

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construction of a public work thereon or not. The result of applying the English decisions to the corresponding Canadian legislation is to read the words "construction of a public work" as meaning "construction or use of a public work". If that is the meaning, as the decisions indicate, then the fact that there was no construction of a public work on the property taken from the defendant does not itself take this case out of the operation of the Canadian legislation, for it is clear, I think, that the expropriated property can be regarded as a "public work" within the wide meaning thereof in section 2 (g) of the Expropriation Act.

The *Sisters of Charity case* (*supra*) is also of importance in laying down that the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected. Nor is it necessary to show that such depreciation is the result of actual adverse use of the other land taken from the owner; it is sufficient to show that it is due only to an anticipated use.

Under the circumstances, I think it may be stated that in Canada if land is expropriated under the Expropriation Act and its actual or anticipated use is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land.

That being so, the defendant has a right to compensation by reason of the dangerous storage of explosives in the raw sugar shed. It was only in respect of a part of the defendant's plant at Woodside that a leasehold interest was expropriated but the storage of the explosives rendered the whole plant less insurable than it had previously been. To that extent the defendant's remaining property, being the whole property at Woodside subject only to the expropriated leasehold interest in part of it was injuriously affected by the use made of such part. It is clear, I think, that the reduced insurability of the property would result in some depreciation in its value.



I find great difficulty in assessing the amount of the defendant's entitlement under this head. Counsel for the plaintiff contended that any prudent and reasonable owner of property, such as that of the defendant, would take out War Risk Insurance in any event, that it was not shown that the defendant would not have done so, and that the defendant was not entitled to any part of the premium. For the defendant, on the other hand, it was contended that but for the storage of the explosives, it would not have been necessary to take out War Risk Insurance at all and that the defendant should be repaid its whole premium for the insurance both of its plant at Woodside and also of the plant of its subsidiary at Saint John, since it could not get the one without paying for both. I am unable to see how this claim can really be justified. The amount of the premium is determined by the extent of the properties of the defendant and its subsidiaries at Woodside and elsewhere but the amount of the defendant's claim for damages is limited to the extent of the depreciation in value of its premises at Woodside, and it cannot be said that such depreciation in value is the same as or is to be measured by the amount of the premium paid. It might be very much less. If the whole premium were repaid to the defendant that would put it and its subsidiary in a better position than they would have been in if there had been no storage of explosives in the raw sugar shed. Moreover, that portion of the premium attributable to the insurance of property other than the defendant's property at Woodside is too remote to be regarded as damage resulting from the storage of the explosives. In my view, it is not possible to fix the amount of the defendant's entitlement precisely, but I think that if it were awarded the portion of the insurance premium attributable to its property at Woodside this would be the most that it could reasonably claim, and I fix the amount of the defendant's entitlement accordingly at \$8,477.06, although not without some doubt as to whether I should allow even this amount. Since the compensation to which the defendant is entitled is thus in excess of the plaintiff's tender, the said amount will carry interest at the rate of 5 per centum per annum from December 24, 1942, to the date hereof.

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There will, therefore, be judgment that the leasehold interest in the premises described in paragraph 2 was vested in His Majesty for the period specified in the Information, that the amount of compensation to which the defendant is entitled is the sum of \$8,477.06 together with interest thereon as stated, and that the defendant is entitled to its costs.

*Judgment accordingly.*

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BETWEEN :

GENERAL MOTORS CORPORATION	APPLICANT
AND	
NORMAN WILLIAM BELLOWS....	RESPONDENT
AND	
NORMAN WILLIAM BELLOWS....	APPLICANT
AND	
GENERAL MOTORS CORPORATION	RESPONDENT

*Trade Marks—"Frigidaire"—"Frozenaire"—The Unfair Competition Act, 1932, secs. 2 (k), (1) 26 (1) (f), and 52—Word marks not likely to cause confusion—Delay in instituting proceedings to expunge not cause for dismissal of motion when no proof that respondent has been put under any unfair disadvantage.*

*Held:* That the words "Frigidaire" and "Frozenaire" used in connection with refrigerators and like wares do not so clearly resemble each other as to be likely to cause confusion nor do they so closely suggest the idea conveyed by each other that confusion is likely to arise.

2. That in the absence of evidence that the delay or neglect of applicant in instituting proceedings to expunge has put the respondent under any unfair disadvantage such delay is not sufficient cause for dismissal of applicant's motion.

MOTION by applicant for an order expunging respondent's trade mark from Register of Trade Marks.

The motion was argued before the Hon. Mr. Justice Cameron at Ottawa.

*Christopher Robinson* for Applicant-Respondent.

*Dr. Harold G. Fox K.C.* and *Gordon Henderson* for Respondent-Applicant.

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

CAMERON J. now (August 30, 1947) delivered the following judgment.

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By notice of Motion dated December, 1946, General Motors Corporation asks for an order under section 52 of the Unfair Competition Act, 1932, expunging from the Register of Trade Marks the registration of the trade mark "FROZENAIRE", registered on April 23, 1940, under No. N.S. 68-17883 by the respondent Norman William Bellows, and recorded on the 18th day of October, 1943, for use on electric refrigerators and refrigeration. This application will hereinafter be referred to as the original motion.

By notice of Motion filed March 10, 1947, Norman William Bellows asks for a similar order expunging the registration of the trade mark "FRIGIDAIRE" the property of General Motors Corporation, registered on the 24th of January, 1933. This application will hereinafter be referred to as the second motion.

By order dated May 15, 1947, all proceedings in the two motions were consolidated.

I shall first consider the original motion. In brief, it is alleged that the trade mark "FRIGIDAIRE" was registered prior to the trade mark "FROZENAIRE", and that the words so nearly resemble each other, or so clearly convey the same idea, that confusion is likely to arise, as they are used in connection with similar wares; and that therefore the word "FROZENAIRE" was not properly registrable under section 26 (1) (f) of the Unfair Competition Act, 1932, which is as follows:

(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.

"Similar" is defined in section 2 (k) of the Act as follows:

(k) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises 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, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

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There is no question that the two words are used in connection with similar wares as defined in section 2 (1) of the Act. The word "FROZENAIRE" is registered for use on electric refrigerators and refrigeration. The word "FRIGIDAIRE" is registered for use in connection with the sale of refrigeration apparatus, namely refrigerators, including electric refrigerators, electrical refrigerating machinery, ice-making machinery, refrigerating cabinets, air-conditioning systems, apparatus and devices for cooling foods by refrigeration of all kinds, part of the above goods and accessories thereto.

It is also fully established that the trade mark "FRIGIDAIRE" was in use and registered long before the word "FROZENAIRE" was adopted by the Respondent. "FRIGIDAIRE" was registered as a trade mark in the United States Patent Office on November 23, 1920, and has been continuously used in the business of the Frigidaire Corporation since September 21, 1918. Under date of September 18, 1929, Frigidaire Corporation applied for its registration in Canada as a special trade mark and the application was granted on January 24, 1933. On November 30, 1936, Frigidaire Corporation assigned all its interest in the trade mark "FRIGIDAIRE", registered in Canada as aforesaid, to General Motors Corporation, together with the goodwill of the business carried on in Canada in association with the wares for which it had been so registered.

The original motion of General Motors Corporation is supported by the affidavit of Lewis Clyde Shannon, Manager of the Canadian and Export Department of the Frigidaire Division, General Motors Corporation. This affidavit shows that subsequent to 1942, owing to war regulations and scarcity of materials, the manufacture and sale of apparatus to which the mark "FRIGIDAIRE" would otherwise have been applied had been greatly restricted. It establishes that between the years 1926 and 1942 the dollar value of sales of wares bearing the mark "FRIGIDAIRE" in Canada alone exceeded thirty-five million dollars, and that more than seven hundred and twenty thousand dollars was expended in Canada alone by the applicant and its predecessors in title on the advertising of the said wares in publications; that during the same

period the sales in the United States of similar wares bearing the same mark were many times as great as in Canada and a substantial part of a total expenditure of forty million dollars for like advertising of similar wares under the same mark in the United States was paid to the periodicals having a substantial circulation in Canada; that about seventy-five per cent of this thirty-five million dollars worth of wares sold in Canada, as above described, represents sales of refrigerators for use in homes, small shops and the like, distributed through retail dealers of whom there were in 1940 about 550 in Canada; and about seventy-five per cent of the advertising expenditures was addressed to members of the public to encourage them to purchase refrigerators bearing the mark "FRIGIDAIRE" in preference to competing units.

This evidence is quite uncontradicted.

There seems no question also that both have been used contemporaneously in the same area, that is, throughout Canada.

The respondent, by his affidavit, shows that since 1931 he has carried on at St. Catharines, Ontario, the business of manufacturing and selling refrigerators and refrigerating apparatus, both of a domestic and a commercial nature. Until 1937, the business was carried on under the name of Norman W. Bellows and Company. From the year 1937, until the present, he has carried on the wholesale part of his business under the name of "Frozenaire Cooler Company", retaining the name of Norman W. Bellows and Company for the retail part of his business. The name "Frozenaire Cooler" was adopted for use in 1937 and at the same time he adopted for use as a trade mark the word "FROZENAIRE" as a symbol to distinguish his wares. Since 1937, he has continuously used the said trade mark "FROZENAIRE" as a symbol to distinguish his goods and has also used the name "Frozenaire Cooler Company" as aforesaid. All the refrigerators and refrigeration apparatus sold by him since 1937 have borne on them a plate or transfer with the name "FROZENAIRE" and all letterheads, bills, invoices and other commercial documents used in the conduct of the wholesale business have used the words "Frozenaire Cooler Company". On April 2, 1940, he applied for registration of the trade mark

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“FROZENAIRE” and stated therein that he had adopted and continuously used the said word since June 2, 1939. The application, as I have mentioned above, was granted as of April 23, 1940.

On this motion, therefore, there remains only the one question for determination, that is whether the two marks, “FRIGIDAIRE” and “FROZENAIRE” so resemble each other, or so clearly suggest the idea conveyed by each other, that their contemporaneous use in the same area would be likely to cause dealers in and/or users of the wares, in respect of which the marks have been registered, to infer that the same person assumed responsibility for their character and quality.

I am of the opinion that the onus here is upon the applicant, General Motors Corporation. See *Battle Pharmaceuticals v. The British Drug Houses, Limited* (1); and *Proctor & Gamble Co. of Canada Ltd. v. LeHave Creamery Co. Ltd.* (2). The respondent has used the word “FROZENAIRE” in substantially the manner complained of for more than five years immediately before the commencement of these proceedings, and therefore the presumption established by section 10 (c) of the Unfair Competition Act, 1932, does not arise. The evidence indicates that the respondent first used the mark “FROZENAIRE” on June 2, 1939, and has used it continuously since that time. Proceedings were commenced on December 19, 1946.

In cases such as this it must be kept in mind that the question must be determined as a matter of first impression and that decisions on disputes as to other trade marks are of no assistance except insofar as some principle is enunciated. See *Battle Pharmaceuticals v. The British Drug Houses, Limited supra*. The President of this Court laid down the proper approach to problems of this type in the same case in this Court (3), when he stated:

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

(1) (1945) S.C.R. 50 at 52.

(3) (1944) Ex. C.R. 239 at 248.

(2) (1943) S.C.R. 433 at 438.

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 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.

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Reference may also be made to *Aristoc, Ltd. v. Rysta, Ltd.* (1) where, at page 86, Viscount Maugham stated:

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of s. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

There is little in the evidence to assist me in reaching a conclusion on this point. The only evidence for the applicant is that of Mr. Shannon, previously referred to. In paragraph 6 of his affidavit of December 9, 1946, he says:

That in my personal opinion there is no doubt whatever that the use of the word "FROZENAIRE" for refrigerators and refrigerating apparatus would inevitably lead to confusion between the goods so marked and those bearing the mark "FRIGIDAIRE".

For the respondent, the only evidence is that contained in his affidavit of January 14, 1947, in which, in paragraph 8 he states:

With respect to paragraph 6 of the said affidavit I deny that the use of the word "FROZENAIRE" for refrigerators and refrigerating apparatus would lead to confusion between the goods so marked and those bearing the mark "FRIGIDAIRE", but on the contrary state that in my personal opinion there is no possibility of confusion between the words "FROZENAIRE" and "FRIGIDAIRE". In my opinion there is not sufficient resemblance between the two words as would deceive purchasers into buying the goods marked with the word "FROZENAIRE" when they intended to buy goods marked with the word "FRIGIDAIRE".

(1) (1945) A.C. 68.

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Neither of these statements is helpful. It is well settled that in cases such as this a witness may not state his opinion as to the effect the use of a mark would have or be likely to have on the mind of someone else, because that is the very point to be determined; but that he may testify as to the effect the use of the mark would have on his own mind. See *Battle Pharmaceuticals v. The British Drug Houses, Limited* (1), and Kerly on Trade Marks, 6th Ed., 293. Both Mr. Shannon and Mr. Bellows have long experience in the trade and neither of them, personally, is likely to be deceived by any similarity between the marks. Their special knowledge of the trade and the fact that the former is an official of the applicant, and the latter is the respondent, prevents me from attaching any weight to such evidence in solving the problem. I must, therefore, act upon my view of the matter, guided by the principles above mentioned and with the admission that no confusion has in fact arisen.

“FRIGIDAIRE” is a combination of two well known English words in common use—“frigid” and “air”. The addition of the letter “e” to the word “air” is, I think, of no importance. The meaning of the word “frigid” as here used is, I think, “cold”. “Frozenaire” is also a combination of two well known English words in common use—“frozen” meaning cooled—and “air”. To fall within the definition of “similar” as related to trade marks, they must so resemble each other, or so clearly suggest the idea conveyed by each other, as to be likely to cause confusion. I do not think that they so clearly resemble each other as to be likely to cause confusion. “Air” is common to both but “frigid” and “frozen” are quite distinct and different and bear little if any resemblance to each other whether written or spoken. In my view the difference is substantial.

In considering whether marks are similar, consideration ought to be given to the nature of the words themselves, and a distinction drawn between a fancy or invented word and an ordinary word in everyday use. In the case of a purely invented word, the scope of protection is very much wider than that of an ordinary word. Reference may be made to *Imperial Tobacco Co. of Great Britain and Ireland Ltd. v. De Pasquali & Co.* (2). In that case

(1) (1945) S.C.R. 53.

(2) (1918) 35 R.P.C. 185.



the Plaintiff was the owner of two marks, "Regimental Cigarettes" and "Regimental", and brought an action for infringement and passing off against the defendant who was using the mark "Pasquali's The Regiment". In giving judgment, dismissing the action for infringement and passing off, Astbury J. stated, at p. 195:

It is true that "The Regiment" as a descriptive reference to goods differs little from "Regimental," but it is not the same, and in judging whether one word mark infringes another by mere colourable difference it is of first importance to have regard to the nature of the word said to have been infringed. A distinctive invented or fancy word has a much wider scope for colourable imitation than a word primarily descriptive, especially if the latter be one in common English use, and just as it is the policy of the present Trade Mark law in this country, except in the rare cases falling within Section 9 (5) of the Act of 1905, to prevent applicants for registration from monopolising ordinary English words which other people may, or reasonably might, desire to use to convey a meaning reasonably flowing therefrom, so I think the Courts should be careful to prevent any undue extension in this direction, by holding that an ordinary and common word is an infringement by way of colourable imitation of another word equally common and ordinary, which has been allowed in the past to find its way upon the Register; and this is especially so when the user complained of on the part of the Defendant is not, as in my judgment it has not been proved to be in this case, calculated to pass off his goods as and for those of the Plaintiff.

I have also been referred to *Office Cleaning Services, Ltd., v. Westminster Window and General Cleaners, Ltd.* (1). The plaintiff carried on business as "Office Cleaning Services" and the defendant, after using the name of "Westminster Office Cleaning", changed it to "Office Cleaning Association". Giving judgment in the House of Lords, Lord Simonds said, at p. 42:

In the present case there are certain considerations to which I think it worthwhile to call particular attention.

Foremost I put the fact that the Appellants chose to adopt as part of their title the words "Office Cleaning" which are English words in common use, apt and more apt than any other words to describe the service that they render. This is a trade name, not a trade mark, case, but I would remind your Lordships of the close analogy between the two classes of case found by *Farwell, J., in Aerators Limited v. Tollitt* ((1902) 2 Chancery 319) and by *Parker, J. in the Vacuum Cleaner case (ubi supra)*. So it is that, just as in the case of a trade mark the use of descriptive words is jealously safeguarded, so in the case of trade names the Courts will not readily assume that the use by a trader as part of his trade name of descriptive words already used by another trader as part of his trade name is likely to cause confusion and will easily accept small differences as adequate to avoid it. It is otherwise where a fancy word has been chosen as part of the name. Then it is that fancy word which is discriminatory and upon which the attention is fixed, and if

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another trader takes that word as part of his trade name with only a slight variation or addition, he may well be said to invite confusion. For why else did he adopt it?

Where, as here, there is no proper evidence of confusion, actual or probable, before the Court, the test and the manner in which the test should be made are laid down by Lord Russell of Killowen in *Coca-Cola Company v. Pepsi-Cola Company* (1) where, at pages 660-1 he states:

In these circumstances the question for determination must be answered by the Court, unaided by outside evidence, after a comparison of the defendant's mark as used with the plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

In matters of this sort consideration should also be given to the nature of the wares and the circumstances under which the articles are sold and the class of purchasers. Here the wares are doubtless of considerable value and ordinary users or purchasers would, I think, give careful consideration to the matter before making a purchase involving such an outlay. It is not a matter where the purchase would be made hastily or without consideration as in the case of an article of little value or importance. As to dealers in the wares, I would think it beyond question that each would have a sufficient knowledge of his business and the trade that no confusion could possibly arise in their minds.

Testing the matter in the manner above laid down, and taking into consideration the circumstances and conditions disclosed by the evidence and for the reasons stated, I am of the opinion that the words "FRIGIDAIRE" and "FROZENAIRE" do not so clearly resemble each other as to be likely to cause confusion.

Nor can I find that the words so closely suggest the idea conveyed by each other that confusion is likely to arise. It is true, I think, that each suggests the idea of "cool air" or "cooled air". But the applicant is not entitled to a monopoly of all words which suggest the idea of "cooled air" or "cold air". He must establish that the word complained of conveys not only the same idea but also that it is likely to cause dealers in and/or users of the wares

to infer that the same persons assumed responsibility for their character or quality. And I think that the difference between the words "FRIGIDAIRE" and "FROZEN-AIRE", as pointed out above, and for the reasons hereinbefore stated, is sufficient to prevent any likelihood of such confusion arising.

