1955

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Exchequer Court of Canada

RALPH M. SPANKIE, Q.C.
Official Law Reporter

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGES:

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

THE HONOURABLE JOHN DOHERTY KEARNEY
(Appointed November 1, 1951)

THE HONOURABLE ALPHONSE FOURNIER
(Appointed June 12, 1953)

THE HONOURABLE LOUIS McC. RITCHIE
(Appointed April 21, 1955)

THE HONOURABLE JACQUES DUMOULIN
(Appointed December 1, 1955)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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.
The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.
His Honour HAROLD L. PALMER, Prince Edward Island Admiralty District—appointed August 3, 1948.
The Honourable Sir BRIAN DUNFIELD, Newfoundland Admiralty District—appointed May 9, 1949.
The Honourable HENRY ANDERSON WINTER, Newfoundland Admiralty District—appointed May 9, 1949.
The Honourable Sir ALBERT JOSEPH WALSH, Newfoundland Admiralty District—appointed September 13, 1949.
His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.
The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.
The Honourable ESTEN KENNETH WILLIAMS, Manitoba Admiralty District—appointed February 26, 1952.

ATTORNEY-GENERAL OF CANADA:
The Honourable STUART S. GARSON, Q.C.

SOLICITOR GENERAL OF CANADA:
The Honourable W. Ross MACDONALD, Q.C.

The Honourable William Pitt Potter, Puisne Judge of the Exchequer Court of Canada, died during the current year.

Howard R. L. Henry, Q.C., Registrar of the Exchequer Court of Canada, died during the current year.

Gabriel Belleau, Q.C., appointed Registrar of the Exchequer Court of Canada on July 28, 1955.

CORRIGENDA

At page 144 in the second line of the captions in *Minister of National Revenue* v. *Tip Top Tailors* section "27(1) *(e)*" should read "127(1)*(e)*".

At page 228 in the second line the figure "(4)" should read "(3)".

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BRITISH COLUMBIA ADMIRALTY DISTRICT

1953
Nov. 27
Dec. 9

BETWEEN:

BIRKS CRAWFORD LIMITED .....PLAINTIFF;

AND

THE SHIP *STROMBOLI* .....DEFENDANT.

Shipping—Practice—Stay of action brought in Canada—Agreement in bill of lading on forum.

Held: That where the parties to a bill of lading have agreed to litigate any dispute arising thereunder by Italian law at Genoa, Italy, an action brought in this Court will be stayed in order that the parties may carry out the agreement.

MOTION to have action dismissed or stayed.

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

J. R. Cunningham for the motion.

F. H. H. Parkes, contra.

SIDNEY SMITH D. J. A. now (December 9, 1953) delivered the following judgment:

This is a motion by the defendant that this action be dismissed or stayed. The proceedings concern cargo found damaged on discharge at Vancouver. There can be no doubt of the Court's jurisdiction.

1953

BIRKS CRAWFORD LIMITED v. THE SHIP *Stromboli*

Smith D.J.A.

The only question to be decided arises by way of a provision in the Bill of Lading to the effect that the parties thereto had contracted to litigate any dispute arising thereunder by Italian law, and "before the Judicial Authority of Genoa", Italy, and not otherwise. On reading the pleadings and on consideration of the authorities, I think the proper order is that made by Sir Samuel Evans in *The Cap Blanco* (1).

> In dealing with commercial documents of this kind, effect must be given if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court.
>
> Although, therefore, this Court is invested with jurisdiction, I order that the proceedings in the action be stayed in order that the parties may litigate in Germany, as they have agreed to do.

I direct therefore that the proceedings in this action be likewise stayed in order that the parties may litigate in Genoa, Italy, as they have agreed to do.

The defendant will have costs of the motion.

Order accordingly.

1954

Nov. 1

Nov. 4

BETWEEN:

S. D. EPLETT & SONS, LIMITED ..... APPELLANT,

AND

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

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, s. 5—Decision of Board not erroneous by reason of possible error in computation of amount of capital employed —Onus on appellant to establish that Board's decision based on wrong principles and that it did not act judicially.

The appellant made an application to the Minister pursuant to section 5 of The Excess Profits Tax Act, 1940, as amended, for a reference to the Board of Referees to determine its standard profits on the ground that its business was itself abnormally depressed during the standard period. The Board found that it was so depressed but did not recommend that the capital standard should be departed from and also

(1) [1913] P. 130 at 136.

1954

S. D. EPLETT & SONS, LIMITED v. MINISTER OF NATIONAL REVENUE

reported that inasmuch as its standard profits exceeded 10 per cent upon the capital it was unable to make any recommendation for an increase of such standard profits. The appellant appealed from assessments based on such standard profits.

Held: That there is no foundation for the objection that the Minister had failed to make a proper reference of the appellant's claim to the Board of Referees in that he failed to ask the Board for advice as to whether or not a departure from the basis of capital employed would be justified and that the Board had erred in recommending to the Minister that the capital employed basis should not be departed from.

2. That even if the Board made an error in computing the amount of the capital employed by the appellant it does not follow that its decision that the appellant's standard profits should not be increased was erroneous or that it was based on wrong principles or that the Board in making it had not acted judicially.

3. That it is pure speculation on the appellant's part that, if the Board had found the capital employed to be the amount which the appellant contended was the correct one, it might then have recommended a departure from the capital employed basis. It is inconceivable that it would have done so.

4. That the appellant could not discharge the onus of establishing that the Board's decision was based on wrong principles and that it did not act judicially in arriving at it by proof of an error in the computation of the amount of capital employed by the appellant that could not possibly have had any effect on it.

APPEALS from assessments under The Excess Profits Tax Act, 1940, as amended.

The appeals were heard together by the President of the Court at Ottawa.

W. G. Burke-Robertson, Q.C. for appellant.

E. G. Gowling Q.C. and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (November 4, 1954) delivered the following judgment:

Two separate proceedings were launched by the appellant herein. In the first it appealed against its excess profits tax assessments for the years 1943 and 1944 and in the second against its excess profits tax assessments for the years 1945, 1946 and 1947. On the opening of the hearing before me it was ordered that all the appeals be heard together.

1954

S. D. EPLETT & SONS, LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

Certain facts are clearly established. On March 11, 1944, the appellant made an application to the Minister pursuant to section 5 of The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, Chapter 32, for a reference to the Board of Referees to determine the standard profits of the standard period for the reason that its business, while not being one of a class which was depressed during the standard period, was itself abnormally depressed during such period for the reason set out in the brief which accompanied the application. The application was made on a form called "S.P. 1 and Questionnaire combined", prescribed and authorized by the Minister. The application and brief were prepared by Mr. N. Child who was employed by the appellant as its accountant from January 1, 1942, to November 15, 1949, and who, at the date of the application and until November 15, 1949, was its treasurer.

On December 16, 1944, Mr. C. F. Elliott, the Deputy Minister of National Revenue for Taxation, referred the appellant's claim to the Board of Referees as follows:

The Secretary,
Board of Referees, Excess Profits Tax Act,
Ottawa.

Dear Sir:—

Pursuant to Section 5 of the Excess Profits Tax Act, 1940, reference to the Board of Referees is hereby made

For advice under Order-in-Council P.C. 6479 as to whether the business of the taxpayer was or was not depressed during the standard period and if depressed, for a determination of the Standard Profits.

The following documents are enclosed herewith:

1943—T.20; S.P. 1 and Questionnaire combined; financial statements. T.2's for 1940, 1941 and 1942.

Any additional data that the Board requires will be furnished on request or explanations given on consultation.

In due course you will please advise us of the conclusions of the Board.

Yours faithfully,
C. F. Elliott,
Deputy Minister (Taxation).

December 16th, 1944.

The Board of Referees held a hearing in respect of the appellant's claim on February 6, 1945, at which Mr. Child represented the appellant.

On February 16, 1945, the Board reported its decision to the Minister as follows:

To:

The Minister of National Revenue,
Ottawa, Ontario.
Re S. D. Eplett & Sons Limited,
New Liskeard, Ontario.

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees upon date of 16th December, 1944, in accordance with the provisions of the Excess Profits Tax Act, 1940, as amended.

The Board of Referees having examined the claim reports as follows:

Under the provisions of section five of the Excess Profits Tax Act, 1940, as amended, the Board of Referees

Finds that the taxpayer was depressed during the Standard Period, but does not recommend that the Capital Standard should be departed from.

Computes the Capital Employed on 1st January, 1939 in the sum of $93,618.10 and inasmuch as the Standard Profits of this company exceed 10% upon the Capital, it is unable to make any recommendation for an increase of such Standard Profits.

Dated at Ottawa this sixteenth day of February, 1945.

Board of Referees,

J. D. Hyndman.	Chairman.
Kris A. Mapp.	Member.
T. N. Kirby.	Member.
C. A. Gray.	Member.

On March 15, 1945, Mr. Elliott wrote to the appellant as follows:

Sir:

Re Excess Profits Tax Act, 1940
Standard Profits Claim.
Decision of the Board of Referees.

Your application, pursuant to Section 5 of the Excess Profits Tax Act, 1940, has been considered by the Board of Referees.

The decision of the Board has been received and a copy thereof is set forth below.

The decision of the Board has been approved and becomes operative accordingly.

Yours truly,

C. F. Elliott,
Deputy Minister (Taxation).

The appellant's claim was made under section 5 of the Act without specific reference to any subsection of it. At the date of the application subsection 1 of section 5 of the Act read as follows:

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which

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during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

Provided that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable, he may direct that the standard profits be ascertained by the Board of Referees and the Board shall thereupon, in its sole discretion, ascertain the standard profits at such an amount as the Board thinks just, being, however, an amount equal to the average yearly profits of the taxpayer during the standard period or to interest at the rate of not less than five nor more than ten per centum per annum of the amount of capital employed at the commencement of the last year or fiscal period of the taxpayer in the standard period as computed by the Board in its sole discretion in accordance with the First Schedule to this Act, or the Minister shall assess the taxpayer in accordance with the provisions of this Act other than as provided in this subsection.

Subsection 3 of section 5, which dealt with standard profits in cases where a capital employed basis was inapplicable, provided as follows:

5. (3) If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

(*a*) the business is of such a nature that capital is not an important factor in the earnings of profits, or

(*b*) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

And subsection 4 of section 5 read as follows:

5. (4) Notwithstanding anything contained in this section the decisions of the Board given under subsections one, two and three of this section shall not be operative until approved by the Minister whereupon the said decisions shall be final and conclusive.

Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

It is established that the appellant's standard profits when computed in accordance with the Act came to $15,241.47. It was this amount which the Board had in mind when it held that since the company's standard profits exceeded ten per cent of the amount of the capital employed by it on January 1, 1939, which it computed at $93,618.10, it was unable to make any recommendation for an increase of such standard profits. The result of the Board's decision and its approval by the Minister was that the appellant was left with its actual standard profits as computed under the Act, namely, $15,241.47, without any increase.

In its appeals against its excess profits tax assessments for the years under review based on the said standard profits the appellant made two complaints against the Minister and the Board of Referees. The first was, in effect, that the Minister had failed to make a proper reference of the appellant's claim to the Board in that he failed to ask the Board for advice as to whether or not a departure from the basis of capital employed would be justified and that the Board had erred in recommending to the Minister that the capital employed basis should not be departed from. But in view of the decisions in *M. Company Ltd.* v. *Minister of National Revenue* (1) and *Bowman Brothers Ltd.* v. *Minister of National Revenue* (2) counsel for the appellant did not press this objection. The questions involved are fully dealt with in the cases referred to and I need not say more than that there is no foundation for the objection.

The appellant's sole complaint is that the Board's computation of the amount of capital employed by the appellant on January 1, 1939, at $93,618.10 was erroneous by reason of the fact that it did not deduct certain amounts owing by the appellant for unpaid income tax and unpaid sales tax and that in failing to do so it did not comply with the requirements of the First Schedule to the Act. It was, therefore submitted that the Board had acted on wrong principles and not in a judicial manner. And it was urged that the Board should be reconvened so that it might find the correct amount of capital employed in accordance with the requirements of Schedule 1 and in the light of a correct

(1) [1948] Ex. C.R. 483; [1950] S.C.R. viii.

(2) [1952] Ex. C.R. 476.

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computation determine what the appellant's standard profits should be. The line of argument was that if the Board had followed the requirements of Schedule 1 and arrived at a correct computation of amount of the capital employed it might have made a different decision regarding departure from the capital employed basis in which case if it decided to depart from such basis it would not be bound by the limitations of subsection 1 of section 5 and might give the appellant a larger amount of standard profits.

In my judgment the appellant's submission is without merit in fact or in law. Although it was stated on the "S.P. 1 and Questionnaire combined" form, on which the appellant made its application for a reference to the Board of Referees, that it was required to compute the "capital employed" in the business in accordance with the First Schedule of the Act and was told that it must attach supporting statements showing its computations of "capital employed" it did not do so. There was no information in the appellant's application or supporting brief from which the amount of the capital employed by it could be ascertained and the appellant never at any time gave the Board any information on the subject. Mr. Child stated that when he appeared before the Board one of the members of the Board made reference to the fact that the Board were limited in their powers to an award somewhere between five and ten per cent of the capital employed and that he then asked them what the amount of the capital employed was but never received an answer. But he made no computation of the amount himself, although no person was in a better position to do so than he was, and he made no submission to the Board on the subject. Moreover, on his cross-examination he admitted that although he could have had access to the appellant's income tax file if he had requested it he did not ask for such access at any time prior to the Board's decision. Nor did he attempt to get any information from the Board or any of its officers regarding its figures of the amount of capital employed. Mr. Child also admitted that he was familiar with an explanatory brochure on The Excess Profits Tax Act "issued by the Income Tax Division, Department of National Revenue,

for the guidance of persons concerned with the application of the Excess Profits Tax Act," in which the taxpayer was told, at page 16:

> The initial calculation of his standard on such a basis is to be made by him when he files his Return, with the limitation of a maximum of 10 per cent on capital employed at the commencement of the 1939 year or fiscal period of the taxpayer. The Minister is given the right to refer any case to the Board of Referees where he considers the taxpayer's estimated standard profits to be too high.
>
> The taxpayer, in so computing his standard profits and applying to have them recognized should complete and file with his Return the form S.P. 1 (page 40) in triplicate. The taxpayer's computation of capital must be in conformity with the definition of capital set out in the First Schedule to the Act (page 33).
>
> The taxpayer in computing his standard profits should indicate the reason and justification for the rate which he has used in computing the standard profits. If his case is referred to the Board of Referees the taxpayer will be required to justify the rate which he has used as well as his basis for computing capital employed.

Yet, notwithstanding these instructions, the appellant made its application for a reference to the Board without giving any information on the important subject of the amount of the capital employed by it. Under the circumstances, it should not be open to it to blame the Board for any error of computation when it was itself mainly to blame. The person best able to compute the amount of capital employed in accordance with the requirements of Schedule 1 was the appellant himself. It knew its assets and liabilities and ought to have disclosed them when it made its application for a reference to the Board. If it had done so there would have been no dispute about the amount of the capital employed. Under the circumstances, the Court should not find in the appellant's favour unless the law makes such a finding clearly mandatory.

But the law does not do so. In the first place, it is not fully established that in computing the amount of capital employed by the appellant at January 1, 1939, at $93,618.10 the Board failed to comply with the requirements of Schedule 1 of the Act. The appellant's main complaint is that in computing the amount of capital employed the Board omitted to deduct a liability of $22,339.40 which should have been deducted, made up of $17,426.02 for unpaid sales tax and $4,913.38 for unpaid income tax. It was contended that the amount of capital employed by the appellant on January 1, 1939, was $84,078.70, instead of

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$93,618.10, as found by the Board, and in support of its contention counsel for the appellant filed a balance sheet prepared by Mr. W. S. Ryan, an Ottawa chartered accountant. This was prepared after the decision of the Board. There was also evidence that the Department of National Revenue had computed the amount of capital employed at $106,418.10 and that this computation was before the Board. The details of how this amount was made up appear in Exhibit 4, a document of four pages containing information prepared for the use of the board. The difference between the amount of the Department's computation and that found by the Board is accounted for by an item of $12,800 which the appellant had set up as a bonus in favour of its shareholders. The Department included this item in its computation of capital employed but the Board considered it a liability and deducted it from the amount of the Department's computation. According to Mr. Ryan's statement his computation of the amount of capital employed at $84,078.70 is lower than the Department's computation of $106,418.10 by $22,339.40, the exact amount of the appellant's alleged liability for unpaid sales tax and unpaid income tax. If Mr. Ryan's computation is correct, and I make no finding regarding it, it would follow that the Board's computation is not correct. But I am not prepared to make any such finding, for the evidence of Mr. J. F. Harmer indicates that the statements of capital employed prepared by the Department were based on information and records furnished by the appellant. I do not see how they could have been prepared otherwise.

But the issue in these appeals is not whether the finding of the Board that the capital employed by the appellant on January 1, 1939, was $93,618.10 was correct or not. What the Board had to ascertain was the amount of the appellant's standard profits. It was required to ascertain these at such an amount as it thought just but there was a limitation on the amount which it could find. It had to be equal to the average yearly profits of the appellant during the standard period or equal to interest at the rate of not less than five nor more than ten per centum per annum of the amount of the capital employed by it on January 1, 1939. This was to be computed by the Board in its sole discretion

in accordance with the First Schedule to the Act. The appellant's standard profits, computed according to the Act, amounted as already stated, to $15,241.47, so that so long as the capital employed did not exceed $152,414.70, the Board could not increase the standard profits beyond $15,241.47, unless it decided to depart from the capital employed basis. Consequently, even if the Board made an error in computing the amount of the capital employed at $93,618.10 and should have found that it was $84,078.70, as Mr. Ryan computed it, it does not follow that the Board's decision that the appellant's standard profits of $15,241.47 should not be increased was erroneous or that it was based on wrong principles or that the Board in making it had not acted judicially.

What the appellant is really seeking is another chance to have its claim considered by the Board of Referees in the hope that it might depart from the basis of capital employed and the limitations imposed by subsection 1 of section 5 of the Act and under subsection 3 on some basis other than that of capital employed grant the appellant a larger amount of standard profits than $15,241.47. It was with that hope in mind that it was urged on behalf of the appellant that if the Board had found the amount of capital employed at $84,078.70, instead of $93,618.10, it might have recommended a departure from the basis of capital employed and that the appellant was entitled to the benefit of this possibility.

I do not agree. As I see it, the fact of possible error in finding the amount of capital employed to be approximately $9,000 more than it was does not make the Board's decision that the appellant's standard profits should not be increased erroneous. It is pure speculation on the appellant's part that if the Board had found the capital employed to be $84,078.70, instead of $93,618.10, it might then have recommended a departure from the capital employed basis. In my judgment, it is inconceivable that it would have done so. Then the Board, having decided that it did not recommend that the capital standard should be departed from, had no alternative other than to decide that it was unable to make

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any recommendation for an increase of the appellant's profits and it could not have made any difference in its decision if it had found the capital employed to be $84,078.70, instead of $93,618.10.

The onus was on the taxpayer to establish that the Board's decision that it could not recommend an increase of the appellant's standard profits was based on wrong principles and that the Board did not act judicially in arriving at it. The appellant has not discharged this onus. It could not do so by proof of an error in the computation of the amount of capital employed by the appellant that could not possibly have had any effect on the decision.

Since the appellant has failed in its attacks on the Board's decision its appeals against the assessments for the years in question must all be dismissed. The respondent is entitled to costs.

Judgment accordingly.

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Nov. 12

BETWEEN:

ROBERT SHORROCKS WILLIAMS .....APPELLANT;

AND

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

Revenue—Income—Income Tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 5(a), 5(b), 11(7) and 127(1)(a)—Income from office or employment—Marine engineer—Board and living accommodation on vessel supplied free of charge—Meaning of "income from an office or employment"—Expenses of transport officers—Meaning of "amount" in s. 127(1)(a) of The Income Tax Act—Conditions of agreement with crew of vessel—The Canada Shipping Act, 1934, S. of C. 1934, c. 44, ss. 165, 226—Appeal from Income Tax Appeal Board dismissed.

In 1952 appellant was employed as a marine engineer on a vessel. With his wife and family, he resided on shore. In addition to his wages his employer supplied him with board and living accommodation on the vessel free of charge while she was making her daily trips. In his amended tax return for the taxation year 1952 appellant did not include the value of this board and living accommodation. The Minister, however, added it to appellant's income and he was taxed accordingly. An appeal from the assessment to the Income Tax Appeal Board was dismissed and from the Board's decision appellant appealed to this Court. On the evidence the Court found that appellant in 1952 received or enjoyed the board and lodging in respect of, in the course of or by virtue of his employment.

Held: That section 5(*a*) of the Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, does not distinguish between the value of board and lodging which is received or enjoyed by an employee—and which by the terms of another statute must be supplied to him by his employer or be set forth in a written agreement—and other cases where there is no such statutory requirement. The purpose of s. 5(*a*) is to extend the meaning of "income from an office or employment" beyond the normal concept of "salary, wages and other remuneration, including gratuities" by including in that term the *value* of board, lodging and other benefits which an employee may receive or enjoy in the course of, or by virtue of, his office or employment.

2. That section 11(7) of the Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, relating to the expenses of transport officers has no application since the amounts here were not *disbursed* by appellant.

3. That neither the living accommodation which appellant was entitled to enjoy by reason of the terms of the Canada Shipping Act, 1934, S. of C. 1934, c. 44, ss. 165, 226, nor the board and provisions which he received by reason of his contract with his employer, was an "amount" within the meaning of the Income Tax Act, 1948, S. of C. 1948, c. 52, s. 5(*b*).

APPEAL from a decision of the Income Tax Appeal Board.

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

Glen McDonald for appellant.

E. S. MacLatchy for respondent.

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

CAMERON J. at the conclusion of the hearing delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 18, 1954, whereby the appellant's appeal from an assessment for the taxation year 1952 was dismissed.

The appellant is a marine engineer and in 1952 was employed as such on the S.S. *Princess of Nanaimo,* plying between Vancouver and Nanaimo in the Province of British Columbia, making six single trips daily. With his wife and family, he resided at Horseshoe Bay. His wages for the year totalled $3,977.32. His employer, the British Columbia Coast Steamship Service, also supplied him with board and living accommodation on the vessel free of charge. Such board and living accommodation was valued at $228.00 and there is no dispute as to the accuracy of that figure.

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In his original tax return the appellant included as part of his income the said sum of $228.00 as "value of free board and living accommodation." In an amended return filed by him, this item did not appear. In the assessment made upon him and dated April 8, 1953, the item of $228.00 was made part of his income and he was taxed accordingly. The sole question for determination in this appeal is whether that sum should be included in his income for purposes of taxation.

The assessment in respect of the value of board and lodging was made under the provisions of s. 5(*a*) of the Income Tax Act, Statutes of Canada, 1948, as amended, and it is upon that section that the respondent now relies. It is as follows:

> 5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus
>
> (*a*) the value of board, lodging and other benefits (except the benefit he derives from his employer's contributions to or under an approved superannuation fund or plan, group insurance plan or medical services plan) received or enjoyed by him in the year in respect of, in the course of or by virtue of the office or the employment.

Prima facie at least, it would seem that the value of the board and lodging received by the appellant falls within the provisions of subsection (*a*). The evidence establishes beyond the shadow of a doubt that the board and lodging which the appellant received or enjoyed was so received or enjoyed by him "in respect of, in the course of or by virtue of" his employment. Had he not been employed by the company, he would not have been entitled to and would not have received or enjoyed the benefits of the board and lodging. Moreover, the standard printed form of agreement signed by all members of the crew, including the appellant, contained the following provisions:

> . . . in consideration of which services to be duly performed, the said master hereby agrees to pay to the said crew as wages the sums against their names respectively expressed, and to supply them with provisions according to the scale herein.

Counsel for the appellant submits, however, that as the appellant's employer was required by law to provide board and lodging the appellant had no option in the matter and that, therefore, the value thereof should not be considered as part of his income. He refers to sections 165 and 228 of

the Canada Shipping Act, 1934, Statutes of Canada, 1934, c. 44, by the terms of which, under certain circumstances, masters of vessels are required to provide lodging for members of the crew and to enter into a written agreement such as was here signed with all members of the crew, setting out the terms of employment and the scale of the provisions to be furnished to each seaman as agreed upon.

The purpose of these provisions in the Canada Shipping Act is quite obvious and need not here be discussed. They cannot, however, in my opinion, affect in any way the problem now before me. Section 5(*a*), which I have quoted above, makes no attempt to distinguish between the value of board and lodging which is received or enjoyed by an employee—and which by the terms of a statute must be supplied to him by his employer or be set forth in the agreement—and other cases where there is no such statutory requirement. The purpose of the subsection is to extend the meaning of "income from an office or employment" beyond the normal concept of "salary, wages and other remuneration, including gratuities" by including in that term the *value* of board, lodging and other benefits which an employee may receive or enjoy in the course of, or by virtue of, his office or employment. The provisions of the subsection are fully satisfied if the board and lodging are received or enjoyed by him in respect of, in the course of or by virtue of the office or employment. To exclude from its ambit the value of board and lodging—admittedly received or enjoyed and proven to have been in respect of, in the course of or by virtue of the office or employment—merely because the law required the employer to provide them, would be to read into the subsection an exception which Parliament has not seen fit to provide and which cannot be inferred from the words of the subsection itself. The question is not whether the employer supplied the benefits because of the requirements of the Canada Shipping Act or whether it did so by voluntary contract or otherwise—but whether the appellant did receive or enjoy them in 1952 in respect of, or in the course of, or by virtue of his employment, and my finding must be that he did.

Counsel for the appellant also relied on section 11(7) of the Income Tax Act, having to do with the expenses of transport employees. It relates to the deduction of certain

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amounts *disbursed* by such employees for board and lodging under certain conditions. Inasmuch as the amounts in question in this appeal were not disbursed by the appellant, section 11(7) has no bearing on the issue.

I am of the opinion also that section 5(*b*)(i) of the Income Tax Act is of no assistance to the appellant. It reads as follows:

> 5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus
>
> (*b*) all amounts received by him in the year as an allowance for personal or living expenses or as an allowance for any other purpose except
>
> (i) travelling or personal or living expense allowances expressly fixed in an Act of the Parliament of Canada.

Subsection (*b*) thereof relates to *amounts* received by a taxpayer as an allowance for personal or living expenses or for any other purpose. The word "amount" is defined in the Act by section 127(1)(*a*) as meaning money, rights, or things expressed in terms of the amount of money, or the value in terms of money of the right or thing. Neither the living accommodation which the appellant was entitled to enjoy by reason of the terms of the Canada Shipping Act, nor the board or provisions which he received by reason of his contract with his employers, was money, or expressed in terms of the amount of money or the value in terms of money, and was consequently not an "amount" within the meaning of subsection (*b*). The statutory provision regarding crew accommodation is defined in terms of cubic feet, and the agreement signed by the appellant provides that the scale of provisions shall be "full and plenty". It becomes unnecessary, therefore, to consider the further submission that the appellant falls within the exception provided by subsection (i), namely "travelling or personal or living expense allowances expressly fixed in an Act of the Parliament of Canada", although I would be of the opinion that he does not.

For the reasons which I have stated, the appeal will be dismissed and the assessment made upon the appellant will be affirmed, with costs to the respondent.

Judgment accordingly.

BETWEEN:

RICHFIELD OIL CORPORATION .....PLAINTIFF;

AND

RICHFIELD OIL CORPORATION OF CANADA LTD. ..... DEFENDANT.

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Apr. 14-16
1954
Nov. 19

Trade name—Trade mark—Infringement of trade name—Expungement of trade mark—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(g), 2(h), 2(k), 2(n), 7, 8, 10, 52(1)—Similar trade name—Knowledge of plaintiff's name in Canada—Meaning of "knowingly adopts" in s. 7—Knowledge or ignorance of corporation that of its directors—Presumption of knowing adoption when trade name similar—Effect of licensing trade name—Likelihood of confusion through similar trade names not to be permitted—Use of trade mark prior to application for registration necessary—Jurisdiction of Court to expunge trade mark—Meaning of "person interested" in s. 52(1).

The plaintiff, a Delaware corporation with its head office at Los Angeles, was incorporated in 1936. It was the successor of two prior United States corporations, each carrying the word Richfield in its corporate name, and acquired all their assets including trade marks. It carried on business as an integrated oil company including the operation of service stations. The defendant was incorporated under the laws of Canada on June 1, 1951, with its head office nominally at Vancouver. It was intended that it should operate service stations to be known as Richfield stations in the same way as service stations were operated by other oil companies but it was not organized for business and did not do any business. Prior to the date of the defendant's incorporation the plaintiff had made its name known in Canada by advertisements of its petroleum products in publications circulated in the ordinary course among potential dealers and users of similar wares in Canada. The plaintiff sued for infringement of trade name, infringement of trade mark and passing-off and prayed for injunctions. The defendant counterclaimed for expungement of the plaintiff's trade mark on the ground that it was invalid by reason of the fact that there had not been any use of it prior to the application for its registration and also because the defendant had licensed its use on products other than its own.

Held: That there was no evidence to support the plaintiff's allegations of infringement of trade mark and passing-off.

2. That the defendant's name is similar to the plaintiff's trade name.

3. That at the date of the defendant's incorporation the plaintiff's name was known in Canada by the advertisement of its wares in Canada in association with its trade name in printed publications circulated in the ordinary course among potential dealers in and users of similar wares in Canada.

4. That since a corporation cannot have any knowledge or be credited with ignorance of a fact otherwise than through its members it must have been intended by Parliament that when the Act speaks of the

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knowledge or ignorance of a person, including therein a corporation, it means in the case of a corporation the knowledge or ignorance of its directors which is attributed to it.

5. That the defendant has failed to discharge the onus cast on it by section 10 of the Act of rebutting the presumption that it knowingly adopted a trade name similar to the plaintiff's.

6. That although the plaintiff's conduct in allowing its trade names to be used on gasolines that were not its own but were purchased from some one else and charging a fee for such use is open to adverse comment it should not be allowed to defeat the plaintiff's claim.

7. That if the defendant used the name Richfield many persons in Canada to whom the plaintiff's name was known would be led to believe that the defendant was a Canadian subsidiary of the plaintiff and in the interests of both the plaintiff and the public the likelihood of such confusion should not be permitted.

8. That the plaintiff's trade mark was not in use prior to the application for its registration.

9. That this Court has jurisdiction to order the expungement of a trade mark only on the application of the Registrar or of any person interested and the defendant was not a "person interested" within the meaning of section 2(*h*) of the Act.

ACTION for infringement of trade name, infringement of trade mark and passing-off.

The action was tried before the President of the Court at Vancouver.

A. Bull, Q.C. and *C. C. I. Merritt* for plaintiff.

J. L. Farris, Q.C. for defendant.

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

THE PRESIDENT now (November 19, 1954) delivered the following judgment:

While the plaintiff brought this action for infringement of its trade name, infringement of its trade mark and passing off and sought injunctions restraining the defendant from such infringements and passing off and the defendant counter-claimed for expungement of the plaintiff's trade mark, it was apparent after the case was closed that the defendant, after its incorporation, had never been organized for business and had never done any business and that there was no evidence that could possibly support the plaintiff's allegations of infringement of trade mark or passing off. Consequently, the only issues in the case are whether the plaintiff has a cause of action against the defendant for infringement of its trade name and whether the defendant

has any right to have the plaintiff's trade mark expunged. It follows that the only evidence to be considered is that which bears on these issues.

The plaintiff was incorporated under the laws of Delaware on November 14, 1936. It was the successor of two prior corporations each carrying the word Richfield in its corporate name, the first being the Richfield Oil Company, incorporated under the laws of California on November 29, 1911, and the second the Richfield Oil Company of California, incorporated under the laws of Delaware on August 2, 1926. The plaintiff acquired all the assets of its predecessors including their various trade marks. The steps by which it did so are set out in detail in the plaintiff's answer to the defendant's demand for particulars and need not be enumerated.

The plaintiff is a fully integrated oil company, that is to say, it produces crude oil, refines it and markets and distributes a complete line of petroleum products. It deals in gasoline of various grades, oils of several kinds, lubricants, greases, solvents and other related products. It has its head office at Los Angeles in California and does business principally in the six Western States although its products are distributed in other areas. Since the beginning the plaintiff and its predecessors have been very active in the promotion of the business and bringing the name Richfield to the attention of the public. Mr. W. G. King Jr., the plaintiff's vice-president, gave an interesting account of the history of the several organizations and their activities. They made the name known by spectacular and bold advertising, such as, for example, the Richfield Beacons. They were active in connection with automobile racing and aviation. They advertised extensively through advertising agencies and their own department. This advertising includes the establishment of a news program emanating from radio station KOMO from Seattle, called the "Richfield Reporter", the oldest sustained newscast in North America, with a very large listening audience including listeners in British Columbia. There was also very extensive advertising in newspapers, magazines, periodicals and trade journals, the advertising budget exceeding $1,500,000

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per year in some years. In addition, there was an interchange of credit cards with the British American Oil Company. In all the advertising the name Richfield was prominently featured. It appeared also on billboards and the plaintiff's various service stations. There is no doubt that the name was well known in the Pacific States to users of gasoline and oil. I shall refer later to the extent to which it was known in Canada. The plaintiff has always looked on Canada as a logical place for expansion of its activities and has plans for it. Its immediate predecessor, the Richfield Oil Company of California, was registered in British Columbia but when it went into receivership, prior to its being taken over by the plaintiff, its provincial registration was withdrawn in 1937, and the plaintiff did not take out a provincial registration until after this litigation was commenced.

The defendant was incorporated by letters patent under the laws of Canada on June 1, 1951. The circumstances surrounding its incorporation were explained by Mr. A. G. D. Crux, a director of the defendant and its solicitor. He had attended to the incorporation, all the applicants for incorporation being associated with him in his law firm. Mr. Crux had become interested in Richfield Petroleum Limited which had been incorporated under the laws of Canada on March 1, 1929. This company was engaged in drilling for and selling oil, first in the Turner Valley field and later in the Leduc field, and it was decided that it should expand its activities and that a new company should be formed to help raise finances and work in association with it. This led to the decision to form a new company under the name of the defendant. Mr. Crux settled on its name. The incorporation was applied for on May 26, 1951. The Companies Branch of the Secretary of State's Department at Ottawa advised that consents to the proposed name should be obtained from Richfield Petroleum Limited and Richfield Oil Company of California. Mr. Crux communicated with the office of the Registrar of Companies at Victoria and was informed that the Richfield Oil Company of California had been struck off the provincial register on June 5, 1937, as it

had ceased to do business in the province. The consent of Petroleum Oil Limited had already been obtained. This information was transmitted to the Companies Branch and the incorporation then went into effect. An agreement had been negotiated between Richfield Petroleum Limited and on behalf of the defendant under which the former was to confine itself to the production of petroleum and its sale to the latter which was to market the products so produced and operate gasoline and oil service stations. The agreement was executed by Richfield Petroleum Limited but not by the defendant. While the document was signed by two of its officers and its seal was affixed, its approval of the agreement was held up because of this litigation. As a matter of fact the defendant has not been organized for business and has not done any business. It has no assets and no office of its own, its registered address being Mr. Crux's law office. Mr. Crux made it quite clear, however, that the defendant intended to acquire and operate retail outlets for the sale of gasoline and oil and that such outlets would be run in the same way as the service stations of other oil companies. They would advertise Richfield gasoline and would be known as Richfield stations. The Richfield name was the one that was wanted for advertising purposes.

