1948
Mar. 18
May 25

BETWEEN:

ORRIN H. E. MIGHT.....APPELLANT;

AND

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

*Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, para. A, First Schedule, ss. 2 (m)—Meaning of "being employed"—Appeal allowed.*

*Held:* That the wife of a taxpayer practising her profession as a physician on her own behalf is a person employed within the meaning of Rule 2 of Section 1 and of Rule 6 of Section 2 of paragraph A of the First Schedule to the Income War Tax Act and the income earned by her in such practice is earned income within the meaning of the Act; the taxpayer therefore is entitled to assessment for income tax as a married person.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Ottawa.

*J. Ross Tolmie* and *Ross Gray* for appellant.

*W. R. Jackett* and *E. S. MacLatchy* for respondent.

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

O'CONNOR J. now (May 25, 1948) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C., 1927, chap. 97, from the assessment for income tax for the taxation year 1942.

The appellant is a barrister-at-law who resides and practises his profession at Calgary, Alberta. The wife of the appellant is a physician who resides with the appellant and practises her profession at Calgary. The investment income of the wife in 1942 did not exceed $660. The income of the wife in 1942 (exclusive of investment income) was income earned from the practice of her profession as a physician.

The appellant filed a return for the year in question on the basis that he was entitled to married status under the

act. The respondent assessed the appellant on the basis that he was not entitled to married status under the act because his wife had an income in excess of $660 and was not employed within the meaning of Rule 2 of Section 1, and of Rule 6 of Section 2 of paragraph A of the first Schedule to the Income War Tax Act.

The then relevant sections of the Act were as follows:

Paragraph A—First Schedule—

(*a*) With respect to Normal Tax.

Section 1—Rule 2.

2. If, during any taxation year, a husband and his wife each had a separate income in excess of $660, each shall be taxed under Rule Three of this section, provided, however, that a husband shall not lose his right to be taxed under Rule One of this section by reason of his wife being employed and receiving any earned income.

(*b*) With respect to Graduated Tax.

Section 2—Rule 6.

6. If, during any taxation year, a husband and his wife each had a separate income in excess of $660 before making the deduction for which provision is made in Rule One of this section, neither of them shall be entitled to the deduction from graduated tax for which provision is made in Rule Three of this section, provided, however, that notwithstanding the foregoing a husband shall not lose his right to the deduction provided in Rule Three of this section by reason of his wife being employed and receiving any earned income but his wife shall for the purposes of this section be treated as an unmarried person.

"Earned income" is defined by the Act to mean:

2 (*m*). "Earned income" means salary, wages, fees, bonuses, pensions, superannuation allowances, retiring allowances, gratuities, honoraria, and the income from any office or employment of profit held by any person, and any income derived by a person in the carrying on or exercise by such person of a trade, vocation or calling, either alone or, in the case of a partnership, as a partner actively engaged in the conduct of the business thereof, and includes indemnities or other remuneration paid to members of Dominion, provincial or territorial legislative bodies or municipal councils, but shall not include income derived by way of rents or royalties.

It was agreed by counsel and it is, of course, clear that the earned income must be received as a result of "being employed", and that the income earned by the wife of the appellant in the practice of her profession was "earned income" within the meaning of the statutory definition section 2 (m).

The issue then is whether or not the appellant is within the proviso and that in turn depends on whether his wife in practising her profession on her own behalf was "being employed and receiving any earned income".

1948

MIGHT
v.
MINISTER
OF NATIONAL
REVENUE

O'Connor J.

The question is whether "being employed" means occupied or engaged or at work, or whether it is limited, as the Crown contends, to those in the relationship of master and servant. In other words the contention of the Crown is this:—that if the wife of the appellant had been engaged to practise medicine by another doctor and was in the relationship of master and servant, she would have been "employed". But when she practised medicine on her own behalf, she was not "employed" within the meaning of the proviso.

The word used in the proviso is "employed" and is not the word "employee" or "employer". The words employee, employer and employment are used in many sections of the act and in their context in those sections undoubtedly refer to the relationship of master and servant.

There are many cases in which the word "employee" has been held in its context to mean servant. For example in *Kearney* v. *Oakes* (1), "employee" in "officer, employee or servant" was held to mean servant and nothing more.

But the word here is "employed".

The Golden Rule of construction was laid down by Lord Wensleydale in *Gray* v. *Pearson* (2):—

> 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 repugnancy 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.

Dictionaries may be resorted to for the purpose of ascertaining the uses of a word in popular language; 3rd Ed., Beal's Cardinal Rules of Legal Interpretation, page 349. In *Rex* v. *Peters* (3), Lord Coleridge said:

> "I am quite aware," said Lord Coleridge, "that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books".

I refer to the following definitions:—

*Murray's New English Dictionary: ("Employ")*

(Omitting the references to physical things and time.)

> 3. To use the services of (a person) in a professional capacity, or in the transaction of some special business; to have or maintain (persons) in one's service.

(1) (1889) 18 S.C.R. 148.
(2) (1857) 6 H.L. Cas. 106.
(3) (1886) 16 Q.B.D. 636.