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I am supported in this view of the matter by the fact that the respondent has been using the word "FROZEN-AIRE" for at least eight years and possibly longer and that no confusion of any sort whatever has arisen during that time. The applicant, of course, need not prove that confusion has arisen but merely that confusion is likely to occur. But the fact that such confusion has not occurred over a period of many years is a circumstance to be taken into consideration and is of some importance in determining whether confusion is likely to occur. Reference may be made to the judgment of Davis J. in *Coca-Cola Company v. Pepsi-Cola Company* (1) where, at page 30, he stated:

Where a defendant's trade is of some standing, the absence of any instance of actual confusion may be considered as some evidence that interference is unnecessary.

There has also been some delay on the part of the applicant in taking proceedings to expunge the word "FROZEN-AIRE", and almost three years elapsed between the time when, through its solicitors, the applicant demanded that the respondent discontinue the use of the word "FROZEN-AIRE" and these proceedings were begun. There is no evidence before me as to the volume of the respondent's business or whether it has increased or decreased since 1943; nor is there any evidence that the delay or neglect of the applicant to institute proceedings has put the respondent under any unfair disadvantage. And my conclusion on this point is, that in the absence of such evidence, I would not be justified in holding that the applicant's delay in instituting proceedings was fatal to its case. See *Addley Bourne v. Swan and Edgar, Ltd.* (2) at pp. 114-115.

For the reasons which I have stated, the applicant's motion is dismissed. The respondent is entitled to the costs of the original motion after taxation.

(1) (1940) S.C.R. 17.

(2) (1903) 20 R.P.C. 105.

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In the second motion, it was agreed by counsel for both parties that, in the event of the original motion being dismissed, the second motion would stand adjourned *sine die*, without judgment being rendered, but that in the event of the applicant in the original motion entering an appeal from the judgment in that motion, an application could be made to deliver judgment in the second motion, and I so direct. The same direction will go in regard to the other motion of the applicant, General Motors Corporation, dated June 12, 1947.

*Judgment accordingly.*

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BETWEEN:

LADY VIRGINIA KEMP,..... APPELLANT;

AND

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

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 (a), 3 (g) 4 (j), 49—Payments to beneficiary under will out of income exempt from income tax in hands of trustees does not change its income tax exempt character—Meaning of word “derived”—Court has no jurisdiction to relieve from interest or penalties.*

The appellant was entitled to certain payments under the will of her deceased husband. Some of these payments were made out of accumulated revenue which at the time of its receipt by the trustees consisted of interest on bonds exempt from income tax. The amounts so paid were included in the assessments under appeal. Appeal allowed.

*Held:* That the whole accumulated revenue consisted of income received by the trustees as interest on income tax exempt bonds and was exempt from income tax under section 4 (j) of the Act. It lost none of that character on being lawfully transferred by the trustees to the appellant in partial discharge of the obligation to her under paragraph 4 of the will.

2. That the word “derived” in section 4 (j) must not be read as meaning “received in the first instance”. The word cannot be limited to income from income tax exempt bonds immediately or directly received by the owners thereof as interest thereon, but must include income that has its source in such bonds even although there may be intervening channels through which it flows from such source to its final destination. It is wide enough to include the payments received by the appellant under paragraph 4 of the will to the extent

that they came out of the accumulated revenue made up of balances of interest on income tax exempt bonds received by the trustees. To such extent they are income derived from income tax exempt bonds within the meaning of section 4 (j) of the Act and not liable to taxation.

3. That the terms of section 49, as it stood at the time of the appellant's liability, are mandatory and leave no discretion as to relief from interest or penalties with the Court.

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Appeal under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*G. W. Mason K.C.* and *D. M. Fleming K.C.* for suppliant.

*R. Forsyth K.C.* and *E. S. MacLatchy* for respondent.

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

THE PRESIDENT now (September 12, 1947) delivered the following judgment:

These appeals from the income tax assessments for the years 1938, 1939, 1940 and 1941 depend on whether certain sums received by the appellant in such years constituted income not liable to taxation as being derived from income tax exempt bonds within the meaning of section 4(j) of the Income War Tax Act, R.S.C. 1927, chap. 97, which provides:

4. The following incomes shall not be liable to taxation hereunder:—

- (j) The income derived from any bonds or other securities of the Dominion of Canada issued exempt from any income tax imposed in pursuance of any legislation enacted by the Parliament of Canada.

The facts are not in dispute. The appellant is the widow of Sir Albert Edward Kemp who died on August 12, 1929. By his last will and testament he appointed her together with Arthur B. Coleville and National Trust Company Limited as executors and trustees, and made substantial provision for her in a number of ways. Paragraph 3 provided in part as follows:

3. I GIVE AND DEVISE to my said Trustees my residence and lands in the City of Toronto, known as "Castle Frank", including houses, out-houses and other buildings thereon, and all the appurtenances used and enjoyed therewith (all of which are to be understood as being included in the term "Castle Frank") upon the following trusts:—

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- (a) During the lifetime of my wife, Virginia, so long as she shall remain my widow, and so long as she desires to make use of the same as her residence, to keep up Castle Frank in a suitable condition for that purpose; and all costs and charges for the payment of taxes, insurance for the repairs, renewals and other like expenditures for the proper structural upkeep of the said houses and buildings shall be borne by my estate and be paid by my Trustees.
- (b) To allow my said wife during her lifetime, and so long as she shall remain my widow, to occupy Castle Frank as her home and residence, free of rent.
- (d) While my said wife shall occupy Castle Frank as her home and residence, my Trustees shall also bear the expense of the maintenance and management thereof; and to cover such cost, my Trustees shall pay to my wife the Sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250) each month in advance so long as she continues to reside in Castle Frank and to use it as her home.

and paragraph 4 further provided:

4. I DIRECT that the above provisions in favour of my wife shall be a first charge upon my estate, and shall be provided for and paid by my Trustees in priority to any other legacies payable under my said Will, and I further direct that any Succession Duties, and all income taxes which may be payable in respect of the above provisions for my wife shall be paid out of my estate by my Trustees.

Then under paragraph 16 the appellant is to receive one-sixteenth of the residuary estate outright and also the following income, namely, from one-sixteenth of the residuary estate during her life and also from one-eighth of the residuary estate as long as she remains the testator's widow. The appellant also had income from sources other than the will.

Under paragraph 4 of the will the amounts payable to the appellant under paragraph 3 were made a first charge on the estate with the result that there could be no payment of legacies and no distribution of any of the estate to other beneficiaries unless the appellant consented thereto. Not wishing to delay the payment of legacies or hold up the distribution to other beneficiaries the appellant agreed, although she was not obliged to do so, that the Trustees should set up trust funds out of the assets of the estate to provide for the payment of the obligations of the estate to her under the various paragraphs of the will. Three such funds were set up in the books of the Trustees, namely, Trust No. 1 for the payment of the income from one-sixteenth of the residuary estate, Trust No. 2 for the pay-

ment of the income from one-eighth of the residuary estate and Trust No. 3 for the payments under paragraphs 3 and 4. After these funds were set up a substantial distribution of the estate became possible. The funds were not evidenced by any documents but were merely set up in the books of the Trustees. The fact is that the appellant allowed the distribution of a part of the estate and was willing to have her charge upon the estate confined to what was left. The trust funds were not in separate bank accounts; the funds of the estate were in the one bank account, the various funds being kept separate only on the books of the Trustees.

We are concerned only with the trust fund known as Trust No. 3 which was set up early in 1930. At that time it amounted to \$743,700, consisting of \$738,200 in Dominion of Canada 5½ per cent bonds due December 1, 1937, and \$5,500 in cash. With this cash other bonds of the same issue were bought on November 30, 1930. All these bonds were exempt from income tax within the meaning of section 4(j) of the Act. The annual income from them as received by the Trustees was credited as revenue of Trust No. 3 and drawn upon to make the payments to the appellant under paragraphs 3 and 4 of the will, and any balance not required for such payments was retained as revenue of the fund and accumulated from year to year. The amounts thus received during the years from 1930 to 1941, both inclusive, and their disposition including the accumulation of the balances above referred to are set out in a statement, Exhibit 2, filed by counsel for the appellant.

This fund, Trust No. 3, may be dealt with in two periods, the first being from its beginning until the end of 1937. In the first column of Exhibit 2 there is shown the gross income of the fund for each year during the period, consisting of the receipts by the Trustees of interest on the income tax exempt bonds that had been allocated to the fund. Then columns 2, 3 and 4 show the dispositions of such income, column 2 the annual amount of \$27,000 paid to the appellant under paragraph 3 of the will, column 3 the amount paid to her under paragraph 4, and column 4 the amount remaining after the payments under paragraphs

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3 and 4 of the will had been made. This last amount was retained in the revenue account of the fund and allowed to accumulate. Up to the end of 1937 the gross income from the fund had been more than sufficient to provide the payments under paragraphs 3 and 4 of the will, and the balances retained and accumulated from year to year totalled \$93,520.55. Out of such accumulated revenue \$27,000 was reinvested in September, 1934, and a further \$8,727.96 in February, 1935. There is no controversy in respect of this period. Neither the estate nor the appellant was taxed in respect of the interest on the income tax exempt bonds received by the Trustees or in respect of the payments received by the appellant under paragraphs 3 and 4 of the will.

The second period from the end of 1937 to the end of 1941 tells a different story. When the income tax exempt bonds matured on December 1, 1937, the proceeds were invested in securities the income from which was no longer exempt from income tax. Such income appears under column 1 of Exhibit 2. This was used to make the payments to the appellant under paragraphs 3 and 4 of the will, as shown by columns 2 and 3 respectively, as far as it would go. In 1938 the income was more than sufficient to make such payments, there being a balance remaining, as shown by column 4. But in respect of the years 1939, 1940 and 1941 the income was not sufficient to cover all the payments and the deficiency in making the payments under paragraph 4 was made up by drawing on the accumulated revenue of \$93,520.55 above referred. The amounts so drawn were \$3,995.98 in 1939, \$6,333.36 in 1940 and \$16,232.22 in 1941.

The simple issue in these appeals is whether such amounts, paid to the appellant under paragraph 4 of the will out of the said accumulated revenue of \$93,520.55, were, when received by her, exempt from income tax as income derived from income tax exempt bonds under section 4(j) of the Act.

Counsel for the appellant contended that there had been no change in their income tax exempt nature; that the accumulated revenue out of which they were paid consisted



of amounts which at the time of their receipt constituted part of the income of the estate and, there being no power under the will to capitalize income, remained impressed with the character of income under the terms of the will, even although some of the accumulation had in fact been re-invested; that such amounts at the time of their receipt by the trustees were income that was exempt from income tax as being derived from income tax exempt bonds and, in the absence of legislation imposing tax thereon, retained that character until they reached the hands of beneficiaries under the will. The argument was that the Trustees were a conduit pipe between the testator and the beneficiaries under the will and that if amounts of income received by the Trustees were exempt from income tax in their hands they could not lose their income tax exempt character by passing from the Trustees into the hands of beneficiaries under the will, unless there was some legislation imposing tax thereon and there was no such legislation.

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I have come to the conclusion that counsel's contention was well founded. He relied strongly on the judgment of the Appellate Division of the Supreme Court of Ontario in *Re Watkins and City of Toronto* (1). There the whole of the testator's property was devised to his executors upon trust. For a period of ten years from his death the duty of the trustees was to pay one-third of the income of the residuary estate to his son. By arrangement the rents of the testator's real estate were collected by agents and paid directly to the beneficiaries, including the son, without passing through the executors' hands. Under section 5 (21) of The Assessment Act, R.S.O. 1914, chap. 195, it was provided that "rent or other income derived from real estate" was exempt from liability for income tax and the question in issue was whether the son was entitled to the benefit of this exemption in respect of the amount which the agents collected as rents and paid directly to him. It was held that he was. At page 138, Middleton J. said of the amount received by the son:

I think that it may be admitted that when it reaches the hands of the beneficiary it has ceased to be "rent", but the statute exempts not merely rent but "other income derived from real estate". This,

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I think, is wide enough to cover the rental received by trustees and paid over to a beneficiary. It can be said to be "derived from real estate" within the meaning of the statute—the mere intervention of trustees, with no duty but to pay over, does not change its character.

It may be said that this case differs from the present one in that here there was no direction in the will to make the payments under paragraph 4 out of the tax exempt income of the estate. It is true that there was no such direction and that the said payments need not have been made out of such income but could have been made from other estate sources. But it is also true that there was nothing to prevent the Trustees from lawfully paying them out of the tax exempt income of the estate and they were, in fact, paid out of an accumulation of such income to the extent mentioned. That being so, I see no reason why that portion of the accumulated revenue that was paid by the Trustees to the appellant under paragraph 4 of the will, being exempt from income tax in their hands, should lose its income tax exempt character merely through being lawfully transferred by them to her. There is, I think, strong support for the view that there is no such change of character in the decision of the Judicial Committee of the Privy Council in *Syme v. Commissioners of Taxes* (1), an appeal from the Supreme Court of Victoria. In that case under a will the trustees carried on certain businesses in Victoria which had been owned by the testator and paid the appellant, one of the testator's sons, a fifth share of the annual profit thereof. Under the Income Tax Acts, 1895 and 1896, of Victoria, the rate of tax on income derived from personal exertion was very much less than on income derived from the produce of property. In respect of the fifth share of the annual profit the Commissioners assessed the appellant on the latter basis, whereas he claimed that he was entitled to be assessed on the former. The Commissioners succeeded in the Supreme Court of Victoria, but this decision was reversed by the Judicial Committee. It was clear that the income received by the trustees from carrying on the businesses was income derived from personal exertion within the meaning of the taxing Acts and the issue was whether it maintained such character when it was passed on to the

beneficiary under the will as a share of the profits. It was argued for the respondent that the income so received by the appellant was a different income from that derived by the trustees from the businesses, being paid out of a fund arrived at by the trustees after setting off profits and losses and deducting prior charges but this argument did not succeed. It was held by Lord Summer, delivering the judgment of the Committee, that the sum received by the appellant from the trustees as his share of the profits of the businesses was not different in character from the income received by the trustees from carrying them on. If in their hands it was derived from personal exertion, so also in his hands it was also so derived. At page 1021, Lord Summer put his conclusion briefly as follows:

What was the produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the cestui que trust.

The whole accumulated revenue consisted of income received by the Trustees as interest on income tax exempt bonds and was exempt from income tax under section 4(j) of the Act. In my view, it lost none of that character on being lawfully transferred by the Trustees to the appellant in partial discharge of the obligations to her under paragraph 4 of the will.

But even if the income received by the appellant under paragraph 4 of the will were not the same as that received by the Trustees as interest on income tax exempt bonds, it does not follow that it would be subject to income tax, for proper regard must be had to the meaning of the word "derived" in section 4(j). Counsel for the appellant contended that it must not be read as meaning "received in the first instance". I agree. In a taxing Act words must, generally speaking, be given their plain and ordinary meaning, and, according to such meaning, the word "derived" covers a wider field than the word "received", and when applied to the word "income" it connotes the source or origin of such income rather than its immediate receipt. In the New English Dictionary, Vol. III, page 230, its meaning is given as "Drawn, obtained, descended, or

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deduced from a source;" and in Webster's New International Dictionary, Second Edition, "Formed or developed out of something else; derivative; not primary;"

The word was recently carefully construed by this Court in *Gilhooly v. Minister of National Revenue* (1) by Cameron J., then Deputy Judge, when he had to consider whether the moneys received by the executors of an estate as dividends on shares held by it in a mining company and paid to a beneficiary entitled to a share of the income of the estate constituted in the hands of such beneficiary "income derived from mining" within the meaning of section 5 (a) of the Act, so as to entitle her to a depletion allowance. He came to the conclusion that they did. In arriving at such conclusion Cameron J. referred to a number of cases, namely, *In re Income Tax Acts 1895 and 1896* (2); *In re Income Tax Acts (No. 2)* (3); *Syme v. Commissioner of Taxes (Supra)*, *In re Income Tax Acts, 1924-1928 (No. 2)* (4); and *Armstrong v. Commissioner for Inland Revenue* (5). I need not here repeat his discussion of the cases or his citations from them. In my view, they support his opinion that income "derived from mining" meant "income originating from mining or coming from mining as its source", and his finding that the moneys received by the appellant beneficiary as a share of the income from the estate were "income derived from mining", notwithstanding the intervention, first, of the mining company paying dividends to the executors of the estate as shareholders in the company and, secondly, of the executors paying a share of the income of the estate to the appellant beneficiary. Whether the moneys were received by the executors as dividends on shares or by the beneficiary as her share of the income of the estate, they had their source or origin in the mining operations that made their payment possible and were, therefore, "income derived from mining", within the meaning of section 5 (a).

Similarly, it seems to me that the word "derived" in section 4 (j) of the Act as applied to the income there referred to cannot be limited to income from income tax

(1) [1945] Ex. C.R. 141

(2) (1897) 22 V.L.R. 539.

(3) (1903) 29 V.L.R. 525.

(4) (1929) St. R. Qd. 276.

(5) (1938) 10 S.A. Tax Cases 1.

exempt bonds immediately or directly received by the owners thereof as interest thereon, but must include income that has its source in such bonds even although there may be intervening channels through which it flows from such source to its final destination. The word, in my opinion, is wide enough to include the payments received by the appellant under paragraph 4 of the will, to the extent that they came out of the accumulated revenue of \$93,520.55 made up of balances of interest on income tax exempt bonds received by the Trustees. To such extent they were, in my judgment, income derived from income tax exempt bonds within the meaning of section 4 (*j*) of the Act and not liable to taxation. To the extent of such payments, namely, \$3,995.98 in 1939, \$6,333.36 in 1940, and \$16,232.22 in 1941, the appeals from the assessments for such years must be allowed and the assessments set aside for amendment accordingly. There being no evidence that any sum was paid to the appellant out of tax exempt income in 1938, the appeal from the assessment for that year must be dismissed.

In view of this result there is no object in considering whether the payments in question could be considered as annuities under section 3 (*g*) of the Act, or free from liability under section 3 (*a*).

This leaves only the question of interest and penalties on the unpaid amounts of income tax as from the date at which they ought to have been paid. Counsel for the appellant urged that it had been necessary to go to the Court for interpretation of the testator's will on a number of points including questions affecting the amount of the appellant's income tax liability and that in view of the difficulties involved in determining such liability interest and penalties, or at any rate the latter, should be computed only as from the date of assessment, namely, November 29, 1943. It is true that the aid of the Court in interpreting the testator's will was sought and the amount of the appellant's tax liability was not determined until just before the date of the assessment, but I have come to the conclusion that under the state of the law governing the matter the Court is powerless to grant relief sought and that if any relief is to be afforded it must come pursuant to an Order in Council under the appropriate legislation dealing with

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such matters as the remission of penalties and the like. At the time of the appellant's liability for income tax for the years in dispute section 49 of the Act read as follows:

49. If any person liable to pay any tax under this Act (except any tax payable under section eighty-eight hereof) pays less than one-third of the tax as estimated by him, or should he fail to make any payment at the time when the filing of his return is due, or fail to pay the balance of the tax as estimated by him within four months therefrom, he shall pay, in addition to the interest of five per centum per annum provided for by the last preceding section, additional interest at the rate of three per centum per annum from the date of default to the date of payment.