This action is mainly for the purpose of determining whether the plaintiff, a foreign corporation, can prevent the defendant from doing business under a name of which Richfield forms a part.

Counsel for the plaintiff, after conceding that on the evidence no case has been made of infringement of its trade mark or of passing off, based its claim for an injunction restraining the defendant from infringement of its trade name on sections 7, 8 and 10 of The Unfair Competition Act, 1932, Statutes of Canada 1932, Chapter 38. These read as follows:

7. No person shall knowingly adopt for use as the name under which he carries on business, or knowingly adopt for use in connection with any business, any trade name which at the time of his adoption thereof is the name, or is similar to the name, in use by any other person as the trade name of a business of the same general character carried on in

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Canada, or of such a business carried on elsewhere if its name is known in Canada by reason of the distribution therein of wares manufactured or handled by such person under such trade name, or of the advertisement of such wares in Canada in association with such trade name, in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

8. No person shall be entitled to continue to use in Canada any trade name which he knew, at the time of his adoption thereof, was, or was similar to, the trade name of a business of the same general character then being carried on in Canada, or of a business carried on elsewhere than in Canada if its name was then known in Canada for one of the reasons aforesaid.

10. Any person who adopts a trade mark, trade name or distinguishing guise identical with or similar to a trade mark, trade name or distinguishing guise which was in use, or in use and known as aforesaid, shall be presumed to have knowingly adopted the same unless it is established either

(*a*) that, in the case of a trade mark, the ownership thereof in Canada passed to the person by whom the same was adopted, or, in the case of a trade name or distinguishing guise not being a trade mark, that the same was adopted with the consent of the person by whom the same was in use; or

(*b*) that, at the time of the adoption of the trade mark, trade name or distinguishing guise, the person who adopted it was in ignorance of the use of the same or of a similar unregistered trade mark or a similar trade name or distinguishing guise, and that in adopting it the person by whom it was adopted acted in good faith and believed himself to be entitled to adopt and use it; or

(*c*) that the person by whom such trade mark, trade name or distinguishing guise was adopted has continuously used the same in the ordinary course of his business and in substantially the manner complained of during the five years immediately before the commencement of the proceedings.

Section 2(*n*) of the Act defines "Trade name" as follows:

2. In this Act, unless the context otherwise requires:—

(*n*) "Trade name" means the name under which any business is carried on, whether the same is the name of a corporation, a partnership or an individual;

And subsection (*k*) of the same section defines "similar", in relation to trade names, 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;

There is, in my opinion, no room for doubt that the defendant's name is similar, within the meaning of the Act, to the plaintiff's trade name. Counsel for the defendant stated that he was not going to argue that the names were not similar. The only dispute is whether on the facts the plaintiff is entitled to the relief sought. To succeed in its claim under section 7 the plaintiff, which carries on its business elsewhere than in Canada, must prove that its trade name was known in Canada at the time of the defendant's incorporation, within the meaning of section 7, and that the defendant knowingly adopted a trade name similar to it.

There is no doubt that the plaintiff's name was known in Canada at the date of the defendant's incorporation. Much evidence was adduced to prove that the "Richfield Reporter" had a large listening audience in Canada, but this would not be sufficient to satisfy the requirement of section 7. To do so the plaintiff must show that its name was known in Canada either by the distribution therein of wares manufactured or handled by it under its trade name or by the advertisement of its wares in Canada in association with its trade name in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

The evidence establishes that more than twenty years ago the plaintiff's predecessor, the Richfield Oil Company of California, distributed its gasoline and oil in Canada. The first distribution was made through the Paragon Oil Company which owned bulk plants in Vancouver and its vicinity. It bought some products and received others on consignment. The products were distributed through service stations known as Richfield service stations. These were painted in the usual Richfield colors and carried the customary Richfield insignia and signs. The products were all identified as Richfield products. Many witnesses were called on behalf of the plaintiff to prove this distribution.

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Certainly, to them the Richfield name was known in Canada at the time of such distribution, and subsequently. The evidence establishes that the first shipment of Richfield products to the Paragon Oil Company was in April, 1929. There is no evidence of any distribution of Richfield's products in Canada prior to that date. The arrangement with the Paragon Oil Company continued until early in 1930 when it got into difficulties. The next distribution was through the Dominion Oil Company, starting in 1931. This company purchased Richfield gasoline, oils and greases and distributed them through service stations in Vancouver and Victoria. These used the Richfield trade marks, that is to say, the Richfield Eagle, on its pump and globes and generally the same advertising as Richfield service stations used in the United States. The arrangement with the Dominion Oil Company continued until 1933.

From that date and until 1945, when the plaintiff made its arrangement with the United Oil Company, to which I shall refer later, there was no distribution of Richfield products in Canada. While the evidence shows that the plaintiff's trade name was known in Canada to certain persons by reason of the distribution referred to and remained known notwithstanding the lapse of time since it took place it seems to me, although the matter is not entirely clear, that the section contemplates knowledge of the name by reason of distribution at or near the time specified in the section, and not a distribution made so long ago. But it is not necessary to decide the question in view of the evidence relating to the advertisement of the plaintiff's products.

Evidence of advertisements of Richfield gasoline oil in printed publications circulated in Canada in the ordinary course was given by Mr. A. A. Wilkie, the sales manager of the Vancouver Magazine Service, Mr. C. Shaw, the manager of the Canadian operations of the Miller Freedman Publications, and Mr. Karl Jorgenson, an advertising agent from Los Angeles. This shows extensive advertising of the plaintiff's products in papers, magazines and trade journals all circulating in Canada, such as the Pacific

Edition of the Wall Street Journal, the Seattle Post Intelligencer and the American Weekly, the Seattle Times, The Spokesman Review, The West Coast Lumberman, The Timberman, Aviation Week, Western Aviation, Western Canner and Packer and Pacific Builder and Engineer. It was argued by counsel for the defendant that there was no evidence that anyone in Canada had seen the advertisements in these publications. I cannot accept this submission. It seems to me that the plaintiff has satisfactorily proved that the plaintiff's trade name was, at the date of the defendant's incorporation, known in Canada by reason of the advertisements referred to, within the meaning of section 7, and that its requirements in this connection have been met.

I now come to the important question whether the defendant knowingly adopted a trade name similar to that used by the plaintiff. During the course of the argument I expressed doubt whether a corporation such as the defendant could have knowingly adopted its corporate name. The term "knowingly adopts" connotes knowledge prior to adoption. Consequently, even if it could be said that a corporation had adopted the name under which it was created the question arose whether it could have done so with knowledge prior to such adoption. Until its incorporation it did not exist and could not have any knowledge. While the matter is not free from difficulty, I have come to the conclusion that this construction of the term should not prevail. If it were so construed it would mean, in effect, that section 7 could not apply to a corporation. But Parliament did not intend such an exclusion, for section 2(*g*) of the Act makes it clear that the word "person" in section 7 does include a corporation. There is a way out of the difficulty. Since a corporation cannot have any knowledge or be credited with ignorance of a fact otherwise than through its members it must have been intended by Parliament, since the word "person" includes a corporation, that when the Act speaks of the knowledge or ignorance of a corporation it means the knowledge or ignorance of its directors which is attributed to the corporation. In the case

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of the defendant the person who had the most to do with its incorporation was Mr. Crux. It is to his knowledge or ignorance that we must look for it is to be deemed that of the defendant. In paragraph (7) of the statement of defence the defendant admitted that it adopted the corporate name of Richfield Oil Corporation of Canada Ltd. for the purpose of carrying on its business. I have already found that this name is similar to the plaintiff's name. These facts subject the defendant to the onus imposed by section 10 of the Act. The effect of this is that the defendant is presumed to have knowingly adopted a trade name similar to the plaintiff's unless it can establish one of the sets of facts specified in paragraphs (*a*), (*b*) or (*c*) of section 10. The only paragraph that could possibly apply to the defendant is paragraph (*b*). To discharge the onus placed on the defendant by this paragraph it must establish two facts, namely, one, that at the time of the adoption of the trade name it was in ignorance of the use of a similar trade name, and the other, that in its adoption it acted in good faith and believed itself to be entitled to adopt and use the name.

In this connection the defendant must be bound by whatever knowledge Mr. Crux had. Such knowledge is to be attributed to it. Mr. Crux said that he knew of the plaintiff corporation as Richfield of California, but I have no hesitation in finding that he knew the name Richfield as the distinctive part of the name of a corporation in the United States dealing in gasoline and oil. He was a frequent visitor to Southern California. He knew the Richfield service stations and had heard of the "Richfield Reporter." Moreover, I am not wholly satisfied that he can meet the second part of the requirement of paragraph (*b*). In his solemn declaration in support of the application for incorporation of the defendant he stated that the proposed name of the Company was not that of any known company, incorporated or unincorporated, or of any partnership or individual, or any name under which any known business was being carried on, or so nearly resembling the same as to deceive except that of Richfield Petroleum Limited, but he

omitted to mention that he knew of an organization in the United States carrying on business under a name of which the word Richfield was the distinctive part. Moreover, the correspondence which he had with Mr. Brittingham is suggestive that he thought that the adoption of the name Richfield by the defendant put it in a strong bargaining position for negotiating a business relationship with the plaintiff. On the evidence I find that the defendant has failed to discharge the onus cast on it by section 10 of rebutting the presumption that it knowingly adopted a trade name similar to the plaintiff's. It follows that the plaintiff has made out a case against the defendant of breach of the prohibition of section 7 and that it is entitled to restrain the defendant from infringing its trade name, unless the defendant can show some reason why the plaintiff should not be given such relief.

The defendant's main defence to the plaintiff's claim was that it had licensed United Oil Limited, a company carrying on business in Vancouver, to use its trade name on products which were not Richfield products, that by so doing it had deceived the public and that its conduct had the effect of defeating its claim. The facts relating to the arrangement between the plaintiff and United Oil Limited may be outlined briefly. It is set out in two letters from the plaintiff, one dated August 30, 1945, and addressed to Mr. H. L. Bevan, the president of United Oil Limited, and the other dated April 23, 1946, and addressed to United Oil Limited. By the first letter the plaintiff granted permission to United Oil Limited to use certain trade names in the sale and distribution in Canada of petroleum products purchased from it, together with the trade name "Richfield" and "all Richfield insigne and trade marks" to be used in connection with specified gasolines and oils. The permission was to terminate at such time as United Oil Limited discontinued purchasing and selling petroleum products purchased from the plaintiff. It was also provided in the agreement that "you may at present and until further notice, use the trade names 'Richfield Hi-Octane' and 'Richfield Ethyl' on

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gasolines which you will purchase from Standard Oil Company of California, it being understood that the said Company has consented to said rebranding". By the letter of April 23, 1946, it was agreed that United Oil Limited would pay to the plaintiff for the privilege of using its trade names the sum of $\frac{1}{4}$ cent for each imperial gallon of gasoline sold by United Oil Limited in Canada, either domestically or for export therefrom, under the trade names "Richfield", "Richfield Hi-Octane" and "Richfield Ethyl". This agreement was to be applicable to all gasolines which were not purchased directly by United Oil Limited from the plaintiff and to all such gasolines sold by United Oil Limited under the said trade names on and after May 1, 1946. This arrangement ran until October, 1949. During its currency United Oil Limited sold 9,256,856 gallons of gasoline on which it paid fees and the fees came to a total of $23,142.14.

Counsel for the defendant contended that the plaintiff's act in licensing United Oil Limited to use its trade names and trade marks on petroleum products that were not Richfield products but were purchased from the Standard Oil Company defeated the plaintiff's claims for infringement of trade name and trade mark. As already mentioned, we are not here concerned wtih any issue of infringement of trade mark but only with that of infringement of trade name. In support of his submission counsel referred to *Bowden Wire Ld.* v. *Bowden Brake Company Ld.* (1) and *Robert Crean & Co., Ltd.* v. *Dobbs & Co.* (2). These are both trade mark cases. Counsel said that he did not have any trade name cases on the subject but submitted that the same principles should apply as in the case of trade marks.

While I must say that I consider that the plaintiff's conduct in allowing United Oil Limited to use its so-called trade names "Richfield", "Richfield Hi-Octane" and "Richfield Ethyl" on gasolines that were not its own but were purchased from some one else and to charge a fee for such use is open to adverse comment, I have come to the conclusion that it should not be allowed to defeat the plaintiff's

(1) (1914) 31 R.P.C. 385. (2) [1930] S.C.R. 307.

claim against the defendant. Mr. King said that there was nothing unusual in the agreement made with United Oil Limited and that it was a common practice in the United States to make such agreements, particularly when a certain standard of quality was specified. In the present case the plaintiff was satisfied that the Standing Oil Company's gasoline was equal in quality to anything on the market, so that the plaintiff's reputation would not suffer by allowing Standard Oil Company's gasoline to be sold under the Richfield name. It should also be noted that the permission applied to two classes of gasoline, "Richfield Ethyl", a premium gasoline and "Richfield Hi-Octane", a second structure quality gasoline. It also appears that the reason for the arrangement was that it was uneconomical for United Oil Limited to purchase its supplies from the plaintiff. As an indication that the arrangement was not an unusual one Mr. King stated that the plaintiff had for some years manufactured all of the refined oil products marketed in British Columbia by the British American Oil Company and sold under its name. Moreover, if the objection to the practice is that the public was deceived I see no reason why the defendant should be allowed to mislead the public by its use of the name Richfield, for there is, in my opinion, no doubt that if it did use the name many persons in Canada to whom the plaintiff's name was known would be led to believe that the defendant was a Canadian subsidiary of the plaintiff. In the interests both of the plaintiff and of the public the likelihood of such confusion should not be permitted. I find some support for this conclusion in the decision of the Judicial Committee of the Privy Council in *J. H. Coles Proprietary Ltd. (in Liquidation)* v. *Need* (1). I, therefore, find that the plaintiff is entitled to an injunction restraining the defendant from using or trading under the name of Richfield Oil Corporation of Canada Ltd. in connection with the production, distribution or sale of gasoline, oil or other petroleum products or in that connection using or trading under any name including the

(1) (1933) 50 R.P.C. 379.

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word Richfield or any title or description including such word, or otherwise colorably resembling or similar to the name of the plaintiff.

I now come to the defendant's counterclaim in which it seeks to expunge the plaintiff's Canadian trade mark "Richfield" on the ground that it had not been used prior to its registration. The trade mark referred to is a specific trade mark registered in the Trade Mark Register No. 208 Folio 45534 under the Trade Mark and Design Act, R.S.C. 1927, Chapter 201, by the Richfield Oil Company of California on January 23, 1929, which was assigned to the plaintiff on March 13, 1937, the assignment being registered on February 21, 1938. The trade mark consists of a shield upon which there appear the word "Richfield" and the words "The Gasoline of Power" in a rectangular border. The trade mark was to be used in connection with the manufacture and sale of motor spirits. The application for its registration was made on August 17, 1929. There had been a previous application for the registration of the word Richfield and the representation of a spread eagle similar to that used by the applicant in the United States but the representation of the spread eagle had to be eliminated because of a prior registration of a similar representation and the shield was substituted. Thus the trade mark that was registered was a different trade mark from the plaintiff's predecessor's trade mark in the United States. In the application of August 17, 1928, the statement was made that the applicant verily believed that the specific trade mark was theirs on account of having been the first to make use of the same. This statement is not correct. At the date of the application the trade mark had not been used by the Richfield Oil Company of California anywhere. Certainly, it had not been used in Canada. The first distribution of Richfield petroleum products in Canada was made to the Paragon Oil Company in April, 1929. Indeed it was not incorporated until February 2, 1929. Thus the trade mark could not have been used in Canada prior to that date. It is thus established that the trade mark in question was not in use prior to the application for its

registration. If I had to decide the question I would find that the plaintiff's trade mark was invalid. *Vide Robert Crean & Co. Ltd.* v. *Dobbs & Co.* (1); *J. H. Munro Limited* v. *Neaman Fur Company Limited* (2); *Lime Cola Company* v. *The Coca-Cola Company* (3). That makes it unnecessary to consider the effect of the licensing to United Oil Limited on its validity.

But, as I see it, I need not decide the question of validity. If the defendant had ever used a trade mark similar to the plaintiff's trade mark it would have had a good defence to an action for infringement of trade mark on the grounds stated but it by no means follows that it has a right to have the plaintiff's trade mark expunged. That right depends on section 52 of The Unfair Competition Act, 1932, which provides:

> 52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

Thus, this Court has jurisdiction to order the expungement of a trade mark only on the application of the Registrar or of any "person interested". It must, therefore, be shown in the present case that the defendant is a "person interested", within the meaning of the Act. The term "person interested" is defined by section 2(h) as follows:

> 2. In this Act, unless the context otherwise requires:—
>
> (*h*) "Person interested" includes any person directly affected by any breach of any provision of this Act; any person who, by reason of the nature of the business carried on by him and the ordinary mode of carrying on such business, may reasonably apprehend that the goodwill of such business may be adversely affected by any entry in the register of trade marks, or by any act or omission or contemplated act or omission contrary to the provisions of this Act; and, in respect of any such act, omission or entry in the register relating to or affecting any right vested in any trade union or commercial association or in the administrative authority of any country, state, province, municipality or other organized administrative area, includes such trade union, such association and such administrative authority, and also any person authorized from time to time by the union, association or administrative authority to make use of the mark;

(1) [1930] S.C.R. 307. (2) [1947] Ex. C.R. 1.
(3) [1947] Ex. C.R. 180.

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In my judgment, the defendant does not come within this definition. It has no right to use the word "Richfield" as a trade name and could not be adversely affected by anything that the plaintiff has done. It would still be open to the plaintiff to cure the defect in its right to the trade mark in question. I, therefore, find that the defendant was not a "person interested", within the meaning of the Act, and that this Court has accordingly no jurisdiction to order the expungement sought. The defendant's counterclaim must therefore, be dismissed.

Consequently, there will be judgment that the plaintiff is entitled to an injunction as specified and that the defendant's counterclaim is dismissed. The plaintiff is entitled to the costs of the claim and of the counterclaim.

Judgment accordingly.

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Nov. 23

Nov. 26

BETWEEN:

PROVINCIAL PAPER, LIMITED ..... APPELLANT,

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 42(1), 42(2), 50(6)—Examination of taxpayer's return—Nature of Minister's assessment function—Minister not precluded from accepting taxpayer's return as correct.

On July 27, 1951, the Minister sent the appellant a "notice of assessment" for the year 1950 showing the same amount of tax levied as it had shown on its return. On January 27, 1953, the Minister sent the appellant a "notice of re-assessment" for the same year showing a balance of tax unpaid and interest thereon from July 1, 1951, to January 27, 1953. The appellant contended that under section 50(6) of The Income Tax Act interest was payable only from July 1, 1951, to June 30, 1952, on the grounds that the Minister did not examine its income tax return within the meaning of section 42(1) and did not assess the tax for the taxation year or the interest payable by it within the meaning of the section and that, consequently, the notice dated July 27, 1951, was not a notice of assessment since there had not been an assessment prior to that date and that the notice dated January 27, 1953, was really the original assessment within the meaning of section 50(6). The contention was that the acceptance of the appellant's return, subject only to the checking of its computations, was not an assessment within the meaning of the Act.

Held: That it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide.

2. That there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide.

3. That the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

APPEAL under The Income Tax Act.

The Appeal was heard by the President of the Court at Toronto.

R. M. Sedgewick for appellant.

W. R. Jackett Q.C. and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (November 26, 1954) delivered the following judgment:

The appellant's appeal against its income tax assessment for 1950 is confined to the item of $1,506.50 for interest on unpaid tax which is included therein.

Certain facts are not in dispute. On June 25, 1951, the appellant filed its income tax return for its fiscal period ending December 31, 1950, showing its taxable income for the period at $2,409,751.33, the tax at $835,490.49, the instalments paid at $860,000.00 and a refund due to it of $24,509.91. On July 27, 1951, the Minister sent the appellant a notice which he called a "notice of assessment" for the taxation year 1950 showing $835,490.49 as the tax levied, $860,000.00 as the amount paid on account and $24,509.51 as a refund. These are the same amounts as those shown on the appellant's return. Subsequently, on January 27, 1953, the Minister sent the appellant another notice which he called "notice of re-assessment" for the taxation year 1950 showing $874,874.60 as the tax levied, $859,776.05 as the amount paid on account and $15,098.55 as the balance of tax remaining unpaid together with interest thereon at $1,506.50, this being interest at 6 per cent on the unpaid tax from July 1, 1951, to January 27, 1953. The change in the amount of tax levied was the result of disallowing certain amounts which the appellant had claimed as deductions and adding them back to the amount of taxable income which it had shown on its return. All the adjustments made in the amount were based on material supplied by the appellant. On March 20, 1953, the appellant sent the Minister a notice of objection in which it objected only to the item of interest as included in the assessment, claiming that the only interest on the unpaid tax payable by it was interest from July 1, 1951, to June 30, 1952, amounting to $905.91. The amount of interest thus in dispute amounts to $600.59. On July 20, 1953, the Minister sent the appellant a notification that he had confirmed the assessment. Thereupon the appeal to this Court was taken.

The appellant based its complaint on subsection (6) of section 50 and subsections (1) and (2) of section 42 of The Income Tax Act, Statutes of Canada, 1948, Chapter 52. Subsection (6) of section 50, as amended in 1949, read as follows:

50. (6) No interest under this section upon the amount by which the unpaid taxes exceeds the amount estimated under section 41 is payable in respect of the period beginning 12 months after the day fixed by this Act for filing the return of the taxpayer's income upon which the taxes are payable or 12 months after the return was actually filed, whichever was later, and ending 30 days from the day of mailing of the notice of the original assessment for the taxation year.

Subsections (1) and (2) of section 42 provided:

42. (1) The Minister shall, with all due dispatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.

It was contended for the appellant that the Minister did not examine its income return, within the meaning of section 42 (1), and that he did not assess the tax for the taxation year or the interest payable by it, within the meaning of such section, that, consequently, the notice dated July 27, 1951, was not a notice of assessment since there had not been an assessment prior to that date and that the notice dated January 27, 1953, was really the notice of the original assessment for the taxation year. On that basis it was submitted that under section 50(6) the interest on the appellant's unpaid tax ran only for the period of 12 months from June 30, 1951, which was the day fixed for the filing of its return, that it then ceased to run and that it did not begin to run again until February 27, 1953, which was 30 days after the mailing of the notice dated January 27, 1953. Thus the appellant claimed that it was not liable to interest on the amount of its unpaid tax for the period from July 1, 1952, to February 27, 1953.

It was properly conceded that if the Minister did make an assessment prior to sending the notice dated July 27, 1951, the appellant had no claim for relief under section 50(6) and its appeal against the assessment must fail. To succeed in its appeal it must establish that the Minister did not make any assessment prior to the said date.

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Counsel agreed on a statement of facts which was filed as Exhibit 1. The most important facts are set out as follows:

3. After the appellant filed its income tax return for the 1950 taxation year,

(a) the return was inspected by an assessor who checked the computation of the tax payable by the appellant on the basis that the taxable income shown by the income tax return was correct;

(b) the work of the original assessor was checked by another assessor;

(c) the payments claimed to have been made were checked by an appropriate section of the Toronto Office of the Department;

(d) the tax payable by the appellant was determined by the Deputy Minister as indicated on the original "Notice of Assessment" without further investigation than indicated by subparagraphs (a), (b) and (c) of this paragraph;

(e) the original "Notice of Assessment" was sent out on behalf of the Deputy Minister;

(f) it having been decided that the return should be reviewed to ascertain whether a "reassessment" was appropriate, another assessor inspected the return and, upon checking the computation of taxable income, conducted an examination of the Company's records as a result of which a "reassessment" of the Company was considered by the appropriate officers of the Department and the tax payable by the taxpayer was redetermined by the Deputy Minister as indicated on the "Notice of Reassessment"; and

(g) the "Notice of Reassessment" was sent out on behalf of the Deputy Minister.

4. The examination before the original "assessment" was confined to the steps described above.

It was on the facts set out in paragraphs (a) to (d) of section 3 of the agreed statement of facts that counsel for the appellant contended that the Minister had neither examined the appellant's income return nor assessed the tax or interest payable by it within the meaning of section 42(1) of the Act. The contention that he had not examined the return may be dealt with briefly. It is clear, of course, that the examination referred to need not be made by the Minister personally. It is sufficient if it is made by his appropriate officers in the course of their duty. In the present case it seems clear to me that the officers referred to in the statement of facts did examine the appellant's return. The assessors could not have checked the computations in it without making some examination of it. Nor could the amounts of payments made have been verified without such examination. It is not for the Court or any one else to prescribe what the intensity of the examination in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide. In

my judgment, while the examination may not have been an exhaustive one, as to which I do not express any opinion, it was, nevertheless, an examination within the meaning of section 42(1). The appellant has thus failed to establish this portion of the submission made on its behalf.

The contention that the Minister did not make an assessment prior to sending his notice of assessment, dated July 27, 1951, although equally untenable, requires more consideration in view of the serious consequences that would follow from its adoption. I shall now summarize the argument of counsel in putting forward this contention. He submitted that all that the Minister had done by the checks made by his officers and his determination, through the Deputy Minister, of the tax as indicated in the original notice without further investigation, as set out in paragraphs (*a*) to (*d*) of section 3 of the agreed statement of facts was the performance of a purely mathetmatical function, but the assessment function required more than this; that it cannot be said that the Minister made an assessment if all that his officers did was to peruse the return and compute the tax on the basis shown by the taxpayer without any separate computation by them; that the Minister must do more than merely have his officers peruse or inspect the taxpayer's return and accept his computations, as checked, of his income, his taxable income and his tax; that assessment is a formal and important operation; that while the Minister may make certain assumptions, such as that the return is in accordance with the books, that what is listed as income has been received or is receivable, that the stated expenditures have been made, that the taxpayer's method of accounting is consistent with that of prior years, that the items in the return are the only ones to be considered and the like, he must, nevertheless, ascertain for himself that the taxpayer has properly computed his income, his taxable income and his tax; that in the course of such ascertainment the Minister must decide whether the deductions claimed are proper and check all additions and subtractions; that the Minister must also determine whether instalment payments have been made as required and whether any interest is payable; and that the Minister must do all these acts before it can be said that he has made an assessment. The essence of the argument was that the

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acceptance of the taxpayer's return, subject only to the checking of his computations, and the determination of his liability on the assumption of its correctness was not an assessment within the meaning of the Act.

In support of his submissions counsel referred to certain decisions of this Court in which the nature of the assessment operation was considered. In *Pure Spring Company Limited* v. *Minister of National Revenue* (1) I dealt with the matter in considerable detail stressing that the assessment operation, as distinct from the exercise of a discretionary power, was solely administrative and referred to the statement of Isaacs A. C. J., the Chief Justice of Australia, in *Federal Commissioner of Taxation* v. *Clarke* (2) that "an assessment is only the ascertainment and fixation of liability". Then, at page 500, I defined assessment as follows:

> The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

In *Dezura* v. *Minister of National Revenue* (3) I said:

> The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act.

And in *Morch* v. *Minister of National Revenue* (4) I described the assessment as "an important administrative act within the exclusive function of the Minister."

There is no justification in any of the statements made in these cases for counsel's contention that the Minister did not make any assessment prior to July 27, 1951. There are several errors implicit in it. It is erroneous to say that unless the Minister has done all the acts that he may possibly do in the performance of his administrative function of assessment he has not made an assessment at all. There is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer. The extent of the investigation that he should make, if any, is for him to decide. Of necessity it will not be the same in all cases.

(1) [1946] Ex. C.R. 471 at 498.
(2) (1927) 40 C.L.R. 246 at 277.
(3) [1948] Ex. C.R. 10 at 15.
(4) [1949] Ex. C.R. 327 at 335.

But the basic fallacy in the contention lies in the assumption that the Minister is precluded from ascertaining and fixing a taxpayer's liability on the basis of the assumed correctness of his income tax return but must do something else and that if he does not do so he has not made an assessment. While the Minister is not bound by the taxpayer's return, as was emphasized in the *Dezura* case (*supra*), there is nothing in the Act to prevent him from accepting it as correct and fixing the taxpayer's liability accordingly. In *Davidson* v. *The King* (1) I made the statement that the taxpayer's own return of his income, while not binding upon the Minister, may be the basis of the assessment made by him and I pointed out that it was reasonable that this should be so, since the taxpayer knew better than anyone else what his income was.

The Minister may, therefore, properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

It may happen that it will subsequently appear that an assessment so made is inaccurate and that a re-assessment is desirable. But there is a vast difference between an assessment that has turned out to be erroneous and an act that is not an assessment at all. It is for the Minister to decide in each case what he shall do. Indeed, in the vast majority of cases he accepts the taxpayer's statement of taxable income as correct and fixes his liability accordingly. It would be fantastic to say that in such cases he has not made an assessment at all. In my opinion, he has plainly done so. Counsel was, therefore, in error in contending that there was no assessment because the Minister's assessors merely checked the accuracy of the computations of the tax payable by the appellant on the basis that the taxable income shown by its income tax return was correct and the Minister determined its liability accordingly without any further investigation. In my opinion, the Minister did make an assessment within the meaning of section 42 (1).

(1) [1945] Ex. C.R. 160 at 170.

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That being so, the notice dated July 27, 1951, was a valid notice of assessment and the appellant has no claim for relief under sections 50 (6). That disposes of its claim.

I am not impressed with the argument that by assessing the appellant in such a perfunctory manner the Minister deprived it of its rights to relief from interest under section 50 (6). The appellant may have cause for annoyance by reason of the delay in re-assessing it but this does not affect the legal question involved. Moreover, I might observe that if the appellant had made a correct return in the first place it could have saved itself from any liability for interest on unpaid tax by paying the full amount of the tax.

It follows from what I have said that the appellant's attack on the assessment fails and its appeal against it must be dismissed with costs.

Judgment accordingly.

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Nov. 24, 25

Nov. 30

BETWEEN:

CANADIAN KODAK SALES LIMITED ..APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 2(3), 3,4, 20(1), 20(3)(a)—Profit from a business—Disposal of depreciable property.

The appellant was formed for the purpose of taking charge of the sales in Canada of all the products of Canadian Kodak Company Limited and sells a large range of cameras and photographic equipment and supplies. In 1940 it acquired the business and assets of Recordak Limited. This company had distributed and serviced special equipment known as recordaks. These were machines equipped with cameras and used for taking reduced photographs and microfilms of documents. They were leased to users on a monthly basis and not sold and Recordak Limited had always considered them as capital assets. The appellant handled the recordak portion of its business in substantially the same manner as Recordak Limited had done. It was identified as the Recordak Division and carried separately on its books of account. In every respect it treated the machines as capital assets in the same way as Recordak Limited had done. In January, 1951, the appellant changed its policy regarding recordaks and decided to sell them. In 1951 approximately 40% of the recordaks

which users had rented were purchased by them and in 1952 approximately a further 5% were thus sold. The appellant continued to lease the recordaks which it did not sell and carried such recordaks as capital assets. The appellant's decision to sell recordaks was made by its general manager as a business decision in the course of its business. In assessing the appellant for 1951 and 1952 the Minister added the amounts of the profits made on the sale of the recordaks to the amounts of taxable income shown on its returns. The appellant objected on the ground that the machines were capital assets and any gain in their sale was a capital gain and that they were not sold in the ordinary course of its business and were not part of its profit-making activities.

Held: That the fact that the appellant's recordaks were formerly leased and treated as capital assets subject to depreciation does not prevent the profit from their sale being profit from the appellant's business once it had made the business decision to sell them and sold them in the course of its ordinary business of selling photographic equipment and supplies. There was no difference in principle between its sales of recordaks and its sales of other photographic equipment and the profit made from such sales was profit from its business and taxable income. *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* [1925] A.C. 467 and 12 T.C. 720 followed.

2. That while the purpose of section 20(1) seems to be to ensure that under the circumstances specified in it some of the proceeds of the disposition of depreciable property, which, apart from the section, would not be income within the meaning of the Act, is included in income because of the fact that depreciation or capital cost allowances have been granted in respect of it, there is no need of resorting to the section for such purpose where the disposition of the property has been made in the course of the taxpayer's business as the result of a change of business policy in dealing with it and all of the proceeds of the disposition have been taken into account as income from the business and all the profit made in the disposition of the property is profit from a business.

APPEALS under The Income Tax Act.

The appeals were heard before the President of the Court at Toronto.

Stuart Thom for appellant.

Peter Wright Q.C. and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (November 30, 1954) delivered the following judgment:

These are appeals against the appellant's income tax assessments for its taxation years ending November 4, 1951, and November 2, 1952.

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The facts are not in dispute. The appellant was incorporated by letters patent under the laws of Canada on December 1, 1938. It is affiliated with Canadian Kodak Company Limited which is also a Canadian corporation. Both companies are wholly-owned subsidiaries of the Eastman Kodak Company, a United States corporation. The appellant is not a manufacturing company but, as its name indicates, a selling company. It was formed for the purpose of taking charge of the sales in Canada of all the products of Canadian Kodak Company Limited, which is a manufacturing company. The appellant sells a large range of cameras and related photographic equipment and supplies as well as other products.

Prior to the incorporation of the appellant there was also another company called Recordak Limited. It was incorporated under the laws of Canada in 1929. This company was also a wholly-owned subsidiary of the Eastman Kodak Company. It was formed to distribute and service special equipment known as recordaks. These were machines equipped with cameras and used for taking reduced photographs and microfilms of documents. Recordak Limited never sold any recordaks but leased them to users on a monthly rental basis. It also supplied the necessary services to keep the machines in order and sold the necessary films and other supplies. It acquired its machines and equipment from its parent, the Eastman Kodak Company. Recordak Limited carried on business until September, 1940, when its business and assets were taken over and acquired by the appellant. Up to that time it considered its recordaks as capital assets and never sold them. In its income tax returns it always claimed depreciation allowances in respect of them. The amounts so claimed were always allowed by the taxing authority and its practice in claiming them was never questioned.