4. To find work or occupation for (a person, his bodily or mental powers); in pass. often merely to be occupied, to be at work. Const. about, in, on.

*"Employed"*

That is in (another's) employ. Also absol. with pl. sense, the wage-earning class.

*Webster's New International Dictionary.*

*"Employ"*

(Again omitting the references to the physical things and time.)

3. To occupy; busy; devote; concern; as, to employ time in study; to employ one's energies to advantage.

4. To make use of the services of; to have or keep at work; to give employment to; to intrust with some duty or behest; as, to employ a hundred workmen; to employ an envoy; often, in the passive, to have employment; to be at work; as, he has been employed for some time.

(Syn.)—Employ, hire. Employ is used to emphasize the idea of service to be rendered. Hire, of wages to be paid; as to employ an expert accountant, to hire a drayman. But the words are often interchangeable. See use, and occupation.

*"Employment"*

1. Act of employing, or state of being employed.

2. That which engages or occupies; . . .

(Syn.) work, business, vocation, calling, office service, commission, trade, profession. See occupation.

The word "employed" which is the word used in these provisoes is also used in three other sections of the Act:—

Par. (*d*) of Rule 1 of Section 1 and par. (*d*) of Rule 3 of Section 2 of Schedule A, provide status equivalent to married persons and a tax credit to:—

(*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.

It is quite clear that the word in that context refers solely to the relationship of master and servant.

Section 9 (1) of the Charging Provisions levies a tax upon the income of a person:—

(*c*) who is employed in Canada at any time in such year.

"Employed in Canada" is defined by Section 2 (1) (*c*) as:—

2 (*c*). "Employed in Canada" means regularly or continuously employed to perform personal services, any part of which is performed in Canada, for salary, wages, commissions, fees or other remuneration, whether directly or indirectly received, derived from sources within Canada.

1948

MIGHT v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The meaning of the definition is none too clear and the expression defined is "employed in Canada", and is therefore restricted to the sections in which that expression occurs. It is significant that Parliament used the word "employed" in (*c*) and the words "salary", "wages", "commissions", "fees" or "other remunerations". Fees or other remunerations would appear to indicate that "employed" in that expression means not only as a servant but one engaged on his own behalf.

The word "employed" also occurs in Section:—

> 81. No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any written statement furnished under the provisions of this Act.

Section 81 deals primarily with those in the public service, i.e., those in the relationship of master and servant. But it is also clear that the section would be applicable to legal counsel and chartered accountants who were not in the public service but engaged by the Department on a tax appeal or other matter on a fee basis. They would be "employed" within the section but would not be in the relationship of master and servant.

The word "employed" has been considered in a number of cases.

In *Harris* v. *Best, Ryley & Company* (1), it was held that the word "employed" in—"the stevedores to be appointed by the charterers but to be employed and paid for by the owners"—meant to be employed as a servant.

In *Carter* v. *Great West Lumber Company* (2), the question was whether a bank president was examinable for discovery as being a person "employed by the Bank" within the meaning of the Court Rules. Walsh, J., said at p. 902:—

> I think that the Master took too narrow a view of the word "employed" as used in this Rule. It may be true in a broad sense to say that one who is employed is an employee and it would certainly sound funny to refer to a bank president as an employee of his bank. While, however, it is strictly correct to say that everyone who is an employee is employed by another, I do not think it is equally true to say that everyone who is employed by another is his employee. For instance, a solicitor who is engaged by a client to do certain work for him is employed by him for that purpose, as is a doctor who gives his professional skill to a patient, but no one would think of referring to either of these professional men as an employee of his client or his patient.

(1) (1893) 68 Law Times, 76. (2) (1919) 3 W.W.R., 901.

One of the definitions of "employ" given in *Murray* is "to use the services of (a person) in a professional capacity, or in the transaction of some special business". A person whose services are used in the transaction of some special business is, therefore, within this definition, employed to do it. Of such a character is the work of a bank president, and so when he is appointed to that office he is employed to transact the business of it. In the case of *Reg.* v. *Reason*, 23 L.J. M.C. 11, at p. 13, 2 C.L.R., 120, to which Mr. Fenerty referred me, Baron Parke said that the word "employed" in the statute then under discussion meant "engaged or occupied."

In *Reece* v. *Ministry of Supply and Ministry of Works and Planning* (1), it was held that "employed" meant "engaged" in the expression, ". . . apply to all workmen employed at any time . . . in any of the following processes . . .", in the Silicosis Act, 1931. Scott, L.J., said at p. 242:—

> The words "employed at any time in the processes" contain a patent ambiguity in that the word "employed" may mean either contractually employed or merely engaged in the processes, that is, working at them. The latter is the true meaning, but it may be that a reading of them in the other sense vitiated the argument addressed to us for the Crown; for in discussing the relevant named processes of sub-paras. (iv) and (vi) the Solicitor-General submitted that "the workman must be employed on the job of, for instance, a cutter or dresser"—using the word "job" almost as the equivalent of the trade of a joiner or of a cabinet maker. In our opinion, that is not the true sense in which the word "employed" is used in the schemes in relation to the named processes. The word has no relation to the capacity in which the employer contracts to employ the workman. The whole emphasis of the legislation is on the nature of the process on which the man is in fact engaged, because of the risk to health which it involves. Had the word used been "engaged" that meaning would have been apparent; but one of the meanings of the word "employed" is "engaged", and we have no doubt that that is the true meaning of the word "employed" in these schemes.