Counsel for the respondent pointed out that, although this section, as later amended, was repealed in 1944, the repeal could not help the appellant; and that its terms are mandatory and leave no discretion as to relief from it with the Court. I agree. He also suggested that any hardship caused in this case was not due to the respondent but to the fact that the testator had made a difficult will that required interpretation by the Court and that the appellant could have protected herself against interest and penalties by making an adequate payment subject to refund of any excess payment if necessary. The adequacy of this suggested answer to this branch of the claim may be open to question but, be that as it may, in any event, I think it is clear that the Court cannot grant the relief sought by the appellant as to interest or penalties other than as consequential to the amendments of the assessments in respect of which there are successful appeals: *Minister of National Revenue v. Trusts and Guarantee Co.* (1).

In the result the appeal from the assessment for the year 1938 is dismissed with costs and the appeals from the assessments for the years 1939, 1940 and 1941 are to the extent indicated, allowed with costs.

*Judgment accordingly.*

BETWEEN :

1947  
June 2  
Sept. 3

WENDELL THOMAS FITZGERALD, }  
Administrator with the will annexed of }  
the Estate of GEORGE V. STEED, }  
deceased, ..... } APPELLANT,

AND

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

AND BETWEEN :

WENDELL THOMAS FITZGERALD, }  
Administrator with the will annexed of }  
the Estate of JAMES KENNETH }  
RAEBURN, deceased ..... } APPELLANT,

AND

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

AND BETWEEN :

WALTER WILLIAM WALSH, on his }  
own behalf, and as sole surviving Execu- }  
tor of the will of KATHERINE WYLIE }  
WILLIAMS, deceased, and as adminis- }  
trator with the will annexed, de bonis }  
non, of the Estate of BONNIE I. R. }  
STEED, deceased, ..... } CLAIMANT,

AND

HIS MAJESTY THE KING, ..... RESPONDENT,

AND

WENDELL THOMAS FITZGERALD, }  
Administrator with the will annexed, of }  
the Estate of GEORGE V. STEED, }  
deceased, and Administrator with the }  
will annexed of the Estate of JAMES }  
KENNETH RAEBURN, deceased, and }  
the OFFICIAL ADMINISTRATOR of }  
the County of Vancouver, in the Prov- }  
ince of British Columbia ..... } INTERVENANTS

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*Revenue—Succession Duties—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 6 (b), 2 (m) (k)—“Property” a chose in action—Situs of chose in action—Unadministered residuary legacy is a chose in action and its situs is where the claim to it is enforceable—Chose in action recoverable in California is not property in Canada—No succession of property in Canada within the meaning of s. 6 (b) of the Dominion Succession Duty Act—Appeals allowed.*

W. domiciled in the Province of British Columbia, Canada, by his will bequeathed to his wife “the sum of one hundred and fifty thousand dollars or one-half of my estate whichever may be the larger sum”. W. died in Vancouver, British Columbia, on September 3, 1921, leaving a net estate of \$125,807.37. His widow, also domiciled in British Columbia, died on July 15, 1924, and by her will bequeathed “the rest and residue of my property, both real and personal, to Bonnie S.”, domiciled in California, U.S.A. who by her will left her property to her husband George S. domiciled in California. He died August 16, 1944, and left his estate to his nephew R., also domiciled in California. R. died in 1944 leaving portions of the estate bequeathed by George S. to members of his family. The estate of W. in Vancouver, British Columbia, consisted chiefly of real property and the distribution of the gift to his widow was dependent upon the sale of this realty which did not take place until November 5, 1945, when the sum of \$250,000 was realized therefrom. The appellant Fitzgerald is the administrator with will annexed of Bonnie S. and by virtue of Power of Attorney from him the claimant Walsh was appointed ancillary administrator of the estate of Bonnie S. in British Columbia. He is also the sole surviving executor of the will of W.’s widow. The administrator of the estates of Bonnie S., George S. and R. is domiciled in the State of California. The Minister of National Revenue assessed duties on the succession to R. and on the succession from R. to his family. The administrator appealed to this Court.

*Held:* That a proprietary interest in an estate not fully administered is a chose in action situated where the claim to it is naturally and properly enforceable against the executors, administrators or trustees concerned.

2. That as the executors of the will of Bonnie S. could only be sued in California the money from the sale of real property in Canada deposited in a bank in Canada is not taxable under s. 6 (b) of the Dominion Succession Duty Act because there was not a succession of property in Canada.

APPEALS under the provisions of the Dominion Succession Duty Act.

The appeals were heard before the Honourable Mr. Justice O’Connor at Toronto.

*C. F. H. Carson, K.C.* and *Allen R. Finlay* for Claimant;

*E. G. Gowling, K.C.* for Appellant Intervenant;

*J. W. Pickup, K.C.* and *J. J. Connolly* for Respondent.



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

O'CONNOR J. now (September 3, 1947) delivered the following judgment:

These are appeals from assessments made under the Dominion Succession Duty Act 1940-41, Statutes of Canada, c. 14, in the estate of George V. Steed, deceased, and the estate of James Kenneth Raeburn, deceased. The same question arises in the two appeals and in the proceedings in which W. W. Walsh is the claimant, His Majesty the King respondent, and W. T. Fitzgerald as intervenant and all proceedings were consolidated.

The question is whether, in the George Steed estate, the succession of James Kenneth Raeburn deceased, under the will of George V. Steed is dutiable under the Dominion Act and in the James Kenneth Raeburn estate, whether the successions of Nan Raeburn, Thomas W. Raeburn, Elizabeth Ellen and William Raeburn, under the will of James Kenneth Raeburn, are dutiable under the Dominion Act.

The Dominion Act came into force on the 14th June, 1941.

The determination of the question depends on whether there was a succession of property within the Dominion of Canada under Section 6 (b) of the Dominion Act.

It was agreed by counsel that if there is a liability for duty the amount of duty will be determined later.

The facts are not in dispute and are set out in the first forty pages of the record of the trial.

They are summarized as follows:—

Adolphus Williams was domiciled in British Columbia. His will was dated 15th January, 1919, and he made two codicils, one 12th May, 1919, and one on the 18th March, 1920. He appointed his wife, Katherine Wylie Williams, and Walter William Walsh the executors and trustees of his will and directed payment of debts. He bequeathed to his wife his personal goods, house, life insurance policies and, in addition:—

I further bequeath to my wife the sum of one hundred and fifty thousand dollars, or one-half of my estate, whichever may be the larger sum, to be paid to her by my trustees as hereinafter mentioned, free of

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succession duty: and I direct that the bequest to my wife shall be the first and prior charge on my estate and shall not be subject to any abatement whatsoever.

Then follow two pecuniary bequests.

All real and personal estate not otherwise disposed of is devised to his trustees. He directs that the trustees shall sell and convert into money, and out of the money to pay the debts, the bequests under the will and codicils and the amount to his wife. And the sale fund, which became a trust fund, was to be divided into ten equal parts to be given to different relatives.

He postponed conversion and authorized the executors, if they agreed, to convey to his wife real estate in satisfaction of his bequest, if she so requested, and, if in her interest so to do, as a desirable investment for her.

By the first codicil he added another executor and by the second he directed his trustees "to pay to my said wife, in equal consecutive monthly instalments" to commence immediately after his death, interest at 5% per annum on the above mentioned legacy, or such portion thereof as shall from time to time remain unpaid. He directed that the interest payable to his wife, as well as the legacy, shall be a first charge on his estate and shall not be subject to any abatement whatsoever.

Mr. Williams died in Vancouver on the 3rd September, 1921. Letters probate were issued on the 25th October, 1921, and according to the inventory the estate included part of the Castle Hotel situated on Lots 11 and 12, Block 53 D.L. 541 in the city of Vancouver, valued at that time at \$175,000, and other assets. The total assets were valued at \$267,508.46 and the liabilities totalled \$141,701.09: leaving a net estate of \$125,807.37.

Katherine Wylie Williams was domiciled in British Columbia. She died on the 9th April, 1924. She executed a will on 15th July, 1922, which was proved on 27th June, 1924. By her will she directed payment of her debts and made a bequest of \$5,000 to John Walter Walsh, and the "rest and residue of my property, both real and personal" was given to her sister, Isabella Steed, known as Bonnie Steed. By a codicil dated the 2nd November, 1923, she

revoked the legacy to John Walter Walsh. The inventory sworn on the 19th June, 1924 includes the following item:—

Legacy \$150,000 with accrued interest amounting to \$7,577.16 and life insurance moneys used by the executors of Adolphus Williams Estate amounting to \$6,250, plus share of executor's fees owed by Adolphus Williams Estate \$201.35. All dependent for payment upon the value of the assets of the Adolphus Williams Estate. (For details of accounts of Adolphus Williams Estate as at 9th April, 1924, see attached schedules.)

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\$129,763.25.

Then on the list attached the assets are valued as at 9th April, 1924, at \$256,415.97, and liabilities of \$126,652.72, leaving the net at \$129,763.25. That figure of \$129,763.25 is not the value of the legacy but merely the net value of the estate of Adolphus Williams. The value of the legacy could not be ascertained until the hotel had been sold because until then it could not be determined whether Katherine Wylie Williams' estate would get \$150,000 or half the value of the estate.

Mr. Walsh is the survivor of the two executors named in the will.

Bonnie Steed was domiciled in California and died at Los Angeles on the 10th January, 1941. She made a will on the 8th December, 1924, leaving her property to her husband, George V. Steed, and naming him executor. Letters Probate (Exhibit 7) were granted in British Columbia to the executor limited to the estate in British Columbia. Exhibit 7 is described as Ancillary Letters Probate, but this appears to be the first grant of probate of the will and limited to the assets in British Columbia. In the inventory of the Bonnie Steed estate (Exhibit 8) there is this memorandum:—

Re legacy from Adolphus Williams, deceased, to Katharine Wylie Williams, see Adolphus Williams Will Probate issued 9th November, 1921.

Said legacy bequeathed to Isabella Steed by Will of Katharine Wylie Williams. See Katharine Wylie Williams Will Probate issued 10th of February, 1925.

(Should be 27th June, 1944).

The unpaid balance of the said legacy at the 10th of January, 1941, the date of the death of Isabella Steed, was \$141,717.03. The value of this legacy at the 10th of January, 1941, as far as can reasonably be calculated is \$75,000. My calculation is based on the following facts:

1. The present assets of the estate, all real estate are assessed by the City of Vancouver Assessor at ..... \$180,160

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2. There is a mortgage on the Castle Hotel one of the assets, in favour of the North British and Mercantile Insurance Company Limited (Royal Trust Co. agents) for ..... \$ 46,000  
 Leaving a balance of ..... 134,160

It is obvious that the present balance of the legacy, namely \$141,717.03, cannot be paid in full and further I am informed and verily believe that owing to the War and present real estate conditions in British Columbia it would be impossible to find cash purchasers for the real estate.

3. Even if purchasers could be found on terms of small cash payments and long deferred yearly instalments which is doubtful, the payments would be so long deferred that sales of these deferred payments would have to be made at heavy discounts, if sales could be made at all.

4. The legacy is subject to the mortgage for \$46,000 in favour of the North British & Mercantile Insurance Company and consequently is a second charge on the estate, and securities by way of second charges such as this legacy are subject to heavy discounts in all markets even under normal conditions and in normal times.

5. The fact that I live in the United States compels me to accept heavy exchange deductions on all payments to be received by me and the further fact of severe War time Canadian currency regulations and restrictions seriously limits the transmission of funds to me.

(Sgd.) George V. Steed.

This memorandum shows that the value of the legacy as at the 10th January, 1941, "so far as can reasonably be calculated is \$75,000." The legacy is, of course, from Katherine Wylie Williams, and the executor George V. Steed, placed a value on something that was coming to Bonnie Steed from the Katherine Wylie Williams estate, but which had not yet come.

The executor, George V. Steed, who was domiciled in California died in California on the 16th August, 1944.

The Castle Hotel in Vancouver was sold for \$250,000 on the 5th November, 1945.

On the 11th January, 1946, letters of administration, with the will annexed of Bonnie Steed, were granted by an Order of the Superior Court of California, appointing W. T. Fitzgerald as administrator. The Order (part of Exhibit 7) recites in part:—

Isabella Steed, who was also known as Bonnie I. R. Steed, died on January 10, 1941, and, at the time of her death was a resident of the City and County of San Francisco, State of California, and left certain property therein, to wit: Personal property of a value in excess of Ten Thousand Dollars (\$10,000).

Said decedent left a will in writing dated December 8, 1924. After the death of said decedent, such proceedings were had and taken in and by the Supreme Court of British Columbia in probate that on April 1, 1941 said will was admitted to probate in said Court as and for the last will and testament of said decedent, and George V. Steed, who was named in said will to be executor thereof, was appointed as executor

thereof by said Court in British Columbia. Said petitioner has filed herein a copy of said will and of the order or decree admitting it to probate as aforesaid, duly authenticated.

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Said George V. Steed died on August 16, 1944, leaving a last will and testament which has heretofore been admitted to probate in this Court and of which estate petitioner herein has heretofore been appointed and is now the duly appointed, qualified and acting administrator with the will annexed thereof.

Under the said last will and testament of said Isabella Steed all of her personal property, of whatsoever kind and wherever situated, was given, devised and bequeathed to said George V. Steed, and under the will of said George V. Steed all of his property, including all the property belonging to said Isabella Steed in her estate, are given, devised and bequeathed to one James Kenneth Raeburn.

Said James Kenneth Raeburn died during the month of December, 1944, from wounds received in battle against the Japanese. Said James Kenneth Raeburn left a last will and testament, dated October 11, 1944, which said will has heretofore been admitted to probate in and by the above styled Court, and petitioner herein has been appointed to be administrator with the will annexed of the estate of said James Kenneth Raeburn, deceased.

Wherefore, by reason of the law and findings aforesaid, it is Ordered, Adjudged and Decreed:

1. ....
2. That the document dated December 8, 1924, heretofore admitted to probate by the Supreme Court of British Columbia as the last will of said decedent, a duly authenticated copy of which has heretofore been filed herein, be and the same is hereby admitted to probate herein as and for the last will and testament of said decedent.
3. That said petitioner W. T. Fitzgerald, whose full legal name is Wendell Thomas Fitzgerald, be and he is hereby appointed Administrator with the will annexed of the estate of said decedent.
4. ....

On the 21st January, 1946, W. T. Fitzgerald executed a Power of Attorney authorizing the appointment of Walter William Walsh as ancillary administrator in British Columbia of the estate of Bonnie Steed. On 6th February, 1946, Letters of Administration with the will annexed were granted to Walter William Walsh of all the unadministered estate within British Columbia.

Under the will of George V. Steed, dated 4th February, 1941, he appointed J. Kenneth Raeburn, a nephew of his wife, Bonnie Steed, to be the executor of his will with power to sell the property. The will provided:—

All my property of whatsoever kind and wherever situated I give, devise and bequeath to the said J. Kenneth Raeburn, nephew of my late wife, Bonnie I. R. Steed. I make this disposition of my property for the reason that all my property has come to me by inheritance from my said wife, and I feel it to be fitting and proper that this property be

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left to a member of my wife's family. In addition, said J. Kenneth Raeburn has for many years last past been a loyal friend to me and to my late wife and at all times has enjoyed our greatest respect and affection. I make no provision for any member of my own family, feeling as I do that my property should revert to my wife's family, but I wish to assure my kindred that my failure to make provision for them does not indicate a lack of affection for them.

By an Order of the Court in California, dated 22nd December, 1944, (Exhibit 12) the will of George V. Steed was admitted to probate and Letters Testamentary were granted to the executor, J. Kenneth Raeburn. This was done without knowledge that J. Kenneth Raeburn had been killed in action in the Pacific on the 14th December, 1944.

By an Order of the Court in California, dated 12th March, 1945, in the George V. Steed estate, Letters of Administration with will annexed were granted and W. T. Fitzgerald appointed administrator.

James Kenneth Raeburn was domiciled in California. The Court in California on the 28th November, 1945, granted Letters of Administration with will annexed and appointed W. T. Fitzgerald administrator.

The will of James Kenneth Raeburn is dated October 11, 1944, and takes the form of a letter addressed to his sister, Nan Raeburn, and includes a letter written by George V. Steed to him dated 4th February, 1941, and is as follows:

My dear Kenneth: I have today made my Will, leaving all my property to you. It is my desire, however, that after you have received the net sum of \$50,000 (exclusive of any interest received by you from the estate of Adolphus Williams (deceased)) and after the payment of all expenses of administration and death taxes, you should distribute the balance of my property, if any, in the following proportions to the following named persons:

Then follows a list of the names in proportions which added up to 94/100.

The letter from J. Kenneth Raeburn to his sister is as follows:—

Dear Nan: Since inheriting Uncle George's estate, I have been giving quite a bit of thought to the possibilities of the days ahead and decided to write to you on the subject of my Will.

To you, Nan Raeburn, I leave one-half of the afore-mentioned estate inherited by me from the late George V. Steed, my insurance policy and any cash left in my account with the California Bank, North Hollywood, California.

To my father, Thomas W. Raeburn, I leave one-sixth of the said Estate left to me by my Uncle George V. Steed.

To my sister, Elizabeth W. R. Allan, I leave one-sixth of the said Estate left to me by my Uncle George V. Steed.

To my brother, William J. M. Raeburn, I leave one-sixth of the said estate left to me by my Uncle George V. Steed.

These three-sixths mentioned above comprise one-half of the estate left to me by my Uncle George V. Steed.

In addition to this, I request that the instructions left to me in a letter now in the hands of the law firm of Morrison, Hohfeld, Foerster, Shuman and Clark of San Francisco, California, by the late George V. Steed be carried out as he desired.

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Correspondence exchanged between the solicitors (Exhibit 14) disclosed in part:—

Following the death of Adolphus Williams the Executors proceeded to administer the estate which consisted, for the main part, of real estate and as the latter was being held by the Executors to obtain a more satisfactory price there were insufficient liquid assets to pay the pecuniary legatees provided for in the Will. It was not, therefore, until 1928 that the consent of the main pecuniary legatee having been obtained, the three minor pecuniary legatees were paid.