After the appellant had taken over the business and assets of Recordak Limited in 1940 the latter went out of business and finally surrendered its charter in 1944. The appellant handled the recordak portion of its business in substantially the same manner as Recordak Limited had done. It was identified as the Recordak Division and carried separately on its books of account. The recordaks were recorded in the accounts as capital assets. They were

taken over at the same book value as had appeared on the books of Recordak Limited each with the same amount of depreciation reserve. In every respect the appellant treated the machines as capital assets in the same way as Recordak Limited had done. Subsequently, the appellant acquired additional recordaks and dealt with them in the same way as it treated the recordaks acquired from Recordak Limited. Each machine was identified on its books with its serial number and its value with the amounts allowed for depreciation in respect of it. The machines were retained as capital assets even when there was 100% reserve for depreciation and kept so long as they were in service. A machine was replaced only when it had become unserviceable or obsolete. Then it was dismantled, but not sold.

In January, 1951, the appellant changed its business policy regarding recordaks. It then decided to sell them. By a letter, dated January 8, 1951, and sent to its recordak users, the user was informed that the recordak which was then on rental to him could be purchased outright. Attached to the letter was a price list. The letter stated that if the user desired to purchase the equipment one-half of the rental which he had paid during the past 36 months could be deducted from the actual purchase price. The announcement of this change of policy was sent to every recordak user, the manager of the Recordak Division and all his salesmen. A copy of the letter was available even to non-users. There was no general advertising of the change and the appellant did not initiate any vigorous campaign. The reason for this change of business policy given by Mr. J. W. Spence, the appellant's treasurer and assistant general manager, was that the new policy would give the appellant a wider distribution of the equipment and reduce the amount of capital invested in it.

In 1951 approximately 40% of the recordaks which users had rented were purchased by them and in 1952 approximately a further 5% were thus sold. Since then there have been very few additional sales. The appellant continued to lease the recordaks which it did not sell. It is still acquiring recordaks and selling them or leasing them. If it leases them it carries them as capital assets.

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During the taxation years 1949 and 1950 the appellant claimed capital cost allowances on its recordaks as Class 8 assets under Part XI, Schedule B of the Regulations at the rate of 20% and its claims were allowed. In its returns for 1951 and 1952 it claimed capital cost allowances on all the Recordaks which had not been sold and these claims are not questioned. It is only in respect of the sales of recordaks to their former users that there is any issue.

On his cross-examination Mr. Spence admitted that the appellant was the domestic sales company for the Kodak group in Canada, that as such it sold cameras, flash bulbs, tripods, motion picture cameras, and recordak machines and films, that it carried on business in 1951 and 1952 in the same manner as it had done previously except that in these years it also sold recordaks and that they are based on principles of photography, a camera being an essential part of the machine.

Mr. Spence admitted that the appellant's decision to sell recordaks was not a decision of its board of directors or of its shareholders but was made by the general manager. He agreed that it was fair to say that it was a business decision made in the course of the appellant's business. No additional salesmen were taken on, the same representatives making the sales as had done the leasing. There was no change in the appellant's business. In its income tax returns for 1951 and 1952, as in those for previous years, it described its business as being "the sale of photographic supplies—wholesale".

Mr. R. L. B. Joynt, the appellant's comptroller, confirmed the evidence of Mr. Spence that its recordaks were recorded on its books as capital assets. They were acquired on the basis of their original cost to the Eastman Kodak Company. If they were used machines they were transferred to the appellant at their book value on the books of the Eastman Kodak Company, which was their finished cost to it less the depreciation reserve against them at the date of their transfer. If the machines were new they were acquired at the finished cost to the Eastman Kodak Company plus the additional cost of their transportation and importation. The recordaks were sold at prices substantially higher than their book value. The profit and loss statement filed with the return for the taxation year ending November 4, 1951,

showed the profit on the sales of recordaks in that year as $148,693.50. And the profit and loss statement filed with the return for the taxation year ending November 2, 1952, showed the profit on the sales in that year as $20,518. In assessing the appellant the Minister added these amounts respectively to the amounts of taxable income respectively shown by it on its returns.

The appellant objected to the assessments on the ground that the machines were capital assets and any gain on their sale was a capital gain and that they were not sold in the ordinary course of its business and were not part of its profit-making activities. The Minister notified the appellant that he confirmed the assessments on the ground that the profits from the sale of recordaks had been properly taken into account in computing the appellant's income in accordance with the provisions of sections 3 and 4 of The Income Tax Act. The appellant then brought its appeals to this Court.

The issue in this case is whether the profit made by the appellant on the sale of the recordaks which it had previously leased was taxable income within the meaning of The Income Tax Act, Statutes of Canada 1948, Chapter 52. By section 2(3) of the Act the taxable income of a taxpayer for a taxation year is said to be this income for the year minus the deductions permitted by Division C. Then section 3 provides, *inter alia,* that such income includes income for the year from all businesses and section 4 goes on to say:

> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

It was contended for the appellant that the profit made by it was not a profit from its business. It was submitted that its recordaks had always been regarded by it as capital assets and accepted as such by the taxing authority, that they had never acquired the characteristics of inventory or property held for sale but had always been held exclusively as revenue producing property from which income was received, that when they were sold the sale was not made with a view to making a profit but for the purpose of freeing capital and obtaining a wider distribution of machines, that they always retained their characteristics as capital assets and that when they were sold they were sold as capital assets with a resulting capital gain.

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I cannot accept these submissions. On the contrary, I agree with the argument put forward by counsel for the respondent. He contended that the appellant was organized to be the selling instrument in Canada of the products of the Eastman Kodak Company, that its recordaks were not fundamentally different in principle from the wide range of cameras and photographic equipment and supplies sold by it, that the decision to sell the recordaks was a business decision made for business reasons to increase the appellants' sales and to increase its profits, that from the time of this decision the appellant was in the business of selling recordaks and that its profit therefrom was a profit from its business and taxable income within the meaning of the Act.

Moreover, I am unable to distinguish this case in principle from the case of *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* (1). In that case the Company was formed to manufacture, buy, sell, hire and let on hire wagons and other rolling stock, and for many years it manufactured railway wagons, either selling them outright or on the hire-purchase system or letting them on simple hire. In the books of the Company the wagons built to be let on hire were capitalized at a sum which included an amount added as profit on manufacture, and year by year an amount was written off the value of the wagons for depreciation. In 1920 the Company decided to cease letting wagons on hire and to sell them. It then sold the entire stock of wagons used in that branch of its business for a sum in excess of the value of the wagons in the Company's books. The surplus was included in an assessment to corporation profits tax on the Company in respect of the profits of its business, and the Company appealed contending that the surplus arose from the realization of capital assets used in its hiring business. The Special Commissioners disagreed with the contention of the Company that the profit on the sales was an accretion of capital. They found as follows, at page 734 of 12 T.C.:

> We are unable to take this view. In our opinion we must have regard to the main object of the Company which is to make a profit in one way or another out of making wagons and rolling stock. We are unable to draw the very sharp line which we are asked to draw between wagons sold, wagons let on hire purchase and wagons let on simple hire, nor do we consider that this very sharp division in fact exists. We do

(1) [1925] A.C. 467; 12 T.C. 720.

not regard ourselves as precluded by the fact that as long as the wagons were let they were treated as "plant and machinery" subject to wear and tear, from deciding that they are stock in trade when they are sold, even though let under tenancy agreements, for they seem to us to have in fact the one or the other aspect according as they are regarded from the point of view of the users or the Company. In our view, shortly, it makes no difference that one way of making profit out of the wagons was given up, for the very giving up itself involved the making of a profit in another way out of the same wagons, and the purpose of the Company's trade is to make a profit out of wagons.

The decision of the Commissioners was affirmed by Rowlatt J. of the King's Bench Division. An appeal from his decision to the Court of Appeal was dismissed, Pollock M. R. dissenting. The judgment of the majority of the Court was clearly to the effect that the profit made by the Company was profit arising from the business. On an appeal being taken to the House of Lords it was unanimously dismissed. I need quote only the last paragraph of Lord Dunedin's speech, reported at page 474 of [1925] A.C.:

> The appellants argue that this is really a capital increment; and to say so they call these wagons plant of the hiring business. I am of the opinion that in calling them plant they really beg the whole question. The Commissioners have found—and I think it is the fact—that there was here one business. A wagon is none the less sold as an incident of the business of buying and selling because in the meantime before sold it has been utilized by being hired out. There is no similarity whatever between these wagons and plant in the proper sense, e.g., machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income. I think that the appeal fails.

The principles applied in the *Gloucester Railway Carriage and Wagon Company* case (*supra*) are applicable in this one. Counsel for the appellant sought to distinguish it from the present case on several grounds one of which was that in the case cited there was only one business whereas in the appellant's case there had always been a sharp separation between its Recordak Division and its other business so that the former was really a separate business, but the fact is that in each case there was only one business. The appellant's Recordak Division was not a separate business. The manner in which the appellant kept its accounts proves this beyond dispute. Moreover, just as in the case cited the Commissioners did not regard themselves as precluded by the fact that as long as the wagons were let they were

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treated as plant and machinery from deciding that they were stock in trade when they were sold, and Lord Dunedin considered that "a wagon is none the less sold as an incident of the business of buying and selling because in the meantime before sold it has been utilized by being hired out", so the fact that the appellant's recordaks were formerly leased and treated as capital assets subject to depreciation does not prevent the profit from their sale being profit from the appellant's business once it had made the business decision to sell them and sold them in the course of its ordinary business of selling photographic equipment and supplies. It was in exactly the same position in which it would have been in if it had acquired the recordaks for resale. There was nothing of a capital nature in the sale of its recordaks and it is fanciful to say that they were realizations of investments. There was no difference in principle between its sales of recordaks and its sales of other photographic equipment. They were all sales in the course of the appellant's business.

I, therefore, find that the profit made by the appellant from the sales of its recordaks in each of the years under review was profit from its business and taxable income within the meaning of the Act.

That, in my opinion, disposes of the appeals but, in view of the submissions of counsel for the appellant that its case falls to be considered under section 20 of the Act I shall now refer to it. In order to make his submission certain figures were established. In the appellant's taxation year ending November 4, 1951, the amount of the sales of recordaks formerly leased to their users came to $177,311.87 and their net value after depreciation and capital cost allowances was $30,148.05. The difference between these amounts together with an item of $1,529.68 for parts and sundry supplies made up the total profit of $148,693.50 which I have already referred to. The undepreciated capital cost of the recordaks at the commencement of the appellant's 1951 taxation year was $99,444.37 and the capital cost to the appellant of the recordaks sold by it in 1951 computed in accordance with section 8 of Chapter 25 of the Statutes of Canada, 1949 (Second Session), was $39,732.85. In the appellant's taxation year ending November 2, 1952, the amount of the sales of recordaks formerly leased to their users came to

$22,640.00 and their net book value after depreciation and capital cost allowances was $2,122.00, resulting in the profit of $20,518.00 already referred to. The undepreciated capital cost of these recordaks at the commencement of the appellant's 1952 taxation year was $48,194.00 and the capital cost to the appellant of the recordaks sold by it computed as aforesaid was $4,105.86.

Section 20(1) of the Act provides as follows:

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

(*a*) the amount of the excess, or

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

shall be included in computing his income for the year.

And section 20(3) (a) provides:

20. (3) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

I shall now summarize the contention of counsel for the appellant as I understood him to make it. He used the 1951 figures to illustrate what he put forward. He submitted that the recordaks sold by the appellant constituted depreciable property of the appellant within the meaning of section 20(3)(a) because capital cost allowances in respect of it had been made in 1949 and 1950 which brought it within the ambit of section 20(1). It was disposed of for $177,311.87 which amount exceeded its undepreciated capital cost to the appellant immediately before its disposition of $99,444.37. Consequently all the requirements of section 20(1) were met. The amount of the excess under paragraph (*a*) of section 20(1) was thus $77,867.50. But if the property had been disposed of for its capital cost to the appellant such amount would have been $39,732.85 in which case there would have been no excess under paragraph (*b*). And since the lesser of the excess under (*a*), namely, $77,867.50, or the excess under (*b*) namely, zero, was to be

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included in computing the appellant's income for the year, zero was the amount to be included in computing the appellant's income.

There is, I think, a brief answer to counsel's submission. While the purpose of section 20(1) seems to be to ensure that under the circumstances specified in it some of the proceeds of the disposition of depreciable property, which, apart from the section, would not be income within the meaning of the Act, is included in income because of the fact that depreciation or capital cost allowances have been granted in respect of it, it seems to me that there is no need of resorting to the section for such purpose in a case such as this where the disposition of the property has been made in the course of the taxpayer's business as the result of a change of business policy in dealing with it and all of the proceeds of the disposition have been taken into account as income from the business and all the profit made on the disposition of the property is profit from a business.

It follows from what I have said that the Minister was right in assessing the appellant as he did and that its appeals from the assessments are dismissed with costs.

Judgment accordingly.

1954

Dec. 13

Dec. 14

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... PLAINTIFF;

AND

ANTONIO TANGUAY .....DEFENDANT and OPPOSANT.

Revenue—Practice—The Income Tax Act, R.S.C. 1952, c. 148, s. 119—Effect of registration of certificate under s. 119—Issue of writ of fieri facias—Seizure by sheriff—Opposition to seizure—Stay of Execution—Code of Civil Procedure, Arts. 645, 648, 649—General Rules and Orders, Rules 201, 208—Articles of Code relating to stay of execution not applicable to execution of writ issued by Exchequer Court.

On the registration of a certificate under section 119 of the Income Tax Act a writ of *fieri facias* issued from the Exchequer Court and the Sheriff of Beauce made a seizure of the defendant's lands and goods. The defendant filed an opposition to the seizure under Article 645 of the Code of Civil Procedure of the Province of Quebec and the plaintiff filed a contestation of the opposition.

Held: That the registration of a certificate under section 119 of the Income Tax Act gave it the force and effect of a judgment against the defendant-opposant.

2. That if the defendant-opposant had wished to show that there were errors in the assessments on which the amounts mentioned in the certificate were based he should have appealed against them and he is not permitted to contest such amounts indirectly by an opposition to the seizure.

3. That if all that the defendant-opposant wished to obtain was a stay of execution and consequently a suspension of the sale of his lands and goods he should not have chosen the procedure that he adopted.

4. That when a writ of execution has been issued by this Court and the party against whom a judgment has been pronounced wishes to obtain a stay of such execution he must apply to this Court or a judge of this Court. That is the only means by which he can obtain what he wishes. He cannot rely on Article 649 of the Code of Civil Procedure of the Province of Quebec, notwithstanding the provision therein contained that notification of the opposition according to Article 648 operates as a stay of the execution and the sale. In the case of a seizure made under a writ of *fieri facias* issued out of this Court such a notification has no such effect. The power to grant a stay of execution rests exclusively with this Court or a judge of this Court.

CONTESTATION of an opposition to a seizure under a writ of execution issued by the Exchequer Court.

The contestation was heard before the President of the Court at Quebec.

Paul Ollivier and *Claude Couture* for plaintiff.

Maurice Boisvert, Q.C. for defendant-opposant.

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

THE PRESIDENT now (December 14, 1954) delivered the following judgment:

Il s'agit dans la présente cause d'une question de procédure qui se présente dans les circonstances suivantes. Le 15 mars 1954, en conformité de l'article 119 de la Loi de l'Impôt sur le Revenu, S.R.C. 1952, chapitre 148, le Directeur du service du Contentieux de la Division de l'Impôt du Ministère du Revenu National a certifié qu'en vertu de la Loi de l'Impôt de Guerre sur le Revenu et la Loi de l'Impôt sur le Revenu le défendeur-opposant était redevable des sommes mentionnées au certificat qui étaient exigibles, dues et impayées, en plus d'un intérêt supplémentaire aussi mentionné au certificat, et que trente jours étaient écoulés depuis la date du défaut de paiement. Ce

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certificat a été enregistré dans cette Cour le 16 mars 1954. En vertu de l'article 119 (2) de la Loi de l'Impôt sur le Revenu l'enregistrement de ce certificat lui donnait la force et l'effet d'un jugement de cette Cour contre le défendeur-opposant. Le 21 avril 1954, le procureur de la Division de l'Impôt du Ministère du Revenu National a requis un bref de *fieri facias* adressé au Shérif du district de Beauce, Québec, lui enjoignant de prélever des biens mobiliers et immobiliers du défendeur-opposant les sommes mentionnées au certificat et les frais d'exécution et le bref requis a été émis par cette Cour. Le 28 mai 1954, le Shérif, d'après ses rapports, a demandé paiement du montant dû sur le bref en autre des intérêts tel que mentionné au bref ainsi que les frais du shérif, mais les montants ci-dessus mentionnés ne lui ont pas été payés et il a saisi les meubles et effets et les immeubles du défendeur-opposant mentionnés à ses rapports.

Le 17 juin 1954, le défendeur-opposant, prétendant se prévaloir de l'article 645 du Code de Procédure Civile de la Province de Québec, a fait une opposition afin d'annuler à ladite saisie et ladite opposition a été signifiée au shérif le 23 juin 1954. Le 20 août le demandeur a contesté l'opposition.

A l'ouverture de la séance le procureur du défendeur-opposant a demandé un ajournement de trente jours pour le motif qu'un règlement était probable. Mais le procureur du demandeur s'y est opposé. Après avoir entendu les arguments de chaque partie j'ai refusé l'ajournement demandé.

Il me paraît que l'opposition est mal fondée en droit. Les moyens allégués par le défendeur-opposant ne la soutiennent pas. Par exemple, il allègue que dans cette affaire des erreurs avaient été commises et que le montant réclamé n'est pas juste. Mais la réponse à ces allégués est simplement que si le défendeur avait voulu démontrer qu'il y avait eu des erreurs dans les cotisations sur lesquelles les montants mentionnés au certificat étaient basés il aurait dû se pourvoir en appel des cotisations. Mais il ne l'a pas fait. Maintenant il ne lui est pas permis de contester indirectement par une opposition à la saisie le montant réclamé.

Et les autres allégués ne peuvent pas non plus soutenir son opposition, c'est-à-dire, les allégués qu'il y avait eu des pourparlers entre ses répresentants et ceux du demandeur et qu'ils ont travaillé pour venir à une entente et effectuer un règlement et qu'il avait été convenu entre lesdits représentants qu'aucune exécution ne serait prise et d'autres allégués d'un genre semblable. Une telle entente ne pourrait pas lier la Couronne et le fait qu'il y avait eu des pourparlers pour essayer d'arriver à un règlement ne pourrait pas justifier un jugement de cette Cour que la saisie doit être annulée. Au contraire, c'est l'opposition à la saisie qui doit être renvoyée.

D'ailleurs, si tout ce que le défendeur-opposant voulait obtenir était un sursis d'exécution et conséquemment une suspension de la vente de ses immeubles et de ses meubles et effets il n'aurait pas dû choisir la procédure qu'il a adoptée, c'est-à-dire, une opposition afin d'annuler la saisie car cette procédure ne s'applique pas dans une cause telle que la présente. Les motifs qui me mènent à cette conclusion sont les suivants. La Règle 2 des Règles et Ordonnances Générales de cette Cour se lit comme suit:

(1) Dans les poursuites, actions, matières ou autres procédures judiciaires devant la cour de l'Echiquier du Canada, non autrement visées par quelque loi du Parlement du Canada ou par une règle ou ordonnance générale de la Cour,

a) Si la cause d'action prend naissance dans une partie du Canada autre que la province de Québec, la pratique et la procédure doivent se conformer, autant que possible, à celles qui sont alors en vigueur dans des poursuites, actions et matières semblables devant la Cour suprême de justice de Sa Majesté en Angleterre et être régies par ces dernières; et

b) Si la cause d'action prend naissance dans la province de Québec, la pratique et la procédure doivent se conformer, autant que possible, à celles qui sont alors en vigueur dans des poursuites, actions et matières semblables devant la Cour supérieure de Sa Majesté pour la province de Québec et être régies par ces dernières; et, en l'absence de toute poursuite, action ou matière semblable dans ladite cour, la pratique et la procédure doivent se conformer à celles qui sont alors en vigueur dans des poursuites, actions et matières semblables devant la Cour suprême de justice de Sa Majesté en Angleterre et être régies par ces dernières.

Conséquemment, s'il n'y avait pas de règle de cette Cour au sujet de la suspension d'une exécution il faudrait, dans une cause qui prend naissance dans la province de Québec,

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adopter la pratique et la procédure mentionnées à la Règle 2. Mais il y a des règles de cette Cour concernant ledit sujet. Par exemple, la Règle 201 se lit comme suit:

201. Lorsque nulle suspension d'exécution n'a été accordée, chaque personne à qui une somme d'argent ou des frais sont payables en vertu d'un jugement ou d'une ordonnance de la Cour, a le droit, dès que ce jugement a été prononcé ou cette ordonnance rendue, de faire émettre un ou plusieurs brefs de *fieri facias* ou autres procédures après jugement, pour en exiger le paiement; toutefois, si le jugement ou l'ordonnance vise un paiement dans un délai y mentionné, le bref susdit ne doit être émis qu'après l'expiration de ce délai.

Et la Règle 208 pourvoit:

208. Toute partie contre qui un jugement a été prononcé ou une ordonnance rendue peut s'adresser à la Cour ou à un juge de ladite Cour pour une suspension d'exécution ou tout autre recours contre ce jugement ou cette ordonnance; et la Cour ou le juge peut accorder cette suspension ou ce recours aux conditions, s'il en est, estimées équitables.

Donc, dans mon opinion, quand un bref d'exécution a été émis par cette Cour et la partie contre qui un jugement a été prononcé veut obtenir un sursis de telle exécution il lui faut s'adresser à cette Cour ou à un juge de cette Cour. C'est le seul moyen à la disposition de telle partie pour obtenir ce qu'elle veut. Elle ne peut pas s'appuyer sur l'article 649 du Code de Procédure Civile de la Province de Québec malgré la disposition y contenue que la signification de l'opposition conformément à l'article 648 opère sursis de la saisie et de la vente. Dans le cas d'une saisie faite en vertu d'un bref de *fieri facias* émanant de cette Cour une telle signification n'a pas un tel effet. Le pouvoir d'accorder un sursis d'exécution est exclusivement confié à cette Cour ou à un juge de cette Cour. Par conséquent le défendeur-opposant n'a pas le droit à un sursis d'exécution simplement parce qu'il a fait une opposition à la saisie et l'a signifiée de la manière pourvue par l'article 648.

Mais, quoiqu'il me faut pour les motifs donnés renvoyer l'opposition à la saisie, je pourrais la considérer comme une demande de suspension d'exécution conformément à la Règle 208 mais, à mon avis, le défendeur-opposant n'a pas montré de cause juste pour obtenir une telle suspension et je refuse de la lui accorder.

Le résultat donc est que l'opposition à la saisie que la défendeur-opposant a faite est renvoyée avec dépens.

Jugement en conséquence.

BETWEEN:

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Sept. 28 & 29

Dec. 29

PICKLE CROW GOLD MINES LTD. .....APPELLANT;

AND

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

Revenue—Income—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, s. 11(1)(b)—Regulation 1205—Exploration and development expenses incurred by a gold mining company prior to coming into production—Liability for such expenses—Purpose of Regulation 1205—Meaning of "expenses incurred by the taxpayer" in Regulation 1205—Appeal from Income Tax Appeal Board dismissed.

Prior to May, 1938 appellant was engaged in the business of prospecting, exploring and mining for gold. Near its claims were other claims owned then by Albany River Mines Ltd. The two companies were entirely independent of each other and Albany River had spent substantial amounts on exploration and development of its claims but had not come into operation. Pursuant to an agreement entered into by the two companies in May, 1938, a new company—the Albany River Gold Mines Ltd.—was incorporated in July, 1938, and all the assets of Albany River were transferred to it and the shares of Albany Gold allotted to Albany River, appellant and another mining company as mentioned in the agreement. Between July, 1938 and October 31, 1945 appellant expended very large amounts in exploring and developing the claims acquired by Albany Gold from Albany River and these amounts were claimed and allowed as deductions from appellant's taxable income for the years 1946, 1947 and 1948. On October 31, 1945 Albany Gold agreed to sell and appellant agreed to purchase all the assets, rights and properties of Albany Gold in consideration for the issue to Albany Gold of 136,850 fully paid shares of appellant to be distributed among its shareholders (other than the appellant). In its income tax return for the year 1949 appellant sought to deduct 25 per cent of the amount disbursed by Albany River Mines Ltd. prior to July, 1938 for pre-production expenses. The claim was disallowed by the Minister and from the assessment an appeal was taken to the Income Tax Appeal Board which dismissed the appeal and from that decision appellant appealed to this Court. On the evidence the Court found that the 1945 agreement between the appellant and Albany Gold was a bona fide sale and purchase by which the appellant acquired the actual assets of Albany Gold, including the mining claims on which both Albany Gold and Albany River had incurred and paid certain exploration and development expenses; that the transaction involved no contractual relationship whatever between the appellant and Albany River or the latter's shareholders; that the only liability of the appellant thereunder (so far as this case is concerned) was to issue to Albany Gold the number of shares agreed upon.

Held: That Regulation 1205 referable to section 11(1)(*b*) of the Income Tax Act, S. of C. 1948, c. 52 was to give special relief to the mines specified in paragraph (1) thereof because of the fact that in many

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cases they might incur substantial expenses prior to the year in which they come into production in reasonable commercial quantities. The Regulation enabled them to do what they could not otherwise have done, namely, to deduct these expenses from income in and following the year in which they came into production in reasonable commercial quantities, and therefore had income from which the deduction could be made.

2. That the words "expenses incurred by the taxpayer" in Regulation 1205 have a natural and ordinary meaning of expenses either paid out by the taxpayer or which he has become liable to pay. Here Albany River became liable for and did pay the costs or expenses of its prospecting, exploration for, and development of its mine and thereafter no other person or corporation became liable to pay them. The question of liability for or payment of these expenses was at an end before the appellant had anything whatever to do with the matter.

3. That the theory advanced by appellant that it reimbursed the shareholders of Albany River for *their* outlay in the exploration and development of Albany River mine and that in this manner the appellant ran into or brought upon itself a liability in regard to the amount of pre-production expenses and thereby "incurred" them, is unsupportable on the proven facts of the case.

APPEAL from a decision of the Income Tax Appeal Board.

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

Stuart Thom and *A. W. Langmuir* for appellant.

Peter Wright, Q.C. and *T. Z. Boles* for respondent.

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

CAMERON J. now (December 29, 1954) delivered the following judgment:

By its decision dated January 10, 1953 (7 T.A.B.C. 348), the Income Tax Appeal Board dismissed an appeal by Pickle Crow Gold Mines, Ltd. from an assessment made upon it for the taxation year 1949, and a further appeal has been taken to this Court. In its return for that year, the appellant had claimed the right to deduct from its income certain exploration and development expenses, but in the assessment the respondent disallowed all that portion of such expenses which was referable to expenditures incurred and paid by another company—Albany River Mines, Ltd. —prior to July 4, 1938. The appellant based its claim, and

now relies, on the provisions of section 11(1)(*b*) of the Income Tax Act and the Regulation referable thereto, which in the year 1949 were as follows:

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

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

Regulation 1205.

(1) A taxpayer may also deduct from the profits for a taxation year reasonably attributable to the operation in Canada of a coal, base metal or precious metal mine or an industrial mineral mine described in section 1203 of these Regulations, such amount as he may claim, not exceeding 25 per cent of an amount calculated as set forth in subsection (2).

(2) The amount referred to in subsection (1) is the aggregate of all expenses incurred by the taxpayer which are reasonably attributable to the prospecting and exploration for and the development of the mine, prior to coming into production in reasonable commercial quantities, but not including . . .

I have omitted that part of subsection (2) of the Regulation which follows the words "but not including", it being admitted that it has here no relevancy. The Regulation was first made applicable to a taxation year ending in 1949.

The amount originally claimed as deductible under that head was $128,021.00. At the trial, however, I granted leave to the appellant to amend its claim by reducing it to $77,076.00, that sum being 25 per cent of $308,307.50 which the parties have agreed was disbursed by Albany River Mines, Ltd. (hereinafter to be called Albany River) prior to July, 1938, on account of expenses which were reasonably attributable to the prospecting and exploration for and the development of a mine, prior to coming into production in reasonable commercial quantities. For the sake of brevity I shall hereafter refer to such expenses as pre-production expenses. The parties have further agreed that no part of the said sum of $308,307.50 has been applied as a deduction in computing the income of Albany River Mines, Ltd., of the appellant, or of another company—the Albany River Gold Mines, Ltd. (which acquired the mining claims of Albany River in 1938, and owned them until they were transferred to the appellant in 1945)—under the Income War Tax Act or the Income Tax Act.

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In order to appreciate the nature of the claim now advanced by the appellant, it is necessary to set out something of the history of the transactions which took place between the two corporations.

The appellant is a company incorporated under The Companies Act of the Province of Ontario and at all times material to this appeal had been engaged in the business of prospecting, exploring and mining for gold in the District of Patricia. Near its claims were certain other claims owned in 1938 by Albany River. Prior to May 27, 1938, the two companies were entirely independent of each other and Albany River had expended very substantial sums on exploration and development of its claims but had not come into production.

On that date the appellant and Albany River entered into an agreement (Exhibit 7) by the terms of which the appellant agreed to proceed immediately and at its own expense to examine the ore deposits of Albany River to such extent as it considered advisable; and if the said examination proved satisfactory to the appellant, it agreed to carry out, on or before June 7, 1938, the remaining terms of the agreement. Briefly, these terms were that the appellant would cause to be incorporated a new company to be called Albany River Gold Mines, Ltd. (hereinafter to be called "Albany Gold"), with a capitalization of three million shares, with a par value of one dollar each. Upon its incorporation, all the assets of Albany River were to be conveyed to Albany Gold (except a small amount of cash to be reserved for the costs of winding up Albany River). The shares of Albany Gold were to be allotted as follows:— to Albany River—1,087,483 shares (for distribution among its shareholders); and to the appellant—1,692,223 shares. The board of Albany Gold was to consist of five directors, three to be appointed by the appellant and two to represent Albany River. The appellant was forthwith to proceed with the active exploration and development of the claims held by the new company and to have complete control of such operations. Before the new company could declare any dividends, the appellant was to be repaid all its costs in relation thereto. It was further provided that if either Albany River or the appellant acquired any interest in

certain adjacent claims owned by Winoga Patricia Gold Mines, Ltd., such claims were to be transferred to Albany Gold at cost.

The preliminary examination of the claims of Albany River proved satisfactory to the appellant and in the result the above agreement was implemented as provided therein about July 1, 1938. The new company Albany Gold was incorporated, the assets of Albany River were transferred to it; the Winoga claims were acquired for the consideration of 220,000 shares of Albany Gold; and the shares of Albany Gold were allotted to Albany River, Winoga and the appellant in the manner prescribed. Between July 1938, and October 31, 1945, the appellant expended very substantial amounts in respect of exploration and development work on the 17 claims owned by Albany Gold and which the latter company had acquired from Albany River and Winoga.

In October 31, 1945, an agreement (Exhibit 11) was entered into between Albany Gold and the appellant. The important terms of that agreement were that Albany Gold agreed to sell and the appellant agreed to purchase all the assets, rights and properties of Albany Gold in consideration of the issue to Albany Gold of 136,850 fully paid shares of the appellant company of a par value of one dollar each, and the payment by the appellant of all debts of Albany Gold. Further, the latter company was released from its obligation to pay to the appellant the amount which the appellant had expended on the Albany Gold claims in exploration and development, an amount agreed upon at $241,154.33. The appellant was also to deliver up for cancellation all its remaining shares (1,631,225) in Albany Gold. The latter company was to distribute rateably among its shareholders (other than the appellant) the shares in the appellant company which Albany Gold received as a result of the sale, each shareholder to receive one share of stock in the appellant company for each 10 shares of Albany Gold held by him.

As stated in the "Agreement on Facts", filed, the 17 claims owned by Albany Gold were transferred to the appellant on or about October 31, 1945. Exhibits 12 and 13, dated December 1945, are the formal documents completing the transfer of all the assets of Albany Gold to the

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appellant. It is also agreed that the 136,850 shares of the appellant company were duly issued to Albany Gold pursuant to the terms of the agreement. The appellant, therefore, in late 1945 became the owner of the 8 mining claims originally owned by Albany River and the 9 mining claims originally owned by Winoga.

In its returns for the years 1946, 1947 and 1948, the appellant claimed deductions from its taxable income in respect of development work done by it on the properties in the years prior to the time when it acquired formal title to the claims of Albany Gold and these claims were allowed in the total amount of $241,154.33—the precise sums which the appellant had spent on behalf of Albany Gold in the years 1938 to 1945.

The question which I have to decide is to be determined by the interpretation to be put upon the provisions of Regulation 1205 (*supra*). I am invited by the appellant to so construe it as to permit the appellant to deduct from its income for the year 1949 a proportion of the amount of pre-production expenses incurred and paid prior to July 4, 1938, by a company which until that date was entirely separate from and had no connection whatever with the appellant.

It seems to me that Regulation 1205 was designed to give special relief to the mines specified in paragraph (1) thereof because of the fact that in many cases they might incur substantial expenses prior to the year in which they come into production in reasonable commercial quantities. The Regulation enabled them to do what they could not otherwise have done, namely, to deduct these expenses from income in and following the year in which they came into production in reasonable commercial quantities, and therefore had income from which the deduction could be made.

In this case, if the appellant is entitled to succeed I must first be satisfied that the expenses now claimed as deductible were "expenses incurred by the taxpayer", that being one of the conditions laid down in the Regulation. It seems to me that these words are precise and unambiguous and that, therefore, no more is necessary than to expound them in their natural and ordinary sense. In my opinion, the words "expenses incurred by the taxpayer" have a natural

and ordinary meaning of expenses either paid out by the taxpayer or which he has become liable to pay. In this case Albany River became liable for and did pay the costs or expenses of its prospecting, exploration for, and development of its mine and thereafter no other person or corporation became liable to pay them. The question of liability for or payment of these expenses was at an end before the appellant had anything whatever to do with the matter.

That finding is sufficient by itself to enable me to reach the conclusion that the deductions claimed were not expenses incurred by the taxpayer and that the appeal should be dismissed.

In view, however, of the able argument advanced by Mr. Thom, counsel for the appellant, it is necessary to consider as briefly as I can the submission made by him that the expenses were in fact "incurred" by the appellant.

His contention is that "incurred" has a much broader meaning than I have attributed to it. Various dictionary definitions were referred to but I think that they are all summed up in that given in *Corpus Juris* as follows:

> To assume, contract for or become liable or subject to through one's own action; to become liable for or subject to; to bring on; to occasion or cause to render liable or subject to; to run into; sometimes it is used in the sense of meeting with, of being exposed to or being liable to.