In *Reg.* v. *Reason* quoted by Walsh, J., in the *Carter* case (*supra*), it was held that a person whom a postmaster requested to assist him in sorting letters was a "person employed by or under the Post Office" under Section 47 of 7 Will 4 & 1 Vict., c. 36. Parke, B., said, "The term 'employed' in this statute, means 'engaged or occupied'."

The cases cited and the references to other sections of the act, in which the word "employed" is found, are not of much assistance.

But they do show quite clearly, first that "employed" is used in both senses; one, occupied or engaged and the

(1) (1945) 1 All E.R., 239.

1948

MIGHT
v.
MINISTER OF NATIONAL REVENUE

O'Connor J.

other, in the relationship of master and servant. They also show how essential it is that the meaning of the word be ascertained in the context in which it is used.

The fundamental rule of interpretation to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that make it". *Fordyce* v. *Bridges* (1).

The intention of Parliament must be gathered from the language employed, having regard to the context in connection with which it is used. Per Lord Russell, C.J., in *Attorney-General* v. *Carlton Bank* (2).

The purpose or object of the proviso is clear. It was enacted by Parliament to induce married women to go to work in order to relieve the manpower shortage. Up to that point I think counsel are in agreement. The nation had then been at war for three years and the manpower shortage was acute. Without these provisoes if a married woman had a separate income in excess of $660 a year, the husband lost the right to be taxed as a married person under Rule 1, Section 1, which provided a normal tax equal to 7 per cent of the income paid by every person whose income during the year exceeded $1,200. He would then be taxed at the rates of 7, 8 and 9 per cent in accordance with the provisions of Rule 3, Section 1, and would also lose the tax credit of $150 for married persons under Rule 3, Section 2. The married woman would also be taxed under Rule 3 (as a single person). The results would be obvious.

The provisos, however, provide that a husband not lose his right to be taxed under Rule 1, nor his tax credit under Rule 3, Section 2, by reason of his wife "being employed and receiving any earned income". There can be no doubt, therefore, that the object of Parliament was to induce married women to go to work in order to relieve the manpower shortage.

It was contended that by the use of the word "employed" Parliament intended married women to work only in the relationship of master and servant: That in turn is based on the contention that "employed" means only employed as a servant, whereas it has both meanings.

(1) (1847) 1 H.L.C., 4.

(2) (1899) 2 Q.B., 164.

1948

MIGHT
v.
MINISTER OF NATIONAL REVENUE

O'Connor J.

But to restrict the provisions to those employed as servants would limit or restrict the number and there would be no object in that. On the contrary the intention must have been to get the largest number possible.

I could agree with that contention if, by limiting the provision to servants, this would result in their engaging in essential work and not in non-essential work. But it would not have that effect, because they could, as servants, be engaged in non-essential work as well as essential.

It would be unreasonable to exclude those engaged on their own behalf, because to do so would exclude doctors and nurses doing private nursing and others whose work was most essential. If Parliament had intended to do so, that intention would have been clearly expressed.

The word "employed" must be construed in the context in which it is used, and particularly in its relation to "any earned income".

"Any" is defined by Webster as, "one indifferently out of a number".

The statutory definition of "earned income" gives a number of categories including "salary, wages, fees . . . and any income derived by a person in the carrying on or exercise by such person of a trade, vocation or calling . . ."

In its context and having regard to its relation to "earned income" the word "employed" means, in my opinion, "occupied or engaged".

It was contended that if there was any ambiguity, then the rule of strict construction compelled the adoption of the more limited meaning. But the sense of the words to be adopted is the one which best harmonizes with the context and promotes in the fullest manner the policy of Parliament.

Maxwell on the Interpretation of Statutes (8th Ed.,) p. 240, states:—

> The rule of strict construction, however, whenever invoked, comes attended with qualifications, and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Per Cur *U.S.* v. *Hartwell,* 6 Wallace, 385, 395. Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature. Sutton, L.J., in *Powell Lane Manufacturing Co.* v. *Putnam,* cited by Horridge J., in *Newman Manufacturing Co.* v. *Marrables,* (1931) 2 K.B., 297, 304. The paramount object, in construing penal as

1948

MIGHT
v.
MINISTER
OF NATIONAL
REVENUE

O'Connor J.

well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. *Hartwell case* (supra) 396. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy. *Heydon's Case*, 3 Rep. 7b.

In my opinion, the adoption of the sense of "being occupied, engaged or at work" of the word "employed" best harmonizes with the context and also promotes in the fullest manner the policy and object of Parliament.

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.*