On the 10th of August in that year, the legacy to the testator’s niece, Mattie Martindale, was paid in the sum of \$3,247.85, representing principal of \$2,500 and accrued interest. The same facts apply in the case of the legacy to the testator’s god-daughter, Hoddie Jackson, being a legacy of a similar amount. The sum of \$1,295 was paid to the testator’s god-son, Eddie Godfrey, being principal of \$1,000 and accrued interest.

Mrs. Williams, the pecuniary legatee mentioned in the Will for \$150,000, received no payment of principal during her lifetime but was paid various payments on account of interest accruing on the said legacy. After her death, in 1924, payments were continued to be made into her estate, and thence from time to time distributed to her sister, Mrs. Steed, who is the sole beneficiary of her estate. This practice continued until September 1930 and thereafter payments were made direct to Mrs. Steed by the executors of the Adolphus Williams estate. Mr. Walsh, one of the executors, has informed the writer that the reason that the practice was changed was to save expense and costs of remuneration by paying the money through one estate instead of two. On Mrs. Steed’s death, in 1941, payments were made into her estate until September 1943 when the payments were made direct to George V. Steed, the sole beneficiary of his wife’s estate, the same reason applying, namely, the payment through one estate instead of through three. No payments whatsoever have been made since the death of George V. Steed as a personal representative was not appointed until some time after his death and there were still insufficient liquid assets in the Adolphus Williams estate to pay the amount of the pecuniary legatee.

We are now in the process of winding up the estate of Adolphus Williams by distributing the residuary estate to the legatees entitled. Two interim distributions have already been made to these legatees on account, as shown on the enclosed excerpt from the final accounts which we are preparing. There are certain minor adjustments to be made

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in the estate as between the pecuniary legatee and the residuary legatee but we hope to distribute shortly to the latter a further \$36,000 in the same proportions as set out in the excerpt. As soon as the pending litigation over the Succession Duties has been settled, the executor of the Katherine Wylie Williams estate will distribute the residue of that estate.

With regard to the question of distribution of the Katherine Wylie Williams estate, the whole of her estate was left to her sister, Isabella Steed, and as mentioned above, payments were made into her estate from time to time on account of principal and interest on the legacy and was distributed thereout to Mrs. Steed until September 1930. At that time the account was closed in her estate and payments made direct to Mrs. Steed from the Adolphus Williams estate. On the 5th of November 1945, however, when funds became available for the payment of the pecuniary legacy and interest, the full amount was paid into the estate of Katherine Wylie Williams and a special trust account was opened in the Royal Bank of Canada, Vancouver Branch, in Mr. Walsh's name in trust and the funds deposited therein where they still remain.

It was agreed by counsel that the statement, "the full amount was paid in to the estate of Katherine Wylie Williams", meant that in the books of Walsh, Houser & Company this amount had been credited to the Katherine Wylie Williams estate and charged to the Adolphus Williams estate.

The correspondence states that no payments have been made since the death of George Steed and that:—

With reference to the distribution in the Bonnie I. R. Steed Estate, payments of principal and interest on the pecuniary legacy were made directly from the Adolphus Williams estate into her estate and from time to time distributions were made therefrom to Mr. George V. Steed, her sole executor and beneficiary. As mentioned above, from and after September 1943 payments were made direct to George V. Steed by the Adolphus Williams estate. It should be noted in this regard, however, that Mr. Steed had taken out an Ancillary Grant of Letters Probate to his wife's estate in British Columbia.

Enclosed with the correspondence and forming part of Exhibit 14 is an excerpt from a letter from the appellant, Fitzgerald, as follows:—

In the Raeburn Estate I have not attempted to file an inventory and appraisal as is our usual procedure because of the fact that it has heretofore been impossible to determine the value of the Raeburn estate's interest in the estate of George V. Steed. Apart from that interest the only asset which he had was a small bank account amounting to \$351.96 with the North Hollywood Branch of the California Bank.

You will note that in the Steed inventory on page 4 mention is made of the Adolphus Williams legacy, but when the inventory was made and filed it was not yet known by me that Mr. Walsh had distributed the Williams property and was in a position to pay the legacy. The letter from Mr. Walsh conveying this news to me was dated November 20, 1945, which was some days after the inventory had been filed.



Needless to say, the statement in the inventory that I did not expect that payment to me in these proceedings was based upon the assumption that the Williams property would not be sold, and that consequently there would be no payment to me, however after I was apprised of the availability of the money it became my legal duty to attempt to reduce it to my possession, if that is possible.

With regard to the statement of distribution, here again I can furnish no court document for the simple reason that no distribution has been made either in the estate of George V. Steed or in the estate of James Kenneth Raeburn. When distribution takes place the estate of Isabella Steed will be distributed to the estate of George V. Steed which in turn will be distributed to the estate of James Kenneth Raeburn, and that estate in turn will be distributed to the legatees and devisees named in the will of James Kenneth Raeburn and the letter which was admitted to probate as a part of the will from George V. Steed to James Kenneth Raeburn.

In short the proceedings looking toward the distribution of the three estates here have come to a halt until I know what assets will be available from Canada to the estate of Isabella Steed.

After the hotel was sold Mr. Walsh moved for the advice and direction of the Court in British Columbia, and notice was given to the Dominion Succession Duties authorities and to the Provincial Succession Duties authorities and they both appeared on the motion. Mr. Justice Manson on the return of the motion made an Order authorizing the administrator, Mr. Walsh, to pay the moneys in question to Mr. Fitzgerald, the California domiciliary administrator and authorized the main branch of the Royal Bank of Canada holding the funds to permit the transfer. The respondent applied for and obtained a Writ of Extent and Mr. Walsh undertook to hold the moneys until the matter had been settled.

After the issue of the Writ of Extent, Mr. Walsh filed a Plea claiming in his capacity as sole surviving executor of the Katherine Wylie Williams estate and as administrator with will annexed of Bonnie Steed estate for a declaration that the sum of \$159,347.33 forms part of the residue of the estate of Katherine Wylie Williams, deceased, or in the alternative for a declaration that the said sum forms part of the residue of the estate of Bonnie Steed, deceased, within the Province of British Columbia, and that it is held by the claimant in trust as administrator with will annexed de bonis non of the said estate limited to the assets thereof within the Province of British Columbia and for a declaration that this sum is not subject to taxation under the Dominion Act.

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Notice of assessment dated the 23rd March, 1946, was sent to W. T. Fitzgerald, administrator of the estate of George V. Steed that duty of \$21,204.91 was assessed upon the succession of James Kenneth Raeburn derived from George V. Steed, valued at \$155,347.33.

O'CONNOR J. On this notice is this statement:—

The property in this succession consists of money on deposit with the main branch of the Royal Bank of Canada at Vancouver, British Columbia, Canada, standing in the name of Walter William Walsh in trust.

Notice of assessment dated the 29th March, 1946, was sent to W. T. Fitzgerald, administrator of the estate of James Kenneth Raeburn that duties were assessed upon the succession valued at \$141,205.29 derived from James Kenneth Raeburn, of Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn in the various amounts set out.

From both assessments Mr. Fitzgerald appealed.

An Order was made consolidating the proceedings that arose on the issue of the Writ of Extent and the filing of the Plea by Mr. Walsh with the appeals from the assessments in the George V. Steed estate and in the James Kenneth Raeburn estate.

Under the Dominion Act duties on successions are imposed by section 6.

6. Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in this the First Schedule to this Act, duties upon or in respect of the following successions, that is to say,—

Both George Steed and James Kenneth Raeburn were domiciled in California. The relevant subsection is, therefore:—

(b) Where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

Succession is defined by Section—

2 (m). "Succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitute limitation, and every devolution.....

"Deceased person" is defined by Section 2 (d) to mean a person dying after the coming into force of the Act.

Bonnie Steed died before the Act came into force but George Steed and James Kenneth Raeburn died after the Act came into force.

Property is defined by Section—

2 (k). "Property" includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death and.....

The tax, if any, accrued at the death of George Steed so that all matters in relation to the taxation are to be determined by the facts then existing. Quigg on Succession Duties 2nd., p. 66.

The character and local situation of an asset in George Steed's estate, is not as to duty arising on his death, affected by the realization of the assets in the Adolphus Williams' estate made subsequent to the death of George Steed.

At the death of George Steed the facts then existing were:—

1. Adolphus Williams' estate was in the process of administration. The Castle Hotel had not been sold. It was not known then whether the executors of Katherine Wylie Williams would receive \$150,000 or a larger sum or a lesser sum. Until there had been a realization of the assets the amount could not be determined. Even after the sale there remained the payment of the balance of the executors' fees which had been fixed and then the payment of the legacy to Katherine Wylie Williams.

2. In the Katherine Wylie Williams' estate the administration could not proceed until the legacy had been received from the executors of Adolphus Williams' estate. After this had been received the fees of the executors would have to be fixed and deducted and payment of the balance made to the executor of Bonnie Steed estate.

3. The estate of Bonnie Steed was not capable of administration until her executor received everything coming to her under the will of Katherine Wylie Williams. When this happened the fee of the executor would be fixed and deducted and then and not until then, could the administration be completed and the amount to which the estate of George Steed was entitled be ascertained.

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While there was a charge in favour of Mrs. Williams on all the assets of the estate of Adolphus Williams, there was, however, no charge on the assets of Bonnie Steed's estate.

The administration of the George Steed estate depended on all these things and so did the estate of James Kenneth Raeburn plus the administration of George Steed's estate.

Bonnie Steed, George Steed and James Kenneth Raeburn were all domiciled in California and their estates are being administered in California.

The question then is, in the circumstances here, what was the claim of George Steed in the estate of Bonnie Steed and is the situs of that claim British Columbia or California.

Because it is the succession of that claim from first, George Steed to James Kenneth Raeburn and, second from Raeburn to his heirs, that the respondent contends is dutiable under the Dominion Act.

In the circumstances here, the principle applicable to the case of a specific legacy is not applicable in this case; namely that assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date.

Neither George Steed nor his administrator could claim the assets in the estate of Adolphus Williams in specie or for that matter the money in the Royal Bank of Canada.

Counsel agree that the "property" in question is a chose in action and that the situs of that chose in action was where it can be enforced. But they do not agree on what the chose in action is or where it can be enforced.

After carefully considering the argument of counsel and the authorities cited, I am of the opinion that the principles applicable here were those first laid down *In the Goods of Ewing* (1). In that case W. Ewing died possessed of property of small value in England and entitled under the will of his uncle, J. O. Ewing, to large assets in Scotland, which were being duly administered there. The executors of W. Ewing proved his will in Scotland only. G. W. Hope, a legatee under W. Ewing's will, applied for a grant of administration of the estate of W. Ewing in England and the Court refused the application.

(1) (1881) 6 P.D. 19.

The President, Sir James Hannen, said p. 22:—

It is not disputed that the deceased, J. O. Ewing, was a domiciled Scotchman, and that his will was properly proved in Scotland, and is being administered there in accordance with Scotch law. The claim of the executors of W. Ewing in respect of the interest of their testator under his uncle's (J. O. Ewing) will, is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to W. Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing *virtute officii*, but it appears to me that it is an asset in Scotland and not in England:

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He points out that the Scotch confirmation has been produced in the principal registry in England and sealed with the seal of the Court so that it then has the like effect as if probate had been granted in England and adds, p. 23:—

.....but the place where the business of administering and winding up the estate of J. O. Ewing is being carried on is Scotland and any acts done in England by the executors of J. O. Ewing are only ancillary to the administration which is taking place in Scotland.

After pointing out that the analogies that lead to the conclusion that Scotland is the local situation of this asset of W. Ewing he states, p. 23:—

And the fact that some of the assets of J. O. Ewing were situate in England does not appear to make any difference. And if I were to constitute the applicant administrator with the will annexed of W. Ewing he could not in that character take possession of or recover the outstanding assets of the uncle's estate, he could not claim those assets themselves *virtute officii*, his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered.

In *Attorney-General v. Sudeley* (1), the testator who died domiciled in England bequeathed his estate to English executors directing them to pay legacies, and *inter alia*, a one-fourth share of his residuary real and personal estate to his wife absolutely. His estate included mortgages on real estate in New Zealand. The wife died before the testator's estate had been fully administered or the clear residue ascertained and no appropriation had been made to any share of the residue. It was held that she died possessed, not of a part of New Zealand mortgages in specie, but of a chose in action, i.e., to require her husband's executors

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to administer his estate and to receive from them one-fourth part of the clear residue and that this was an English asset of the wife's estate.

In *Sudeley case* in the Divisional Court (1), (Lord Russell of Killowen C.J., and Charles J.,) gave judgment in favour of Lord Sudeley. In the course of the judgment Lord Russell said that the claim of the Crown was mainly rested upon the authority of the case *in re Ewing*.

In the Court of Appeal (2), the appeal was allowed. The judgment of Lord Hannen in the *Ewing* case was approved by Lopes L.J., and Kay L.J., Lord Esher M. R., (dissenting) did not place the same interpretation on Lord Hannen's judgment and said that if that was the proper interpretation, it was contrary to all other authority.

On appeal to the *House of Lords*, the decision of the Court of Appeal was unanimously affirmed and the judgment of Lopes, L.J., was approved and adopted by Lord Halsbury and Lord Macnaghten.

Lopes L.J. (*supra*) said at p. 363:—

The material facts are as follows: Algernon Gray Tollemache by his will, after bequeathing various specific legacies, devised and bequeathed the residue of his real and personal estate to trustees to pay the income thereof in the events that have happened to his wife Frances Louisa for her life, and by a codicil he gave one-fourth of the entire residue to his wife absolutely. The husband died domiciled in England, and his will was duly proved in England. At the time of his death he was possessed of personal estate, including large sums invested on mortgage of real estate in New Zealand. While the estate under the will was in course of administration, and before the amount of the clear residue was ascertained, his wife Frances died, having by her will appointed the defendants her executors, who duly proved her will in England. At the date of her death the New Zealand mortgage securities remained unrealized, and no portion of them had been appropriated to any particular share of the ultimate residue.

It is to be observed that neither Frances nor her executors could claim any part of this estate in specie: the executors of her husband were not trustees of the estate for her—all she was entitled to was her proportion of the proceeds of her husband's estate after realization. Neither Frances nor her executors had any claim against the mortgagees to recover the mortgage debt or any portion of it; that was a claim enforceable only by the executors of Algernon. The right of the executors of Frances as against the executors of her husband is a right to have his estate administered. Administered where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the

(1) (1895) 2 Q.B.D. 526.

(2) (1896) 1 Q.B.D. 354.

husband can only be sued in the English Courts by the executors of Frances. It is an English chose in action, recoverable in England, and is, in my opinion, an English and not a foreign asset, and as such is subject to probate duty here. *In the Goods of Ewing*, 6 P.D. 19 is in point—a case which I think is rightly decided.

The principle laid down in the *Sudeley* case (*supra*) was followed by Romer, J., in *Re Smyth* (1), and affirmed again in the House of Lords in *Dr. Barnardo's Homes v. Special Income Tax Commissioners* (2), and considered in *Skinner v. Attorney-General* (3).

In the *Sudeley* case (*supra*), Lord Herschell said that while it was unnecessary to say what would have been the case if the estate had been administered he certainly was very far from thinking, as at present advised, that it would have made any difference. Lord Shand suggested, p. 20, that the case might have been different if the whole estate had been held for one beneficiary. But as is pointed out in 2nd ed., *Green on Death Duties*, p. 589, this suggestion does not accord with the principles laid down in the majority judgment of Lopes, L.J., and Kay L.J., adopted in the House of Lords by Lord Halsbury and Lord Macnaghten.

In *Barnardo's Homes v. Special Income Tax Commissioners* (*supra*), Viscount Finlay said, p. 8:—

It appears to me that the present case is really decided by the decision of this House in Lord Sudeley's case. It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete.

Lord Atkinson at page 11 said:—

.....on the erroneous assumption that a certain principle applicable to the case of a specific legacy applied to a bequest of the residue of a testator's estate—namely, that the assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date. That principle has no application whatever and could not in the nature of things have any application whatever, to a legacy of the residue, which is, as its name indicates, only the property or fund which remains after all claims upon the testator's estate have been satisfied. The case of *Lord Sudeley v. Attorney-General*, (1897) A.C. 11, decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses etc., have been satisfied, the

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(1) (1898) 1 Ch. D. 89.

(3) (1940) A.C. 350.

(2) (1921) 2 A.C. 1.

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residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.

In *Skinner v. Attorney-General (supra)*, Lord Russel of Killowen in considering the *Sudeley* case (*supra*), said at p. 358:—

They (the executors of the testator's widow) sought to establish that the widow, had a proprietary interest in, and was the owner of, a share of the mortgages, i.e., of property situate in New Zealand. They failed because the mortgages did not, nor did any share in them, constitute an asset of the widow's estate. The testator's estate had not been administered, nor had any appropriation to the widow's share been made. The whole point of the decision was that the widow did not own any part of the mortgages. As Lord Herschell pointed out in his speech *Ibid.*, 18, the whole fallacy of the argument of the widow's executors rested on the assumption that she or they were entitled to any part of the mortgages as an asset—she in her own right or they as executors. "I do not think", he said "that they have any estate, right, title or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate". My Lords, I emphasize the last ten words of that sentence, which show clearly that the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator "has an interest" in the different items of which that estate from time to time consists.

In this case, the estates of Adolphus Williams, Katherine Wylie Williams and Bonnie Steed were all in the course of administration and the amount that the estate of Bonnie Steed would become entitled to could not be ascertained until the other estates had been fully administered.

In those circumstances, the statement of Lord Herschell is applicable here. In my opinion the administrator of George Steed had no estate, right, title or interest, legal or equitable in the assets of the estate of Adolphus Williams or in the money in the Royal Bank of Canada, that constituted an asset in the estate of George Steed, and therefore James Kenneth Raeburn did not become beneficially entitled to such an asset under George Steed's will on Steed's death.

While Lord Russel of Killowen in the *Skinner* case (*supra*), p. 358, said that the *Sudeley* case (*supra*) was not in any way a decision that the widow or her executors had no interest in the mortgages, he points out that the interest that was repudiated was a proprietary interest.



The proprietary interest which George Steed possessed in the Bonnie Steed estate is described in the 9th ed., (1946) Hanson's Death Duties, p. 105 as:—

A proprietary interest in an estate not fully administered is a chose in action and situate where the claim to it is naturally and properly enforceable against the executors, administrators or trustees concerned.

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As Lord Halsbury pointed out in the *Sudeley* case (*supra*) p. 15, that it is idle to use such phrases as "that this was what the person was 'entitled'—that she had an 'interest' in this estate". And that while those phrases are perfectly true in a general way of speaking, they are not applicable to the particular discussion. What the executors of the widow in that case had was a right as against the executors of her husband's estate to have his estate administered.