He says that in substance the transactions between the appellant, Albany River and Albany Gold, which I have referred to, when considered in the light of the evidence given at the hearing, amount to a payment by the appellant to the shareholders of Albany River of an amount computed with reference to and approximately equivalent to the amount expended for such expenses by the shareholders of Albany River; and that, therefore, the appellant assumed, or contracted for, or became liable or subject to the payment of, and did in fact pay, such pre-production expenses. Part of his argument was stated in these words:

> . . . it is exactly as though Pickle Crow had gone into the share market—had sold a new issue—sufficient of its shares to an underwriter and taken that cash and had gone on to the first Albany representatives and said, "Now how much cash do we have to give you to buy out your interests in these claims which we have been working and exploring for the last seven years?"
>
> . . . we feel that it (the argument) has substance and that one must get away from the notion that "incurred" means "paid" and that "incurred" has a much broader and more comprehensive meaning and that the Pickle

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Crow Company did literally "incur" expenses by taking upon themselves these assets in 1945 and paying the owners of them or giving them back their money in the form of shares of the Pickle Crow stock.

It is shown that Albany River, in its balance sheet which formed part of the agreement of May 27, 1938, with the appellant, treated "exploration and development" expenditures as an asset; that Albany Gold, which acquired all the assets of Albany River, in its annual statements and in the agreement of 1945 with the appellant, stated its "exploration and development" expenses as an asset in the balance sheet, including therein from time to time the amount of such expenditures which were previously made by Albany River. It is said, therefore, that the asset which it called "exploration and development" was in fact an asset—one which was kept alive from 1938 onwards, and was included in the assets acquired by the appellant from Albany Gold in 1945.

Then it is suggested that I should find that there was a direct link between the appellant company and the shareholders of Albany River by reason of the agreement of 1945 between the appellant and Albany Gold and the manner in which the parties thereto agreed on the number of shares in the appellant company which were allotted to Albany Gold in return for the transfer of all its assets to the appellant. The documentary evidence shows only that the appellant was to issue a specified number of its shares (having a par value of one dollar each) to Albany Gold and that the latter company was to divide them rateably among its shareholders. The oral evidence is that in negotiating the agreement it was decided that the stock to be issued by the appellant should be valued at $4.00 per share—which was approximately its market value; that the number of shares to be issued should be such that at that valuation the shares which Albany Gold would then have available for its shareholders who derived their title thereto from the implementation of the agreement of Albany River to sell its assets to Albany Gold would have a total value approximately equivalent to the total outlays by the shareholders of Albany River. That amount was taken to be something in excess of $400,000.00, the main item of which was that of $308,307.50 for "exploration and development". Accordingly, it was agreed to issue 136,850 shares of the appellant

company, some of which would be distributed to the Winoga interests and to the estate of a deceased shareholder. In the result, each shareholder of Albany Gold would receive one share in the appellant company for every 10 shares held by him in Albany Gold.

From these facts I am asked to find that the substance of the series of the transactions was the purchase by the appellant from the shareholders of Albany River of an asset called "exploration and development expenses"; and that as the value and number of the shares issued by the appellant was computed on a basis which included as its main item the costs of the development work done by Albany River, that the appellant did, in fact, "incur" such costs or expenses. I am invited to overlook the existence of Albany Gold and to consider it as having been merely a vehicle or an interim corporation for the carrying out of a transaction between Albany River and the appellant.

In considering this submission I was greatly assisted by Mr. Wright, counsel for the respondent who analyzed it in great detail. I have given it careful consideration and must reject it as insupportable on the proven facts. The whole submission rests on the theory that the appellant reimbursed the shareholders of Albany River for *their* outlay in the exploration and development of Albany River mine and that in this manner the appellant ran into or brought upon itself a liability in regard to the amount of pre-production expenses and thereby "incurred" them.

The expenses were, in fact, both incurred and paid by Albany River and not by its shareholders. The corporate existence of that company cannot be overlooked any more than that of Albany Gold. The latter company carried on its business for a period of seven years before the appellant company conceived the idea of acquiring full ownership of its mining claims and other assets. It was Albany Gold and not the appellant which acquired ownership of the assets of Albany River; and in turn the appellant acquired the mining claims which included those formerly owned by Albany River, from Albany Gold. The appellant at no time entered into any contractual relationship of any kind with the shareholders of Albany River. In pursuance of the 1945 contract its duty was to issue its shares to Albany Gold

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and the latter company obligated itself to divide them rateably amongst *its* shareholders, not among the shareholders of Albany River. Moreover, there is no certainty as to what proportion of the shareholders of Albany River (as they were in 1938) later received the shares of the appellant company. By 1945 only 67 per cent had converted their shares into shares of Albany Gold and it is shown that in the intervening seven years there had been registered a very substantial number of transfers to others. It is highly probable, therefore, that a very large number of the shares issued by the appellant eventually were distributed by Albany Gold to parties who were not in 1938 shareholders of Albany River.

There cannot be the slightest doubt that the transactions between Albany River and Albany Gold and later between Albany Gold and the appellant were in fact sales. That is shown by the agreements and the conveyances which followed. Nor is there any doubt in my mind that in each case what was sold was mining claims on which exploration work had been done and not an asset which could be called "exploration and development expenses". As I have said, they were so called in the balance sheet, but in the transfers there was no conveyance of any such item; it was the mining claims that were conveyed. I cannot understand how such expenses could be called an asset as that term is normally understood. I have no doubt that in accounting quarters it may be useful to keep a record under that heading so as to fix the amount of outlay on that account and perhaps assist in determining the value of the mining claims on which the work has been done in the event of a sale. In a commercial sense, "asset" means property of one sort or another and I am at a loss to understand how the mere recording of an amount expended in years gone by could be considered as an asset and by itself become the subject of sale and purchase.

I must find, therefore, that the 1945 agreement between the appellant and Albany Gold was a bona fide sale and purchase by which the appellant acquired the actual assets of Albany Gold, including the mining claims on which both Albany Gold and Albany River had incurred and paid certain exploration and development expenses; that the transaction involved no contractual relationship whatever

between the appellant and Albany River or the latter's shareholders; that the only liability of the appellant thereunder (so far as this case is concerned) was to issue to Albany Gold the number of shares agreed upon.

It is probably correct to say that the appellant issued more of its shares to Albany Gold as consideration for the transfer to it of mining claims on which development work had been done by Albany River (as well as by Albany Gold itself) than it would have done had such development work not been done. The value of the mining claims was enhanced because of such development work. But the true nature of the agreement of 1945—and also of the 1938 agreement when it was implemented—was that of a sale of mining claims for shares. That was admitted by Mr. Bland, an official of both Albany Gold and the appellant, who also stated that there were no collateral agreements which in any way altered that fact. All that the appellant was required to do in 1945 was to issue its shares to Albany Gold. In my view that could not be considered as running into or becoming liable for or subject to, or assuming or contracting for, pre-production expenses; such expenses were not thereby "incurred" by the taxpayer, the appellant. I think, therefore, that this submission of the appellant must fail.

In view of my finding on the main point, it becomes unnecessary to consider another submission put forward on behalf of the respondent, namely, that in any event the appellant was not entitled to the deductions claimed as the "mine" referred to in Regulation 1205 was the same as the original mine of the appellant which admittedly came into production in reasonable commercial quantities in 1936, the added claims formerly owned by Albany River being at all times considered only as a reserve for the original mine.

For the reasons stated, the appeal will be dismissed and the assessment made upon the appellant will be affirmed. The respondent is also entitled to be paid his costs after taxation.

Judgment accordingly.

1954
Oct. 26
1955
Jan. 7

BETWEEN:

OKALTA OILS LIMITED ..... APPELLANT;

AND

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

Revenue—Income—Income tax—The Income War Tax Act R.S.C. 1927, c. 97, s. 8(6)—Allowable deductions—Oil wells—Expenditures on dry oil wells—Wartime Oils Limited—Financial assistance given by Wartime Oils Limited in drilling oil wells—Effect of s. 8(6) of the Income War Tax Act—Interpretation of s. 8(6) of the Income War Tax Act—Appeal from Income Tax Appeal Board dismissed.

Section 8(6) of the Income War Tax Act, R.S.C. 1927, c. 97 is as follows:

(6) A corporation whose principle business is the production, refining or marketing of petroleum products is entitled to deduct from

(*a*) the aggregate of the taxes under this Act and The Excess Profits Tax Act, 1940, payable by it in respect of the year of expenditure, and

(*b*) if the deduction permitted under this subsection exceeds the taxes so payable in that year, from the taxes so payable in subsequent years,

an amount equal to

(*c*) twenty-six and two-thirds per centum in the case of a corporation substantially all of whose income is subject to depletion under this Act, or

(*d*) forty per centum in the case of any other corporation, of the aggregate of drilling and exploration costs, including all general geological and geophysical expenses, incurred by it directly or indirectly on oil wells spudded in during the period from the first day of January, nineteen hundred and forty-three to the thirty-first day of December, nineteen hundred and forty-six and abandoned within six months after completion of drilling.

In 1943 appellant company which held certain oil leases on property in Turner Valley entered into an agreement with Wartime Oils Limited —a Crown corporation—by which it received subject to certain terms and conditions financial assistance in drilling, among other wells on its property, Well No. 20. The well was spudded in on January 18, 1944, and finally abandoned on December 18, 1944. The amounts received in 1944 and 1945 for drilling and cleaning up expenses totalled approximately $220,000.00 which more than covered its out-of-pocket expenses on the operation. Having faithfully carried out its part of the agreement appellant company, by reason of a clause to that effect therein, was under no liability to repay the moneys advanced by Wartime Oils Limited. It transferred the whole of the amount so received to capital surplus and in computing its tax for the taxation year 1946 claimed the benefit of the provisions of s. 8(6) of the Act. The claim was disallowed by the Minister on the ground that appellant company incurred no drilling or exploration costs in relation to that well and that if any such costs were incurred, they were incurred

by Wartime Oils Limited. An appeal from the assessment was taken to the Income Tax Appeal Board which dismissed the appeal and from that decision appellant appealed to this Court.

Held: That the effect of s. 8(6) of the Income War Tax Act is to enable a taxpayer who has incurred costs in drilling an oil well which has proven unproductive, to recover by means of tax deductions the amounts which he is out-of-pocket by reason of such costs and which he could not otherwise recover. The probability—if not the certainty—that such losses would be recovered, provides the incentive for extending his operations by further drilling. The general intent of the enactment is to place the taxpayer in such cases in the position where he would suffer no loss so far as the unproductive operation is concerned—that he would not be out-of-pocket.

2. That to construe s. 8(6) of the Act so as to enable a corporation which is not out-of-pocket on its operation, but on the contrary has had all its expenses paid for by another party—here a Crown corporation—to be repaid for such expenses out of taxes which would otherwise accrue to the Crown, would mean that the legislation was intended to confer not only indemnity for such losses, but also an additional bonus of a like amount, an interpretation Parliament did not contemplate.

APPEAL from a decision of the Income Tax Appeal Board.

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

J. M. Robertson for appellant.

H. W. Riley, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (January 7, 1955) delivered the following judgment:

This appeal involves questions arising out of an assessment made upon the appellant company in respect of its taxation year ending December 31, 1946. The substantial question is whether the appellant in computing its tax had the right on the particular facts of this case to apply the provisions of section 8(6) of the Income War Tax Act relating to certain deductions from taxes and applicable in certain circumstances with respect to drilling and exploration costs incurred on oil wells which proved to be unproductive and were abandoned. An appeal from the assessment was taken to the Income Tax Appeal Board which, by its decision dated September 3, 1953 (9 T.A.B.C. 65), disallowed the appeal, and a further appeal is now taken to this Court.

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At the hearing of the appeal the parties filed an agreed Statement of Facts, and while each reserved the right to call witnesses, it was found unnecessary to do so. The appeal therefore is to be determined on the facts as agreed upon and the applicable provisions of the Act.

The appellant was incorporated in 1925 and it is agreed that at all material times its principal business was the exploration for and the production of petroleum. Subsection (6) of section 8 of the Act is as follows:

> (6) A corporation whose principal business is the production, refining or marketing of petroleum or petroleum products is entitled to deduct from
>
> (*a*) the aggregate of the taxes under this Act and The Excess Profits Tax Act, 1940, payable by it in respect of the year of expenditure, and
>
> (*b*) if the deduction permitted under this subsection exceeds the taxes so payable in that year, from the taxes so payable in subsequent years,
>
> an amount equal to
>
> (*c*) twenty-six and two-thirds per centum in the case of a corporation substantially all of whose income is subject to depletion under this Act, or
>
> (*d*) forty per centum in the case of any other corporation, of the aggregate of drilling and exploration costs, including all general geological and geophysical expenses, incurred by it directly or indirectly on oil wells spudded in during the period from the first day of January, nineteen hundred and forty-three to the thirty-first day of December, nineteen hundred and forty-six and abandoned within six months after completion of drilling.

Now it is not disputed that in some circumstances the appellant is entitled to the benefit of that subsection. In fact, in assessing the appellant for the year 1946, tax credits under that subsection were allowed to the appellant in respect of one of its wells which proved to be unproductive, namely, Keho Lake No. 1. In the main, however, the appellant's claim to the benefit of subsection (6) relates to expenditures on Well No. 20. The respondent, in effect, disallowed any claim in regard thereto on the ground that the appellant incurred no drilling or exploration costs in relation to that particular well and that if any such costs were incurred, they were incurred by Wartime Oils Limited.

It becomes necessary, therefore, to consider the special facts relating to Well No. 20 and the manner in which its drilling was financed. In view of my conclusions, it is not necessary to state in detail the particulars of the amounts involved.

During the Second World War it was found necessary to encourage and stimulate the production of oil in Canada; accordingly, by P.C. 3567 of May 4, 1943, authority was given under the War Measures Act for the incorporation of a Crown corporation—Wartime Oils Limited—charged with the duty of negotiating and entering into contracts for the carrying out of said objective and for the furnishing of financial assistance in connection therewith. The appellant company held certain oil leases from the Government of Alberta on property in Turner Valley. It entered into a series of agreements with Wartime Oils Limited by which it received financial assistance in drilling certain wells on its property.

Exhibit 1, dated December 30, 1943, is a photostatic copy of the agreement relating to the drilling of Well No. 20 and is similar to the others. Thereby the appellant undertook to drill the well in accordance with certain specifications; Wartime Oils agreed to finance all the costs of the drilling and for that purpose to deposit the necessary funds with the Trusts and Guarantee Co. Ltd (also a party to the agreement) as trustee. The trustee was to disburse the money so received to the appellant at the times and in the amounts specified in the agreement and the schedule thereto, upon the requisition of Wartime Oils or upon the requisition of the appellant when approved for payment by a representative or appointee of Wartime Oils. All moneys so advanced to the appellant were to be repaid to Wartime Oils, together with interest at 3½ per cent, but only out of the proceeds of oil produced from the said well (or from a second well which might be drilled on the same premises if the first well proved to be unproductive). It was further provided that after repayment of the said loan and interest, Wartime Oils would become entitled to a royalty in perpetuity of ¼ of 1 per cent of the petroleum and natural gas produced, for each $12,500.00 of such advances. As security for the advances to be made, the appellant assigned to the trustee that part of the leased lands on which Well No. 20 was located; and mortgaged to Wartime Oils all its interest in the petroleum therein and in the surface rights and property thereon, and also on the production from any well or wells (subject only to the prior payment and deduction of royalties and the operating

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expenses of the appellant company). The appellant assigned to the trustee the whole of the production of petroleum and natural gas to be produced from the said well.

Well No. 20 was spudded in on January 18, 1944; drilling was completed on August 8, 1944, and after attempted acidization, etc., the well was finally abandoned on December 18, 1944. The major part of the drilling expenses was incurred in 1944; but in 1945 further expenses were incurred in cleaning up the site and certain settlements were arrived at regarding items of expense which had not previously been settled. In these two years the appellant received from the trustee on behalf of Wartime Oils a total of about $220,000.00, an amount which more than covered its out-of-pocket expenses, the balance being referable to management costs, overhead, depreciation on the equipment used, and matters of that sort.

Clause 27 of the agreement (Exhibit 1) provided as follows:

> So long as the Company shall duly and faithfully perform and observe the covenants and agreements on its part herein contained or implied and shall commit no breach or default thereof, there shall be no obligation upon it to repay the monies advanced by Wartime Oils, and interest thereon, except out of the proceeds of production of the well or wells in respect of which such advances are made, the proceeds of disposal of casing and equipment thereof and any monies which may become payable under the bond referred to in paragraph 26 hereof.

No question arose as to the manner in which the appellant had carried out its contract. By reason, therefore, of clause 27, the appellant was under no liability to repay to Wartime Oils any portion of the moneys which it had received, and of course Wartime Oils was not entitled to any royalty under that agreement.

The appellant under these conditions transferred the whole of the amount so received to capital surplus. It now seeks to claim the benefit of the provisions of section 8(6) of the Act in relation to those amounts (as well as on certain royalty matters to which I shall refer later).

Counsel for the appellant, as I have said, submits that all such costs were in fact "incurred" by the appellant. He points out that the appellant had full charge of the drilling; that it became primarily liable for costs of labour and material and did in fact pay for them. He submits that the

agreement (Exhibit 1), properly interpreted, establishes that Wartime Oils made a loan to the appellant, and he refers to paragraph 6 thereof which states that Wartime Oils "agrees that by way of loan to the company (i.e. the appellant) it will provide the trustee with the amounts required". He also refers to the other terms of the agreement by which provision is made for the repayment of the advances with interest, for the taking of a mortgage and the giving of an assignment of the lease and of the production as further indicia that it was a loan. He says that as the moneys were advanced under the "loan", they became the property of the appellant and that when expended by it for labour and material, such expenditures were made by the appellant and were made out of its own funds. He says, therefore, that the appellant not only incurred but paid such costs and that its positions is precisely the same as if it had secured funds by way of a bank loan or by issue of debentures or the like. He points out, also, that in certain circumstances—such as the appellant company defaulting on its agreement—the "loan" would have had to be repaid even if the well had been found unproductive. Finally, he says that the mere fact that the moneys received did not in the result become repayable has no bearing on the matter.

The argument is persuasive and I must admit that on first consideration I felt it had considerable merit. Upon further consideration, however, and after examining the provisions of subsection (6) and endeavouring to ascertain its true purpose and meaning, I have reached the conclusion that it must be rejected.

Subsection (6) is incentive legislation designed to encourage the production of oil and oil products. It is well known that drilling for oil is an expensive operation which in many cases results in no production. The subsection permits the specified corporations to deduct from their total tax liability under both the Income War Tax Act and The Excess Profits Tax Act the stated percentages of the costs incurred on expenditures on dry oil wells within the five years mentioned. There is no limitation as to the amount of such expenses and as I understand the matter, the result of the application of the formula laid down

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(which involves a deduction from the taxes otherwise payable and not from the taxable income) is that all of such costs may be eventually recovered over a period of one or more years. The effect of the subsection, it seems to me, is to enable a taxpayer who has incurred costs in drilling an oil well which has proven unproductive, to recover by means of tax deductions the amounts which he is out-of-pocket by reason of such costs and which he could not otherwise recover. The probability—if not the certainty—that such losses would be recovered, provides the incentive for extending his operations by further drilling. The general intent of the enactment is to place the taxpayer in such cases in the position where he would suffer no loss so far as the unproductive operation is concerned—that he would not be out-of-pocket.

On that construction of the subsection, it seems to me that the appellant must fail on this point. The agreement was made in such a way as to provide that there was no possibility of the appellant sustaining any loss whatever on the drilling operation of Well No. 20, provided that it faithfully carried out the agreement. The fact is that it suffered no loss but made a profit on the operation, the whole of its costs having been paid by Wartime Oils. While it may perhaps be said that from one point of view the appellant "incurred" the costs by becoming liable and paying the costs of labour and material, it cannot be said in the light of what occurred that it suffered or was put to any loss or that on the operation it was out-of-pocket. I find it impossible to put upon the subsection such a construction as would enable a corporation which is not out-of-pocket on its operation, but on the contrary has had all its expenses paid for by another party—in this case a Crown corporation —to be repaid for such expenses out of taxes which would otherwise accrue to the Crown. To do so would mean that the legislation was intended to confer not only indemnity for such losses, but also an additional bonus of a like amount, an interpretation which I think Parliament did not contemplate. For these reasons, the appeal, so far as it relates to the direct drilling and exploration costs, is dismissed.

In its claim the appellant included also three items called "gross royalty to Wartime Oils Limited"; in 1944 the amount was $16,000.00 and in 1945 $2,000.00, both referable to Well No. 20; the remaining item of $1,000.00 was referable to Well No. 18, a companion well of Well No. 15 which was drilled under a similar contract with Wartime Oils and found productive, Well No. 18 being commenced but not drilled.

These items arose in this way. As I have said, the agreements provided that in the eventual production of oil or gas from the respective lands, Wartime Oils was to acquire in perpetuity a gross royalty percentage in the production of the well, computed at $\frac{1}{4}$ of 1 per cent for each $12,500.00 advanced by it in respect of such well. The appellant's directors considered it proper to record in their accounts the value of the gross royalty interest in such potential production. Having regard to market prices for such interests, they fixed an amount of $4,000.00 for each 1 per cent of the gross royalty so to be acquired by Wartime Oils and on that basis, as the total advances for each well were determined, an entry was made charging expenditures on wells and crediting leases with the value of the interest. As the companion well of Well No. 18 was productive, Wartime Oils might at some date acquire a $\frac{1}{4}$ of 1 per cent royalty in perpetuity therein, but in the result it never could acquire any royalty in connection with Well No. 20 or its companion Well No. 22. The total of these three items—namely, $19,000.00—was charged as expenditures and written off to profit and loss. It is now sought to include the total amount as "expenses" in the same manner as was done in regard to the drilling and exploration costs and to apply the provisions of section 8(6) thereto.

I am not asked to consider the valuation of $4,000.00 placed upon each 1 per cent of the gross royalty interest, but merely the question as to whether anything should be allowed under this claim. Counsel for the appellant submits that the present value of the gross royalty was an expense of drilling the well; that the granting of the royalty or of the obligation to pay that royalty represented something additional which the appellant agreed to pay or grant in order to secure the advances from Wartime Oils to drill the well.

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Cameron J.

The short answer to this submission so far as Well No. 20 is concerned is that the appellant never became liable to provide for or pay any royalty to Wartime Oils. The provision for the royalty was merely a contingency which might arise but did not in fact arise at all for the reason that Wartime Oils was entitled to it only if the well or its companion well proved productive, an event which did not occur. It never was and could never become an expense of drilling or prospecting. The situation in regard to the $1,000.00 claimed in regard to Well No. 18 is somewhat different, for while it proved unproductive, its companion well did come into production and for that reason Wartime Oils might conceivably at some time be entitled to $\frac{1}{4}$ of 1 per cent royalty. It is quite problematical as to whether it eventually would receive anything therefrom or become entitled thereto for its right to receive it would not arise until all operational expenses had been met, the full amount of the advances repaid and other prior charges met; the well might be exhausted prior to that time. In any event, there is no evidence that Wartime Oils ever became the owner of any royalty rights therein or were ever paid anything in regard thereto. For that reason it cannot be said that the bookkeeping entry made by the appellant was at any time up to December 31, 1946, an expense which the appellant had incurred in its drilling or exploration operations. These claims must also be rejected.

A further defence was raised by the respondent, namely, that there is no right of appeal from an assessment to nil dollars. In this case the appellant was originally assessed for $1,000.00; it served a Notice of Objection and thereafter the Minister, upon reconsideration, reassessed the appellant at nil dollars. In view of the conclusions I have reached on the merits of the case, it becomes unnecessary to consider this submission.

The appeal will accordingly be dismissed and the assessment affirmed. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.

BETWEEN:

1955
Jan. 20
Feb. 10

GRACE ELIZABETH (BOWDEN) HARRIS and HOWARD HARRIS } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages for injury as result of a fall on stairway in a Customs building—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Statutory conditions of Crown's liability to be proven—Onus of proof on suppliants—Crown's liability under s. 19(c) of the Exchequer Court Act a vicarious liability—Act of a Customs officer in granting permission in violation of instructions not an act of negligence in performance of his duties—Failure of a Customs officer to obey instructions not a breach of duty toward suppliants.

Returning to Canada from a motor trip in U.S.A., suppliants reported at the Customs office at Highwater, P.Q. to make the usual declarations. It was then 1 a.m. One B. was the only Customs officer on duty at the time. In the office there was a door and close to the door a poster with the words "for employees only" thereon. Suppliant Mrs. Harris asked B. permission to use the toilet facilities in the building. B. granted the permission, told her that the facilities were in the basement and indicated the door with his hand. Mrs. Harris, who wore glasses at the time, then proceeded to the door, opened it and fell down ten steps to the basement. The defence to an action seeking damages as a result of this accident is that B. was not acting within the scope of his duties when he granted the permission to Mrs. Harris. On the facts the Court found that for the last fifteen years respondent had refused the use of that door to the public; that the employees were aware of this prohibition and had been instructed not to admit the public to the basement. It also found that the stairway was in good condition and lighted at the time of the accident.

Held: That the onus of proof that B. was an officer of the Crown; that he was acting within the scope of his duties when he gave permission to use the toilet facilities; that he was negligent in the performance of his duties and that the injuries to suppliant Mrs. Harris resulted from his negligence, rests upon suppliants. No presumption or assumption can displace this statutory obligation imposed by s. 19(*c*) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended. Conjectures, suppositions, speculations or surmise are not sufficient to discharge the duty which lies with suppliant to establish those facts. *Labelle* v. *The King,* [1937] Ex. C.R. 170; *The King* v. *Moreau,* [1950] S.C.R. 18; *Ginn et al* v. *The King,* [1950] Ex. C.R. 208; *Diano* v. *The Queen,* [1952] Ex. C.R. 209; *Magda* v. *The Queen,* [1953] Ex. C.R. 22, referred to and followed.

2. That the act of B. in granting the permission to suppliant Mrs. Harris cannot in any way be treated as an act of negligence committed while acting within the scope of his duties. It was his own wilful act, done through kindness perhaps, but outside the range of what may be even considered as part of his duties or incidental thereto. *Anthony* v. *The King,* [1946] S.C.R. 569, followed.

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3. That B.'s failure to follow the instructions of his superior officer was not a breach of his private duty toward suppliants. Section 19(c) of the Exchequer Court Act creates a liability against the Crown through negligence of its servants but does not impose duties on the Crown in favour of the subject. *Anthony* v. *The King*, [1946] S.C.R. 569, followed. Here B. had no duty to care for suppliant Mrs. Harris. There being no duty, he was not negligent when he indicated the door leading to the basement.

PETITION OF RIGHT by suppliants seeking damages for injury as a result of a fall on a stairway in a Customs building owned by the Crown.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

Pierre Dessaulles for suppliants.

Gaston Lacroix, Q.C. for respondent.

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

FOURNIER J. now (February 10, 1955) delivered the following judgment:

In this petition of right the suppliants seek to recover from the Crown damages for personal injuries and losses sustained by them as the result of the fall of the suppliant Grace Elizabeth (Bowden) Harris, hereinafter called Mrs. Harris, in the stairway leading from the main floor to the basement in a Customs building the property of the respondent at Highwater, Province of Quebec.

This petition is taken in the name of both suppliants, who are married and are separate as to property as it appears from Exhibits 1 and 2 filed at the trial.

The suppliants and members of their family had been travelling by automobile in the United States when at 1 a.m. on August 5, 1951, they entered Canada at Highwater, Province of Quebec, and reported there, as required by law, at the Federal Government Office for Immigration and Customs and Excise. The suppliant Howard Harris and his daughter walked in the office first and went to the counter to make the usual declaration concerning the goods they were bringing into the country. As they were speaking to Cedric Bailey, the only official there at the time and in charge of the office, the suppliant Mrs. Harris came in. According to two witnesses, she asked the aforenamed

officer permission to use the toilet facilities in the establishment. He granted this permission to her and indicated with his hand the door leading to these facilities. In the main, these facts were corroborated by the respondent's witness Cedric Bailey. His only addition to and modification of this evidence were that when Mrs. Harris entered the office she looked at the sign near the door, which indicated that the facilities were not for the public, and then requested her daughter to ask the above permission. When he granted the request he told Mrs. Harris that the toilet was downstairs and showed the door with his hand.

On entering the office, two counters are in view: one to the right and another—a very long counter—facing the door. To the left of this last counter, there is a passage way on the employees' side of the building leading to a door at the rear left side of the room. Close to the door is a poster showing that it is for the use of employees only. This door opens on a stairway going down to the basement where the toilet facilities are located. The stairway has a length of 11 feet 3 inches. There are 10 steps having a tread of 10 inches and a rise of $8\frac{1}{2}$ inches. The sketch filed as Exhibit A gives an accurate description of the main floor of the building.

Mrs. Harris proceeded to this door, presumably opened it and fell down to the basement. In her fall, she was seriously injured, though the injuries were not apparent. A doctor was called who examined her and advised that she could proceed by automobile to her home in Montreal, but would need medical attention on her arrival there.

She received medical treatment from the date of the accident to about April 1953, but with very little result. She was in severe pain nearly all that time and required the continuous use of drugs to relieve her pains. In April 1953, she was operated on by a specialist. The injuries caused by the fall were to her spine and two discs of the vertebrae had to be removed. After the operation and for a certain period the pain in her back and left leg disappeared. But in September 1953 she complained of acute pain in the lower part of her back and was examined by another physician who found that she was suffering from a cancer growth to her left hip. This cancer was not detected by the doctors who

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had treated her previously, nor by the surgeon who had performed the operation in April of the same year. It was stated at the trial by the two medical experts who were heard that Mrs. Harris underwent an operation for cancer in 1946, when her uterus had been removed. From then on to the time of the accident she had been in good physical condition.

Doctor George Hutchison testified on behalf of the suppliants. I believe he was the family doctor. At all events, he treated Mrs. Harris in this instance. He gave a description of her condition from August 5, 1951, to September 1953 when it was found that she was suffering from cancer. From his knowledge of the case and his experience, he concluded that during her stay in the different hospitals for treatment she was totally incapacitated and when at home she suffered a 65 per cent disability and this from the date of the accident to September 1953. After that date, in his opinion, her disability was the result of the cancer growth on her left hip.

Doctor Townsend, who examined the patient at the request of the respondent and perused all the files relating to her different ailments at the various hospitals where she was treated reached conclusions similar to those of Doctor Hutchison. He was of the opinion that the victim suffered a total disability for three months after the accident, followed by a partial disability of 65 per cent up to September 1953. He then went further and expressed the view that her present disability of 65 per cent was due to the extent of 50 per cent to her accident and to the extent of 50 per cent to her cancerous condition.

It is for the injuries sustained by his wife that the suppliant Howard Harris has incurred the following expenses:

doctors' fees	$428.00
hospital costs	612.96
glasses	18.00
medical prescriptions	150.00
upkeep of his daughter who took care of her mother after leaving her employment	2500.00
total	$3708.96

If I were of the opinion that the suppliants are entitled to any of the relief sought in their petition of right, I would award the suppliant Howard Harris the sum of $3,708.96 for the above expenses and the suppliant Mrs. Harris the sum of $2,500 as compensation for her temporary disability and for her pain and suffering.

The suppliants' claims are made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, which reads as follows:

19. The Exchequer Court shall also have exclusive 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.

The suppliants in order to succeed against the respondent must bring their claims within the ambit of this paragraph 19(c) of the Exchequer Court Act above cited. It must be shown conclusively that Cedric Bailey was an officer of the Crown; that he was acting within the scope of his duties when he gave permission to use the toilet facilities; that he was negligent in the performance of his duties and that the injuries to the suppliant Mrs. Harris resulted from his negligence. The onus of proof of these facts rests upon the suppliants. No presumption or assumption can displace this statutory obligation. Conjectures, suppositions, speculations or surmise are not sufficient to discharge the duty which lies with the suppliants to establish the above matters.

This principle has received application in numerous decisions of this Court and of the Supreme Court of Canada; it will suffice to refer to a few: *The King* v. *Moreau* (1); *Labelle* v. *The King* (2); *Ginn et al* v. *The King* (3); *Diano* v. *The Queen* (4). The most recent decision dealing therewith is in the case of *Magda* v. *The Queen* (5). The President of this Court then said (pp. 31 et seq.):

. . . To engage the responsibility of the Crown to a suppliant under section 19(c) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(c), if the term liability is a precise

(1) [1950] S.C.R. 18, 24.
(2) [1937] Ex. C.R. 170.
(3) [1950] Ex. C.R. 208.
(4) [1952] Ex. C.R. 209.
(5) [1953] Ex. C.R. 22.

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one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him, that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant resulted therefrom: vide *Lochgelly Iron and Coal Co.* v. *McMullan,* [1934] A.C. 1; *Hay or Bourhill* v. *Young,* [1943] A.C. 92; *The King* v. *Anthony,* [1946] S.C.R. 569.

It was established and admitted that Cedric Bailey was a servant of the Crown on August 5, 1951. He was employed by the Department of National Revenue as a Customs officer, stationed at the port of Highwater, and on the day of the accident he was in charge of the office.

The powers and duties of Customs officers are fully described in the Customs Act, R.S.C. 1927, chap. 42, and amendments, specially under sections 142 to 152 of the Act. After a careful study of the section thereof dealing with these duties and functions, I was unable to find that amongst their duties they had the care of the building in which they performed said duties. The duties are related to the application and enforcement of the provisions of the Act. The administration, maintenance and care of public buildings come under the jurisdiction of other officials or departments.

But let us assume that amongst the duties of a Customs officer there is the care of the building in which he operates and let us consider the evidence. There are no toilet facilities for the public in the Customs building at Highwater. In the basement of the building there is a toilet room for the use of the employees. The door to the basement is on the office floor and there is a sign near this door indicating that the latter is for the use of the employees only. For the last fifteen years the respondent has refused the use of this door to the public. The employees were aware of this prohibition and had been instructed not to allow the public to the basement. If he took on his own to permit the use of the door, stairway, basement and toilet facilities, in so doing he was not acting within the scope of his duties but acting outside the scope of his duties.

The act of Cedric Bailey in granting permission to Mrs. Harris to use the toilet facilities in the basement, in my opinion, cannot in any way be treated as an act of negligence committed while acting within the scope of his duties. It was his own wilful act, done through kindness, if you will, but outside the range of what may be even considered as part of his duties or incidental thereto. His failure to follow the instructions of his superior officer was not a breach of his private duty toward the suppliants. Section 19(*c*) of the Exchequer Court Act creates a liability against the Crown through negligence of its servants but does not impose duties on the Crown in favour of the subject.

It was argued that if the officer was bound by duty to refuse the permission requested, the granting of the request amounted to negligence in the performance of his duties. This contention does not seem to me tenable. The Statute imposes a vicarious responsibility on the Crown for the damages resulting from the negligence of its servants only when they are acting within the scope of their duties and not for their negligence while acting outside the scope of their duties or doing things not contemplated by the Act or which cannot be reasonably considered as coming within the meaning of its section 19(*c*). To follow the above contention would have, in my view, the effect of imposing on the Crown a responsibility greater than that contemplated by Parliament.

There is no doubt in my mind that the officer in charge took onto himself to do something which he had been forbidden to do by his superior officer. But it is a well known principle that negligence in law only creates a responsibility or liability when it corresponds to a duty. In the present case, I am of the opinion that the Customs officer had no duty to care for the injured party and I do not believe he was negligent. There being no duty, he could not be considered negligent when indicating the way to the toilet facilities. The stairway was in good condition and offered no danger.