What the administrator of George Steed had in this case was a right as against the executors of the Bonnie Steed estate to have her estate administered. Both George Steed and Bonnie Steed were domiciled in California and both their estates are being administered in California.

The executors of the Bonnie Steed estate can only be sued in the California Courts by the executors of George Steed. It is, in my opinion, a California chose in action recoverable in California and is a California asset and not a British Columbia asset.

It is not, therefore, property in Canada.

Counsel for the respondent contends that administration of both the estates of George Steed and James Kenneth Raeburn must be taken out in British Columbia, so that the discharge can be given first to the administrator of the Bonnie Steed estate and then to a British Columbia administrator of the George Steed estate. I do not agree with that contention.

The duty of the ancillary administrator is to administer the assets under his control and he may safely, and in fact, be compelled to transmit the residue to the domiciliary administrator. *De la Viesca v. Lubbock* (1), approved and followed in *Eames v. Hacon* (2).

(1) (1840) 10 Sim. 629.

(2) (1881) 18 Ch. D. 347, 352.

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In a recent decision in *Re Miller's Agreement Uniacke v. Attorney-General* (1), Wynn-Parry, J., said that beneficially "entitled" in Section 2 of the Succession Duty Act, 1853, necessarily implied that the person entitled had a right to sue for and recover the property in question.

It is clear that James Kenneth Raeburn had no right to sue for and recover any property in Canada. If James Kenneth Raeburn had been appointed administrator with the will annexed of George Steed, in British Columbia, he could not in that character take possession of or recover the outstanding assets in the Bonnie Steed estate, his only remedy would still be through and by means of his claim upon the executors of the Bonnie Steed estate in California. Per Lord Hannen in the *Ewing* case (*supra*).

In my opinion the succession of James Kenneth Raeburn under the will of George Steed is not dutiable under the Dominion Act, because there was not a succession of property in Canada within the meaning of Section 6 (b) of the Dominion Act. For the same reason the succession of Nan Raeburn, Thomas W. Raeburn, Elizabeth Ellen and William Raeburn, under the will of James Kenneth Raeburn are not dutiable under the Dominion Act.

Both appeals will be allowed and the claimant is entitled to a declaration that the sum in the Royal Bank of Canada is not subject to taxation under the Dominion Act.

The appellant and the claimant are entitled to costs.

*Judgment accordingly.*

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47. WORKMEN'S COMPENSATION BOARD SUBROGATED TO RIGHTS OF WIDOW WHOSE HUSBAND'S DEATH WAS CAUSED BY THE NEGLIGENCE OF A SERVANT OR EMPLOYEE OF THE CROWN. No. 5.

CROWN—*Action to recover damages suffered by the Crown through loss of services of a member of the military forces and medical and hospital expenses incurred due to negligence of defendants dismissed. Action by Crown not prescribed by the Ontario Highway Traffic Act, R.S.O. 1937, c. 238, s. 60 (1)—Law of Province of Ontario applicable when accident occurs in that province though negligent parties domiciled in Province of Quebec.*—The action is one to recover from defendants, both of whom are domiciled in the Province of Quebec, damages suffered by the Crown by way of pay and allow-

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ances paid to and medical and hospital expenses paid for a member of the military forces of Canada, who was injured and rendered temporarily incapable of service while a passenger in a car which was in collision, in the Province of Ontario, with a car driven by the defendant Adams and owned by defendant Richardson. The Court found that the collision was caused solely by the negligence of the defendant Adams. *Held*: That the rights and liabilities of the parties are determined by the law of the Province of Ontario. 2. That the prescription established by the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, s. 60 (1) is not applicable to the Crown in right of Canada. 3. That the damages suffered by the Crown are not the natural consequence of the negligence which caused the accident and are not damages suffered from the loss of services of a servant. 4. That the action per quod servitium amisit does not lie. *Attorney-General v. Vallee-Jones* (1935) 2 K.B. 209 not followed; *Admiralty Commissioners v. S.S. Amerika* (1917) A.C. 51 applied. **HIS MAJESTY THE KING v. ALFRED H. RICHARDSON AND JAMES HAROLD ADAMS** ..... 55

2.—*Petition of right—Doctrine res ipsa loquitur applicable where Crown a party—Damage to suppliant's barge caused by respondent's scows breaking their moorings—Negligence of Crown officers in not maintaining watch on respondent's scows—Defence of inevitable accident or superior force—Suppliant entitled to recover.*—Suppliant's barge the *Gerard B*, on November 30, 1944, was securely moored for the winter at a berth ascribed to her by the superintendent of lighthouses and harbour master at Sorel, in the Lanctot basin, part of the harbour of Sorel, Quebec, and on that day was constantly in charge of and under the care of her owner. Two sounding scows, the property of the Crown, and entirely unattended for the whole day of November 30, 1944, were moored at the same dock some distance away from the *Gerard B*. About eleven o'clock in the morning these scows broke their moorings and struck suppliant's barge. They were hauled back to the place where they had been moored and were again made fast to the dock. In the afternoon they again broke away and collided with suppliant's barge. They were again hauled back to and secured to the dock and one of them broke away a third time. Suppliant's barge was damaged as a result of the collisions. In an action to recover for such damage the respondent pleaded that the collisions and damage were caused by a storm of extraordinary violence equivalent to inevitable accident and superior force. *Held*: That respondent was negligent in leaving the scows not securely moored with proper and sufficient lines and without a watchman or other person in charge. 2. That the doctrine *res ipsa loquitur* applies

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to cases in which the Crown is a party. **GERARD BEAUCHEMIN v. HIS MAJESTY THE KING**..... 102

3.—*Reference under s. 19(g) of the Exchequer Court Act, R.S.C. 1927, c. 34—Answers to hypothetical questions of law concerning liability for taxes to the City of Ottawa of owner of land acquired by the Crown before and after rates levied pursuant to the Municipal Act, R.S.O. 1937, c. 266—The Assessment Act R.S.O. 1937, c. 272.*—*Held*: That if the Crown acquired land in the City of Ottawa in the year 1938 after the 1938 assessment was made pursuant to the Assessment Act, R.S.O. 1937, c. 272, and in 1939 the City passed its by-laws to levy the 1939 rates upon such assessment pursuant to the Municipal Act, R.S.O. 1927, c. 266, s. 315, the person who was the owner of the land at the time the assessment was made is not liable to the City for taxes levied upon such assessment. 2. That if the Crown acquired land in the City of Ottawa in 1939 before the City passed the by-laws to levy the 1939 rates upon the assessment made in 1938 pursuant to the Assessment Act, R.S.O. 1937, c. 272, the person who was the owner of the land at the time the assessment was made is liable to the City for taxes levied upon such assessment. Reference by the Crown and the City of Ottawa under s. 19(g) of the Exchequer Court Act. **HIS MAJESTY THE KING v. CORPORATION OF THE CITY OF OTTAWA** ..... 118

4.—*Petition of Right—Expropriation—Action to recover value of an alleged interest in lands the property of the Crown—Suppliant a mere licensee with no property in the land—No basis for estoppel—Action dismissed.*—Suppliant, pursuant to a call for tenders by the Deputy Minister of the Department of Mines and Resources of the Government of Canada under the authority of Order in Council P.C. 3102, December 14, 1938, entered into an agreement with that department whereby suppliant was granted the right to enter on certain lands in the Petawawa Forest Reserve, Ontario, and cut timber thereon. Subsequently the respondent initiated expropriation proceedings to enter and cut timber on the said land. Respondent did not proceed by way of information in this Court to ascertain the value, if any, of suppliant's rights and suppliant now brings this action by way of petition of right, the action being one for compensation following an alleged expropriation and not for damages. The fee in the lands in question is and always has been in the Crown in the right of the Dominion of Canada. *Held*: That Order in Council P.C. No. 3102 did not authorize a grant or lease of the lands in question and that there was no grant or lease thereof to the suppliant; the suppliant was a mere licensee and no interest in the land passed to it. 2. That the sale

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to the suppliant was of logs and in addition the suppliant was permitted or licensed to go upon the property only for the express purpose of cutting designated trees and removing them in the ordinary way as provided by the conditions of sale. 3. That there is no basis for estoppel since any representation concerning suppliant's interest in the land was a mere misrepresentation of a matter of legal inference from facts known to both parties or of which both parties could be presumed to have equal knowledge. 4. That since no interest in the land passed to suppliant and the expropriation was of no effect as the Crown took from the suppliant no interest in the land, this action must be dismissed. **GILLIES BROS. LTD. v. HIS MAJESTY THE KING**..... 210

5.—*Exchequer Court Act, R.S.C., 1927, c. 34, s. 19(c)*—*The Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, c. 303*—*Workmen's Compensation Board subrogated to rights of widow whose husband's death was caused by the negligence of a servant or employee of the Crown—Respondent's responsibility under Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c) not increased by ss. 3 of s. 9 of The Workmen's Compensation (Accident Fund) Act.*—Suppliant seeks to recover from the Crown the sum of \$8,715.92, representing the capitalization of the compensation which suppliant is liable to pay to Mary Belanger, widow of Joseph Belanger, and the children of the said Joseph and Mary Belanger, under the provisions of the Workmen's Compensation (Accident Fund) Act, R.S.S. 1940, c. 303, as the result of the death of Joseph Belanger, caused by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment. *Held:* That the Workmen's Compensation Board of the Province of Saskatchewan was, under the provisions of The Workmen's Compensation (Accident Fund) Act of that province, duly subrogated to the rights of the widow of Joseph Belanger and is entitled to claim from the respondent the reimbursement of the compensation which it has paid in part and is liable to pay to her. 2. That this action brought by suppliant has not and cannot have the effect of increasing the respondent's responsibility under ss. (c) of s. 19 of the Exchequer Court Act, R.S.C. 1927, c. 34. The Petition of Right brought by suppliant could have been instituted by the widow of Joseph Belanger for herself and her minor children. **THE WORKMEN'S COMPENSATION BOARD OF THE PROVINCE OF SASKATCHEWAN v. HIS MAJESTY THE KING**..... 262

6.—*Judges Act R.S.C. 1927, c. 105, s. 27—Interpretation Act R.S.C. 1927, c. 1, ss. 13 and 14—British North America Act, ss. 53 et seq.*—*Retired Judge having a pension when appointed Lieutenant Governor of a*

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*province is entitled to receive both pension and salary*—“*Becomes entitled to a salary in respect of any public office under His Majesty in respect of his Government of Canada*”—“*Such salary shall be reduced by the amount of such pension*”—“*Public Office*”—*Lieutenant Governor of a province is not a person receiving a salary in respect of a public office under His Majesty in respect of the Government of Canada.*—*Held:* That a lieutenant governor of a province is not a person receiving a salary in respect of a public office under His Majesty in respect of his Government of Canada, but one receiving a salary in respect of a public office under His Majesty in respect of his government of one of his provinces. 2. That where a retired Justice of the Court of King's Bench entitled to a pension is appointed lieutenant governor of a province he is entitled to receive his pension as a retired Justice and his salary as lieutenant governor. **DAME JULIETTE CARROLL ET AL v. HIS MAJESTY THE KING** . . . . . 410

7.—*Petition of Right—Expropriation of highway of which soil and freehold vested in suppliant—Highways held in trust for the public—Suppliant not entitled to compensation for their loss.* Suppliant claims compensation for loss of highways included in area of land taken by His Majesty under the Expropriation Act for war purposes. *Held:* That the owner of expropriated property is to be compensated for the loss of the value of the property according to its value to him, but in estimating such value regard must be had to the conditions under which he held the property and any restrictions to which it was subject, and the circumstances could be such that the value of the property to the owner in terms of money was nil. 2. That where highways are included in land taken by His Majesty under the Expropriation Act for public purposes and the soil and freehold in them is vested in the municipality in which they are situate, the municipality holds such highways in trust for the public and is not entitled to any compensation to itself for their loss through the expropriation. **THE CORPORATION OF THE TOWNSHIP OF PICKERING v. HIS MAJESTY THE KING** 446

8.—*Negligence—Limitation on amount of damages recoverable by passenger in motor vehicle injured by joint negligence of owner or driver of that vehicle and driver of another vehicle—Negligence Act R.S.O. 1937, c. 115 s. 2(2).* Suppliant, a passenger in a car, was injured as the result of the joint negligence of the driver of that car and of a servant of the respondent acting within the scope of his duties or employment. *Held:* That suppliant cannot recover from respondent that portion of his damages caused by the owner or driver of the motor vehicle in which he was a passenger. **LEO R. TISDALE v. HIS MAJESTY THE KING**..... 480

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9.—*Petition of right—Orders in Council P.C. 1665 of March 4, 1942, P.C. 2483 of March 27, 1942, P.C. 469 of January 19, 1943—Consolidated Regulations respecting Trading with the Enemy (1939)—War Measures Act, R.S.C. 1927, c. 206, s. 3—Custodian not servant or agent of the Crown—Decision of Governor in Council as to necessity or advisability of an order under the War Measures Act not open to review by the Court.*—Suppliants, who were persons of Japanese origin evacuated from a protected area west of the Cascade Mountains, brought petitions of right claiming that the Custodian, in whom their properties had been vested as a protective measure and subject to his control and management, had no right to sell them, notwithstanding Order in Council P.C. 469 of January 19, 1943, which purported to authorize such power of sale, the validity of which was challenged. Question of law whether petition of right lies. *Held:* That the Custodian is not a servant or agent of the Crown but an independent person in respect of whose acts a petition of right against the Crown does not lie. 2. That under the War Measures Act Parliament has left the decision as to the necessity or advisability of an order for the security, defence, peace, order and welfare of Canada, not to the Court, but to the Governor in Council, and once he has made his decision that such order is necessary or advisable for any of the purposes mentioned, that is the end of the matter. The Court has no right to substitute its opinion of what is necessary or advisable for that of the Governor in Council or to question the validity of an order so made. 3. That Order in Council P.C. 469, of January 19, 1943, was validly enacted and the Custodian has the lawful right to liquidate, sell, or otherwise dispose of the properties of the suppliants vested in him. **EIKICHI NAKASHIMA v. HIS MAJESTY THE KING . . . . . 486**

**TADAO WAKABAYASHI v. HIS MAJESTY THE KING . . . . . 486**

**JITARO TANAKA ET AL v. HIS MAJESTY THE KING . . . . . 486**

10.—*Public Work—Claim by suppliant for expenses incurred during stand-by period ordered by Deputy Minister of Public Works while contract entered into between suppliant and His Majesty in force—Public Works Act R.S.C. 1927, c. 39 s. 36—“Addition of Works” as set forth in specification forming part of contract.*—Suppliant and respondent represented by the Minister of Public Works for Canada, entered into a contract whereby suppliant agreed “to perform, complete and finish . . . to the satisfaction of the Minister . . . or as may hereafter be directed by the engineer or officer in charge of the work”, all the work required for the dredging and clearing of an obstruction in Seymour Narrows, British Columbia, known as Ripple Rock,

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suppliant to be paid the cost of such work plus a fixed fee, Specification 21 of the specifications attached to the contract and forming part of it states “The engineer shall have the power to add to or alter the work herein specified . . . without violating the contract”. After operations had been carried on for a time a new method for completing the work was submitted to the Chief Engineer and his assistants and approved at a meeting between the Deputy Minister of Public Works, the Chief Engineer and the engineers under him in the Department of Public Works and the officials of suppliant company. The Deputy Minister of Public Works instructed suppliant to maintain intact that part of its organization known as the Ripple Rock Division while awaiting instructions to resume work. Later such instructions were given and work resumed under the original contract. Suppliant claims in its Petition of Right payment by respondent of the expenses incurred by suppliant during the “stand-by” period. The bulk of these expenditures had been passed and approved by the proper officers of the Department of Public Works. Respondent contends that the “stand-by” was not work under the contract and that the officials of the Department of Public Works had no authority to order the same by virtue of the Public Works Act, R.S.C. 1927, c. 39, s. 36. *Held:* That the “stand-by” was so connected with the work to be performed that it can reasonably be held to constitute an “addition of works” to the work to be performed under the contract which the engineer had power to add under s. 21 of the specifications. **BRITISH COLUMBIA BRIDGE & DREDGING CO. LTD. v. HIS MAJESTY THE KING . . . . . 506**

11.—*Action for damages resulting from alleged negligence of servant of Crown acting within scope of duties or employment—Servant of Crown driving motor vehicle lawfully when overtaken with sudden illness causing him to lose control of vehicle—No negligence on part of superior officers—Action dismissed.*—Suppliant was injured by being struck by a motor car operated by one Joyes, a servant of the Crown, acting within the scope of his duties or employment at the time, who immediately prior to the accident was driving the vehicle at a reasonable rate of speed and under control. Joyes suddenly became unconscious and fell down on the floor of the car. The car, without guidance, ran over a sidewalk and injured the suppliant. The Court found that there was no negligence on the part of Joyes in operating the car nor was there negligence on the part of his superior officers in permitting Joyes to drive a motor vehicle. *Held:* That this action must be dismissed since the driver of the car by reason of the seizure was rendered incapable of appreciating the duty to take care and was unable to discharge that duty; the



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action being founded on negligence it is necessary in order to create liability for an act, not wilful or intentional, to show not only that it is negligent but also that it was the conscious act of the defendant's volition. *MEYER GOOTSON v. HIS MAJESTY THE KING*..... 514

**CUSTODIAN NOT SERVANT OR AGENT OF THE CROWN.**

*See CROWN, No. 9.*

**CUSTOMS TARIFF ACT, R.S.C. 1927, C. 44, S. 35A, PAR. 710 (F).**

*See REVENUE, No. 9.*

**DAMAGE TO SUPPLIANT'S BARGE CAUSED BY RESPONDENT'S SCOWS BREAKING THEIR MOORINGS.**

*See CROWN, No. 2.*

**DANGEROUS USE OF EXPROPRIATED PREMISES.**

*See EXPROPRIATION, No. 1.*

**DECISION OF GOVERNOR IN COUNCIL AS TO NECESSITY OR ADVISABILITY OF AN ORDER UNDER THE WAR MEASURES ACT NOT OPEN TO REVIEW BY THE COURT.**

*See CROWN, No. 9.*

**DEDUCTIBLE DISBURSEMENTS.**

*See REVENUE, No. 5.*

**DEDUCTIBLE EXPENSES MUST BE THOSE LAID OUT OR EXPENDED IN THE YEAR INCOME IS RECEIVED.**

*See REVENUE, No. 4.*

**DEDUCTION FROM INCOME OF MONEY EXPENDED IN DRILLING OIL WELL ALLOWED.**

*See REVENUE, No. 3.*

**DEFENCE OF INEVITABLE ACCIDENT OR SUPERIOR FORCE.**

*See CROWN, No. 2.*

**DELAY IN BRINGING ACTION FOR INFRINGEMENT NOT LACHES OR ACQUIESCENCE.**

*See PATENTS, No. 4.*

**DELAY IN INSTITUTING PROCEEDINGS TO EXPUNGE NOT CAUSE FOR DISMISSAL OF MOTION WHEN NO PROOF THAT RESPONDENT HAS BEEN PUT UNDER ANY UNFAIR DISADVANTAGE.**