In the case of *Anthony* v. *The King* (1) Mr. Justice Rand made a clear exposé of the principle that the Crown's liability under Section 19(*c*) of the Exchequer Court Act was a

(1) [1946] S.C.R. 569.

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vicarious one based on a tortious act of negligence committed by a servant while acting within the scope of his employment.

The head-note in the last-mentioned case reads in part thus (p. 569 et seq.):

> M., a soldier, took wrongfully a quantity of live ammunition from the gun stores and had it in his possession, while being transported by truck as part of a draft which was moved to another building. The draft was in charge of two non-commissioned officers, sergeant major W. being in command and lance-corporal H. assisting him. During the trip some soldiers in M.'s truck fired blank ammunition, and M. fired live ammunition at least once before reaching Anthony's barn. The live ammunition was property of the Crown, the soldiers were not to fire except under orders of a superior officer and the orders were that the soldiers should turn in the ammunition at the close of military exercises. When M. passed in front of respondent Anthony's barn, he directed a tracer bullet at a window, and the barn, and its contents belonging to respondent Thompson, were destroyed by fire. In actions against the Crown under section 19(c) of the Exchequer Court Act, the trial judge found that, while M. was not acting within the scope of his employment, there was liability on the Crown because of the negligence of the officers in charge of the draft in failing to stop the firing.
>
> *Held,* reversing the judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 30), Kerwin and Estey JJ. dissenting, that the Crown was not liable.
>
> The act of M. in shooting the incendiary bullet into the barn cannot, in any way, be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called reasonably incidental to them.
>
> The failure of the officers, in charge of the draft, was a neglect of duty only in respect of military law; it did not constitute also a breach of private duty toward the respondents; and the rule of *respondeat superior* has no application.
>
> Paragraph (c) of section 19 of the Exchequer Court Act creates a liability against the Crown through negligence under the rule of *respondeat superior,* and it does not impose duties on the Crown in favour of subjects. The liability is vicarious, based as it is 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 "while acting" clearly exclude such an interpretation.

I find that Cedric Bailey was an officer of the Crown performing his duties in the respondent's building at High-water, but that he was not acting within the scope of his duties when he indicated to Mrs. Harris the door leading to

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the toilet facilities and granted her permission to use the same. This act was not part nor incidental to his duties. If his act resulted in the damages and losses claimed, I must say that I fail to see how the respondent can be held liable.

The evidence before the Court has convinced me that the injuries complained of were the result of an accident. Mrs. Harris, the suppliant, who wore glasses, did not look carefully or did not see the first step or thought there was a platform at the head of the stairway. She took a step and fell to the bottom of the stairs. The stairway was in good condition and I really believe the light was on at the time of the fall, though no witness was positive one way or the other.

Under the circumstances, since the suppliants did not establish that the injury sustained by the suppliant Grace Elizabeth (Bowden) Harris was due to the negligence of the servant of the Crown while acting within the scope of his duties, the latter is not liable for the damages claimed. There will consequently be judgment declaring that neither of the suppliants is entitled to any of the relief sought by their petition of right.

The respondent is entitled to costs, which are hereby awarded, if the Crown deems fit to claim them.

Judgment accordingly.

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BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE MONTREAL TRANSPORTATION COMMISSION .....DEFENDANT.

Crown—Action to recover damages—Negligence—Civil Code of Quebec, Articles 1053, 1054 and 1056—Collision between R.C.A.F. ambulance and tramcar—Medical and hospital expenses incurred by the Crown on behalf of a serviceman—Pay and allowances paid by the Crown to serviceman during his incapacity—Right to recover under Article 1053 c.c.—Article 1056 c.c. limits right of action under Article 1053 to a certain category of persons under specified situations and conditions.

An R.C.A.F. ambulance while transporting one S., an airman, to a military hospital came into collision, at the corner of Bordeaux and Ontario streets in Montreal, with a tramcar owned by the defendant and

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operated by its employee. Alleging negligence on the part of defendant's employee the Crown, under Articles 1053 and 1054 of the Civil Code of Quebec, seeks to recover the loss of its ambulance; the medical and hospital expenses incurred on behalf of the injured serviceman; and the pay and allowances which it continued to give him during his incapacity. One of the defences is that the language of Article 1056 c.c. restricts the right of recovery under Article 1053 to the person bodily injured by the wrongful act of a third party. On the facts the Court found that both drivers were equally negligent and fixed their share of responsibility at fifty per cent.

Held: That the R.C.A.F. ambulance was an emergency vehicle within the meaning of By-law No. 1319 of the City of Montreal, para. 36: "Fire department apparatus, police patrol wagons, hospital ambulances and all authorized vehicles on their way to save life or prevent property loss."

2. That the words used in Article 1053 c.c. are not ambiguous and should not be given a meaning other than their ordinary meaning. The rule of legal construction applicable to all writings should be applied.

3. That Article 1053 c.c. gives a general right of action to all persons sustaining damage through the wrongful act of another person capable of discerning right from wrong. *Regent Taxi and Transport Co.* v. *Congrégation des Petits Frères de Marie* [1929] S.C.R. 650. Article 1056 c.c. does not give a general right; it limits the right of action under Article 1053 to a certain category of persons under specified situations and conditions. Thus persons entitled to a claim for damages under Article 1053 are *not* deprived of this right by Article 1056 when they are not related to the person fatally injured.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover damages under Articles 1053 and 1054 of the Civil Code of Quebec.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

Jacques Vadboncoeur, Q.C. for plaintiff.

G. R. W. Owen, Q.C. and *A. S. Hyndman* for defendant.

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

FOURNIER J. now (February 25, 1955) delivered the following judgment:

This is an information exhibited by the plaintiff seeking damages from the defendant for loss sustained by the Crown as the result of a collision between an ambulance, the property of the plaintiff, driven by J. M. G. Nadeau, a member of the Royal Canadian Air Force, while acting within the

scope of his duties, and a tramcar owned by the defendant and operated by Gérard Latour, its employee, in the performance of the work for which he was employed.

The plaintiff alleges that the collision was due solely to the fault, negligence, imprudence and carelessness of the defendant's employee. The damages caused to the Crown as a result of the collision are the following: (*a*) the loss of its ambulance; (*b*) the expenses to which it was put for medical and hospital services to a member of its armed forces; (*c*) the loss of his services during a certain period.

The defendant denies responsibility for the collision and alleges that it was caused by the fault and negligence of the plaintiff's employee. Furthermore that the plaintiff has no right of action against the defendant to claim the cost of hospitalization and doctors nor the amount of pay and allowances paid to the airman V. Stang, who was injured as a result of the collision, because these damages are too remote and are not a direct consequence of the accident.

I will first consider the circumstances and facts of the case and then determine the question of responsibility, to wit, who was guilty of the fault or negligence which brought about the collision.

The accident took place on October 19, 1949, at about 7 p.m., at the intersection of Bordeaux and Ontario streets, in the city of Montreal. The plaintiff's ambulance was proceeding from south to north on Bordeaux street and the defendant's tramcar was travelling from west to east on Ontario street. At the point of the intersection, that part of Bordeaux street which is south of Ontario street is sixty-four feet six inches in width and that part of the same street north of Ontario street is thirty-one feet seven inches wide and is a one-way street. Ontario street at the same point has a width of thirty-six feet six inches. The centre line of Bordeaux street south is in line with the east side of the pavement of Bordeaux street north. On Exhibit B appears a "Stop" sign in the centre of Bordeaux street at the intersection, but at the time of the collision the "Stop" sign was on the southeast corner of Bordeaux street. The actual point of the collision was a short distance north of the centre of the intersection. The ambulance had practically crossed the tramcar tracks prior to being struck by the tramcar. The latter hit the rear left side of the ambulance and

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toppled it over on the north sidewalk of Ontario street near the northeast corner of Bordeaux street. The impact damaged the ambulance to such an extent that it was impracticable to have it repaired. A passenger in the ambulance, Victor Stang, a member of the Royal Canadian Air Force, was seriously injured in the accident. These facts are supported by uncontradicted evidence.

The evidence for the plaintiff shows that early in the evening on the day of the collision Victor Stang was a passenger on a motorcycle operated by another air force man, when it skidded on a street in St. Lambert. He fell to the pavement, was knocked unconscious and, according to Dr. Flint's testimony, suffered injuries. An ambulance of the Air Force stationed at St. Hubert was called to drive the victim to Queen Mary Hospital in Montreal. When the ambulance arrived, the victim, still unconscious or in a dazed condition, was placed in the ambulance on a stretcher. The ambulance crossed Jacques Cartier Bridge and proceeded on Bordeaux street in a northerly direction at a speed of 35 to 40 miles an hour. All the lights were on and specially the red cross light on the front top of the vehicle. The driver and a companion seated with him stated that the siren was being sounded continuously while on the bridge and Bordeaux street up to the moment of the impact. This statement is supported by witness Bergeron who was a passenger in the tramcar, by witness Lagacé who was standing on the corner at his taxi stand and, to a certain degree, by three other witnesses. As he approached the intersection he brought his speed down to 10 or 15 miles an hour. He is corroborated on this point by other witnesses. He looked to his left but he did not see the tramcar; he then looked to his right and saw some automobiles stopped on the east side of Ontario street to let him pass. He proceeded, without stopping, to cross the intersection. As he passed the safety zone, he veered a little to his left to continue on Bordeaux street north and most of the ambulance was across the tramcar tracks when it was struck on its rear left fender. It was thrown over and fell on its right side on the sidewalk on the northeast corner of the intersection.

The driver had been called to drive to the hospital an air force man who had been in an accident. Though he was not told about the condition of this party, he saw that he

was unconscious or dazed and thought it was an emergency case. That is why he did not stop at the intersection.

The principal witness for the defendant was Gérard Latour, who was operating the tramcar at the time of the accident. He had stopped at the corner of Dorion street and then continued on to its next stop at the corner of Delorimier street. There is no stop at Bordeaux street. He was driving at about twenty miles an hour. This seems to have been the speed; most of the witnesses mentioned this figure. He thought he heard the sound of a siren in the distance, but he is not sure he heard it. As he reached the intersection, he saw, at a distance of 100 to 120 feet, the ambulance proceeding north on Bordeaux street at a speed of about 45 miles an hour. He applied his brakes and put the tramcar in reverse. As he reached the centre of the intersection, the ambulance tried to pass in front of the tramcar, veering slightly to the left. The ambulance was at a partial left angle when the tramcar struck its rear left side. Very little damage was done to the tramcar. He states that the driver of the ambulance did not slow down at the intersection, but maintained or increased his speed to pass in front of the tramcar. When he was asked directly if he had sounded his bell, he answered yes. When I inquired why he had not stated this fact in his evidence, he said this is done automatically and he had forgot to mention it.

He knew this intersection very well. He was always careful when he reached this point, because many strangers travel north from Jacques Cartier bridge on Bordeaux street.

Mr. Claude Danis, who was standing behind the motorman in the tramcar, says that it was being driven at about 20 miles an hour. Just before the intersection he heard the sounding of a siren, he looked to his left, saw, at a distance of 60 to 75 feet, the ambulance, with all its lights on, proceeding at 40 to 50 miles an hour. The tramcar continued at its same speed and the motorman applied his brakes at the very last moment preceding the collision. The tramcar stopped before having crossed the length of the intersection.

When the tramcar had stopped at the corner of Dorion street, a taxi was at its rear. The driver, Gabriel Falcon, tried to pass it on its run from Dorion street to Bordeaux

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street. He was driving his taxi at 15 to 20 miles an hour on the right side of the tramcar, at a distance of 10 to 15 feet from the car's front door. He saw the ambulance near the safety zone and heard its siren. He heard the crash and turned to his right on Bordeaux street.

This résumé of the evidence deals with the most important facts brought before the Court as to how the collision happened.

I am satisfied that the intersection where the collision took place is a dangerous spot on account of the dense traffic and the large number of strangers following this route to reach their destination in Montreal and that the motorman was well aware of this fact.

Knowing this, he nevertheless operated the tramcar at a speed of 20 miles an hour at this intersection, which in my view is excessive and unreasonable under the circumstances, even if he had the right of way. I am also convinced that he heard the sounding of the siren. His testimony on this point is revealing: "J'ai cru entendre la sirène au loin, mais je ne le crois pas." If he thought he heard the siren his first duty was to slow down to a speed at which he could have stopped within a short distance, should he be faced with an emergency. Most of the witnesses stated that they heard the siren at one time or another, even those who were passengers in the tramcar.

I am also satisfied that he put on his brakes only at the last moment. One witness (Bergeron) said that the brakes were not applied at all and another witness (Danis) said they were applied just before the impact.

As to the ringing of his bell, nobody heard it and he himself forgot to mention it till he was pressed by a direct reminder.

On the other hand, I am of the opinion that the ambulance was an emergency vehicle within the meaning of by-law 1319 of the City of Montreal. Paragraph 36 of said by-law is thus worded:

> 36. Fire Department apparatus, police patrol wagons, hospital ambulances and all authorized vehicles on their way to save life or prevent property loss.

This ambulance was used by the Royal Canadian Air Force to take care of such cases as accidents to members of its personnel. They are on call for the meeting of emergency and the transportation of the victims to civilian or Veterans' Affairs hospitals. In the present instance, the call for the services of this ambulance was made at the request of Dr. Flint who had examined Victor Stang. The driver received the order to proceed to the place of the accident and drive the victim to the hospital. As a matter of fact, ambulances are seldom called for minor cases; they are called when a person in authority thinks it is necessary. This driver, who is an experienced man, saw the condition of Stang and made up his mind that it was an emergency case. This is not surprising seeing he had just received a hurried call to drive this airman to the hospital. I cannot see on what grounds I could rule that this ambulance was not an emergency vehicle within the meaning of the aforesaid by-law.

Having decided this point, it follows therefore that he was not obligated to stop before crossing Ontario street or to give right of way to the tramcar. He had the right of way and could pass on stop signs. But this did not relieve him of the ordinary duty to take care. It remains consequently to determine whether he did act at all times in a careful manner.

He knew this intersection and also knew that Bordeaux street, north of Ontario street, was not in line with the south part of Bordeaux street on which he was driving. He had to turn left to continue north. Notwithstanding this knowledge, in my opinion, he did not decrease his speed before arriving at the intersection, which he should have done. Furthermore, he first looked to his left and did not see the tramcar coming. This is understandable, because his view, at the moment he looked, was blocked by the buildings. He then looked to his right and saw that the traffic had stopped to give him right of way. He should have looked again to his left then he would have seen the tramcar coming, would have slowed down and would have perhaps avoided the collision.

Both drivers, in my opinion at one time or another were imprudent and careless. The motorman by driving at an excessive speed at a dangerous intersection after hearing the

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sound of a siren, by applying his brakes only at the last moment and by not sounding his bell prior to or when reaching the intersection. The driver of the ambulance should have exercised a better lookout and slowed down before the intersection. In other words, though the drivers of these two vehicles were not bound to the usual traffic rules, they were not relieved from the ordinary duty to take care and they failed to use the care a prudent person would have used under similar circumstances.

I am, therefore, of the view that there was "faute commune" and that the two drivers are equally to blame for the collision; I deem it fair and reasonable to fix their share of responsibility at fifty per cent each.

Having arrived at this conclusion, the question to be determined is whether the plaintiff is entitled to recover the damages claimed. These damages come under three headings: the loss of its ambulance, the reimbursement of the monies paid for medical and hospitalization services for L.A.C. Victor Stang and the reimbursement of the pay and allowances paid to him during the period he was incapacitated and under treatment.

The question of the damages to the ambulance does not present any difficulty. The ambulance was damaged as a result of the collision. The collision was due partly to the fault and negligence of the defendant's employee. To the extent of its responsibility, the defendant is liable for the damages caused.

Robert W. Huson, W.O. in charge of the mobile equipment section at St. Hubert in October and November 1949, who examined the ambulance after the collision, declared that it was beyond economical repair. The estimated value of the ambulance was $836 prior to the event. The witness estimated the salvage worth at about $400, which would leave the loss sustained by the Crown at $436 plus $71 for the towing of the ambulance back to the section and for the cost of bringing an interim and permanent replacement. This would make a total of $507 for the loss of the ambulance.

In the collision, attributable to a certain degree to the fault and negligence of the defendant's employee, airman Victor Stang, who was being transported in the plaintiff's

ambulance, sustained serious injury. His injuries necessitated hospitalization and medical treatment. As a consequence, he was, during a certain period, unable to perform his duties as a member of the armed forces of Canada. For the hospital and medical services required the plaintiff had to pay a sum of $6,865.30 and had also to pay to Victor Stang during his period of disability a sum of $4,070.43 for pay and allowances.

The defendant alleges that the plaintiff is not entitled to recover the amount claimed for hospital and medical expenses, nor the amount claimed in connection with the incapacity of Stang for the loss of his services, because the damages are too remote and are not a direct consequence of the collision. Furthermore, it is alleged that there is no "lien de droit" between the plaintiff and the defendant and that, even if a right of action existed, it was prescribed and time-barred.

As to the allegation of prescription, section 32 of the Exchequer Court Act, R.S.C. 1927, chap. 34, in my opinion disposes of the matter. It reads as follows:

32. The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province.

At the hearing, counsel for the defendant admitted that the law of prescription applies to proceedings against the Crown, but not to proceedings of the Crown against the subject, and that the defendant's allegation of prescription was unfounded in law.

Now there remains the question whether the plaintiff had a right of action to claim damages from the defendant for the loss sustained by the Crown owing to the expenses to which it was put and to its having been deprived of the services of a member of the Canadian Air Force.

The plaintiff's claim is based on Articles 1053 and 1054 of the Civil Code of the Province of Quebec. These articles, in French and in English, read thus:

1053. Toute personne capable de discerner le bien du mal est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par son imprudence, négligence ou inhabilité.

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Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. Elle est responsable non seulement du dommage qu'elle cause par sa faute, mais encore de celui causé par la faute des personnes sous son contrôle.

He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control.

It having been admitted and established that the drivers of the two vehicles were employees of the parties and were acting within the scope of their respective duties at the time of the collision, Article 1054 need not be dealt with.

The terms of Article 1053 are very clear and sweeping. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another (others, mankind, etc.), or, in French, "autrui", which word is defined in every dictionary that I have consulted by the words "les autres—le prochain". In ordinary language it is understood that the word "another" means "everybody—anybody"; and, according to the rules of interpretation, the words that present no ambiguity should be given their ordinary and generally admitted meaning. The same applies to the principle of fault or tort: he who is guilty of fault causing damage to another is responsible of the consequences. The principle enunciated in this article is the basis of the civil law of delicts and quasi-delicts. The article makes every person guilty of the fault responsible and gives a right of action to the victims of the damage resulting from the wrongful act. To deny the right of action, some other article of the Code must have the effect of restricting the terms of Article 1053. Unless these terms are otherwise restricted they should be adhered to.

In my mind the words of the article are not ambiguous and should not be given a meaning other than their ordinary meaning. The rule of legal construction applicable to all writings should be applied. In *Beal's Cardinal Rules of Legal Interpretation,* 3rd ed., p. 80, *in fine,* it is said.

> . . ., 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 further.

This rule has received constant application. As aforesaid, standing alone the words of Article 1053 give a right of action to every person who suffers injury directly attributable to the fault of another.

The same principle is dealt with in a similar manner in *Traité de Droit civil du Québec par André Nadeau*, vol. 8, p. 547:

635. *Sens du mot 'autrui' de cet article.* La détermination des personnes à qui appartient une action en indemnité à la suite d'un accident mortel est faite expressément à l'art. 1056 C. civ. (v. supra, nos 568 et 594 et s.). Dans les autres cas, il faut s'en rapporter au texte de l'art. 1053 qui, dans sa très grande généralité, décrète une responsabilité pour tout dommage fautivement causé à "autrui". Quel peut bien être le sens de ce mot? A le prendre dans son sens ordinaire,—et on ne voit pas bien pourquoi on le prendrait dans un autre sens,—le mot "autrui" désigne toute personne lésée par la faute. Il devrait donc y avoir en principe autant d'indemnités distinctes qu'il y a de personnes lésées. C'est déjà ce qu'enseignait Langelier en 1903, sans aucune hésitation.

La Cour suprême, dans l'aff. *Regent Taxi*, a décidé, par un jugement majoritaire que l'art. 1053 C. civ. confère un droit d'action à toute personne directement lésée par la faute d'un tiers et qu'on ne saurait limiter le droit à une réparation à la "victime immédiate" de la faute, c'est-à-dire à "la partie, contre qui le délit ou le quasi-délit a été commis."

De la sorte, on se trouvait à juger que l'art. 1056 ne pouvait justifier une interprétation étroite de l'art. 1053, cet art. 1056 ne couvrant spécifiquement que le cas où la victime décède en conséquence de la faute, avec les dommages qui en résultent pour les personnes mentionnées.

But in this case as in the case of *Regent Taxi & Transport Company* v. *Congrégation des Petits Frères de Marie* (1) it is contended that the right of action under Art. 1053 C.C. should be restricted to the person bodily injured by the wrongful act of the defendant. It is argued that this restriction would be the logical result of having Art. 1056 in the Civil Code:

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

.....

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

In support of the contention that Articles 1053 and 1056 of the Civil Code should be read together, the case of *Quebec Railway Light Heat & Power Co.* v. *Vandry* (2)

(1) [1929] S.C.R. 650. (2) [1920] A.C. 662.

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was quoted, wherein the following rule of interpretation was laid down (see the headnote, p. 663):

> The Civil Code of Quebec should be interpreted in the first instance solely according to the words used, the Code, or at least cognate articles, being read as a whole forming a complete scheme. It is only if the meaning is not plain that light should be sought from exterior sources, such as decisions in Quebec earlier than the code, or the exposition of similar articles of the Code Napoléon.

Taking for granted that the two articles are to be read together, it is argued that Article 1056 C.C. applies not only to the cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, but read with Article 1053 C.C. it applies to all cases of responsibility in matters of bodily injuries. From the above it is concluded that the right of action in Article 1056 being clearly limited to the consort, ascendant and descendant relations of the person bodily injured, the same meaning should be given to the terms of Article 1053.

In my view, Article 1053 of the Civil Code gives a general right of action to all persons who have sustained damage when the damage was caused by the wrongful act of another person capable of discerning right from wrong. To enforce this right of action a liability is imposed on the responsible party. Article 1056 does not give a general right of action; it limits this right to the consort or ascendant or descendant relations of an injured person, by the commission of an offence or quasi-offence, who dies in consequence without having obtained indemnity or satisfaction. The death of the injured person gives birth to this right of action to a limited category of persons. The effect of this article is to limit the right of action under Article 1053 C.C. when the injured person dies. Were it to exclude from Article 1053 all cases of liability for bodily injury except to the immediate victim, it would in as clear and explicit words as used in Article 1053 state that such was the law. I am of the opinion that a general right of action as plainly expressed as that provided for in Article 1053 C.C. cannot be restricted by the mere creation of a special right to a certain category of persons under specified situations and conditions. I believe Article 1056 C.C. has the effect of depriving persons not related to the deceased of a right to claim damages arising out of injuries causing death to which they would have been otherwise entitled.

The leading case to which reference was made before the Court is *Regent Taxi & Transport Company* v. *Congrégation des Petits Frères de Marie* (*supra*).

In that case the plaintiff, a religious community, sued the defendant to recover damages sustained by the community as the result of one of its members being injured while travelling in an omnibus belonging to the defendant. The action was brought more than a year later, but within two years. The claim consisted of a certain amount for expenses incurred by the community in medical and hospital care, an amount for clothing and an amount for damages due to the loss of services of the injured brother. The responsibility for the accident having been established, the trial judge assessed the plaintiff's damages at $4,000, of which $2,236.90 was allowed for out-of-pocket expenses and the balance on account of the claim for other damages. This decision was affirmed by the Court of Appeal.

It was held by the Supreme Court of Canada (affirming in part the decision of the Court of King's Bench (1)) that:

> The respondent (plaintiff) has a right of action against the appellant (defendant) but that it is entitled to recover only the sum of $2,236.90 for the expenses incurred by it as a result of the injuries sustained by the member of the community (Mignault and Rinfret JJ. dissenting).

It was also held (Mignault and Rinfret JJ. dissenting) that:

> The plaintiff was within the purview of the word "another" ("autrui") as used in article 1053 C.C., and therefore entitled to maintain this action. Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal. Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 C.C. its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims. Moreover, it is not necessary so to restrict the scope of article 1053 C.C. in order to give full operation to the terms of article 1056 C.C., as nothing in this latter article suggests an intent to narrow the scope of article 1053 C.C., save "where the person injured . . . dies in consequence" and the claim is for "damages occasioned by such death."

It was further held that the action was not prescribed.

This case went to the Privy Council and the appeal was allowed solely on the grounds that the action was prescribed.

(1) (1928) Q.O.R. 46 K.B. 96.

1955

THE QUEEN v. THE MONTREAL TRANSPORTATION COMMISSION

Fournier J.

Reference was also made to two other cases: *Le Procureur Général du Canada* v. *La Cité de Hull,* 1948, No. 8337, Superior Court, District of Hull, and *The King* v. *Richardson and Adams* (1).

The facts in the former case are as follows: A constable of the defendant corporation had by wrongful act injured a member of the armed forces of Canada who was hospitalized, was treated for his injuries and was paid his pay and allowance during his absence on acount of illness. The Crown claimed the amounts paid for medical and hospital services and for pay and allowance. The learned trial judge (Honourable Duranleau) having found the defendant responsible for the damages claimed, proceeded to award the amount claimed by the plaintiff.

The same year, in the latter case, which is similar to the preceding one, the Supreme Court of Canada reversed the judgment rendered by O'Connor J. (Exchequer Court of Canada). The trial judge had dismissed the information on the ground that the services of members of the Naval, Military and Air Forces of His Majesty in right of Canada are so different from those in private employment that an action *per quod servitium amisit,* such as the present, could not succeed. The headnote in the Supreme Court reports reads in part thus:

> An action *per quod* is properly brought by the Crown in the Exchequer Court under section 30 (*d*) of the Exchequer Court Act. It is entitled to recover the medical and hospital expenses incurred on behalf of the injured serviceman and (Kellock J. dissenting) the pay which the Crown continued to give the serviceman during his incapacity. Such pay, being merely one item in the total of pay, allowance and maintenance, to which the serviceman is entitled, is evidence of the value of his services of which the Crown has been deprived.

This decision was referred to and followed in *The King* v. *Lightheart* (2). In that case the President held that when the Crown has lost the services of a member of its armed forces it may bring an action *per quod servitium amisit* in the same way as any other master and that the amount of pay to which the member of the armed forces is entitled is evidence of the value of his services.

(1) [1948] S.C.R. 57. (2) [1952] Ex. C.R. 12.

In his comments he also stated that it is a settled practice of this Court that the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs irrespective of the fact that his claim may have been reduced by reason of concurrent negligence on his part.

In my view, these decisions and the rules therein enunciated should apply to this action, wherein the Crown seeks relief for the loss sustained owing to the expense to which it was put and to having been deprived of the services of one of the members of its armed forces. The loss thus sustained resulted in part from the fault and negligence of the defendant's employee while performing the work for which he was employed.

Having found that there was "faute commune ou contributoire" and having fixed the responsibility at fifty per cent for each party, I now find that the plaintiff is entitled to recover half of the damages, the amount of which was established at the trial.

It is impossible to measure the value of the services of the injured airman, but I believe that the amount of pay he received during his incapacity, pursuant to the pay and allowance regulations, is evidence of his services. I find that the sum of $4,070.43, being the amount of pay and allowance he received, is well established. It is also in evidence that the Crown paid $6,865.30 for hospital and medical services. The damage to the ambulance was $436 plus $71 disbursed to replace the demolished vehicle. These amounts add up to a total of $11,442.73.

In the result there will be judgment in favour of the plaintiff for fifty per cent of his claim, established at $11,442.73, namely, $5,721.37.

There will, therefore, be judgment that the plaintiff is entitled to recover the sum of $5,721.37 and costs, to be taxed in the usual way.

Judgment accordingly.

1955

Feb. 16

Feb. 26

BETWEEN:

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LTD., FIRESTONE TIRE AND RUBBER COMPANY OF CANADA LTD. AND B. F. GOODRICH COMPANY OF CANADA LTD. .. APPLICANTS;

AND

T. EATON CO. LTD., SIMPSON-SEARS LTD., ATLAS SUPPLY COMPANY OF CANADA LTD., GENERAL TIRE AND RUBBER COMPANY OF CANADA LTD., AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENTS.

Revenue—Excise tax—Sales tax—The Excise Tax Act, 1952, c. 100, as amended, ss. 2(a)(ii), 57 and 58—"Special brand" automobile tires manufactured for and sold by retail agencies—Meaning of "manufacturer or producer" in s. 2(a)(ii) of the Act—Tariff Board—Finding of the Board—Jurisdiction of the Board challenged—Application for leave to appeal from finding of the Board—Leave to appeal a matter of judicial discretion—Leave to appeal from Tariff Board granted.

Certain Canadian rubber companies are making "special brand" automobile tires bearing the names of the purchasers or having treads which are molded with special markings and are sold only to various retailing agencies such as T. Eaton Co. Ltd. On a reference to the Tariff Board by the Deputy Minister of National Revenue, Customs and Excise, following objections by competing manufacturers to his ruling that the manufacturers of these "special brand" tires were the manufacturers or producers of the tires for the purposes of the Excise Tax Act, the Board before which the contention was renewed that the "special brand" customers should be considered as the manufacturers or producers of the tires within the meaning of s. 2(a)(ii) of the Act and subjected to tax on their sale, upheld the Deputy Minister's ruling. On an application under s. 58 of the Act for leave to appeal from the Board's decision

Held: That this is not a case in which such rights as the applicants may have should be summarily disposed of on an application of this nature by a finding that the Tariff Board exceeded its jurisdiction. The matter here is not so clear and indisputable that it would be the duty of a judge hearing an application such as this to declare the entire proceedings a nullity.

2. That under the circumstances of the case and in the exercise of the discretion conferred by the Excise Tax Act R.S.C. 1952, c. 100, as amended, s. 58, the applicants here have a fairly arguable case to

submit to the Court and should be permitted to do so. *Canadian Horticultural Council et al.* v. *J. Freedman and Sons Ltd.* [1954] Ex. C.R. 541 referred to.

APPLICATION for leave to appeal under section 58 of the Excise Tax Act, R.S.C. 1952, c. 100, as amended.

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

The Honourable S. A. Hayden, Q.C. and *K. E. Kennedy* for applicants.

Gordon F. Henderson, Q.C. for respondent T. Eaton Co. Ltd.

C. W. Lewis for respondent Simpson-Sears Ltd.

A. S. Pattillo, Q.C. and *J. F. Barrett* for respondent Atlas Supply Company of Canada Ltd.

Stuart Thom for respondent General Tire and Rubber Co. of Canada Ltd.

K. E. Eaton for respondent Deputy Minister of National Revenue for Customs and Excise.

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

CAMERON J. now (February 26, 1955) delivered the following judgment:

Under section 58 of The Excise Tax Act, R.S.C. 1952, chapter 100, as amended, the applicants ask leave to appeal from a decision of the Tariff Board dated December 7, 1954, made under the provisions of section 57 of that Act. While the notice of motion was duly served on all the parties who had appeared before the Tariff Board, only the above-named respondents appeared on the return of the motion. These two sections set out the jurisdiction of the Board to settle doubts and differences and the procedure to be followed when it is desired to appeal from the Board to this Court; the parts thereof which are here relevant are as follows:

57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the Tariff Board Act may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

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THE GOODYEAR TIRE AND RUBBER CO. OF CANADA LTD. *et al.* *v.* T. EATON CO. LTD. *et al.*

Cameron J.

(2) Before making a declaration under subsection (1) the Tariff Board shall provide for a hearing and shall publish a notice thereof in the *Canada Gazette* at least twenty-one days prior to the day of the hearing; and any person who, on or before that day, enters an appearance with the Secretary of the Tariff Board may be heard at the hearing.

(3) A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

58. (1) Any of the parties to proceedings under section 57, namely

(*a*) the person who applied to the Tariff Board for a declaration,

(*b*) the Deputy Minister of National Revenue for Customs and Excise, or

(*c*) any person who entered an appearance with the Secretary of the Tariff Board in accordance with subsection (2) of section 57,

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or Judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

(2) The appellant under subsection (1) shall give to the Tariff Board, and to the other parties to the proceedings under section 57, seven clear days' notice of his application for leave to appeal, and the Tariff Board and such other parties have the right to be heard by counsel or otherwise upon the application or upon the appeal, or both.

(4) The Exchequer Court may dispose of an appeal under this section by dismissing it, by making such order as the Court may deem expedient or by referring the matter back to the Tariff Board for re-hearing.

The matter came before the Board under a reference by the Deputy Minister of National Revenue (Customs and Excise) dated August 19, 1954, the relevant parts thereof being as follows:

For some years certain Canadian rubber companies have been manufacturing "special brand" automobile tires for sale to various retail corporations as well as to other rubber companies. These tires bear the names of the purchasers and the treads are molded with special markings which are not sold to others. The former companies have been regarded by the Department as the manufacturers or producers of the tires for the purposes of the Excise Tax Act.

However, competing manufacturers of automobile tires object to our ruling and contend that the "special brand" customers should be treated as the manufacturers or producers of the tires within the meaning of Section 2(a)(ii) of the Excise Tax Act and subjected to sales and excise taxes on their sales.

I am therefore referring this case to the Board in accordance with Section 57 of the Excise Tax Act for a declaration as to the correctness or otherwise of the Department's ruling.

Before the Board the main dispute was between tire manufacturers who make "standard brand" tires and sell them through their own distributors, and other manufacturers who in some cases make "special brand" tires bearing

the name and/or trade marks of a retailing agency or have treads which are molded with special markings and are sold only to such retailing agencies, such as T. Eaton Co., Ltd. The applicants herein are manufacturers of "standard brand" tires and on their behalf it was contended that on a proper interpretation of section 2(a) of the Act which defines "manufacturer or producer", the "special brand" customers such as T. Eaton Co., Ltd. should be found to be the "manufacturer or producer" and that accordingly the excise and sales taxes should be levied on the sale price of the "special brand" customers and not, as has been done by the Department, on the actual manufacturers of such tires, such as The Dominion Rubber Company which manufactured the "special branch" tires for T. Eaton Co., Ltd.

The conclusions of the Board as stated in the last two paragraphs of its declaration are as follows:

> We find, therefore, that The T. Eaton Co. Limited, not being the producer or manufacturer of the special-brand tires "Bulldog" and "Trojan" is not liable for tax on sales of such tires.
>
> In so far as any other "special brand" customer may have a relationship with his supplier which parallels that of The T. Eaton Co. Limited, he is not liable to account for tax on the sale of such "special brand" tires.