*See TRADE MARKS, No. 4.*

**DISBURSEMENTS OR EXPENSES "WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME".**

*See REVENUE, No. 5.*

**"DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME."**

*See REVENUE, Nos. 3, 4 & 12.*

**DISCLOSURES REQUIRED IN SPECIFICATION.**

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**DISTINCTIVENESS AN ESSENTIAL REQUIREMENT.**

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**DOCTRINE RES IPSA LOQUITUR APPLICABLE WHERE CROWN A PARTY.**

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**DOMINION SUCCESSION DUTY ACT, 4-5 GEO. VI, C. 14, SS. 6(B), 2(M) (K).**

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**EXCESS PROFITS TAX ACT, 1940, C. 32, S. 7(A).**

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**EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S.19(C).**

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*See REVENUE, No. 5.*

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**EXPROPRIATION.**

1. ANNUAL VALUE OF LEASEHOLD INTEREST. No. 1.
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**EXPROPRIATION**—*Expropriation Act, R.S.C. 1927, c. 64, ss. 2 (g), 9, 23, 26, 27, 31—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 19 (b), 47—Annual value of leasehold interest—Onus of proof of value—Dangerous use of expropriated premises—Claim for damage to property injuriously affected by construction of any public work may include damage through use of expropriated property—Applicability of English decisions under Lands Clauses Consolidation Act, 1945—Measure of damages is depreciation in value of lands injuriously affected.*—The plaintiff expropriated a two year leasehold interest in part of the defendant's sugar refining plant at Woodside on the eastern side of Halifax Harbour for defence purposes and stored explosives on the premises with the result that the defendant could not continue its ordinary insurance and took out a policy of War Risk Insurance. The action was taken to have the amount of the defendant's compensation determined by the Court. *Held:* That the annual value of property expropriated for a term of years is the net value of the rent at which it might reasonably be let, having regard to the value of the property of the owner, or, in other words, the net value of the rent which a tenant, in a position similar to that of the landlord, "would have been willing to pay for the land sooner than fail to obtain it." Such a defence contemplates that all the factors of value that the owner of the premises and the "hypothetical" tenant would be likely to consider will be taken into account. 2. That the onus of proof of value in expropriation cases is on the former owner of the property whose value it is sought to establish. 3. That where part of the owner's land has been expropriated his right to compensation for the injuries affecting his remaining land is not limited

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to the loss or damage resulting from the construction of the public work on the land taken but extends to that resulting from the use of such land. 4. That if land is expropriated under the Expropriation Act and its actual or anticipated use is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land. 5. That the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected. *HIS MAJESTY THE KING V. ACADIA SUGAR REFINING CO. LTD. ET AL.*..... 547

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*See* REVENUE, Nos. 5, 6, 7 & 12.

**INCOME TAX.**

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**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 6(1) (A), 6(1) (B) & 90.**

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**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 3(A), 3(G), 4(J), 49,**

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**INVALID REGISTRATION A DEFENCE IN AN INFRINGEMENT ACTION.**

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- MEMBER OF CANADIAN MILITARY FORCES WESTERN HEMISPHERE FOR PART OF A YEAR ENTITLED ONLY TO REDUCED RATE OF TAXATION FOR THAT TIME.**  
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- NO BASIS FOR ESTOPPEL.**  
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- NO NEGLIGENCE ON PART OF SUPERIOR OFFICERS.**  
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- NO SUCCESSION OF PROPERTY IN CANADA WITHIN THE MEANING OF S. 6(B) OF THE DOMINION SUCCESSION DUTY ACT.**  
*See REVENUE, No. 16.*
- NONPAYMENT OF APPLICATION FEES NOT A DEFENCE IN INFRINGEMENT ACTION.**  
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- NON-USE OF TRADE MARK BEFORE REGISTRATION.**  
*See TRADE MARKS, No. 1.*
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- ONUS ON APPELLANT TO BRING ITSELF WITHIN EXEMPTING PROVISIONS OF STATUTE.**  
*See REVENUE, No. 1.*
- ONUS ON TAXPAYER TO SHOW ASSESSMENT INCORRECT.**  
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- ORDER IN COUNCIL P.C. 6982, DATED DECEMBER 4, 1940.**  
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- PATENTS FOR INVENTION.**
1. ANTICIPATION. Nos. 2 & 4.
  2. CLAIM FOR SUBSTANCE PER SE NOT VALID. No. 1.
  3. CLAIM FOR SUBSTANCES PREPARED OR PRODUCED BY CHEMICAL PROCESSES AND INTENDED FOR FOOD OR MEDICINE. No. 1.
  4. CLAIM MUST BE FREE FROM AVOIDABLE AMBIGUITY OR OBSCURITY. No. 4.
  5. CORRECT AND FULL DESCRIPTION OF INVENTION. No. 4.
  6. DELAY IN BRINGING ACTION FOR INFRINGEMENT NOT LACHES OR ACQUESCENCE. No. 4.
  7. DISCLOSURES REQUIRED IN SPECIFICATION. No. 4.
  8. ESTABLISHED ROYALTY RULE. No. 3.
  9. EXPERIMENTAL USE. No. 2.
  10. INFRINGEMENT. No. 4.
  11. INVENTION CLAIMED FOR NEW IMPROVEMENTS IN MANUFACTURE OF SKIS. No. 2.
  12. INVENTION MUST NOT CLAIM WHAT IS USEFUL. No. 4.
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  15. MEANING OF WORD "CLAIMED". No. 1.
  16. NONPAYMENT OF APPLICATION FEES NOT A DEFENCE IN INFRINGEMENT ACTION. No. 4.
  17. ORDER IN COUNCIL P.C. 6982, DATED DECEMBER 4, 1940. No. 3.
  18. PATENT ACT, 1923 ss. 7(1), 14(1), 43(1). No. 4.
  19. PATENT ACT, 1935, ss. 19, 33. No. 3.
  20. PATENT ACT, 1935, s. 26(1) (c). No. 2.
  21. PATENT ACT, 1935, ss. 37(1), 61(1) (a). No. 4.

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22. PATENT ACT, 1935, SS. 40(1), 40(4). No. 1.
23. PRIOR USER. No. 2.
24. PUBLIC USE. No. 2.
25. REASONABLE COMPENSATION FOR USE OF INVENTION. No. 3.
26. REASONABLE COMPENSATION A QUESTION OF FACT. No. 3.
27. REASONABLE ROYALTY RULE. No. 3.
28. SELECTION PATENT. No. 4.
29. SEPARATE CLAIM FOR PROCESS NOT PREPARED. No. 1.
30. SPECIFICATION MUST NOT CONTAIN MISLEADING STATEMENTS. No. 4.
31. SPECIFICATION SHOULD BE CONSTRUED FAIRLY. No. 4.
32. SPECIFICATION THE DICTIONARY FOR THE CLAIMS. No. 4.
33. TEST OF ANTICIPATION. No. 4.
34. UNSUCCESSFUL EXPERIMENTATION NOT PRIOR INVENTION. No. 4.
35. USE OF INVENTION OF COMBINATION. No. 3.
36. USE OF XANTHATES IN FROTH FLOTATION CONCENTRATION OF ORES. No. 4.
37. USEFULNESS OF INVENTION. No. 3.
38. VALUE OF INVENTION TO OWNER. No. 3.

**PATENTS—The Patent Act, 1935, ss. 40 (1), 40 (4)—Claims for substances prepared or produced by chemical processes and intended for food or medicine—Meaning of word "claimed"—Claim for substance per se not valid—Separate claim for process not required.**—Each of the claims in the appellant's patent specification contained the definition of a substance prepared by a chemical process and intended for medicine together with a definition of the process by which it was prepared so that the claim was for the substance as prepared by the defined process, but the process itself was not claimed. The Commissioner of Patents rejected the claims on the ground that section 40 (1) of The Patent Act, 1935, required that claims for the substances covered by it must be accompanied by claims for the processes by which they were prepared. From such decision an appeal was taken. *Held:* 1. That section 40 (1) is complied with if in a claim for a substance to which it applies the process of its manufacture is described in the disclosure of the specification and so defined in the claim as to be made an essential element thereof so that the claim is restricted to the substance as produced by the process so defined, even if such process is not a patentable one. There is no need for a separate claim for the process. **WINTHROP CHEMICAL CO. INC. v. COMMISSIONER OF PATENTS . . . 36** (No. 2.)

2.—*Invention claimed for new improvements in manufacture of skis—Anticipation—Prior user—Experimental use—*  
99312—4a

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*Public use—Patent Act 1935, s. 26 (1) (c).*—The action is one for infringement of Letters Patent numbered 344,858. The invention claimed is an improvement to a three layer ski and consists of a centre layer tapered from the middle to both ends and a top layer bent over the thick part of the central layer and extending to both ends of the ski. The Court found that the invention claimed had been used in Canada on a date more than two years before the application for the patent in question. *Held:* That use of an invention in such a way that persons under no obligation of secrecy have access to it is not such a use as mere experiment and amounts to prior use. **THE CUSTODIAN v. PROPELLER WOODWORKING COMPANY OF CANADA LIMITED . . . . . 96**

3.—*Reasonable compensation for use of invention—The Patent Act, 1935, ss. 19, 33—Order in Council P.C. 6982, dated December 4, 1940—Reasonable compensation a question of fact—Usefulness of invention—Value of invention to owner—Established royalty rule—Reasonable royalty rule—Use of invention of combination.*—Respondent entered into contract with S. for purchase of parachutes, the production and sale of which involved use of inventions covered by five patents owned by appellant, and gave S. indemnity against infringement proceedings under Order in Council P.C. 6982 of December 4, 1940. Appellant brought proceedings before Commissioner of Patents for reasonable compensation for use of inventions and appealed from the Commissioner's decision. *Held:* That what is reasonable compensation for the use of an invention is a question of fact depending upon all the surrounding circumstances and that the usefulness and success of the invention is an important factor. 2. That the principles for measuring damages laid down in the infringement cases, although not binding upon the Commissioner in determining what is reasonable compensation under the Order in Council, should not be disregarded as inapplicable. The Commissioner should take into account the damages to which the owner of the patents would have been entitled against the user of the inventions covered by them, if the Order in Council had not been passed, measured by the profits the user would have made or by the established royalty if there is one, or in its absence by an estimated reasonable royalty, since the amount of such damages represents the value to the owner of the patents of the right that has been taken from him, but the amount of such damages, although a useful guide to the Commissioner, is not binding upon him for he must also take into account another factor, namely, that if the compensation for the use of the invention by a contractor for the Crown is to be reasonable, it must be fair not only to the owner of the patents covering the inventions, but also to the Crown, having regard to all the circum-

**PATENTS—Continued**

stances of the case. *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1910) 27 R.P.C. 721; (1911) 28 R.P.C. 157, approved. 3. That where the invention is of a combination of elements the essence of the invention is the combination, not any element in it, and the owner is entitled to compensation for its use. 4. That in fixing a reasonable compensation for the use of an invention of a combination the selling price of the article in which such invention is inseparably embodied so that it cannot be used apart from the article is a reasonable base for the application of a reasonable rate of royalty. 5. That when the Commissioner excluded the value of the canopy and shroud lines from the base to which he applied the rate of royalty he considered reasonable he acted on a wrong principle *IRVING AIR CHUTE COMPANY INC. v. HIS MAJESTY THE KING*. . . . . 278

4.—*Infringement—Use of xanthates in froth flotation concentration of ores—The Patent Act, 1923, ss.7(1), 14(1), 43(1)—The Patent Act, 1935, ss. 37(1) 61(1) (a)—Specification should be construed fairly—Disclosures required in specification—Correct and full description of invention—Specification must not contain misleading statements—Inventor must disclose all necessary information and all useful information within his knowledge—Claim must be free from avoidable ambiguity or obscurity—Inventor must not claim what is useless—Specification the dictionary for the claims—Maxim ut res magis valeat quam pereat—Selection patent—Nonpayment of application fees not a defence in infringement action—Anticipation—Unsuccessful experimentation not prior invention—Test of anticipation—Delay in bringing action for infringement not laches or acquiescence.—Plaintiff sued for infringement of its patent covering invention relating to new and useful improvements in froth flotation concentration of ores. Defendant attacked validity of patent. Held: That a specification should be construed “fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent”. *Hinks & Son v. Safety Lighting Co.* (1876) 4 Ch. D. 607 at 612 followed. 2. That the inventor has correctly and fully described his invention in its various aspects so that any person skilled in the froth flotation art would know precisely what the inventor has found to be new and useful. 3. That the inventor has fulfilled the duty of full disclosure required of him by section 14(1) of the Patent Act, 1923. 4. That claim 6 is invalid for avoidable obscurity and ambiguity. 5. That the construction of a specification is a matter of law for the Court. 6. That the interpretation of the word xanthate in claim 9 comes within the application of the principle that “the specification itself provides the dictionary by which the scope and effect of the terms*

**PATENTS—Concluded**

in the claims is to be ascertained”, and the word should be read in the light of the inventor's definition in paragraph 4 of the specification. *Western Electric Co. v. Baldwin International Radio of Canada* (1934) S.C.R. 570 followed. 7. That it would be erroneous to construe the word xanthate in claim 9 as including a useless xanthate, such as cellulose xanthate, and declaring the claim invalid on that account, when the word is fairly capable of another meaning which will exclude cellulose xanthate and support the patent, particularly when such meaning is in accord with the common dictionary meaning of the word and clearly the meaning with which the inventor himself has used the term in the specification and that it is sound in principle and consistent with authority under the circumstances to resort to the maxim *ut res magis valeat quam pereat* and give effect to the construction that will validate the patent. 8. That the patent is not a selection patent. 9. That the patent contains a recital that the petitioner has complied with the requirements of the Patent Act, and it is not open to the defendant in an infringement action to deny the validity of the patent on the ground that the fees payable on the application for it have not been paid, even if such has been the case. 10. That the defendant has failed to discharge the onus of proving that the invention was previously known by Martin or that he had disclosed it in such manner that the invention had become available to the public. 11. That delay in bringing an action for infringement until just before the patent has expired is not laches or acquiescence on the part of the plaintiff. *MINERALS SEPARATION NORTH AMERICAN CORPORATION v. NORANDA MINES, LIMITED* . . . . . 306

**PATENT ACT, 1923, SS. 7(1), 14(1), 43.**

See PATENTS, No. 4.

**PATENT ACT, 1935, SS. 19, 23.**

See PATENTS, No. 3.

**PATENT ACT, 1935, S. 26(1). (C).**

See PATENTS, No. 2.

**PATENT ACT, 1935, SS. 37(1), 61(1) (A).**

See PATENTS, No. 4.

**PATENT ACT, 1935, SS. 40(1), 40 (4).**

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**PAYMENT OF DAMAGES AND COSTS FOR NEGLIGENCE DEDUCTIBLE WHEN LIABILITY WHOLLY INCIDENTAL TO BUSINESS.**

See REVENUE, No. 14.

**PAYMENT OF INCOME TAX AS PART OF SALARY.**

See REVENUE, No. 10.

**PAYMENTS TO BENEFICIARY UNDER WILL OUT OF INCOME EXEMPT FROM INCOME TAX IN HANDS OF TRUSTEES DOES NOT CHANGE ITS INCOME TAX EXEMPT CHARACTER.**

See REVENUE, No. 15.

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1. COSTS, No. 2.
2. EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 30, No. 1.
3. EXCHEQUER COURT RULE 240, No. 1.
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5. ITEM 58 OF TARIFF A, No. 2.
6. LACK OF JURISDICTION IN COURT IN MATTERS ARISING BETWEEN SUBJECT AND SUBJECT IN WHICH THE CROWN IS NOT DIRECTLY INTERESTED. No. 1.
7. MOTION TO HAVE A THIRD PARTY NOTICE BY A DEFENDANT TO A CO-DEFENDANT SET ASIDE. No. 1.

**PRACTICE**—*Motion to have a third party notice by a defendant to a co-defendant set aside—Lack of jurisdiction of Court in matters arising between subject and subject in which the Crown is not directly interested—Exchequer Court Act, R.S.C. 1927 c. 34, s. 30—Exchequer Court Rule 240.*—Motion under rule 240 of the General Rules and Orders of the Exchequer Court to have set aside a third party notice served on defendant The Price Navigation Company Limited by the defendants Sauvageau for indemnity. *Held:* That rule 240 of the General Rules and Orders of the Exchequer Court has no application in actions between subject and subject in which the Crown has no interest. 2. That the jurisdiction of the Court is fixed by the Exchequer Court Act R.S.C. 1927, c. 34, s. 30 and cannot be enlarged by Rule 240 of the General Rules and Orders of the Court. 3. That s. 30 of the act limits the jurisdiction of the Court to matters affecting the Crown in the right of the Dominion and to cases relating to the revenue. **HIS MAJESTY THE KING V. ARTHUR SAUVAGEAU ET AL.**..... 16

2.—*Costs—General Rules and Orders of the Exchequer Court—Item 58 of Tariff A.*—*Held:* That Item 48 of Tariff "A" in the appendix to the General Rules and Orders of the Exchequer Court is applicable only to actions in which the sole relief given is the payment of a stated sum by way of damages or otherwise, and not when the relief given is other than, or in addition to, such payment. **THE B. MANISCHEWITZ COMPANY V. HARRY GULA**..... 190

**PRIOR USER.**

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**PROFITS OF A TRADE OR ACCRETIONS OF CAPITAL.**

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**"PROPERTY" A CHOSE IN ACTION.**

See REVENUE, No. 16.

**"PUBLIC OFFICE."**

See CROWN, No. 6.

**PUBLIC USE.**

See PATENTS, No. 2.

**PUBLIC WORK.**

See CROWN, No. 10.

**PUBLIC WORKS ACT, R.S.C. 1927, C. 39, S. 36.**

See CROWN, No. 10.

**"RATE OF SALARY ESTABLISHED AND PAYABLE".**

See REVENUE, No. 10.

**REASONABLE COMPENSATION FOR USE OF INVENTION.**

See PATENTS, No. 3.

**REASONABLE COMPENSATION A QUESTION OF FACT.**

See PATENTS, No. 3.

**REASONABLE ROYALTY RULE.**

See PATENTS, No. 3.