Mr. Pattillo and Mr. Thom, counsel respectively for Atlas Supply Company of Canada and General Tire and Rubber Company of Canada, vigorously opposed the application on the ground that in making the declaration on the questions submitted to it by the Deputy Minister, the Board had exceeded its jurisdiction. I was asked by them to refuse the application on the ground that the declaration was a nullity and also that I should declare it to be a nullity. Their main contention is that the Board was not empowered to consider such a reference as that made by the Deputy Minister or to make the declaration which it did make. It was submitted that, as tires are clearly taxable at specified rates under the provisions of The Excise Tax Act and its schedules, there could not possibly be any doubt or difference as to whether any or what rate of tax is payable on tires; and that what the Board actually did by its declaration was to determine that the T. Eaton Co.

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THE GOODYEAR TIRE AND RUBBER CO. OF CANADA LTD. *et al.* *v.* T. EATON CO. LTD. *et al.*

Cameron J.

Ltd. (and other special-brand customers whose relations with their suppliers were parallel to that of the T. Eaton Co. Ltd.) was not a "manufacturer or producer" as that term is defined in section 2 of the Act.

However valid this submission may be—and I express no opinion on the matter—it seems to me that this is not a case in which such rights as the applicants may have should be summarily disposed of on this application by a finding that the Board exceeded its jurisdiction. It is conceivable, at least, that there might be a case in which the matter is so clear and beyond dispute that it would be the duty of a judge hearing an application such as this to declare the entire proceedings a nullity, but in my opinion this is not a case of that sort.

In the case of *Canadian Horticultural Council et al* v. *J. Freedman & Son Limited,* (1), decided by the President of this Court, consideration was given to the powers and duties conferred on this Court by section 45 of The Customs Act, R.S.C. 1952, chapter 58, on an application for leave to appeal from an order, finding or declaration of the Tariff Board. By that section also, a right of appeal is given "upon any question that in the opinion of the Court or judge is a question of law" and leave to appeal must be obtained from this Court. The learned President pointed out that the right of appeal is dependent on leave to appeal being granted, a matter which connotes the exercise of judicial discretion in determining whether leave should be granted even although a question of law is involved. After reviewing the reported cases in which the Supreme Court of Canada had discussed the principles to be followed on applications for leave to appeal, the President stated:

> While it may be conceded that since an item in the Customs Tariff is involved leave to appeal should not be refused on the ground that no question of public importance is involved, I am of the view that, as in the case of applications for leave or special leave to appeal to the Supreme Court of Canada, it is not possible to lay down specific and all-embracing rules for the granting of leave to appeal under section 45 of the Customs Act. But I see no reason why the grounds for refusing leave to appeal should not be similar to those taken by the Supreme Court of Canada in dealing with applications for leave to appeal to it. Consequently, in my opinion, if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is

(1) [1954] Ex. C.R. 541.

sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

Under the circumstances of this case and in the exercise of the discretion conferred, I have reached the conclusion that the submission so made in opposition to the motion must be rejected. I shall say no more than that, in my opinion, the applicants have a fairly arguable case to submit to the Court and should be permitted to do so.

At the hearing Senator Hayden, counsel for the applicants, was content to have the question of law submitted in the following form:

> Did the Tariff Board err as a matter of law in deciding that The T. Eaton Company, Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires?

It is the duty of the Court or judge to reach an opinion as to whether or not the question raised is a question of law. In this case I am of the opinion that it is. It is also the duty of the Court or judge to determine the form in which the question of law should be presented for the hearing of the appeal. It will be noted that the concluding clause of the Board's declaration (*supra*) makes applicable to a "special brand" customer whose relationship to its supplier parallels that of the T. Eaton Co. Ltd., the decision made in the paragraph immediately preceding. The applicants did not appeal from that part of the declaration and their counsel now objects to any reference being made thereto in the question of law to be submitted for hearing. It seems to me, however, that as the concluding paragraph is based entirely on the preceding one, the two should be treated as a whole. If the applicants are successful in their appeal, the concluding paragraph should not be allowed to stand—at least in its present form—as it would be contradictory to the finding which the applicants now seek to have substituted for the present immediately preceding clause.

Counsel for the T. Eaton Co. Ltd. and for Simpsons-Sears Ltd. did not oppose the application except as to the form in which the question should be submitted; counsel for the Deputy Minister took a neutral position.

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Cameron J.

The applicants will therefore have leave to appeal on the following question of law:

Did the Tariff Board err as a matter of law in deciding that the T. Eaton Co. Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires and that, in so far as any other "special brand" customer may have a relationship with his supplier which parallels that of the T. Eaton Co. Ltd., he is not liable to account for tax on the sale of such "special brand" tires?

I was asked by counsel for the Deputy Minister to include a further question for the decision of the judge hearing the appeal, namely whether the Board had exceeded its jurisdiction in making the declaration. In my view, it is unnecessary to do so as such a question is implicit in the form of the question I have set out above. It seems to me that if the Board exceeded its jurisdiction, it erred as a matter of law in making its declaration.

Costs of all parties appearing on the matter will be costs in the cause.

Judgment accordingly.

1952

Feb. 18-21

1953

Jan. 9

(THE QUEBEC ADMIRALTY DISTRICT)

BETWEEN:

ILLINOIS ATLANTIC CORPORATION AND FEDERAL MOTORSHIP CORPORATION *(Plaintiffs)* — APPELLANTS,

AND

THE S.S. *RAPIDS PRINCE* and her owners *(Defendants)* ..... — RESPONDENTS.

Shipping—Claim for bottom damage—Burden of proof—Expenses of adjusting general average expenditures as between ship and cargo not recoverable by carrying ship from wrong-doing ship.

The plaintiffs brought action against the defendants for damages alleged to have resulted from a collision between their M.V. *Buckeye State* and the defendants' S.S. *Rapids Prince*. The defendants paid all the damages except the claims for bottom and detention damage sustained by the *Buckeye State* and the expenses incurred in adjusting general average expenditures between ship and cargo. Liability for these damages was denied. The action was dismissed by Smith D.J.A. of the Quebec Admiralty District. The plaintiffs appealed.

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Held: That the burden of proof that the *Rapids Prince* was responsible for the bottom damage sustained by the *Buckeye State* rests on the *plaintiffs*. The plaintiffs need not establish their case beyond all reasonable doubt. All that is needed is a preponderance of evidence that the damage complained of was caused as alleged so that the Court may be reasonably satisfied, having regard to all the circumstances, that it was so caused.

2. That where damage may have been due to one of several causes it is not to be assumed, in the absence of cogent reasons, that it was the result of any one particular cause.

3. That the expenses of adjusting the general average expenditures to determine the proportions to be paid by ship and cargo respectively were not collision damage.

4. That while cargo has an independent and direct right to recover from the wrong-doing ship its portion of the general average expenditures that were collision damages there is no justification for allowing the owners of the carrying ship the further expenditures involved in adjustments between the ship and cargo. *Owners of Cargo ex "Greystoke Castle"* v. *Morrison Steamships Company Ltd.* (1947) 80 Ll. L. 55 discussed.

Appeal from judgment of Smith D.J.A. of the Quebec Admirality District dismissing the plaintiffs' action.

The appeal was heard by the President of the Court at Montreal.

J. Brisset for (plaintiffs) appellants.

R. C. Holden Q.C. for (defendants) respondents.

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

THE PRESIDENT, on January 9, 1953, delivered judgment, but the same is reported only on the questions stated:

This is an appeal from the judgment of Smith D.J.A. of the Quebec Admiralty District dismissing certain claims by the appellants for damages alleged to have resulted from a collision between the respondent vessel S.S. *Rapids Prince* and the M.V. *Buckeye State* owned by the appellant Federal Motorship Corporation and chartered by the appellant Illinois Atlantic Corporation.

[The President then set out the facts on which the plaintiffs made their disputed claims relating to bottom and detention damage and to general average disbursements.]

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Thorson P.

[The President then set out the nature and extent of the claim for bottom damage and held]:

The burden of proof that the *Rapids Prince* was responsible for the bottom damage sustained by the *Buckeye State* rests on the plaintiffs. To succeed in their claim they must prove that the *Buckeye State* was grounded after she was tied up to the bank and that the damage to her bottom and other damage complained of was the result of such grounding. The plaintiffs need not, of course, establish their case beyond all reasonable doubt. All that is needed is a preponderance of evidence that the damage complained of was caused as alleged so that the Court may be reasonably satisfied, having regard to all the circumstances, that it was so caused.

[The President then reviewed the evidence relating to the claim for bottom damage and stated]:

Where damage may have been due to one of several causes it is not to be assumed, in the absence of cogent reasons, that it was the result of any one particular cause.

[The President continued his review of the evidence and concluded]:

On the evidence, as I find it, I have no difficulty in reaching the conclusion that the plaintiffs have failed to discharge the burden of proof cast upon them. There is certainly no preponderance of evidence that the damage complained of was caused while the *Buckeye State* was tied up to the bank as alleged by the plaintiffs and I do not see how the Court could possibly feel satisfied that it was so caused. In my judgment, the plaintiffs have failed to establish any responsibility on the part of the *Rapids Prince* or her owners for the damage complained of.

[The President then commented on the condition of the bottom plates and held]:

And it should be remembered that it is not for the defendants to prove the cause of the bottom damage. It was for the plaintiffs to do so and to prove that the cause was attributable to the *Rapids Prince*. This they have failed to do and their claim in respect of the bottom damage cannot be allowed.

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Thorson P

[The President then continued as follows]:

There remains only the claim for so-called general average expenditures set forth in item 14 of the first group of the plaintiff's claims. These were not general average expenditures in the ordinary sense of expenditures incurred by an injured ship in putting into a port of refuge, but rather the expenses of adjusting the general average expenditures to determine the proportions to be paid by ship and cargo respectively. They were therefore not collision damage, the collision not being the *causa causans* of the adjustment expenditures but only their *causa sine qua non*. All the actual expenditures for salvage and general average expenditures in the ordinary sense have been paid by the defendants. They deny liability for the expenditures connected with adjusting such expenditures as between the owners of the ship and the cargo. Counsel for the plaintiffs relied upon the decision of the House of Lords in *Owners of Cargo ex "Greystoke Castle"* v. *Morrison Steamship Company Ltd.* (1) in support of their claim. While it was held there for the first time, overruling *The Marpessa* (2), that cargo had an independent and direct right to recover from the wrongdoing ship its portion of the general average expenditures I agree with counsel for the defendants that this decision does not cover the adjustment and other expenses set out in item 14. The decision merely goes to the extent of deciding that cargo can claim its portion of the general average expenditures that were collision damage, such as, for example, its portion of the general average expenditures that might be incurred because as a result of a collision with the wrongdoing ship the carrying ship had to put into port, discharge cargo, effect repairs and reload cargo, but that there is no justification for allowing the owners of the carrying ships the further expenditures involved in adjustments between the ship and cargo. The claim for the so-called general average disbursements is thereof denied.

For the reasons given the appeal herein must be dismissed with costs.

Judgment accordingly.

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(1) (1947) 80 Ll. L. 55.

(2) (1891) P. 403.

1954
Dec. 6, 7 & 8
1955
Mar. 5

BETWEEN:

KEN STEEVES SALES LIMITED ..... APPELLANT,

AND

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

Revenue—Income—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 3, 4, 11(1)(d) and (e), 14(1), 42(3) and (4)—Trader-sales made on credit—Accounts receivable—Notes receivable—Method for computing income—"Cash Receipts and Expenditure" method under which "receivables" excluded—"Receivables" part of income in the year in which goods sold and delivered—Deductions permitted only for doubtful and bad debts—Notice of assessment showing "nil" tax levied not an acceptance of "Cash Receipts and Expenditure" method—Meaning of word "accepted" in s. 14(1) of the Act—Minister's power of reassessment—Appeal from Income Tax Appeal Board dismissed.

Appellant is engaged in the retail business of selling hearing aids, a substantial part of its sales being on credit. At the end of its fiscal year, January 31, 1951, the amounts remaining unpaid on the purchase price were represented by accounts receivable and notes receivable, the latter having been pledged at appellant's bank as security for a loan of an equivalent amount. In its income tax return for that year appellant used the form of accounting known as "Cash Receipts and Expenditure" method under which only cash actually received is taken into account as income, all accounts and notes receivable being excluded, and the expenditure includes not only disbursements actually made but also accounts payable. A first notice of assessment sent to appellant showed "nil" tax levied but subsequently the Minister reassessed appellant by adding back to its declared income the amount of those "receivables". An appeal from the assessment to the Income Tax Appeal Board was dismissed. Hence the present appeal to this Court.

Held: That when trading stocks are sold and delivered the full price should be brought into account in the year in which the delivery is made irrespective of the time of payment, the trader in such cases having, however, the right to take advantage in proper cases of the provisions of The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, regarding bad and doubtful debts. *Absalom* v. *Talbot (H. M. Inspector of Taxes)* (1944) 26 T.C. 188; *British Mexican Petroleum Co. Ltd.* v. *Johnson* (1932) 16 T.C. 570 at 593; *Johnson (H. M. Inspector of Taxes)* v. *W. S. Try Ltd.* (1946) 27 T.C. 167 at 181.

2. That the "Cash Receipts and Expenditure" method purported to have been used by appellant is not permissible under the Income Tax Act. It excludes as an item of income all receivables which form a necessary part of any trader's profit and loss statement. Such a method is incomplete and misleading and one which fails entirely to show the true state of a taxpayer's position or to reflect his true profit and loss. It is not according to generally accepted accounting practice in

Canada. Its use in many cases would show a loss when in reality there was a profit. It brings in nothing on the receipts side to balance outgoing inventory which has not been paid for in full.

3. That there is no evidence that the Minister reassessed appellant in order to prevent s. 14(1) of the Act being effective in respect of a subsequent year, and the burden of proof is on appellant.

4. That it is always open to the Minister by a reassessment to correct errors made in the original assessment within the time limited by s. 42(4) of the Act.

5. That the original Notice of Assessment which levied no tax was not an acceptance by the Minister of the "Cash Receipts and Expenditure" method purported to have been used by appellant. The word "accepted" as used in s. 14(1) of the Act connotes a taking or receiving with consenting mind—something in the nature of an admission. Here the notice of assessment was merely a statement that "nil" tax was levied; it said nothing whatever about any method.

6. That the provisions of s. 14(1) of the Act (which in terms are "subject to the other provisions of this Part") must be read with those of s. 42, including those of subsection 4 relating to the Minister's power of reassessment. Here there was a reassessment which entirely set aside the original assessment and which clearly denied to appellant the right to deduct from its accounts the amount of its receivables.

APPEAL from a decision of the Income Tax Appeal Board.

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

Redmond Quain, Q.C. for appellant.

W. R. Jackett, Q.C.
Maurice Paquin, Q.C.
D. S. Maxwell
} for respondent.

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

CAMERON J. now (March 5, 1955) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated October 8, 1953 (9 T.A.B.C. 156), whereby the appellant's appeal from an assessment dated November 22, 1952, in respect of the appellant's taxation year ending January 31, 1951, was dismissed.

The facts are not seriously in dispute. The appellant is engaged in the retail business of selling hearing aids. It commenced operations on January 31, 1950, and in its income tax return for the year ending January 31, 1951,

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showed a net loss of $53.10. On August 15, 1951, a Notice of Assessment was forwarded to the appellant showing "nil" tax levied. Subsequently, on November 22, 1952, the appellant was reassessed and thereby there was added to its declared income the sum of $4,240.92. The appellant was assessed accordingly, the tax levied amounting to $506.75, and interest. An appeal was taken to the Income Tax Appeal Board and was disallowed; hence the present appeal. The sole question for determination is whether or not the sum added to the appellant's income forms part of its taxable income for the year in question.

In order to appreciate the nature of the dispute, it is necessary to refer to financial statements attached to the income tax return. In the operating statement gross sales for the year are stated to be $45,497.31. From that amount there is deducted an item of $4,240.92 called "Provision for uncollected accounts", and the balance of $41,256.39 only is used in computing the net profit or loss. Further details are given in the Statement of Assets and Liabilities as follows:

Accounts receivable—trade	$ 716.90
Notes receivable—pledged	3,524.02
	$4,240.92
Less provision for uncollected accounts	$4,240.92

The situation at the end of the fiscal year was that the appellant had accounts receivable of $716.90 and notes receivable of $3,524.02 (all the latter having been pledged or discounted at the appellant's bank as security for a loan of an equivalent amount), all arising from sales made by it during its fiscal year. Acting on the advice of its accountant, Mr. Lorenzen, it prepared its tax return in such a way as to state the nature and amount of these items, but excluded them entirely in the computation of its taxable income.

Mr. Lorenzen gave evidence on behalf of the appellant. He is a chartered accountant who has been practicing his profession for twenty-seven years. He had full charge of the appellant's books and was responsible for the form in which the tax return was made. He stated that the form of accounting used therein is known as the "Cash Receipts and Expenditure" method. He explained that under that

method only cash actually received is taken into account as income, all items of accounts and notes receivable being excluded; but that on the expenditure side there are included not only disbursements actually made, but also accounts payable. Counsel for the appellant referred to it as a "hybrid" method and by that I think he meant that it embraces some of the features of two other methods which are sometimes referred to as the "Cash" method and the "Accrual" method. Mr. Lorenzen stated that in his opinion such a method, which excluded the receivables, was a proper one to determine the actual profit of a trader, but was unable to say that it was one which was in accordance with generally accepted accounting practice in Canada. He himself had prepared some accounts on that basis and said that it was particularly useful to a company with small capital which was just commencing business, the advantage being that if at the end of its first year it had little cash on hand, it could postpone payment of income tax in respect of the receivables to the following year in which it was anticipated that the receivables would actually be received. In that way it would not be necessary to borrow money for the purpose of paying taxes on receivables. He explained, also, that another advantage to all traders would be the elimination of difficulty in reaching agreement with the Revenue Department as to what amount, if any, should be allowed as a reserve for bad debts. His opinion also was that by the "Cash Receipts and Expenditure" method, the department over a period of years would not sustain any loss of revenue as the receivables here in question were normally payable in five or six months after the sales were made and would usually appear as cash receipts in the following year. He was quite frank in admitting that the method would necessarily result in the year end's statement showing a loss in respect of the goods taken out of stock and sold, and for which payment had not actually been received in the year, even though the goods had been sold at prices greatly exceeding the cost of sales.

The matter is to be determined under the provisions of The Income Tax Act, Statutes of 1947-48, chapter 52 as amended. Sections 3 and 4 thereof in 1951 were as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside

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Canada and, without restricting the generality of the foregoing, includes income for the year from all

(a) businesses,

(b) property, and

(c) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The main submission of Mr. Quain, counsel for the appellant, may be stated briefly. He says that the Act does not specify any particular method of computing income and that therefore a taxpayer may adopt any method (subject to the provisions of section 14(1) which I will refer to later) which accurately reflects his true income; that trade debts outstanding at the end of a fiscal year form no part of a taxpayer's income as there has been no "in-coming" in respect thereto; and that therefore the "Cash Receipts and Expenditures" method is one which should be accepted. Mr. Jackett, counsel for the respondent, submits that in the case of a trader, all accounts and notes receivable form part of his income in the year in which the goods are sold and delivered to the purchaser, and that in the case of short term debts (all the accounts and notes in question were payable in five or six months) the only deductions that could be made are those permitted by section 11(1) (d) (e) for doubtful and bad debts.

In considering the problem, I shall not attempt to deal with the general question as to whether the so-called "Cash" method of computing income for tax purposes is or is not permissible; that question is not before me. I shall confine myself to the problem raised by the facts of this case. The appellant herein is a trader engaged in the business of buying and selling goods. A substantial part of its sales were on credit; the sales were completed, the goods taken out of stock and delivered to the purchaser in the fiscal year ending January 31, 1951, but the full purchase price was not paid in that year. At the end of the year the amounts remaining unpaid were represented by Accounts Receivable or Notes Receivable. The neat question is whether these "receivables" should be taken into account in computing the income of a taxpayer who is a trader, for that year.

In my opinion, that question must be answered in the affirmative and the "Cash Receipts and Expenditures" method must be rejected as one which does not accurately

reflect the true profit or gain of the trader. I was not referred to any case in Canada in which the problem in relation to a trader has been directly discussed, nor do I know of any such case. It is highly probable, I think, that the question has not previously been raised because of the general acceptance that such receivables should be included and that it would be contrary to generally accepted accounting practice to exclude them.

In *Scottish North American Trust* v. *Farmer* (1), Lord Atkinson, in delivering the unanimous judgment in the House of Lords, stated the general concept of the profit obtained in a trading transaction, as follows:

> The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended, and part of that cost may consist of the sum he pays for the hire of a machine, or the services of persons employed to produce, procure, or sell the article.

To the same effect is the statement of Lord Sands in *Whimster & Co.* v. *The Commissioners of Inland Revenue* (2), in which he also dealt with the general principles to be followed in ascertaining the profit or loss. At p. 823 he said:

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

It is correct to say that the Income Tax Act does not specify any particular method which must be followed in the account to be made up for the purpose of ascertaining the true profit or loss. In *Trapp* v. *Minister of National Revenue* (3)—a case decided under the Income War Tax

(1) (1911) 5 T.C. 693 at 705. (2) (1925) 12 T.C. 813.
(3) [1946] Ex. C.R. 245.

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Act—the President of this Court decided that under that Act the basis of taxability was that of income received. He held that under the Act as it then was, there was no place as a matter of right for the use of an accounting method on an accrual basis, even if it did reflect the true net profit or gain of a taxpayer. Following that decision, section 14(1) in the form to be referred to later was introduced into the law to remove any doubt as to a taxpayer's right to compute his income upon a basis other than that which is frequently referred to as the "Cash" basis.

Sections 3 and 4 of our Act provide that the income for a taxation year is the profit therefrom for the year. Do receivables, such as the accounts and notes receivable here in question, form part of the profit for the year ending January 31, 1951?

The English law is not in doubt on that point and I am greatly indebted to Mr. Jackett for an excellent summary of the cases. In the *Whimster* case to which I have referred, Lord Sands said at p. 826:

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

That case was followed in *Naval Colliery Co. Ltd.* v. *The Commissioners of Inland Revenue* (1) by Rowlatt, J. whose decision was affirmed in the House of Lords.

> Now, one starts, of course, with the principle that has often been laid down in many other cases—it was cited from *Whimster's* case (12 T.C. 813), a Scotch case—that the profits for Income Tax purposes are the receipts of the business less the expenditure incurred in earning those receipts. It is quite true and accurate to say, as Mr. Maugham says, that receipts and expenditure require a little explanation. Receipts include debts due and they also include, at any rate in the case of a trader, goods in stock. Expenditure includes debts payable; and expenditure incurred in repairs, the running expenses of a business and so on, cannot be allocated directly to corresponding items of receipts, and it cannot be restricted in its allowance in some way corresponding, or in an endeavour to make it correspond, to the actual receipts during the particular year.

(1) (1928) 12 T.C. 1017 at 1027.

The doctrine of the relation-back of trading receipts of a business to the year with which they are properly connected was established in the famous *Woolcomber's* case, *Isaac Holden & Sons Ltd.* v. *The Commissioners of Inland Revenue* (1), a case which has been repeatedly approved by the House of Lords. The company combed wool on commission for the Government, which controlled the wool trade, on the basis of a tariff fixed in 1917. In July, 1918, a provisional increase of 19 per cent in the tariff was agreed subject to revision when the accounts to December, 1918, had been examined. In July, 1919, a total increase of 20 per cent., to include the earlier increase was fixed *retrospective* to January 1, 1918. It was held that the total commission received for the company's year ended June 30, 1918, arose from the company's trade in that year and must be included in the assessable profits thereof, regardless of the fact that the final payment was both determined and made long afterwards. In that case, Rowlatt, J. said at p. 772:

> Did not that (the extra commission under the 1919 agreement—A.F.) arise from the work that they did in their trade in the first half of 1918? If not, from what did it arise? . . . These profits arose from the business in that accounting period . . . As the fact which shows that the books were wrong has occurred after they have been closed, I do not see any difficulty in reopening them and putting them right.

The decision of the House of Lords in the case of *Absalom* v. *Talbot* (H. M. Inspector of Taxes) (2) is of special importance. There Viscount Simon, L. C. said at p. 189:

> When a trader in the course of his trade makes a sale to a purchaser, whether the subject-matter of the sale be a house or any other asset in which he deals, his accounts for the year in which the transaction takes place should, for Income Tax purposes, normally include on the one side the cost of providing the asset with which he has parted to the purchaser and, on the other side, the price for the asset which the purchaser has paid or bound himself to pay. The figure to be entered on the credit side is ordinarily the full price and its face value. If at the end of the year the taxpayer can satisfy the Commissioners that such portion of the debt as has not actually been paid is a bad or doubtful debt, an adjustment under Rule 3(i) of the Rules applicable to Cases I and II may be obtained, though presumably this sort of adjustment is more likely to arise at a later stage. But from the point of view of the trader the relevant time is the time when he parts with his asset to the purchaser, and if the accounts are to set out correctly his profits and gains, the whole consideration must be brought in at that stage, notwithstanding that a portion of it will not be payable until later, while carrying interest in the meantime.

(1) (1924) 12 T.C. 768. (2) (1944) 26 T.C. 188.

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If the transaction took the unusual form of a sale in return for a payment, in whole or in part, of a lump sum in the future, with no interest in the meantime, I should be quite prepared to agree that the debt representing the true price required to be arrived at by taking the present value of the lump sum which is payable *in futuro*. But when the unpaid lump sum (as is usually the case) carries a commercial rate of interest until payment, it is the lump sum itself which enters into the calculation of the price.

Counsel for the appellant submits, however, that these cases—and many others which were cited by counsel for the respondent—are inapplicable as they were decided under the provisions of the Rules applicable to the English Income Tax Act. Schedule D levies tax under that schedule in respect of "the annual profits or gains *arising or accruing*" and the provisions of Rule 3(1) applicable to certain cases under Schedule D are sufficiently stated in the judgment of Viscount Simon in the *Absalom* v. *Talbot* case (*supra*) to which I am about to refer. In at least three cases, however, it has been pointed out that the reason for including "receivables" on the credit side of the accounts is not primarily because their deduction is barred by the Rule, but rather because they are elements in arriving at the true profits and gains and that it is in accordance with accounting practice to do so.

In the *Absalom* case, Viscount Simon said at p. 189:

As this appeal has been very fully and ably argued on both sides, I do not wish to leave it without making an observation on Rule 3, paragraph (i), which provides that, in computing the amount of the profits and gains to be charged, no sum shall be deducted in respect of "any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad." It is clear from the words used in the beginning of the Rule that it is concerned with prohibiting various claims for deduction from profits, and has nothing to do directly with declaring what are profits. Yet I cannot help suspecting that it must be sometimes rather hastily read as though it amounted to an assertion that trade debts are profits. The true view is that in cases like the present, profits (or losses) so far as due to the particular transaction, arise from the sale and at the time of the sale; the debt representing the price is created by the sale and at the time of the sale. Indeed, the second reason of the Respondent's case is that debts due to the Appellant from the purchasers of houses "were debts within the meaning of Rule 3(i)". If that were so, the only result would be that such debts necessarily enter into the calculation of profits. To my way of thinking, the reason why debts such as the £65 in this case are to be brought in on the credit side of the account, is because they are an element in arriving at the Appellant's profits and gains, and not because of anything stated in Rule 3(i) at all.

In the same case Lord Atkin said at p. 191:

Now no one doubts that in ordinary commercial practice where goods are sold on terms of ordinary commercial credit, three or six months or even more, traders are in the habit of treating the debt so created as part of the profits of the year in which the debt is incurred. Thus, where the business accounts are made up at the end of the calendar year, a sale in December on credit terms which expire in March or April will be regarded as a profit made in December. And this commercial practice is treated by taxpayers and tax collectors alike as involving a just and accurate computation of profits. The obligations so incurred in ordinary trading are treated as firm obligations and as good as cash in hand, and no one is any the worse. If expectations are disappointed, an allowance for a bad debt can be claimed and will be granted. But when one leaves the realm of ordinary commercial credits and has to deal with credits extending over many years, the whole situation is changed.

The matter was also considered in *British Mexican Petroleum Co. Ltd.* v. *Jackson* (1), where Lord Macmillan stated:

If profit and loss accounts were compiled on the basis of entering only sums actually received and sums actually paid, then the debt of £1,270,232, incurred by the Appellant Company to the Huasteca Petroleum Company, would never have appeared in the accounts of the Appellant Company, for it was never in fact paid. But business men do not so prepare their accounts either for their own purposes or for the purposes of the Inland Revenue, and debts incurred by a trader as well as debts which have become due to him, though in neither case yet paid, are properly taken into account in ascertaining the profits of the year.

In *Johnson (H. M. Inspector of Taxes)* v. *W. S. Try Ltd* (2), Lord Greene, M. R. said this:

I may, perhaps, make one general observation with regard to those matters. I think it is generally true to say that the scheme of Income Tax legislation is based on the idea that the tax is assessed and paid year by year. The taxpayer makes his return for the year, he is taxed, and there is an end of it. It is perfectly true that there are powers in the Act, when the Surveyor makes a discovery, by which he may make an additional assessment, and in appropriate cases that is undoubtedly a proper way of proceeding. But that does not alter the fact that that is what one may call an exception on the general scheme by which a year is taken, finished and done with, and the taxpayer knows where he is. His profits are ascertained in general on what I may call sound and normal commercial principles. He knows exactly where he is. But, in the cases to which Mr. Tucker referred, the principles adopted are, in a sense, reopening a previous assessment in circumstances which will appear when I come to examine those cases. It should be noted that in general tax is calculated on the basis of the receipts of a business. There is one notable exception to that and that is the case of trade debts. I had occasion a few days age to refer to the rather peculiar language of the Rule relating to permissible deductions in arriving at the profits of a

(1) (1932) 16 T.C. 570 at 593. (2) (1946) 27 T.C. 167 at 181.

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business, and I pointed out that one of the things which it is not permissible to deduct is a debt owing to the trader (*Bristow* v. *William Dickinson & Co., Ltd.* p. 162 ante). All the other matters, the deduction of which is disallowed, are expenditure, liabilities and disbursements. It occurred to me to wonder what debts (which are not disbursements and not expenditure) have got to do in this particular context. The reason, I ventured to suggest, was this. A trader is not to be entitled to say: You must not tax me on these debts because I have not yet received payment. You can only tax me when I have received payment. The Legislature says: No, it is ordinary commercial practice in calculating your profits to bring in debts which are owing to you in connection with the business: therefore you are to be bound to bring in debts which are owed to you on the same basis as if they were receipts, subject, of course, to the allowance for bad or doubtful debts for which the Rule provides. But I venture to think in one sense that is an anomaly, because it is a departure from what I have always understood to be the fundamental conception of Income Tax legislation—that you ascertain your profits in reference to your receipts. The reason why that exception is brought in is that it is in accordance with ordinary commercial practice to treat debts in that way.

In Simon's Income Tax Second Edition, Vol. II, p. 153, the general rule for ascertaining the period in which an item is includible was stated thus:

> Normally an item becomes a trade receipt on the day when it is receivable even though the date of receipt is postponed. Equally, an item becomes an admissible deduction for tax purposes on the day on which it becomes a debt due from the business, irrespective of the date of its actual payment.
>
> Accordingly, when a sale is made, the sale price has to be brought into account at that date, and it will form part of the total of the sales in the profit and loss account for the then current period; and that will be so even if the sum is not paid to the trader until after the end of the current accounting period. The fact that the consideration for a sale is other than money, or is an asset not immediately realisable, is no reason for excluding it. It should be included at the relevant accounting date at its then value.

In *Minister of National Revenue* v. *Sinnott News Co. Ltd.* (1) I considered the right of a distributor to set up a "Reserve for loss on returns", being the estimated loss of profits on magazines not sold by the retailers and liable to be returned to the distributor in the following year. The main point for consideration there was whether or not there was a sale of the goods, but in my conclusion I said:

> On these facts I find that the transactions in question were sales, and that the whole of the accounts receivable in respect thereof at the end of the fiscal year constituted part of the income of the respondent to be taken into account in computing its profit or gain. Moreover, it is clear that the respondent in seeking to deduct from its income the estimated amount of the profit which it might lose in the next fiscal year by reason

(1) [1952] Ex. C.R. 508.

of compensating the retailers for unsold goods then returned, was transferring or crediting to a reserve or contingent account a part of the income which it had earned, and that is forbidden by the terms of s. 6(1)(*d*).

I am of the opinion that the principles laid down on this point in the cases which I have cited, and more particularly those in *Absalom* v. *Talbot, Johnson* v. *Try* and *British Mexican Petroleum* v. *Jackson* are of equal application under our Act. The exclusion from an operating statement of the amount of the receivables of a trader would give a completely inaccurate and incomplete picture of the year's operations. Let me assume a case in which a trader has disposed of all his inventory on credit a month before the end of his fiscal year on terms which were very favourable to him and under which payment in full could be anticipated after three or four months. Under a "Cash" system or the "Cash Receipts and Expenditure" system, the year's operations would admittedly result in a loss. The inventory is reduced to the extent of the cost of the articles sold but not paid for, and nothing is shown as coming in to balance those items unless and until the price has been paid.

On this point, I would refer to the case of *Commissioners of Inland Revenue* v. *Gardner et al* (1)—a decision of the House of Lords. In that case Viscount Simon said at p. 93:

> In calculating the taxable profit of a business on Income Tax principles (and the same point has been constantly illustrated in calculating Excess Profits Duty—Volume 12 of Tax Cases contains a number of examples) services completely rendered or goods supplied, which are not to be paid for till a subsequent year, cannot, generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to Income Tax under Schedule D the net result of the transaction, setting expenses on the one side and a figure for remuneration on the other side, ought to appear (as it would appear in a proper system of accountancy) in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered . . . This may involve, in some instances, an estimate of what the future remuneration will amount to (and in theory, though not usually in practice, a discounting of the amount to be paid in the future), but in the present case the amount of the commission due to be paid on 31st March, 1941, as part of the remuneration for services rendered two years before was already known before the additional assessment was made. The Crown is right in treating this additional sum as earned in the chargeable accounting period 1st April, 1938, to 31st March, 1939.

(1) (1947) 29 T.C. 69.

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Supposing that in the illustration I have given, a partner had been interested in the profits of the taxpayer's business for the year in question. I ask myself whether he would have had a right to share in the "receivables" as part of his profit at the end of the fiscal year. I think the answer would clearly be in the affirmative. And just as those sums are part of the profits of the year so as to entitle a partner to share in them, so it appears to me they are profits, or at least items to be taken into consideration in computing profits, under the Income Tax Act.

In my opinion, therefore, when trading stocks are sold and delivered, the full price should be brought into account in the year in which the delivery is made irrespective of the time of payment. The trader in such cases has the right to take advantage in proper cases of the statutory provisions regarding bad and doubtful debts to which I have referred above.