**REFERENCE UNDER S. 19(G) OF THE EXCHEQUER COURT ACT, R.S.C. 1927, C. 34.**

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**REIMBURSEMENT BY APPELLANT TO ONE OF ITS SHAREHOLDERS FOR MONEY SPENT ON MANAGEMENT SERVICES FOR APPELLANT.**

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**RESPONDENT'S RESPONSIBILITY UNDER EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 19(C) NOT INCREASED BY SS. 3 OF S. 9 OF THE WORKMEN'S COMPENSATION (ACCIDENT FUND) ACT.**

See CROWN, No. 5.

**RETIRED JUDGE HAVING A PENSION WHEN APPOINTED LIEUTENANT GOVERNOR OF A PROVINCE IS ENTITLED TO RECEIVE BOTH PENSION AND SALARY.**

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1. ACTION FOR DUTIES ON PACKAGING CHARGES ON GASOLINE IMPORTED IN DRUMS DISMISSED. No. 9.

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2. ADOPTION. No. 8.
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8. "ASSETS SITUATED ENTIRELY OUTSIDE OF CANADA", No. 2.
9. BONUS, No. 10.
10. "BUSINESS OPERATIONS CARRIED ON ENTIRELY OUTSIDE OF CANADA", No. 2.
11. CAPITAL OR INCOME, No. 12.
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13. CHOSE IN ACTION RECOVERABLE IN CALIFORNIA IS NOT PROPERTY IN CANADA, No. 16.
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18. CUSTOMS TARIFF ACT, R.S.C. 1927, c. 44, s. 35A, PAR. 710(f), No. 9.
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20. DEDUCTIBLE EXPENSES MUST BE THOSE LAID OUT OR EXPENDED IN THE YEAR INCOME WAS RECEIVED, No. 4.
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22. DISBURSEMENTS OR EXPENSES "WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME", No. 5.
23. "DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME", NOS. 3, 4 AND 12.
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32. INCOME TAX, NOS. 2, 3, 4, 8, 11, 12, 13, 14 AND 15.
33. INCOME WAR TAX ACT R.S.C. 1927, c. 97, No. 10.
34. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 2(f), 5(c), No. 8.
35. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 3, 6(a), NOS. 4 AND 14.
36. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 4(k) (i), No. 2.
37. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 6(1) (a), 6(1) (b) AND 90, NOS. 3, 5 AND 12.
38. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, RULES 1 AND 2 OF s. 1 OF PAR. A OF FIRST SCHEDULE, No. 13.
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40. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 3(a), 3(g), 4(j), 49, No. 15.
41. MEANING OF WORDS "FOR THE PURPOSE OF EARNING THE INCOME", No. 14.
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47. PAYMENT OF DAMAGES AND COSTS FOR NEGLIGENCE DEDUCTIBLE WHEN LIABILITY REALLY INCIDENTAL TO BUSINESS, No. 14.
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50. PROFITS OF A TRADE OR ACCRETIONS OF CAPITAL, No. 6.
51. "PROPERTY" A CHOSE IN ACTION, No. 16.
52. "RATE OF SALARY ESTABLISHED AND PAYABLE", No. 10.
53. REIMBURSEMENT BY APPELLANT TO ONE OF ITS SHAREHOLDERS FOR MONEY SPENT ON MANAGEMENT SERVICES FOR APPELLANT, No. 7.
54. SELF-CONTAINED DOMESTIC ESTABLISHMENT MAINTAINED BY APPELLANT WHO SUPPORTED THEREIN TWO PERSONS CONNECTED WITH HER BY ADOPTION BY VERBAL AGREEMENT WITH PARENTS, No. 8.
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57. "THE ANNUAL NET PROFIT OR GAIN OR GRATUITY . . . DIRECTLY OR INDIRECTLY RECEIVED", No. 4.
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59. TRAVELLING AND LEGAL EXPENSES INCURRED IN PREPARATION OF A BRIEF FOR SUBMISSION TO THE MINISTER OF NATIONAL REVENUE IN RESPECT OF ALLOCATION OF PROCEEDS OF OIL WELL TO CAPITAL AND INCOME RESPECTIVELY NOT ALLOWED IN DEDUCTIONS FROM INCOME, No. 3.
60. UNADMINISTERED RESIDUARY LEGACY IS A CHOSE IN ACTION AND ITS SITUS IS WHERE THE CLAIM TO IT IS ENFORCEABLE, No. 16.
61. WARTIME SALARIES ORDER P.C. 1549, FEBRUARY 27, 1942, No. 10.
62. WORD "SHAREHOLDERS" INCLUDES "SHAREHOLDER", No. 1.

REVENUE—*Excess Profits Tax—Excess Profits Tax Act, 1940, c. 32, s. 7 (a)—The Interpretation Act, R.S.C. 1927, c. 1, s. 31 (j)—Word "shareholders" includes "shareholder"—Onus on appellant to bring itself within exempting provision of statute—Appeal dismissed*—T. owner of one share of the issued capital of appellant was also its salaried secretary. Appellant was assessed for Excess Profits Tax for 1942 and appealed on the ground that T. was not a shareholder within the meaning of s. 7 (a) of the Excess Profits Tax Act, since payment was made only to one shareholder. *Held:* That the appeal must be dismissed since words in the singular include the plural and words in the plural include the singular (The Interpretation Act, R.S.C. 1927, c. 1, s. 31 (j)) and appellant had not discharged the onus on it to bring itself clearly within the exemption of s. 7 (a) of the Excess Profits Tax Act. THE CREDIT PROTECTORS (ALBERTA) LIMITED v. MINISTER OF NATIONAL REVENUE . . . 44

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2—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 4 (k) (i)—"Business operations carried on entirely outside of Canada"—"Assets situated entirely outside of Canada"—Failure of appellant to bring itself within terms of exempting provision of the Act—Appeal dismissed.*—Appellant company during the year 1940 unsuccessfully carried on exploration and drilling operations for oil in the Province of Alberta. It sublet a part of its business offices in Calgary, Alberta, receiving rents therefor, and also owned leases and royalties of a value in excess of \$1,000,000, a warehouse, stocks, loans, credits, accounts receivable and an interest in syndicates, all within Canada. Appellant was assessed for income tax for the year 1940 and appealed from such assessment. It contended that its oil drilling operations did not constitute carrying on business in Canada and that the assets in Alberta were not assets productive of income. *Held:* That the appeal must be dismissed as appellant has not brought itself within the terms of s. 4 (k) (i) of the Income War Tax Act to exempt it from taxation. 2. That the appellant is not such a company as is described in s. 4 (k) (i) of the act since the "business operations" and "assets" therein referred to are not to be restricted to those resulting in income or profit. ALBERTA PACIFIC CONSOLIDATED OILS LIMITED v. MINISTER OF NATIONAL REVENUE . . . . . 48

3.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6 (1) (a), 6 (1) (b) and 90—Deduction from income of money expended in drilling oil well allowed—Travelling and legal expenses incurred in preparation of a brief for submission to the Minister of National Revenue in respect of allocation of proceeds of oil well to capital and income respectively not allowed as deductions from income—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income."*—The appeal is from the disallowance of part of a claim under s. 90 of the Income War Tax Act for capital expenditures, made by the appellant in the development of two oil wells. These expenditures consist of (1) amounts laid out to dig the well into which casing was later placed, including the cost of all necessary steps to get the drilling equipment set up, to provide power, supplies and labour therefor, the maintenance and operation thereof, and the cost of removing such plant and equipment after the well was completed; (2) the purchase of the casing and the cost of actually putting it in the well which were admitted by the respondent to be capital expenditures within the meaning of s. 90 of the act. The appellant did not claim allowance for the cost of rental of a drilling rig. Appellant also appealed from a refusal to allow a claim for deduction from its income of certain costs for travelling expenses and legal expenses

## REVENUE—Continued

incurred in the preparation of a brief for submission to the Minister of National Revenue on the matter of determining what proportions of the proceeds of production were properly applicable to capital and income respectively. *Held*: That the well or hole in the ground is part of the equipment of an oil well and the costs of constructing it as claimed by the appellant are all capital costs within the meaning of s. 90 of the Act. 2. That the travelling and legal expenses were incurred in the process of conserving and retaining the profits which had been earned by the appellant and not in the process of profit earning and were "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within s. 6 (1) (a) of the act, and, since they had to do with the preservation or protection of a capital asset, the outlay was a capital outlay and properly disallowed under s. 6 (1) (b) of this act. *Montreal Coke and Manufacturing Company v. Minister of National Revenue* (1944) A.C. 126; *Minister of National Revenue v. Dominion Natural Gas Company Limited* (1941) S.C.R. 19 and *Mahaffy v. Minister of National Revenue* (1946) S.C.R. 450 followed and applied. **ANGLO-CANADIAN OIL COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE**. . . . . 63

4.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a)*—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"The annual net profit or gain or gratuity . . . directly or indirectly received"—*Deductible expenses must be those laid out or expended in the year income is received—Appeal dismissed*.—Appellant, a manufacturer of lingerie fabrics, in making its income tax return for the year 1939, sought to deduct from its 1939 receipts certain operating expenses incurred in 1938. The deduction was disallowed and on appeal to the Minister of National Revenue the assessment was affirmed. From such assessment the appellant brought its appeal to this Court. *Held*: That the word "annual" in s. 3 of the Income War Tax Act as applied to profit or gain or gratuity does not mean that the profit or gain or gratuity must necessarily be of a recurring nature from year to year, but rather that it is the profit or gain or gratuity of or in or during the year in respect of which the assessment is made. 2. That the "net" profit or gain or gratuity "received" is to be determined by deducting from the gross income received in or during the year the deductible disbursements or expenses laid out or expended in or during the same year; the taxable income of the year is the difference between the incoming receipts and the outgoing deductible expenditure of that year. **CONSOLIDATED TEXTILES LIMITED v. MINISTER OF NATIONAL REVENUE** . . . . . 77

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5.—*Income—Income War Tax Act R.S.C. 1927, c. 97, s. 6 (1) (a)*—*Deductible disbursements—Expenses of litigation incurred to enjoin competitor from using appellant's name are deductible—Disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Appeal allowed*.—Appellant is a corporation incorporated by Royal Charter of May 2, 1670, giving appellant the lands, territories, rights and powers therein set forth. Its head office is in London, England, and its chief office for Canada is in Winnipeg, Manitoba. It has carried on business continuously since its incorporation and has maintained and still maintains many stores and trading posts in Canada. It is the largest dealer in raw furs in the English-speaking world and deals in dressed furs and in fur garments. Its goods are known in Canada and also in the United States and it has acquired a valuable and long established reputation for honest and reliable dealing and has a valuable trade name and good will. In making its income tax return for the years 1938 and 1939, appellant deducted from income for these years certain disbursements made by it in payment of legal expenses of its attorneys, solicitors and counsel for services in connection with an action brought by the appellant in the United States District Court for the Western District of Washington, ninth circuit, against Hudson Bay Fur Company Inc., a trade competitor, which the appellant alleged had designedly adopted the name used by it, to restrain that company from interfering with the appellant's trade. The action was terminated by the issue of the usual injunction. In assessing the appellant for the years 1938 and 1939 the Commissioner for Income Tax refused to allow the deductions claimed by the appellant. These accounts were affirmed by the Minister of National Revenue and appellant appealed to this Court. *Held*: That the costs and expenses laid out by the appellant to prevent the use of a firm name so closely resembling its own as to mislead customers are disbursements or expenses laid out and expended for the purpose of earning the income of appellant within the meaning of s. 6 (1) (a) of the Income War Tax Act; they were not laid out with the object of acquiring or bringing into existence an asset but were made in the ordinary course of preserving and maintaining the trade of the appellant and safeguarding it from the diversion thereof by a party misusing the appellant's name. **THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND v. MINISTER OF NATIONAL REVENUE**. . . . . 130

6.—*Income—Excess Profits Tax Act 1940—Profits of a trade or accretions of capital—Carrying on a business—Appellant buying and selling securities—Appeal dismissed*.—Appellant, manager of a loan company, gave practically all his time for the period

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material to this appeal, to its business. He carried on in a small way an insurance business mostly in respect of the affairs of the loan company and drew an income from shares of the company but principally from mortgages and agreements of sale purchased as investments and, to a small extent, from loans and notes to shareholders of the company. He had a secretary who attended to his insurance business and investments. He paid her salary, owned the desk, typewriter and equipment used by her, and paid for a telephone and also contributed a share of the office rent. Appellant filed his income tax return for the year 1940 and was assessed by the Commissioner of Income Tax for excess profits tax. Appellant appealed to this Court. *Held:* That the appellant was carrying on a business within the meaning of s. 2 (1) (g) of the Excess Profits Tax Act 1940 and the appeal must be dismissed. **GEORGE W. ARGUE v. MINISTER OF NATIONAL REVENUE** . . . . . **192**

7.—*Income—Excess Profits Tax Act 1940, secs. 3, 7(c), 14—“Any payments to proprietors, part owners or shareholders by way of salary, interest or otherwise”—Reimbursement by appellant to one of its shareholders for money spent on management services for appellant—Appeal allowed.*—The majority of appellant's shares are owned by the National System of Baking of Alberta, Limited. That company in the year 1940 performed certain services for appellant in the way of management, supervision, purchase and delivery of commodities, book-keeping and other services, receiving therefor the sum of \$6,359.50 paid to it by appellant. After the payment of such sum the income of appellant was reduced to less than \$5,000. Appellant was assessed for excess profits tax by respondent who contended that the payment of the sum of \$6,359.50 was a payment by appellant to a shareholder of appellant by way of salary, interest or otherwise. On appeal the Court found that the payment by appellant to National System of Baking of Alberta, Limited is a reimbursement to the latter of moneys disbursed by it for services performed for the appellant. *Held:* That the payment of appellant to National System of Baking of Alberta, Limited, was not by way of salary or interest and that the words “or otherwise” in s. 7(c) of the Excess Profits Tax Act, must be interpreted strictly and do not apply to payments made to a shareholder as reimbursement for expenses incurred and services performed, but must be restricted to cover only salaries and interest payments or payments of a similar nature. **EDMONTON NATIONAL SYSTEM OF BAKING LIMITED v. MINISTER OF NATIONAL REVENUE** . . . . . **231**

8.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2 (f), 5(c)—Adoption—Householder—Self-contained domestic estab-*

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*lishment maintained by appellant who supported therein two persons connected with her by adoption by verbal agreement with parents—Appeal allowed.*—Appellant, an unmarried person, during the years material to this appeal maintained a self-contained domestic establishment as defined by the Income War Tax Act and supported therein two minor children who retained their original surname. These children were adopted by appellant by a verbal agreement with their parents and during these years were dependent upon and connected with the appellant by such adoption. The Commissioner of Income Tax assessed appellant for the years 1935 to 1939 inclusive and refused to allow exemption claimed by appellant for her support of these children on the grounds that the adoption was not an adoption within the meaning of the relevant provisions of the Income War Tax Act. The appellant appealed to this Court. *Held:* That the position of appellant with respect to the two children meets all the exigencies of clause (iii) of paragraph (c) of sub-section (1) of section 5 of the Income War Tax Act, R.S.C. 1927, c. 97 as amended by 23-24 Geo. V, c. 41, s. 4, since she was at all times an individual who maintained a self-contained domestic establishment and who actually supported therein two persons connected with her by adoption, and the appeal must be allowed. **HENRIETTA A. R. ANDERSON v. MINISTER OF NATIONAL REVENUE** . . . . . **389**

9.—*Customs Tariff Act, R.S.C. 1927, c. 44, s. 35, Schedule A, par. 710 (f)—Action for duties on packaging charges on gasoline imported in drums dismissed.*—Defendant imported from The United States of America motor fuel in drums owned by defendant. The fuel was purchased from the Ethyl Corporation, a company carrying on business in the United States. The Crown alleges that the value of the fluid imported is greater than that declared by defendant and that such excess is accounted for by a charge for packaging the drums or filling them with motor fuel, paid by the defendant to the Ethyl Corporation. The action is to recover from defendant customs duties on this packaging charge. *Held:* That the packaging charge so-called is merely an item of cost taken into account in a formula used to ascertain what credit on freight charges should be allowed defendant. The defendant paid the freight to the railroad and not to the Ethyl Corporation which corporation endeavoured to equalize the cost to the defendant between a shipment by tank car and a shipment of drums. In the result no packaging charge was imposed and the action must be dismissed. **HIS MAJESTY THE KING v. GAS AND OIL PRODUCTS LIMITED** . . . . . **452**

10.—*Income War Tax Act R.S.C. 1927, c. 97—Excess Profits Tax Act 1940, Statutes of Canada, 1940, c. 32—Wartime Salaries*

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*Order, P.C. 1549, February 27, 1942*—"Free of income tax"—*Bonus—Payment of income tax as part of salary*—"Rate of salary established and payable"—*Appeals allowed*.—In June, 1941, appellant, by resolutions passed by its shareholders at a general meeting, fixed the salaries of certain of its officials at various amounts free of income tax. Respondent disallowed the amounts paid in 1943 and 1944 in excess of the salary and income tax for the base year commencing on November 7, 1940, and ending November 6, 1941, defined by the Wartime Salaries Order, Order in Council No. P.C. 1549, dated February 27, 1942, on the ground that the amounts disallowed were in excess of the amount permitted by s. 2 of the Wartime Salaries Order. The Company appealed. The Court found that the resolutions passed at the general meeting of the Company fixing the salaries were valid. *Held*: The payment of income tax by the appellant is not a bonus within s. 2 (d) of the Wartime Salaries Order. 2. That the "rate of salary established and payable" for each official by the resolutions passed by appellant was the number of dollars plus the tax payable by each official on those dollars and this was the standard or way of reckoning by which his salary was established each year. 3. That while the result of the resolutions passed by appellant was to increase materially the salaries paid the officials in 1943 and 1944 there was no increase in the "rates of salary" paid in 1943 and 1944 above the most recent rates established and payable to them prior to November 7, 1941, since the words "established and payable" in the Wartime Salaries Order refer to the "salary rate" and not to the amount of salary. **THE GREAT WESTERN GARMENT COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE . . . 458**

11.—*Income Tax—Income War Tax Act R.S.C. 1927, c. 97, Rules 2 and 3, s. 3, par. A, of First Schedule—Member of Canadian Military Forces in Western Hemisphere for part of a year entitled only to reduced rate of taxation for that time*.—*Held*: That a member of the Canadian Military Forces in the Western Hemisphere other than in Canada for part of a year and in the Canadian Active Service for the balance of that year is only entitled to the reduced rate of taxation, as per the Schedules in s. 3 of the First Schedule to the Income War Tax Act, in respect to the service pay and allowances received while he was in the Western Hemisphere other than in Canada. **JAMES M. McLEAN v. MINISTER OF NATIONAL REVENUE . . . 469**

12.—*Income—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, s. 6(1)(a)—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"*—*Commissions paid to guarantors of appellant for loans from bank not deduct-*