The probable result of failing to include accounts receivable in the computation of profit is referred to by the learned President in the *Trapp case* (*supra*). At page 258 he said this:

> It is generally conceded that in many cases, if not in most, the true net profit or gain position of a taxpayer, particularly if he is in business, cannot be ascertained otherwise than by an accounting method on the accrual basis. A person who has accounts receivable at the end of the year that are attributable to the earnings of such year and owes accounts payable for debts relating to the earnings of such year but keeps his accounts only on a basis of cash received and cash expended will frequently arrive at an amount of income "received" during the year that is not a reflection of his true net profit or gain for such year. But under the Income War Tax Act, as it stands, there is no place, as a matter of right, for the accounting method on an accrual basis, even if it does reflect the true net profit or gain of the taxpayer, and it must give way to the express provisions of the Act. Income tax law in Canada in this respect lags far behind that of the United Kingdom and the United States and runs counter to well recognized principles of sound business and accountancy practice.

For these reasons I must reach the conclusion that the "Cash Receipts and Expenditure" method purported to have been used by the appellant in this case is a method which is not permissible under the Act. I say that because of the fact that it excludes as an item of income all receivables, which in my opinion form a necessary part of any trader's profit and loss statement. Such a method is incomplete and misleading and one which fails entirely to show

the true state of a taxpayer's position or to reflect his true profit or loss. There is no evidence whatever that it is according to generally accepted accounting practice in Canada—and Mr. Lorenzen admitted that it was not. Moreover, he said that had he been the company's auditor, he would not have given the usual auditor's certificate which is attached to corporate returns without a special statement to indicate that it was based on the "Cash Receipts and Expenditure" method. Its use in many cases would show a loss when in reality there was a profit. It brings in nothing on the receipts side to balance outgoing inventory which has not been paid for in full.

In Hannan and Farnsworth's work on The Principles of Income Taxation, the following appears at page 210:

> The costs of manufacturing and acquiring trading stock are obviously a proper charge in arriving at the profits of a business. For similar reasons, the respective values of stock on hand at the beginning and end of each accounting period must also be taken into account, since these values represent the advantage gained by the costs of manufacturing or acquiring the goods. It follows, of course, that sales of goods which were on hand when the accounting period began or were manufactured or acquired during that period, will necessarily find a place in the accounts, whether the customers have paid for the goods or not. Payment by a customer in any subsequent accounting period is merely the realisation of what has already been brought to account—in other words, the realisation of income that has already "arisen".

I think that statement correctly sets out the law applicable to short term trading accounts such as those in the present case. It may be noted, also, that the notes receivable in this case all bore interest and all were discounted or pledged to the bank, the appellant receiving the full face value thereof in the fiscal year in question. In view of my finding that all the receivables should have been included in the accounts, it is perhaps not necessary to consider the further question as to whether the discounting of the notes at the bank and the receipt by the appellant of the full proceeds thereof was equivalent to "Cash Receipts", although I think that was the result.

A further point, however, is raised by the appellant. It rests on the provisions of section 14(1) which is as follows:

> 14. (1) When a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or

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property for a subsequent year shall, subject to the other provisions of this Part, be computed according to that method unless the taxpayer has, with the concurrence of the Minister, adopted a different method.

As I have noted above, the appellant was sent a Notice of Assessment showing "nil" tax levied; subsequently, the respondent, acting under the provisions of section 42(4), reassessed the appellant by adding back the amount of the receivables. In the Notice of Appeal to this Court, the appellant alleges that the reassessment was made "for the purpose of preventing section 14 coming into effect whereby the method adopted by the appellant in respect of its 1952 return (said to have been also on the "Cash Receipts and Expenditures" method) would be conclusive and binding upon the respondent in view of the acceptance by the respondent of the method adopted in respect of the 1951 taxation year." It was stated therein that the respondent was not entitled to reassess in order to prevent section 14 being effective in respect of a subsequent year. The short answer to this submission is that there is no evidence whatever that the Minister reassessed the appellant for the reasons suggested, and the burden of proof is, of course, on the appellant. It is said, further, that "the respondent is not entitled to reassess merely because he changes his mind (without the emergency of new facts) in respect of the original assessment". Section 42(4) has no such requirement and I am of the opinion that it is always open to the respondent by a reassessment to correct errors made in the original assessment within the time limited by that subsection. Subsection (3) of section 42 specifically provides that liability for tax under this part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

A further argument is made on the basis of section 14(1). It is said that in its return for the next fiscal year the same method of accounting was used, that it showed a loss and that the return was accepted. No Notice of Assessment for the year 1952 was produced at the hearing, but Mr. Lorenzen intimated that the usual Notice of Assessment showing "nil" tax levied was received. It is submitted that the first Notice of Assessment for the taxation year 1951 was an acceptance by the Minister of the "Cash Receipts and Expenditure" method and that the Minister allowed the

same method to be used in assessing the appellant's return for the year 1952 before notice of reassessment for the year 1951 was sent out (later returns were also referred to but I am of the opinion that they are totally irrelevant to the issue). It is said that if the Minister accepts a return made under a certain method in 1952, he is bound by section 14(1) to accept that method in subsequent years; and that *a fortiori* he must be deemed to be bound by it in respect of the year 1951 when the same method is said to have been used.

This submission rests entirely on the theory that the Minister did accept the "Cash Receipts and Expenditure" method purported to have been used by the appellant, merely by sending out the original Notice of Assessment for the year 1951. There is no evidence of "acceptance" unless it can be said that the original Notice of Assessment which levied no tax was acceptance. I do not think that it was. It seems to me that the word "accepted" as used in the subsection connotes a taking or receiving with consenting mind —something in the nature of an admission. Now the first Notice of Assessment was merely a statement that "nil" tax was levied; it said nothing whatever about any method. In fact, it seems clear that the assessing officers were not aware even at the time the notice of reassessment was sent out that any such method as the "Cash Receipts and Expenditure" method was being put forward. On that reassessment it was noted that "Reserve for bad debts ($4,240.92) disallowed". It was assumed, I think, that the entry "Provision for uncollected accounts" was merely one way of attempting to set up a reserve for bad and doubtful debts. There is nothing in the return except this one item which differentiates it from the ordinary trader's return which includes all receivables, and they were set out but not carried into the computation. I am unable to find anything which supports the suggestion that the Minister accepted the "Cash Receipts and Expenditure" method for the year 1951.

Moreover, I am satisfied that the provisions of section 14(1) (which in terms are "subject to the other provisions of this Part") must be read with those of section 42, including those in subsection (4) relating to the Minister's power of reassessment. It is inconceivable that the Minister

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should have full power by a reassessment to correct an error made in the original assessment in order that the full tax liability should be collected, and still be bound by the method said to have been used in the tax return on which the original assessment was made. In this case there was a reassessment which, in my opinion, entirely set aside the original assessment and which clearly denied to the appellant the right to deduct from its accounts the amount of its receivables.

For these reasons the appeal must fail. It will be dismissed and the reassessment dated November 22, 1952, will be affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

1954

Oct. 20 & 21

1955

Mar. 11

BETWEEN:

MAURICE TOUGAS ..... APPELLANT,

AND

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

Revenue—Income—Income tax—The Income Tax Act, 1948 S. of C. 1948, c. 52, as amended, ss. 3, 4, 127(1)(e)—Profit from sale of real estate by taxpayer—Whether capital gain—Whether profit from business—Question to be determined in the light of facts of each case—Burden on taxpayer to show error in taxation imposed upon him—Appeal from Income Tax Appeal Board dismissed.

Appellant was reassessed for the taxation year 1950 in respect of profits realized by him on the sale of a ten-suite apartment block which he built in May of that year and sold six months later. An appeal from the assessment to the Income Tax Appeal Board was dismissed. On an appeal from the Board's decision to this Court appellant contended that it was his intention to build the block and keep it as an investment but that he was forced to sell it in order to raise funds for the completion and expansion of another business—a children's wear retail store—which he owned.

Held: That the question whether a profit realized on the sale of real estate by an individual is a realization or change of investment or an act done in the carrying on of a business is to be determined in the light of the facts in each case. *California Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 at 165 referred to.

2. That the burden is on the taxpayer to establish the existence of facts or law showing the error in relation to the taxation imposed upon him. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486

referred to. Here the assessment is based on the fact that the profit was one which arose in the course of appellant's business and to succeed in the appeal he must show that such is not the fact.

3. That on the evidence appellant at all material times was still engaged in the business of a builder or contractor and that the profit which he received from the sale of that apartment block was a profit from that business. He has not established to the satisfaction of the Court that the block was intended to be built and kept as an investment or that the reasons he gave for the sale were the real reasons.

APPEAL from a decision of the Income Tax Appeal Board.

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

G. H. Steer, Q.C. and *J. J. D. Cregan* for appellant.

D. B. Mackenzie, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (March 11, 1955) delivered the following judgment:

In reassessing the appellant for the taxation year 1950, the respondent added to his declared income the sum of $13,630.86 as "Profit on sale of 9806-106th Street". An appeal to the Income Tax Appeal Board was dismissed on May 25, 1953, and a further appeal is now taken to this Court. The appellant asserts that the profit so realized (there is no dispute as to the amount) was a capital gain and not subject to tax. The respondent submits that it was a profit from a business—that of a builder or contractor—and therefore income subject to tax under the provisions of sections 3, 4 and 127 (1) (*e*) of the Income Tax Act, 1948, which were then as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

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127(1). In this Act,

(e) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The facts relating to the construction and sale of this property (which I shall refer to as the "106th Street apartments") are as follows: In 1949 the appellant decided to take advantage of the provisions of the National Housing Act under which very large loans were made to builders of apartments, and contracts of rental insurance could be provided. On May 7 he purchased the land for $6,500.00 and on July 14 secured a permit from the City of Edmonton to build a ten-suite apartment block. Through Central Housing and Mortgage Corp. a loan of $51,000.00 was secured from the Manufacturers' Life Association. Building was practically completed by May, 1950, the total cost being $62,500.00. In order to finance the balance of the cost, the appellant sold an apartment block on 107th Street. By May, 1950, the new block was tenanted and the appellant moved into one of the apartments. On November 1, 1950, it was sold for $76,500.00 to Mr. and Mrs. Kirk. In the construction of the building the appellant acted as contractor throughout, purchasing all necessary supplies and supervising the work, but relying in part on the assistance of a skilled foreman. It is the profit on this sale which is here in question.

The appellant says that it was his intention to build the block, rent it, and keep it for rental revenue as an investment and as a home for his family. He says, however, that he was forced to sell it and in the Notice of Appeal to this Court the reason assigned is stated as—"To raise funds for the completion and the expansion of the 'Jack and Jill' business and to pay for stock-in-trade." It becomes necessary, therefore, to refer in some detail to that business.

From 1938 to 1945 the appellant operated a retail tobacco store in Edmonton. In the latter year he sold that business and most of his real estate holdings in anticipation of going into business in the United States. He found conditions there unfavourable and returned to Edmonton early in 1946. His intention then was to establish a children's wear retail store; he therefore purchased a lot and erected a suit-

able building known as 10424 Jasper Avenue. Due to post-war conditions, he was unable to purchase the necessary stock and for the time being gave up his intention to open the new store; he therefore leased the premises for a long term to Lowe Brothers.

Being unable to enter the retail business, he decided to embark on that of a builder. In 1946 and 1947 he purchased some sixteen vacant lots, erected houses thereon and sold them at a profit as soon as they were constructed. In 1947 he contracted to build a store for one Evanoff at 10428 Jasper Avenue—next to his own property—and received a commission of 8 per cent. on the cost of construction. That fee, and the profits he received on the sale of the sixteen houses, were shown as taxable income in his annual returns.

Upon the completion of the Evanoff building in 1948, the appellant found that he could now enter the retail business; accordingly, he leased the property from Evanoff and with one of his brothers, opened a children's wear store known as "Jack and Jill". About June, 1950, he was asked by Lowe Brothers to accept surrender of their lease. He did so, but found he was unable to get a satisfactory tenant for the premises. Accordingly, he decided to expand the "Jack and Jill" business by opening up new departments in his own property. About August of that year he commenced the reconversion of the property. He states that he soon found that he had under-estimated the cost and that he then found it necessary to sell the "106th Street apartments" in order to provide funds to complete the conversion and purchase the necessary stock.

The basic principle to be applied in determining whether the profit realized on the sale of property is a capital gain or a gain made in an operation of business is stated in the well-known case of *California Copper Syndicate* v. *Harris* (1). There the Lord Justice-Clerk said:

> It is quite a well settled principle in dealing with questions 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 realisation or conversion of securities

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

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may be so assessable where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business . . .

In the same case the Lord Justice-Clerk said:

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

In *Campbell* v. *Minister of National Revenue* (1), Locke J., in delivering the judgment of the Court, stated that while the above decision turned upon the interpretation of Schedule D of the Income Tax Act of 1842, the passage which I have first referred to expressed the principle which is applicable in Canada.

Each case must therefore be considered according to its own facts. The burden is on the taxpayer to establish the existence of facts or law showing the error in relation to the taxation imposed upon him *Johnston* v. *Minister of National Revenue* (2). In this case the assessment is based on the fact that the profit was one which arose in the course of the appellant's business and to succeed in the appeal, the appellant must show that such is not the fact.

It becomes necessary, therefore, to examine with great care the evidence adduced on behalf of the appellant. Summarized briefly, it amounts to this.

My intention was to build and retain the block as an investment for rental purposes. My original plan was thwarted because the bank was pressing me for the repayment of my loans and I needed further money to expand the "Jack and Jill" business and therefore I sold the block for that purpose.

Now if all these allegations were proven and if there were no other evidence which had a bearing on the matter, much might be said for the appellant's contention that his profit was not income. Unfortunately for the appellant, neither of these conditions prevails.

In the first place, there is no evidence which corroborates that of the appellant on these all-important matters. If the bank was pressing for repayment of its loans or had refused to grant additional loans for the extension of the

(1) [1953] S.C.R. 3. (2) [1948] S.C.R. 486.

"Jack and Jill" store, it should have been possible to produce evidence from a bank official to that effect. If the appellant had earlier offers to purchase the block—as he alleges was the case—it should have been possible to prove that by the evidence of those offering to purchase. Nothing of this sort was done.

Then it is established beyond dispute that none of the immediate proceeds of the sale—some $19,000 to $20,000—found its way into the "Jack and Jill" business. The entire amount was paid immediately after the sale to the appellant's bank to retire his own personal obligations in full. The payment had nothing whatever to do with the "Jack and Jill" business. It is somewhat vaguely suggested that as the bank relied mainly on the appellant as security for any loans made to "Jack and Jill", the extinguishment of his own liability might have resulted in an additional line of credit to the "Jack and Jill" business. But I find no satisfactory evidence as to what the line of credit was prior to November 1, 1950, or that it was altered in any way after the appellant's own bank liability was wiped out in November. There is no satisfactory proof whatever that the sale of the "106th Street apartments" resulted in any benefit, direct or otherwise, to the "Jack and Jill" business.

Moreover, with regret, I have come to the conclusion that I cannot accept the uncorroborated evidence of the appellant as to his intention in building the block or as to the reasons which led him to sell it within six months of its completion. Certain matters were brought out in cross examination which indicated that he was very careless of the truth. In the transfer of the property to the Kirks (Exhibit G), the appellant took the usual affidavit required of a transferor in Alberta, stating the total consideration to be $66,355 when, in fact, the actual consideration (exclusive of the chattels) was $72,355. His explanation is that until the date when the sale was to be completed, he had thought the purchasers would pay all cash over and above the mortgage; that then only was he told that they wanted him to accept their undertaking to pay $6,000 of the purchase price within two years (Exhibit 7); and that he feared that if the solicitor for the mortgage company (who was also his solicitor) knew that the purchasers were not paying all his equity in cash, the sale might not be allowed to proceed.

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He therefore concealed the fact from them (as was also done in the further document Exhibit 5) and swore to a false consideration. He does not suggest that it was a mistake or that he did not understand the matter and I am satisfied that he must have known that he was swearing to an untruth. There was another instance, also, when it was shown that in a similar affidavit he had grossly exaggerated the amount of the improvements on the property sold. Of a more minor nature is the fact that in 1949 when he was applying for building permits on two properties which he now says at the time belonged to his mother and brother, he described himself as the owner. He explains that by saying that he was acting for them, that it was a matter of no importance and that he merely did it to facilitate matters. These matters—and others which I need not refer to—lead me to the conclusion that I should not accept his evidence as to his intentions where that evidence is not supported by other material evidence.

Moreover, there are other circumstances which must be taken into consideration. As I have said, the appellant was admittedly carrying on the business of building and selling properties in 1946 and 1947. At the time of the trial in 1954 and for at least a year prior thereto, he has been the president of a firm engaged in the construction of apartment houses. I think the evidence establishes also that he was engaged in a similar business in the years 1949 and 1950.

The construction of the "106th Street apartments" was but one of three blocks constructed by the appellant in 1949 and 1950, the proceeds of the sales amounting to about $225,000.00. He considered that it would be good business for both his mother and his brother Paul to invest their money in the construction of apartment blocks. On behalf of his mother he purchased a lot in her name and secured a large loan through the Central Mortgage and Housing Corporation (which he personally guaranteed unconditionally); with the aid of certain monies advanced by his mother he constructed an apartment block, securing and paying for all materials, supervising the work to the same extent as he had done in his own block, and signing all documents under a power of attorney given by her. The property was sold by

him on her behalf in February, 1952, at a considerable profit, all of which the appellant says was paid to her. He states that he received nothing for his services in connection with this matter.

The story of the appellant in connection with the other block is rather peculiar. His brother Paul—who was described as an alcoholic and as incompetent to manage his own affairs—had certain monies on hand. The appellant thought it would be wise for that money to be invested in some permanent form which would produce a steady income for Paul. He therefore decided that it should be used in the construction of an apartment block which would be financed in the same way as his own and his mother's. A lot was purchased in the appellant's name and a building permit taken out in his own name as owner and contractor. A large mortgage was secured through Central Mortgage and Housing and the building completed about April, 1950. About $10,000.00 was advanced by the brother Paul and an additional $3,000.00 or $4,000.00 by the appellant or his mother. The net rentals up to December 31, 1950, seem to have been paid to Paul. As of January 1, 1951, however, the latter ceased to have any interest in the property, the appellant stating that his brother wanted to withdraw monies for various purposes, including the purchase of a coffee shop. In all, the brother was paid his advance of $10,000.00 and a small amount of rentals. The appellant became the sole owner as of January 1, 1951, although the records show that Paul did not receive the last of his advances until six months later. No records were produced to show the real nature of the transaction between the brothers. It is significant to note, however, that the appellant said at one stage that he had given Paul his "I.O.U." for the amount of the advances, and if that were correct it would seem to suggest that the real owner throughout was the appellant and that Paul had made a loan to assist in the construction of the building. The appellant also said that at the time he settled with Paul, he received some sort of document by which the latter released all his interest in the property to him, but neither that document nor the "I.O.U." was produced. The building was erected by the

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appellant in the same way as the mother's. It was sold by him in 1953 at a substantial profit, all of which accrued to him personally.

It is of some interest, also, to note that in the transfer of the apartments to the Kirks, the appellant is described both in the document itself and in his own affidavit as a contractor. The same description is used in Exhibit 5 dated November 2, 1950 (by which he assigned to the Kirks his interest in the rental insurance contract on the block), and also in Exhibit K dated February 26, 1952—the transfer by him on behalf of his mother of the block owned by her.

From these facts I can reach no other conclusion than that the appellant at all material times was still engaged in the business of a builder or contractor and that the profit which he received from the sale of the "106th Street apartments" was a profit from that business. The appellant has not established to my satisfaction that the block was intended to be built and kept as an investment or that the reasons he gave for the sale were the real reasons.

In his very able argument, Mr. Steer counsel for the apellant, drew my attention to the fact that between 1932 and 1935 the apellant had purchased three small houses which he had rented for a number of years until they were sold at a profit about 1944 and the proceeds invested in an apartment block which was also rented for a number of years. He suggests that this indicates an intention on the part of the appellant to invest his savings in something which would give him a continuing revenue. That may well have been the case at the time, but these events occurred long before the appellant actually became a contractor and builder. There may be cases in which the law would recognize a division of income in the case of a taxpayer who holds out of his inventory some portion of it as a long-term investment while trading in the balance, but I am quite unable to find that this is such a case. The difficulties encountered in attempting to establish a case of that sort are shown in *Gairdner Securities Ltd.* v. *Minister of National Revenue* (1)—a decision which was affirmed in the Supreme Court of Canada by a judgment not yet reported.

(1) [1952] Ex. C.R. 448.

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For these reasons the appeal will be dismissed and the reassessment made upon the appellant will be affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

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Mar. 21

Apr. 22

BETWEEN:

PETER VALENTINE GAETZ *et al.* .....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Pedestrian struck by motor vehicle owned by the Crown and driven by its servant acting within the scope of his duties—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 3(2), 4(2) and (3)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(c)—Onus of proof on suppliants—Liability of the Crown a statutory one and limited to express terms of the statute creating it.

Suppliants claimed special and general damages for personal injuries and losses sustained by them as a result of an accident in which one of the suppliants while walking on a highway was struck by a motor vehicle owned by the Crown and driven by one of its servants who was then acting within the scope of his duties. On the facts the Court found that both the pedestrian and the driver of the motor vehicle were negligent and fixed the former's share of responsibility at 30 per cent and the latter's at 70 per cent.

Held: That the law applicable to claims against the Crown for damages caused or losses sustained as the result of the negligence of one of its servants while acting within the scope of his duties or employment is the same under the Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(*a*) and 3(2) as it was under the Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(*c*).

2. That the onus of proof of the following facts rests upon the suppliants: (*a*) that the driver of the respondent's motor vehicle was a servant of the Crown and was acting within the scope of his duties at the time and at the place of the collision; (*b*) that he was negligent in the performance of his duties; (*c*) that the suppliant suffered injury and sustained losses; (*d*) that the injuries and losses to the suppliants resulted from his negligence. No presumption or assumption can displace this statutory obligation.

3. That although the liability of the Crown under this Act is to be determined by the law of negligence in force in the province in which the alleged negligence occurred such provincial law shall apply only so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. This liability is a statutory one and is limited to the express terms of the statute creating it.

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GAETZ *et al.* v. THE QUEEN

PETITION OF RIGHT under the Crown Liability Act.

The action was tried before the Honourable Mr. Justice Fournier at Kamloops.

N. A. Davidson and *P. D. Seaton* for suppliants.

R. M. Hayman and *D. S. Maxwell* for respondent.

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

FOURNIER J. now (April 22, 1955) delivered the following judgment:

In this petition of right the suppliants seek to recover from the Crown damages, special and general, for personal injuries and losses sustained by them as the result of a collision between a motor vehicle owned by the respondent and driven by Robert Sidney Rogers, a member of the Royal Canadian Mounted Police, a servant of the Crown then and there acting within the scope of his duties and employment, and Peter Valentine Gaetz, a pedestrian, hereinafter referred to as the male suppliant.

The petition is taken in the name of the male suppliant by William Charles Rotar, his next friend, and by his mother, hereinafter referred to as the female suppliant, the latter claiming special damages for the expense to which she has been put, for hospital, medical care and incidentals, and also general damages.

The suppliants allege that the collision was due solely to the negligent driving and operation of the respondent's motor vehicle, that by reason of this negligence they suffered personal injuries and sustained losses and that they are entitled to the relief sought in their petition of right. The Crown, through one of its officers, admitted that the driver of its motor vehicle was its servant acting within the scope of his duties, but denied that the collision was due to his negligence and alleged that the accident was caused by the negligence of the male suppliant or by the negligence of both the driver of the motor vehicle and the pedestrian.

The suppliants' claims are made under the Crown Liability Act, Statutes of Canada, 1952-53, chapter 30, which came into force on May 14, 1953. The rules to be considered in

the present instance are to be found in section 3 (1) (*a*) (2) and section 4 (2) (3). They are correlated and should be read in conjunction. They are thus worded:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, . . .

(2) The Crown is liable for the damage sustained by any person by reason of a motor vehicle, owned by the Crown, upon a highway, for which the Crown would be liable if it were a private person of full age and capacity.

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

(3) No proceedings lie against the Crown by virtue of subsection (2) of section 3 in respect of damage sustained by any person by reason of a motor vehicle upon a highway unless the driver of the motor vehicle or his personal representative is liable for the damage so sustained.

This statute imposes a liability on the Crown for the torts of its servants generally. The former statute which imposed a liability on the Crown for damages resulting from the negligence of its officers and servants was the Exchequer Court Act, R.S.C., 1952, chapter 98, section 18 (1) (*c*) which replaced section 19 (1) (*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34. Section 18 (1) (*c*) provides:

18. (1) The Exchequer Court also has 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;

This provision of the Exchequer Court Act was repealed upon the coming into force of the Revised Statutes of Canada, 1952, and replaced by the provisions of the Crown Liability Act. The Crown, instead of being liable only for the damage resulting from the negligence of its officers and servants, is now liable for the damage resulting from a tort committed by its servants. The Crown is in the same legal position with respect to liability in tort as a private person of full age and capacity.

But the law is the same under both statutes whenever a claim against the Crown arises out of the death of or injury to the person resulting from the tort or negligence of a servant of the Crown. That is to say that the law applicable

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to claims based on damage caused or losses sustained as the result of the negligence of a servant of the Crown while acting within the scope of his duties or employment is the same under sections 3 (1) (*a*) (2) and 4 (2) (3) of the Crown Liability Act, as it was previously under section 18 (1) (*c*) of the Exchequer Court Act.

The suppliants to succeed against the respondent must establish (*a*) that the driver of the respondent's motor vehicle was a servant of the Crown and was acting within the scope of his duties at the time and at the place of the collision; (*b*) that he was negligent in the performance of his duties; (*c*) that the suppliant suffered injury and sustained losses; (*d*) that the injuries and losses to the suppliants resulted from his negligence.

The onus of proof of these facts rests upon the suppliants and no presumption or assumption can displace this statutory obligation. Though it is well established that the liability of the Crown under this statutory provision is to be determined by the law of negligence in force in the province in which the alleged negligence occurred, this rule is subject to the qualification that such provincial law shall apply only so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. This liability is a statutory one and is limited to the express terms of the statute creating it.

Now let us see if the suppliants have discharged their obligation to establish the necessary facts to succeed in their claims.

It has been established that the driver of the respondent's motor vehicle, at the place and at the time of the collision, was a servant of the Crown acting within the scope of his duties. It is in evidence that the male suppliant was injured and that both suppliants sustained losses as a result of the collision.

The questions to be determined are whether the driver was negligent while driving the motor vehicle and, if the answer is in the affirmative, whether his negligence was the cause of the injuries to the male suppliant and of the losses sustained by both suppliants.

On November 17, 1953, at or about 11.30 p.m., the suppliants were walking on highway 97-A in an easterly direction between the city of Armstrong and the town of Enderley in the Province of British Columbia. At the same time, on the same highway, at the same place and in the same direction, the respondent's motor vehicle was being driven and operated. At approximately 1·5 miles east of the city of Armstrong the male suppliant was struck by the motor vehicle when the driver was attempting to pass another motor vehicle travelling in the same direction.

As in most cases of collision, the evidence is contradictory. The male suppliant says that he was walking in an easterly direction on the extreme left side of the paved portion of the roadway and that his mother was following a foot or two behind him. At a certain moment he turned his head and saw at a distance two motor vehicles travelling in the same direction on the right lane of the highway. He noticed the lights of these vehicles and heard his mother say: "They are coming straight on us, jump." At that precise moment, he was struck by the respondent's vehicle and was thrown on the left shoulder of the road. As a result, he was severely injured. His two legs were fractured and also his pelvis. His legs and right buttock were bruised and lacerated. He had no time to jump to his left because he was struck just as his mother was warning him. He had a flash-light, but was not using it seeing there was no oncoming traffic. He was then driven in a car to the Armstrong Hospital where he was treated.

Mrs. Gaetz, the female suppliant, was walking behind her son, a little to his left on the shoulder of the roadway. She was so close to her son that she could touch him with her outstretched hand. On three occasions in a very short period of time, she saw the two motor vehicles coming. They were on the right lane of the highway when she looked back the two first times, but the last time that she glanced back one of the vehicles was coming on the left lane in their direction. She cried out a warning to her son and at the same time jumped to her left. Both these witnesses maintain that at no time they had walked in the middle of the left lane; they had kept to the extreme left portion of the hard-surfaced pavement.

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Three witnesses who were at the time on the scene of the collision testified on behalf of the respondent. Constable Rogers, of the Royal Canadian Mounted Police, was driving the Crown's motor vehicle in the same direction as the two previous witnesses were walking. He was following another car. He had been driving at 35 miles an hour more or less till he came up to about 40 feet to the rear of the car preceding him. He saw that there was no traffic behind him and decided to overtake the first vehicle. He increased his speed to 40 miles an hour and turned to his left. He says that as he saw no oncoming traffic he got on the left lane of the highway, put his lights on high beam and noticed at that moment a pedestrian walking ahead of him in the middle of the left lane, in front of his car, at a very short distance, say 15 to 20 feet. He immediately put his foot heavily on the brakes, turned his wheel to his right, but at that moment the front left light of the car hit the pedestrian, who was thrown on the left side of the hood, bounced sideways on the left front door and fell on the left shoulder of the road. The constable stopped, parked his car, gave his attention to the victim and drove to the hospital with the male suppliant and another party. Later that night, accompanied by Corporal Calvert, he took measurements at the location of the accident and drew a sketch and plan of the roadway, place of impact, position of victim after the collision, skid-marks, and so forth.

The car which Constable Rogers was trying to pass was driven by James Shiach accompanied by Miss Shirley Patton, now his wife, and her father and mother. These two last were seated in the rear and did not see what took place. Miss Patton was seated sideways in the front and was looking to her left, so that she could see and speak to her friend. She says that when she first noticed the pedestrians they were in the middle of the left lane and very close. The other car was attempting to pass them. The driver saw the pedestrians when they were at a distance of the length of a car in front of his vehicle. As to their position, he started by saying that they were in the middle of the centre line, but when pressed he said that Mrs. Gaetz was walking on the extreme left of the pavement and that her son was at her side at a distance of about one foot. He was driving at 35 miles an hour. Previously he had seen

the police car parked on the right side of the highway. Having passed that spot he had increased his speed to 40 miles an hour and then had slowed down to 35 miles an hour when he saw that the police car was following him. Both cars were proceeding on a part of the highway where the speed limit was 50 miles an hour. Though he knew by the light signal that the police car was attempting to pass him, he continued on the right lane without going further to his right. Other witnesses were heard but they were not eye-witnesses of the accident.

I will not deal at length with the testimonies relating to the skid-marks. In my opinion the measurements of the skid-marks would indicate that the police car was being driven at a rate of speed of at least 40 miles an hour. It is possible, and perhaps probable, that he was driving a little faster than that, taking into consideration that he was travelling on a straight stretch of the road where the speed limit was 50 miles an hour and that he was attempting to pass another car.

As to exactly where the pedestrians were walking, it would appear from the evidence as a whole that the suppliants were walking side by side on the left side of the paved portion of the highway, the mother on the outside and the son on the inside. At exactly what distance from the shoulder of the pavement is difficult to determine, but I believe they would have occupied between $2\frac{1}{2}$ and 4 feet of the paved portion.

Regarding the visibility that evening, while listening to the testimonies I became convinced that not one witness knew exactly if it was clear, dark, cloudy or starry. In my mind it was an ordinary night of November, the nights at this period of the year being never very clear but rather dark. The visibility being such, I understand that a driver would have difficulty in seeing dark obstacles on the roadway.

The drivers of both vehicles told the Court that their lights were in good condition and that their eyesight was good. Taking for granted that with good lights on high beam, one having no impairment to his eyesight can see at a distance of 200 to 300 feet, how can it be explained that they saw the pedestrians at a distance of only 15 to 20 feet?

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They gave as their reason that it was very dark, that the pedestrians were dressed in dark clothing and that there were mountains in the background. At the same time, they admitted that they were familiar with this stretch of the road and knew that pedestrians often travelled on the roadway, even at night.

The collision, in my view, was brought about by two facts. The driver of the respondent's motor vehicle was eager to overtake the car ahead. Seeing that there was no traffic at his rear, without paying attention to what was ahead he turned to his left to get on the left lane when he was only about 40 feet behind the first car and put his lights on high beam. At that moment, when his front bumper was parallel with the rear bumper of the other car, he saw the male suppliant right ahead of his car. Had he taken the left lane when he was further behind the first car I am sure he would have seen the pedestrians in time to return to the right lane before colliding with him, or he could have either warned the pedestrian of his intention to pass ahead or stopped his car in time to avoid striking him.

True that he was proceeding on a 50-mile an hour zone and that driving at say 40 miles an hour, under ordinary conditions, would not have been exaggerated. But in a night when the visibility, according to his own testimony, was very poor, it was an obvious act of negligence and imprudence on his part to attempt to pass another car without giving due warning to the traffic ahead and without being sure that no obstacle lay in his way. He was taking a risk.

As to the pedestrians being on the highway, I cannot bring myself to believe that their presence was the *causa causans* of the collision. They were on the left side of the pavement—at what distance, I am not too sure—, but their duty to exercise due care cannot be compared to that of a driver of a motor vehicle. I do not think that pedestrians are legally bound to walk at all times on the shoulder of a highway. If they conform to the statutes and bylaws prescribing that they should walk to their left side of the road, so that they can see the oncoming traffic and avoid danger,

they cannot be held responsible when they are struck from behind by a motor vehicle travelling in the same direction and whose driver failed to give proper warning of his approach or of his intention to overtake another vehicle.

On the other hand, had they been closer to the left edge of the pavement, perhaps the results of the accident would have been less severe or serious.

Therefore, I find that the accident was due to the negligence of the respondent's servant who failed to keep a proper lookout and who was driving the motor vehicle at a speed in excess of that justified by the facts and circumstances of the collision.

I also find that the accident was not solely due to the negligence of the driver of the car. The male suppliant, with a little more care, could have, by walking closer to the edge of the pavement, perhaps not avoided the impact but diminished the seriousness of the injuries. I have reached the conclusion that there was negligence both on the part of the driver of the motor vehicle and of the victim. On the evidence, I find that the driver of the respondent's motor vehicle was seventy per cent to blame for the collision and the male suppliant 30%.

As a consequence of the accident, the male suppliant was seriously injured. He was skilfully treated and he now appears to be in good condition.

In 1953, which was the first year in which he was gainfully employed, he earned $1,400. He has been unable to work for a year following his accident. I will allow him $1,400 for his temporary disability and $1,600 for his partial permanent disability. I also award him $200 for pain and suffering. Had he not contributed, to a certain extent, to his misfortune he would have been entitled to the sum of $3,200. Thirty per cent (30%) of this sum being deducted as his share of responsibility, he is entitled to $2,240.