## REVENUE—Continued

*ible when company engaged in construction business—Capital or income—Appellant's loans are borrowed capital used in same way as its own capital—Commissions are expenditures incurred in relation to the financing of the business—Commissions are paid in order to borrow additional capital and so are part of financial arrangements of appellant*.—Appellant company is engaged in the construction business. From time to time appellant obtained loans from its bank in order to carry on its business operations. The bank required that such loans be guaranteed by directors of appellant. Appellant paid interest to the bank on the advances obtained and also paid to the guarantors by way of commission a sum equal to the interest payments. Appellant sought to deduct from income for the years 1941 and 1942 the amounts paid as commissions. The respondent refused to allow such deductions and appellant appealed to this Court. *Held*: That the money borrowed by appellant is not temporary accommodation but is borrowed capital used in the same way as appellant's capital and the commissions are expenditures incurred in relation to the financing of appellant's business and the financial arrangements are quite distinct from the activities by which appellant earns its income and, therefore, are not expenditures incurred in earning the income within s. 6 (1)(a) of the Act, and consequently are not deductible expenses. **BENNETT AND WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE . . . 474**

13.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, Rules 1 and 2 of s. 1, of par. A of First Schedule—Onus on taxpayer to show assessment incorrect—Appeal dismissed*.—*Held*: That an assessment for income tax is valid and binding unless an appeal is taken from such assessment and the Court determines that such was made on an incorrect basis and where an appellant has failed to show that the assessment was incorrect, either in fact or law, the appeal must be dismissed. **RODERICK W. S. JOHNSTON v. MINISTER OF NATIONAL REVENUE . . . 483**

14.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a)—Meaning of words "for the purpose of earning the income"*—*Payment of damages and costs for negligence deductible when liability really incidental to business*—Appellant sought to deduct amount paid in settlement of damage claims arising out of a collision at sea between one of its oil tankers and another vessel, causing the latter vessel to sink, the collision resulting from negligence on the part of the appellant's seamen. The deduction was disallowed and the amount included in the appellant's assessment, from which it appealed. The appeal was allowed. *Held*: That if a particular disbursement or expense is not within the

REVENUE—*Continued*

express terms of the excluding provisions of section 6 (a), its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice. 2. That the words "disbursements or expenses . . . laid out or expended for the purpose of earning the income" in section 6 (a) mean "disbursements or expenses . . . laid out or expended as part of the process of earning the income". 3. That it is never necessary to show a causal connection between an expenditure and a receipt. 4. That where income is earned from certain operations, all the expenses wholly, exclusively and necessarily incidental to such operations must be deducted as the total cost thereof in order that the amount of the profits or gains from such operations that are to be assessed may be computed. Such cost includes not only all the ordinary operations costs but also all moneys paid in discharge of the liabilities normally incurred in the operations. When the nature of the operations is such that the risk of negligence on the part of the taxpayer's servants in the course of their duties or employment is really incidental to such operations, with its consequential liability to pay damages and costs, then the amount of such damages and costs is properly included as one of the items of the total cost of such operations and may properly be described as a disbursement or expense that is wholly, exclusively and necessarily laid out as part of the process of earning the income from such operations. **IMPERIAL OIL LIMITED v. MINISTER OF NATIONAL REVENUE. . . 527**

15.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 (a), 3 (g) 4 (j), 49—Payments to beneficiary under will out of income exempt from income tax in hands of trustees does not change its income tax exempt character—Meaning of word "derived"—Court has no jurisdiction to relieve from interest or penalties.*—The appellant was entitled to certain payments under the will of her deceased husband. Some of these payments were made out of accumulated revenue which at the time of its receipt by the trustees consisted of interest on bonds exempt from income tax. The amounts so paid were included in the assessments under appeal. Appeal allowed. *Held:* That the whole accumulated revenue consisted of income received by the trustees as interest on income tax exempt bonds and was exempt from income tax under section 4 (j) of the Act. It lost none of that character on being lawfully transferred by the trustees to the appellant in partial discharge of the obligation to her under paragraph 4 of the will. 2. That the word "derived" in section 4 (j) must not be read as meaning "received in the first instance". The word cannot be limited to income from income tax exempt bonds

REVENUE—*Continued*

immediately or directly received by the owners thereof as interest thereon, but must include income that has its source in such bonds even although there may be intervening channels through which it flows from such source to its final destination. It is wide enough to include the payments received by the appellant under paragraph 4 of the will to the extent that they came out of the accumulated revenue made up of balances of interest on income tax exempt bonds received by the trustees. To such extent they are income derived from income tax exempt bonds within the meaning of section 4 (j) of the Act and not liable to taxation. 3. That the terms of section 49, as it stood at the time of the appellant's liability, are mandatory and leave no discretion as to relief from interest or penalties with the Court. **LADY VIRGINIA KEMP v. MINISTER OF NATIONAL REVENUE . . . . . 578**

16.—*Succession Duties—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 6 (b), 2 (m) (k)—"Property" a chose in action—Situs of chose in action—Unadministered residuary legacy is a chose in action and its situs is where the claim to it is enforceable—Chose in action recoverable in California is not property in Canada—No succession of property in Canada within the meaning of s. 6 (b) of the Dominion Succession Duty Act—Appeals allowed.*—W. domiciled in the Province of British Columbia, Canada, by his will bequeathed to his wife "the sum of one hundred and fifty thousand dollars or one-half of my estate whichever may be the larger sum". W. died in Vancouver, British Columbia on September 3, 1921, leaving a net estate of \$125,807.37. His widow, also domiciled in British Columbia, died on July 15, 1924, and by her will bequeathed "the rest and residue of my property, both real and personal, to Bonnie S.", domiciled in California, U.S.A., who by her will left her property to her husband George S. domiciled in California. He died August 16, 1944, and left his estate to his nephew R., also domiciled in California. R. died in 1944 leaving portions of the estate bequeathed by George S. to members of his family. The estate of W. in Vancouver, British Columbia, consisted chiefly of real property and the distribution of the gift to his widow was dependant upon the sale of this realty which did not take place until November 5, 1945, when the sum of \$250,000 was realized therefrom. The appellant Fitzgerald is the administrator with will annexed of Bonnie S. and by virtue of Power of Attorney from him the claimant Walsh was appointed ancillary administrator of the estate of Bonnie S. in British Columbia. He is also the sole surviving executor of the will of W.'s widow. The administrator of the estates of Bonnie S., George S. and R. is domiciled in the State of California. The Minister of

**REVENUE—Concluded**

National Revenue assessed duties on the succession to R. and on the succession from R. to his family. The administrator appealed to this Court. *Held*: That a proprietary interest in an estate not fully administered is a chose in action situated where the claim to it is naturally and properly enforceable against the executors, administrators or trustees concerned. 2. That as the executors of the will of Bonnie S. could only be sued in California the money from the sale of real property in Canada deposited in a bank in Canada is not taxable under s. 6 (b) of the Dominion Succession Duty Act because there was not a succession of property in Canada. **WENDELL THOMAS FITZGERALD v. MINISTER OF NATIONAL REVENUE**..... 589

**SELECTION PATENT.**

*See* PATENTS, No. 4.

**SELF-CONTAINED DOMESTIC ESTABLISHMENT MAINTAINED BY APPELLANT WHO SUPPORTED THEREIN TWO PERSONS CONNECTED WITH HER BY ADOPTION BY VERBAL AGREEMENT WITH PARENTS.**

*See* REVENUE, No. 8.

**SEPARATE CLAIM FOR PROCESS NOT PREPARED.**

*See* PATENTS, No. 1.

**SERVANT OF CROWN DRIVING MOTOR VEHICLE LAWFULLY WHEN OVERTAKEN WITH SUDDEN ILLNESS CAUSING HIM TO LOSE CONTROL OF VEHICLE.**

*See* CROWN, No. 11.

**SHIPPING.**

1. ABANDONMENT OF SHIP, No. 1.
2. ACTION DISMISSED, No. 1.
3. ACTION FOR GENERAL AVERAGE CONTRIBUTION, No. 1.
4. "ACTUAL FAULT OR PRIVITY" OF OWNERS, No. 1.
5. CANADA SHIPPING ACT, 1934, 24-25 GEO. V, c. 44, s. 649, No. 1.
6. COUNTERCLAIM ALLOWED, No. 1.
7. COUNTERCLAIM FOR LOSS OF CARGO, No. 1.
8. EXTENT OF OWNER'S RESPONSIBILITY, No. 1.
9. LIMITED LIABILITY OF SHIPOWNER, No. 1.
10. THE WATER CARRIAGE OF GOODS ACT, 1936, 1 ED. VIII, c. 49, No. 1.

**SHIPPING—Action for general average contribution—Abandonment of ship—Counterclaim for loss of cargo—Unseaworthiness—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49—Extent of owner's responsibility—Canada Shipping Act, 1934,**

**SHIPPING—Concluded**

24-25 Geo. V, c. 44, s. 649—*Limited liability of shipowner—"Actual fault or privity" of owners—Action dismissed—Counterclaim allowed.*—The schooner *City of Alberni*, owned by the plaintiff and carrying a cargo of lumber, owned by the defendant, from Vancouver, B.C., to Durban, S.A., was forced to put into San Francisco, California, and later into Valparaiso, Chile, for repairs. At the latter port she was abandoned by her owner and the ship and cargo were sold, causing heavy losses to both owners. The action is brought by the ship owners to recover a general average contribution from the owners of the cargo who defend on the ground that the ship was unseaworthy at the commencement of the voyage and that the owners failed to use due diligence to make her seaworthy. The cargo owners counterclaim for the loss they sustained. The Court found that the ship was not seaworthy when she sailed from Vancouver nor when she left San Francisco. *Held*: That the carrier's obligation under The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49 to exercise due diligence to see that his vessel is seaworthy is not limited to his personal diligence, his responsibility extends to the acts or defaults of his agents or servants. 2. That the action must be dismissed since the ship was unseaworthy and judgment be given in favour of the defendant on its counterclaim for the amount of limited liability under the Canada Shipping Act, 1939, 24-25 Geo. V, c. 44, s. 649. **CANADIAN TRANSPORT COMPANY LIMITED v. HUNT, LEUCHARS, HEPBURN, LIMITED**..... 83

**SITUS OF CHOSE IN ACTION.**

*See* REVENUE, No. 16.

**SPECIFICATION MUST NOT CONTAIN MISLEADING STATEMENTS.**

*See* PATENTS, No. 4.

**SPECIFICATION SHOULD BE CONSTRUED FAIRLY.**

*See* PATENTS, No. 4.

**SPECIFICATION THE DICTIONARY FOR THE CLAIMS.**

*See* PATENTS, No. 4.

**"STANDARD".**

*See* TRADE MARKS, No. 3.

**SUCCESSION DUTIES.**

*See* REVENUE, No. 16.

**"SUCH SALARY SHALL BE REDUCED BY THE AMOUNT OF SUCH PENSION."**

*See* CROWN, No. 6.

**SUPLIANT A MERE LICENSEE WITH NO PROPERTY IN THE LAND.**

*See* CROWN, No. 4.

**SUPLIANT ENTITLED TO RECOVER**

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**TEST OF ANTICIPATION.**

See PATENTS, No. 4.

**"THE ANNUAL NET PROFIT OR GAIN OR GRATUITY DIRECTLY OR INDIRECTLY RECEIVED."**

See REVENUE, No. 4.

**THE ASSESSMENT ACT, R.S.O. 1937, C. 272.**

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**THE INTERPRETATION ACT, R.S.C. 1927, C. 1, S. 31(J).**

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**THE UNFAIR COMPETITION ACT, 1932, SS. 4(4), 19, 23(1), 26(1) (C), 29.**

See TRADE MARKS, No. 1.

**THE UNFAIR COMPETITION ACT, 22-23 GEO. V, C. 38, S. 29.**

See TRADE MARKS, No. 3.

**THE UNFAIR COMPETITION ACT, 1932, SECS. 2(A), 2(B), 2(M), 3, 4, 6, 26(1) (C), 28(1) (D), 29.**

See TRADE MARKS, No. 2.

**THE UNFAIR COMPETITION ACT, 1932, SECS. 2(K) (1) 26(1) (F) AND 52.**

See TRADE MARKS, No. 4.

**THE WATER CARRIAGE OF GOODS ACT, 1936, 1 ED. VIII, C. 49.**

See SHIPPING, No. 1.

**THE WORKMEN'S COMPENSATION (ACCIDENT FUND) ACT, R.S.S. 1940, C. 303.**

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**TRADE MARKS.**

1. ACQUISITION OF SECONDARY AND DISTINGUISHING MEANING SUBSEQUENT TO REGISTRATION, No. 1
2. DELAY IN INSTITUTING PROCEEDINGS TO EXPUNGE NOT CAUSE FOR DISMISSAL OF MOTION WHEN NO PROOF THAT RESPONDENT HAS BEEN PUT UNDER ANY UNFAIR DISADVANTAGE, No. 4.
3. DISTINCTIVENESS AN ESSENTIAL REQUIREMENT, No. 1.
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15. THE UNFAIR COMPETITION ACT, 1932 SS. 4(4), 19, 23(1), 26(1) (c), 29, No. 1.
16. THE UNFAIR COMPETITION ACT, 22-23 GEO. V, c. 38, s. 29, No. 3
17. THE UNFAIR COMPETITION ACT, 1932, SECS. 2(a), 2(b), 2(m), 3, 4, 6, 26(1) (c), 28(1) (d), 29, No. 2.
18. THE UNFAIR COMPETITION ACT, 1932, SECS. 2(k) (1), 26(1) (f) AND 52, No. 4.
19. TRADE MARK AND DESIGN ACT, R.S.C. 1927, c. 201, ss. 5, 11(e), 13, 20, RULE X, No. 1.
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**TRADE MARKS—"Gold Medal Furs"—Trade Mark and Design Act, R.S.C. 1927, c. 201, ss. 5, 11 (e), 13, 20, Rule X—The Unfair Competition Act, 1932, ss. 4 (4), 19, 23 (1), 26 (1) (c), 29. Invalid registra-tion a defence in an infringement action—Misrepresentation in application for regis-tration—Non-use of trade mark before regis-tration—Essentials necessary to constitute trade mark—Distinctiveness an essential requirement—Laudatory or commendatory epithets not distinctive—Acquisition of sec-ondary and distinguishing meaning subse-quent to registration.—The plaintiff, a dealer in manufactured furs particularly real Alaska seal fur coats, had the words "Gold Medal Furs" registered as a specific trade mark. In an action for infringement against the defendant who made and sold electric seal fur coats carrying a label containing the words "Gold Medal Seal" the defendant attacked the validity of the registration of the plaintiff's alleged trade mark. *Held:* That the plaintiff's alleged trade mark "Gold Medal Furs" lacked the**

**TRADE MARKS—Continued**

necessary quality of distinctiveness and did not, therefore, contain the essentials necessary to constitute a trade mark, properly speaking within the meaning of section 11 of the Trade Mark and Design Act and was not validly registered. 2. That if the words "Gold Medal Furs" were not *per se* apt and appropriate for trade mark use at the time of their registration because of their lack of distinctiveness and, therefore, not properly registrable, then any subsequent acquisition of a secondary and distinguishing meaning denoting only the plaintiff's furs could not for the purpose of supporting an action for infringement give validity to a registration that was invalid when it was made. **J. H. MUNRO LIMITED v. NEAMAN FUR COMPANY LIMITED . . . 1**

2.—"Lime Cola"—*The Unfair Competition Act, 1932, secs. 2(a), 2(b), 2(m), 3, 4, 6, 26(1)(c), 28(1)(d), 29—Use of trade mark required to be proved in an application under s. 29 of The Unfair Competition Act, 1932, is a use in Canada. Held:* That for the purpose of a declaration under s. 29 of The Unfair Competition Act, 1932, the use of the trade mark required to be proved must be a use in Canada. **LIME COLA COMPANY v. THE COCA-COLA COMPANY OF CANADA LIMITED . . . . . 180**

3.—*The Unfair Competition Act, 22-23 Geo. V, c. 38, s. 29—"Standard"—Mark consisting of word used in laudatory nature and not meaning the articles made by petitioner is not registrable—Where part of mark abandoned registration of remaining portion refused.—Held:* That the word "Standard" used in connection with goods is of a laudatory nature and cannot mean the articles made by the petitioner. 2. That since petitioner had used the words "Standard Stoker" on his goods to bring them to the attention of the public he cannot now abandon one part of his chosen mark and obtain a declaration under s. 29 of The Unfair Competition Act in respect to only one portion of it. **STANDARD STOKER COMPANY, INC. v. THE REGISTRAR OF TRADE MARKS . . . . . 437**

4.—"Frigidaire"—"Frozenaire" — *The Unfair Competition Act, 1932, secs. 2(k), (1) 26(1)(f), and 52—Word marks not likely to cause confusion—Delay in instituting proceedings to expunge not cause for dismissal of motion when no proof that respondent has been put under any unfair disadvantage.—Held:* That the words "Frigidaire" and "Frozenaire" used in connection with refrigerators and like wares do not so clearly resemble each other as to be likely to cause confusion nor do they so closely suggest the idea conveyed by each other that confusion is likely to arise. 2. That in the absence of evidence that the delay or neglect of applicant in instituting proceedings to expunge has put the respondent under any unfair disadvantage such delay

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is not sufficient cause for dismissal of applicant's motion. **GENERAL MOTORS CORPORATION v. NORMAN WILLIAM BELL-LOWS . . . . . 568**

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**TRAVELLING AND LEGAL EXPENSES INCURRED IN PREPARATION OF A BRIEF FOR SUBMISSION TO THE MINISTER OF NATIONAL REVENUE IN RESPECT OF ALLOCATION OF PROCEEDS OF OIL WELL TO CAPITAL AND INCOME RESPECTIVELY NOT ALLOWED IN DEDUCTIONS FROM INCOME.**

*See* REVENUE, No. 3.

**UNADMINISTERED RESIDUARY LEGACY IN A CHOSE IN ACTION AND ITS SITUS IS WHERE THE CLAIM TO IT IS ENFORCEABLE.**

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**USE OF TRADE MARK REQUIRED TO BE PROVED IN AN APPLICATION UNDER S. 29 OF THE UNFAIR COMPETITION ACT, 1932, IS A USE IN CANADA.**

*See* TRADE MARKS, No. 2.

**USE OF XANTHATES IN FROTH FLOTATION CONCENTRATION OF ORES.**

*See* PATENTS, No. 4.

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*See* PATENTS, No. 3.

**VALUE OF INVENTION TO OWNER.**

*See* PATENTS, No. 3.

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**WORD MARKS NOT LIKELY TO CAUSE CONFUSION.**

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