Mrs. Gaetz, the female suppliant and mother of Peter Gaetz, as sole support of her son was put to expense for medical, hospital and surgical care and incidentals thereto.

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The amounts duly proven and established before the Court are as follows:

Armstrong & Spallumcheen Hospital	$1,894.70
The Vernon Clinic	192.50
Vernon Jubilee Hospital	13.00
Dr. Ragn Vald Hangen	300.00
Dr. Kope	15.00
Ambulance, taxis, etc.	25.00
	$2,440.20

Mrs. Gaetz will be entitled to seventy per cent (70%) of this amount of $2,440.20 or a sum of $1,708.14.

In the result there will be judgment in favour of the male suppliant Peter Valentine Gaetz for seventy per cent (70%) of his claim established at $3,200, viz. $2,240, and in favour of the female suppliant Mrs. Katherine Christina Gaetz for seventy per cent (70%) of her claim established at $2,440.20, viz. $1,708.14.

It is settled by the practice of this Court that the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs irrespective of the fact that his claim may have been reduced by reason of concurrent negligence on the part of the defendant or his servant.

There will therefore be judgment in favour of the male suppliant Peter Valentine Gaetz for $2,240 and in favour of the female suppliant Mrs. Katherine Christina Gaetz for $1,708.14, plus costs to be taxed in the usual way.

Judgment accordingly

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Mar. 21

Mar. 28

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

PACIFIC LIME CO. LTD. ..... PLAINTIFF;

AND

VANCOUVER TUG BOAT CO. LTD. .... DEFENDANT.

Shipping—Practice—Amendment of writ and statement of claim to correct misnomer of plaintiff allowed—No costs to either party.

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PACIFIC LIME CO. LTD. v. VANCOUVER TUG BOAT CO. LTD.

In a writ and statement of claim plaintiff was described as Pacific Coast Lime Company Limited whereas its correct name is Pacific Lime Company Limited there being no Pacific Coast Lime Company Limited. Plaintiff now moves to amend both documents by striking out the word "Coast".

Held: That the amendment should be allowed the running of the Statute of Limitations not being a circumstance that should prevent the correction of a misnomer of parties.

MOTION to amend a writ and statement of claim.

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

G. F. McMaster for the motion.

J. I. Bird contra.

SIDNEY SMITH, D.J.A. now (March 28, 1955) delivered the following judgment:

The plaintiff, whose right name is Pacific Lime Company Limited, by a solicitor's slip issued a writ and delivered a statement of claim showing its name as Pacific Coast Lime Company Limited. It now applies to amend both documents by striking out the word Coast. There is no actual company having the name used. The defendant opposes the change, because the action is governed by the *Water Carriage of Goods Act,* under which an action must be brought within one year. The writ was issued within the year, but the period has now expired and the defendant contends that no amendment can now be allowed. Apart from limitations the writ is amendable under Admiralty Rule 9 and the Statement of Claim under Rule 73.

At conclusion of argument I had little doubt how the matter should go; but out of deference to the argument and authorities presented, thought it well to reserve for further consideration. The defendant cited a number of cases, several of which showed that, after the statutory period had run, amendment should not be allowed if such amendment would, for the first time, permit an action to be maintained that would otherwise be unmaintainable. But none of these authorities cover an amendment like the present and I think *W. Hill & Son* v. *Tannerhill* (1), in the English Court of

(1) [1944] K.B. 472.

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Sidney Smith D.J.A.

Appeal is ample authority for allowing this amendment. There, as here, the plaintiff's name was wrongly given and a statute of limitations had run.

This is really a case of misnomer, and in another appeal case *Alexander Mountain & Co.* v. *Rumere Ltd.* (1), the Court approved an illuminating article which shows that the defendant here could have derived no advantage from the plaintiff's name being wrongly given, even if the plaintiff had taken no step to correct it. This article also shows that no distinction can be drawn between a corporate plaintiff and an individual as regards misnomer. I find the question came before our own Courts in *Russell* v. *Diplock-Wright Lumber Company* (2), a case very like this. There the Court of Appeal held that the running of the statute was not a circumstance that should stand in the way of merely a correction of a misnomer of parties. I therefore allow the amendment.

Now as to costs: No doubt the plaintiff ought to pay for its mistakes if they increase the other side's expense. But here the defendant only appeared to raise objections which I have held to be unfounded. This of course counsel had every right to do for it is not competent for him to throw away any point his client may have. On the other hand no expense would have been caused to defendant had it simply acquiesced in the application. I therefore give no costs to either party.

Order accordingly.

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Mar. 21

Apr. 23

BETWEEN:

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

AND

TIP TOP TAILORS LIMITED ..... RESPONDENT.

Revenue—Income Tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, s. 3, 4 and 27(1)(e)—Profit made on devaluation of pound sterling—Income or capital gain—Profit made in course of taxpayer's business—Appeal from Income Tax Appeal Board allowed.

Through the devaluation of the pound sterling a profit accrued to the respondent on account of its financial transactions with a London.

(1) [1948] 2 K.B. 436 at 441, 442. (2) (1910) 15 B.C.R. 66.

England, Bank. Anticipating that the pound would be devalued, the respondent deliberately incurred a large overdraft with the London Bank which was used in paying accounts in England. After the devaluation of the pound sterling the respondent paid its overdraft to the London Bank at the reduced rate and its resulting profit amounted to a considerable sum of money. The cost of goods to the respondent was carried on its books at the rate of the pound sterling before devaluation.

The Income Tax Appeal Board held that this profit was a capital gain. The Minister of National Revenue appealed to this Court.

Held: That the profit received by respondent was one made in the course of its normal business operations while carrying out a scheme for profit-making.

2. That the use of the overdraft was a scheme for profit-making in one part of the respondent's trading operations, namely, the purchase of sterling funds, an essential part of an integrated commercial operation, namely, the purchase of supplies and the payment thereof by the method adopted by respondent.

3. That the loan by the bank was used to pay trade accounts and was circulating capital used in the trade; the fixed capital of the respondent was at no time employed in the transactions and the profit when made did not affect the capital structure of respondent in any way but was an increase in its trading profit and available for distribution to its shareholders.

APPEAL from the Income Tax Appeal Board.

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

D. W. Mundell, Q.C. and *T. Z. Boles* for appellant.

Lazarus Phillips, Q.C. and *Philip F. Vineberg* for respondent.

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

CAMERON J. now (April 23, 1955) delivered the following judgment:

This is an appeal by the Minister from a decision of the Income Tax Appeal Board dated January 8, 1954, allowing the appeal of the respondent from an assessment made upon it for its 1949 taxation year. In computing its taxable income, the respondent had deducted an item of $169,614.96 entitled "Capital profit arising in sterling exchange, September 20, 1949". In the assessment dated March 14, 1951, that deduction was disallowed and the full amount thereof added to the respondent's declared income. The appeal to the Income Tax Appeal Board was heard by Mr. Fisher who

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was of the opinion that the profit so realized was a capital profit and did not arise out of the trading operations of the respondent.

At the hearing of the appeal it was agreed that the evidence set out in the transcript of proceedings before the Income Tax Appeal Board, and the exhibits therein filed, should be evidence in this Court; that evidence was supplemented by a further cross-examination of the witness O'Halloran who had also given evidence before the Board.

The facts are not in dispute. The respondent is in the business of manufacturing and selling clothing at retail. It purchases very large quantities of cloth and other supplies and for many years it has followed a practice of paying for such goods immediately after their receipt. Its purchases in Canada are paid for by cheques sent direct to the suppliers. A very substantial part of its purchases are made in the United Kingdom and for many years the suppliers there had been paid in a somewhat different manner. The accounts of these suppliers are all payable in sterling funds and it was therefore necessary for the respondent to purchase and remit sterling funds. The respondent transacts a substantial part of its business with the Canadian Bank of Commerce which has a London agency—which I shall refer to as the London Bank. Arrangements were entered into by which upon the receipt of the goods from the United Kingdom, the respondent purchased sterling funds and remitted them to the London Bank with a letter of instructions to the latter to pay the suppliers. It seems that even prior to November 1947, the respondent had a line of credit with the London Bank and that at times its account there was overdrawn as the result of the remittances being less than the total of the accounts paid by the Bank.

For some years prior to November 1947, the pound sterling had a value of $4.04 Canadian. The respondent's officials were of the opinion that it would be devalued sooner or later and that it would be profitable to the company, if such an event occurred, to build up in the meantime a substantial overdraft at the London Bank. Mr. Clayton, the secretary and controller of the respondent, in

reply to a question as to why the company did not use its credit balances in Canada to discharge the liabilities to the Bank, said:

> Because it was felt that the pound sterling would be devalued, and after discussing the matter fully with the President and other top officials in the company we decided to deliberately pursue this policy of running a large overdraft in England in the hope of gaining a capital profit on devaluation.

Following that decision the respondent, through the Canadian Bank of Commerce, arranged for an extended line of credit at its London agency in a sum not exceeding £250,000. It was not required to provide any collateral security for such part of the line of credit as it might use and no restriction was placed on the use to be made of the funds advanced thereunder.

The proposed policy was immediately put into effect. The United Kingdom suppliers' accounts were paid promptly and in exactly the same manner as theretofore, namely, by the London Bank upon the written directions of the respondent. The respondent continued to make substantial remittances in sterling to the London Bank, but in amounts less than sufficient to take care of the suppliers' accounts in full. In the result, the overdraft at the London Bank was progressively increased and on September 20, 1949, when the pound sterling was devalued and in terms of dollars was reduced from $4.04 to $3.0875, the overdraft amounted to just over £178,073. Up to that date, the liability to the bank had been shown in the respondent's books not only in sterling funds, but in Canadian funds at the rate of $4.04 to the pound. In its income tax returns for all relevant years, the latter of these two sets of figures was used and allowed as reflecting the cost of goods. In October of that year the respondent decided to pay its liability to the London Bank and by purchasing sterling at the reduced rate and remitting funds to the Bank, it settled its liability to the latter at $169,614.96 less than it would have been required to pay had the pound sterling not been devalued.

It is admitted that a profit thereby accrued to the respondent and the question is whether that profit is a capital profit or a revenue profit. It is admitted that the full amount of the overdraft was used in payment of supplies purchased by the respondent in the United Kingdom.

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Immediately after the settlement of its overdraft with the London Bank, the respondent resumed and has since continued the same policy in paying its United Kingdom suppliers as it had followed prior to November 1947.

It will be observed that the only difference between the policy followed in the period prior to November 1947, and that adopted for the period from November 1947, to October 1949, was that in the latter period the respondent remitted to the London Bank less sterling funds than were required to pay the suppliers' accounts in full. It may be noted here, also, that in each of the taxation years 1948 and 1949, the interest charges paid to the London Bank in respect of the overdraft were claimed and allowed as ordinary operating expenses.

For the appellant it is submitted that the profit so received was a profit from the respondent's business or, alternatively, that it was received from an adventure in the nature of a trade. He relies on sections 3, 4 and 127(1) (*e*) of the Income Tax Act 1948, which were as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

(4) Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

127. (1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

Notwithstanding that the respondent was successful in its appeal to the Income Tax Appeal Board, the onus is on it to establish that the assessment is incorrect, either in fact or in law (*Minister of National Revenue* v. *Simpson's Ltd.* (1)).

Counsel for the respondent concedes that if the profit on foreign exchange had been made in remitting sterling to the firms which had supplied it with materials, such profit would have been on revenue account as one arising in the

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

operation of its business (*Eli Lilly & Co. (Canada) Ltd.* v. *Minister of National Revenue* (1)). He submits, however, that as the suppliers had been paid in full, the trading operations of the respondent were at an end; that the profit resulted from incurring and payment of a bank loan which was of a capital nature and therefore non-taxable. He says that there was no trading relationship with the London Bank; that the relationship between them was not that of buyer and seller, but rather that of debtor and creditor. Finally, he says that this is a casual profit resulting from something over which the respondent had no control—namely, the devaluation of the pound; that the respondent is not engaged in the business of speculating in foreign exchange and that this "speculation" in foreign exchange was the only transaction of that character undertaken by it.

In *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* (2), it was held that if the profit was one made in an operation of a taxpayer's business, or made in an operation of business in carrying out a scheme for profit-making, it was a revenue profit and therefore subject to tax. In that case the business of the taxpayer was the purchase of raw sugar, refining and selling it at wholesale. Because of certain conditions, it speculated in raw sugar futures on the stock exchange and made a profit thereon. It was held that, even if it were the only transaction of that character, in the light of all the evidence, it was a part of the taxpayer's business and therefore a profit from its business or calling within the meaning of section 3 of the Income War Tax Act.

No question as to foreign exchange profit arose in that case but it seems to me that the tests there stated are of general application in considering whether a profit is of a capital or income nature. Applying these tests to the facts of the instant case, it seems to me that the profit here realized was one made in the course of the respondent's normal business operations while carrying out a scheme for profit-making.

Business operations are carried out in a great variety of ways. In the case of the respondent, its normal operations required it to purchase goods in the United Kingdom and to

(1) [1953] Ex. C.R. 269. (2) [1949] S.C.R. 706.

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pay for such purchases in sterling funds. Its normal practice was to buy sterling in Canada, remit the funds to the London Bank with instructions to pay the suppliers even if the payments resulted in an overdraft. That was its customary way of operating its business and the profit it realized arose out of that mode of doing business. In my view, the mere fact that the overdraft was deliberately incurred cannot assist the respondent. That was done in the hope that if the pound were devalued, the actual amounts which the respondent would ultimately be required to pay in respect of the goods which it had purchased would be less and its profits therefore greater. In my view, it was a scheme for profit-making in one part of the respondent's trading operations, namely, the purchase of sterling funds. The purchase of sterling funds in October 1949 was an essential part of an integrated commercial operation, namely, the purchase of supplies and the payment thereof by the method adopted by the respondent.

Counsel for both parties referred me to a case decided in the English Court of Appeal—*Davies* v. *The Shell Company of China, Ltd.* (1). The facts are set out in the headnote as follows:

> The Company was a British company which sold and distributed petroleum products in China. The Company made a practice of requiring its agents to deposit with the Company a sum of money, usually in Chinese dollars, which was repayable when the agency came to an end. Previously the Company had left on deposit with banks in Shanghai amounts approximately equal to the agency deposits, but because of the hostilities between China and Japan the Company transferred these sums to the United Kingdom and deposited the sterling equivalents with its parent company, which acted as its banker. Owing to the subsequent depreciation of the Chinese dollar with respect to sterling, the amounts eventually required to repay agency deposits in Chinese currency were much less than the sums held by the Company to meet the claims, and a substantial profit accrued to the Company.
>
> On appeal to the Special Commissioners against assessments to Income Tax under Case 1 of Schedule D, the Company contended that the deposits received from its agents had been used as fixed capital and not as circulating capital, and that the profit on exchange was a capital profit not subject to Income Tax. For the Crown it was contended that the deposits, to which the Company could have recourse in the event of default by the agent, were circulating capital and that the exchange profit was made in the course of the Company's business and must be included in the computation of its profits for Income Tax purposes. The Commissioners found that the exchange profit was a capital profit not subject to Income Tax.

(1) (1951) 32 T.C. 133.

Held, that the Special Commissioners' decision was correct.

Counsel for the Minister in the instant case relied on the following statement by Jenkins L. J.—and concurred in by all the other judges—at page 151.

As regard the law to be applied there is a considerable measure of agreement between the parties. Mr. Grant for the Company does not dispute that where a British company in the course of its trade engages in a trading transaction such as the purchase of goods abroad, which involves, as a necessary incident of the transaction itself, the purchase of currency of the foreign country concerned, then any profit resulting from an appreciation or loss resulting from a depreciation of the foreign currency embarked in the transaction as compared with sterling will *prima facie* be a trading profit or a trading loss for Income Tax purposes as an integral part of the trading transaction. That concession or admission by Mr. Grant is amply justified by the cases to which we have been referred. There is the case of *Landes Brothers* v. *Simpson,* 19 T.C. 62, which is a decision of my brother Singleton as a Judge of first instance. There the appellants, who carried on business as fur and skin merchants and as agents, were appointed sole commission agents of a company for the sale in Britain and elsewhere of furs exported from Russia on the terms, *inter alia,* that they should advance to the company a part of the value of each consignment. All the transactions between the appellants and the company were conducted on a dollar basis and owing to fluctuations in the rate of exchange between the dates when advances in dollars were made by the appellants to the company against goods consigned and the dates when the appellants recouped themselves for the advances on the sales of the goods, a profit accrued to the appellants on the conversion of repaid advances into sterling. The decision was that the exchange profits arose directly in the course of the appellants' business with the company and formed part of the appellants' trading receipts for the purpose of computing their profits assessable to Income Tax under Case 1 of Schedule D. My brother Singleton, on page 69 of the report, cited the case of *McKinlay* v. *H. T. Jenkins and Sons, Ltd.,* 10 T.C. 372, to which I will refer in a moment, and then made this comment upon it: "I pause there to say that in my view the profit which arises in the present case is a profit arising directly from the business which had to be done, because, as is found in paragraph 6 of the Case, the business was conducted on a dollar basis and the Appellants had, therefore, to buy dollars in order to make the advances against the goods as prescribed by the agreements. The profit accrued in this case because they had to do that, thereafter as a trading concern in this country re-transferring or re-exchanging into sterling." That is accepted by both parties as correctly stating the law, and if I may say so in my view it was clearly a right decision on the facts of that case. The question is whether it can be said to have any bearing on the very different facts of the present case.

Counsel for the respondent stressed the fact that in the instant case the repayment to the London Bank was a repayment of a loan; he relies on the finding in the *Shell* case that the deposits there were held to be a loan to the company and thus receipts of a capital nature. In that case Jenkins L. J., after stating that the real issue was whether

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the taking of each deposit on the terms of the relative deposit agreement was a trading transaction or not, said at p. 155 that the question resolved itself into this:

> On the facts of this case, were these deposits trading receipts received by the Company in the course of its trade, and giving rise to corresponding trade liabilities in the form of the Company's obligation as to repayment, or should they be regarded simply as loans received by the Company and thus as receipts of a capital nature giving rise to a corresponding indebtedness on capital account and not forming part of the Company's trading receipts or liabilities at all?

And at page 157, his conclusions are stated in these words:

> After paying the best attention I can to the arguments for the Crown and those for the Respondent Company, I find nothing in the facts of this case to divest those deposits of the character which it seems to me they originally bore, that is to say the character of loans by the agents to the Company, given no doubt to provide the Company with a security, but nevertheless loans. As loans it seems to me they must *prima facie* be loans on capital not revenue account; which perhaps is only another way of saying that they must *prima facie* be considered as part of the Company's fixed and not of its circulating capital. As appears from what I have said above, the evidence does not show that there was anything in the Company's mode of dealing with the deposits when received to displace this *prima facie* conclusion.
>
> In my view, therefore, the conversion of the Company's balances of Chinese dollars into sterling and the subsequent re-purchase of Chinese dollars at a lower rate, which enable the Company to pay off its agents' deposits at a smaller cost in sterling than the amount it had realised by converting the deposits into sterling, was not a trading profit, but it was simply the equivalent of an appreciation in a capital asset not forming part of the assets employed as circulating capital in the trade. That being so it was a profit of the nature not properly taxable under Schedule D, and the Special Commissioners in my view came to a right conclusion, which was rightly affirmed by the learned Judge, and I would therefore dismiss the appeal.

In my opinion, the conclusion in that case can be of no assistance to the respondent here. There the finding was based on the fact that the deposits or loans were *prima facie* loans on capital and not on revenue account, which might be considered as part of the taxpayer's fixed and not of its circulating capital, and that there was nothing in the evidence to show that there was anything in the taxpayer's mode of dealing with the deposits when received to displace that *prima facie* conclusion; that the profit received was simply the equivalent of an appreciation of a capital asset *not forming part of the assets employed as circulating capital in the trade.* The facts in the instant case are quite different. Here the loan by the bank was

used to pay trade accounts and was, in my opinion, circulating capital used in the trade. The fixed capital of the respondent was at no time employed in the transaction and the profit when made did not affect the capital structure of the respondent in any way, but was an increase in its trading profit and available for distribution to its shareholders.

Counsel for the respondent also referred me to the case of *McKinlay* v. *H. T. Jenkins & Son, Ltd.* (1). The facts are stated in the headnote as follows:

Under an Agreement dated the 8th March, 1921, for the supply of a quantity of marble by a Torquay Company of marble and stone merchants to certain building contractors, the contractors agreed, on receipt of a guarantee for the fulfilment of the contract, to advance £20,000 of the price, percentage deductions being made from the amount due on each consignment of marble until the advance had been repaid. On the 17th March, 1921, the £20,000 was paid to the Company and was credited to an account at a London bank in the joint names of nominees of an insurance company, acting as guarantor, and of the Torquay Company, the nominee of the latter being its controlling shareholder.

In anticipation of the required marble being purchased in Italy—though not till the autumn of 1921—the Company at once arranged for the conversion of the greater part of the £20,000 into lire at 103 to the £, and a lira account in the same joint names was opened. In May, 1921, the lira had appreciated in value, and, as the money was not yet required by the Torquay Company, its nominee, on the 25th May, 1921, without the Company's knowledge or authority, but with the consent of the nominee of the insurance company, directed the sale of the balance of the lira joint account. At 72 to the £ the lire realised £22,870 (for which a further account in the joint names was opened), a profit on their original purchase price (103 to the £) of £6,707, which was received by the Torquay Company. The lire were subsequently repurchased for the purposes of the contract for £19,386, which was allowed as a deduction from the Company's profits for Income Tax purposes.

In computing the Company's profits for the purposes of assessment to Income Tax for the year 1922-23, the said sum of £6,707 arising from the exchange transaction was included as a profit but the Special Commissioners on appeal decided that it was not a profit assessable to Income Tax.

Held, that the said sum of £6,707 was not a profit arising out of the contract for the supply of marble, but was merely an appreciation of a temporary investment, and was not assessable to Income Tax as part of the profits of the Company's trade.

In agreeing with the findings of the Commissioners, Rowlatt J. said at page 405:

It seems to me that this profit out of the change from currency to currency three times does not touch the question of what the profit on the contract was at all. The profit on the contract is the difference between

(1) (1926) 10 T.C. 372.

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the sum they received and what it cost them to supply the marble, and this intermediate use that was made of the sum which they happened to have because they had got this contract has nothing to do with the profits of the contract, I think, at all. It was an accident that this sum can be identified, as I have already explained, as coming from the contract, but it has nothing to do with the profit of the contract. If that is so, what is it? It seems to me it is the mere appreciation of an investment into which they had put their money temporarily; an appreciation of something, if you like to look at it one way, that they had bought forward, because they would want it later, namely, the lire; a temporary appreciation of which they took advantage. If you look at it the other way, it was a profit which they had made by buying forward, instead of waiting until they had to provide the money. I do not think it has anything to do with the profit of the contract itself. It was, as I say, a mere appreciation of something which they had got in hand, and I think the Commissioners were bound to hold (because I see no evidence at all to the contrary) that it was not merged in a business of the Company.

That case, I think, is readily distinguishable from the instant case. It is of particular importance to note that the profit there in question arose out of the purchase and sale of foreign exchange which in the opinion of Rowlatt J. was quite unconnected with the actual purchase of marble which the taxpayer was required to buy in fulfillment of its contract and which it did buy at a later date. He found the transaction was a mere appreciation of an investment into which the taxpayer had put its money temporarily and that the asset "was not merged in the business of the company". In the present case, if the arrangements by which the respondent could overdraw its account can be considered as the acquisition of sterling funds, such funds were at once used in the respondent's trading operations to pay its trading liabilities and were therefore merged in its business.

One other case was referred to by counsel for the respondent. It is *Income Tax Case No. 308* (1), a decision of the Special Courts for Hearing Income Tax Appeals in South Africa. The facts are stated in the headnote as follows:

Appellant company, which carried on business in the Union, where it had its headquarters and its accounts were framed, had for many years financed its operations by an overdraft with a bank in London.

On the 21st September, 1931, when the United Kingdom left the gold standard, the company owed various sums of money in England, partly in respect of the overdraft at its bank and partly on bills given for goods supplied for the business of the company.

(1) 8 S.A. Tax Cases 99.

Taking advantage of the favourable rate of exchange resulting from the maintenance of the gold standard by the Union, the company discharged its liabilities under the overdraft and the trade bills for an amount in South African pounds substantially less than the nominal amount of these debts expressed in sterling.

The difference between those items of indebtedness as expressed in pounds sterling and the amount in South African pounds required to discharge them was shown by the company in its profit and loss account as credit, "By Bank Exchange."

In assessing the company for Income Tax purposes, the Commissioner for Inland Revenue included in its taxable income this credit derived from exchange. To this the company took objection, on the grounds that the gain made by exchange in discharging these liabilities was a gain of a capital nature.

On appeal:

Held, that inasmuch as the debt due to the bank on overdraft was of the nature of a loan and therefore a capital liability, any gain made by exchange in discharging that liability was also of a capital nature, but on the other hand the gain made in the discharge of bills given in the course of trading for goods was to be connected with the trade carried on by the company and was properly included in the taxable income.

The facts in that case, in so far as they relate to the bank overdraft, closely parallel the instant case. That decision is, of course, not binding on me and with respect I must decline to follow it as I have found it impossible to reconcile it with the decision in the *Shell* case (*supra*). It may be noted, also, that the profit made in the *South African* case was a purely fortuitous one whereas in the instant case the profit was made as the result of a deliberate scheme for profit-making in the course of the respondent's trade.

In addition to the cases I have mentioned, reference may also be made to *Imperial Tobacco Co. Ltd.* v. *Kelly* (1) and to *Willard Halburn Inc.* v. *Commissioner of Internal Revenue* (2).

My conclusion, therefore, is that the profit made in the instant case was one made in the ordinary course of the respondent's business operations and while engaged therein on a scheme for profit-making. For the reasons which I have stated, the appeal will be allowed, the decision of the Income Tax Appeal Board set aside, and the assessment made upon the respondent affirmed. The appellant is entitled to his costs after taxation.

Judgment accordingly.

(1) [1943] 2 A.E.R. 119. (2) (1954) 214 F. 2d 815.

1955
Mar. 16
Apr. 29

BETWEEN:

FREDERICK R. MEREDITH *et al.* .....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Claim for damages as a result of a fall on a floor in a building owned and operated by the Crown—Negligence—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 4(2)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(c)—Liability of the Crown only vicarious—Onus of proof on suppliants.

On leaving the shower-room suppliant, Mrs. Meredith, slipped and fell on the floor of the ladies' dressing room at the Miette Hot Springs Bath House, Jasper National Park, the property of respondent and operated at the time by its servants. Suppliants sought to recover damages for personal injuries and losses alleging that the fall was caused by the dangerous condition of the floor because of the negligence of respondent's servants in omitting to remove the water on it or to place matting on its concrete surface or to give proper warning of its dangerous condition.

Held: That in a claim against the Crown under the Crown Liability Act, S. of C. 1952-53, c. 30, for damages resulting from the negligence of its servant while in the performance of his duties it must be established conclusively that the servant himself could be held liable for the damages sustained and claimed. S. 4(2) of the Act affirms the principle that the Crown's liability is a vicarious and not a direct liability. *The King* v. *Anthony* [1948] S.C.R. 569; *Magda* v. *The Queen* [1953] Ex. C.R. 22 referred to.

2. That the Crown's liability under that Act is a statutory one and the suppliants in order to succeed against respondent must bring their claim within the ambit of the terms of the Act. The onus of proof in respect of that matter rests upon suppliants and no presumption or assumption can displace this statutory obligation. If suppliants do not discharge this obligation their claim fails. This rule applies under s. 3(1)(*a*) of the Act as it applied to claims made under s. 18(*c*) of the Exchequer Court Act, R.S.C. 1952, c. 98.

3. That suppliants failed to establish any negligence on the part of some servant of respondent in the performance of his duties on the day of the accident.

4. That suppliant, Mrs. Meredith, suffered injury through her own fault and carelessness.

PETITION OF RIGHT under the Crown Liability Act.

The action was tried before the Honourable Mr. Justice Fournier at Edmonton.

A. F. Moir for suppliants.

A. W. Miller, Q.C. and *D. S. Maxwell* for respondent.

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

FOURNIER J. now (April 29, 1955) delivered the following judgment:

In this petition of right the suppliants, husband and wife, seek to recover from the Crown damages for personal injuries and losses sustained by them as the result of a fall by the suppliant Lorna M. Meredith, hereinafter referred to as Mrs. Meredith, on the floor of the ladies' dressing room at the Miette Hot Springs Bath House at Jasper National Park in the Province of Alberta, the property of the respondent and operated by its servants at the time.

The suppliants and members of their family went with Mrs. Helen Morris on Sunday, June 21, 1953, to Miette Hot Springs for a swim. They arrived around noon. The women of the party and the children proceeded to the ladies' dressing room to divest themselves of their clothing and put on their swimming suits. The floor, which was made of cement, had been freshly painted before the opening of the season on or about May 24, 1953. There was water on the floor. They went to the cubicles to undress and after putting on their swimming suits they placed their clothes in the lockers. Then Mrs. Meredith, holding two of her grandchildren by the hand, crossed part of the dressing room and went out to the pool. While in the dressing room, the children slid or slipped and were held up by the protecting hands of their grandmother. They remained in the pool until nearly four o'clock.

Mrs. Morris was the first to leave the pool to go to the dressing room; she was followed by Mrs. Meredith with the eldest of the children. Then Mrs. Breton, mother of the children, came in with the two youngest. There was more water on the floor than when they had arrived. Mrs. Morris proceeded to her cubicle and locker room without difficulty. Mrs. Breton and her two children went to their locker room and cubicle without incident. Mrs. Meredith and the eldest child went in the shower room. When they came out Mrs. Meredith led the child to her mother's cubicle and proceeded to her own cubicle. She states that at that time there was $\frac{1}{4}$ of an inch of water on the floor. Before reaching her cubicle, she slipped and fell, then tried to get up

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but felt a pain in her left arm or wrist and called for help. She was helped to the first-aid room, then to the steam room where an attendant, a medical student, gave her first aid. Her left arm was in an awkward position and swollen. It was found that her left wrist was fractured.

She was then driven to Jasper, where a doctor gave her an anaesthetic and set the fracture. She wore splints for one week, then a plaster cast was applied from below the elbow down over part of the hand. This cast was removed after eight weeks and for a short period thereafter the arm was supported by a sling.

The suppliants contend that the fall was due to the dangerous condition of the floor resulting from the negligence of the respondent's servants who neglected or omitted to remove or mop up the water on the floor or to place matting on the concrete flooring or to give proper warning of the dangerous condition there existing. The respondent denies responsibility and alleges that the injuries and damages complained of were the result solely of the suppliant Mrs. Meredith's own negligence and carelessness.

If the accident had happened prior to May 14, 1953, the basis of the suppliants' claim would have been section 18 (1) (*c*) of the Exchequer Court Act, R.S.C. 1952, chapter 98, formerly section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34, which reads as follows:

18. (1) The Exchequer Court also has 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;

The injuries and damages having occurred on June 21, 1953, the claim has to be considered under the Crown Liability Act, Statutes of Canada, 1952-53, chapter 30, section 3(1) (*a*), which is thus worded:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

Counsel for the suppliants admitted at the hearing that the claim for the damages sustained was based on the negligence of the respondent's servants, though he would also

have invoked paragraph (*b*) of subsection (1) of section 3 of the Act, if it had been in force. This paragraph is in the following words:

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

The Crown's liability under the Crown Liability Act is a statutory one and the suppliants to succeed against the respondent must bring their claim within the ambit of the terms of the statute and specially within the provision of section 4 (2) of the Act:

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

It would seem that when a claim is made against the Crown for damages resulting from the negligence of its servant in the performance of his duties it must be shown conclusively that the servant himself could be held liable for the damages sustained and claimed. In the present instance it should be established without doubt that the servant was negligent in the performance of his duties; that the injuries to Mrs. Meredith resulted from his negligence; that his negligence was such that he could be held personally responsible for the damages claimed had he been sued for same.

The onus of proof of these facts rests upon the suppliants and no presumption or assumption can displace this statutory obligation. Suppositions, speculations, conjectures are not sufficient to discharge the duty which lies with the suppliants to establish the above matters; and, if they do not discharge this obligation, their claim fails. In my opinion this rule applies to claims under section 3(1) (*a*) of the Crown Liability Act as it applied to claims made under section 18(*c*) of the Exchequer Court Act.

Furthermore, section 4 (2) of the Act puts into statute form a principle which has received its application in a number of outstanding cases. It affirms that the Crown's liability is a vicarious and not a direct liability. To become responsible, it must be shown that one or several of its

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servants could have been held liable if the claim had been directed against them. In *The King* v. *Anthony* (1) it was held (*inter alia*):

> Paragraph (*c*) of section 19 of the Exchequer Court Act creates a liability against the Crown through negligence under the rule of *respondeat superior*, and it does not impose duties on the Crown in favour of subjects. The liability is vicarious, based as it is 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. . . .

In a more recent decision, the President of this Court dealt with the same question: *vide Magda* v. *The Queen* (2). He said (pp. 31 *et seq.*):

> . . . To engage the responsibility of the Crown to a suppliant under section 19(*c*) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(*c*) if the term liability is a precise one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him, that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant resulted therefrom: *vide Lochgelly Iron and Coal Co.* v. *McMullan*, [1934] A.C. 1; *Hay or Bourhill* v. *Young*, [1943] A.C. 92; *The King* v. *Anthony*, [1946] S.C.R. 569.

Now, in this case it is shown by the evidence that the cement floor of the ladies' dressing-room had been painted a month or two before the accident. When Mrs. Meredith first went to the dressing-room there was water on the floor and more water on the floor when she returned from the pool. There was no matting on the floor though such matting was on the premises. From these facts, the suppliants contend that the condition of the floor in the ladies' dressing-room was dangerous and that due warning of this danger should have been given to the guests. By not wiping or mopping the water on the floor, or putting a matting on the said floor or not warning the guests of the dangerous condition of the floor, it is submitted that some servant of the Crown was negligent in the performance of his duties.

(1) [1946] S.C.R. 569, 570. (2) [1953] Ex. C.R. 22.

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I will first consider the facts and circumstances to see if in reality the floor was in a dangerous condition. One must keep in mind that the ladies' dressing-room was adjacent to the open deck of the swimming pool and contained a shower-room, lockers and dressing cubicles. After bathing, the guests entered the shower-room and then proceeded to the lockers and dressing cubicles. Along the way, water dripped from the bodies and swimming suits. Consequently there was bound to be water on the floor. As to the floor itself, it had a smooth, painted cement surface. The paint was put on for sanitary purposes and for cleanliness. It seems to me that a floor made of smooth concrete does not become dangerous because it is covered with paint; it becomes a little smoother because the paint fills in certain cavities, but to conclude that it becomes a dangerous floor is far-fetched. As to the water, it is agreed that there is always some water on the floor of dressing-rooms close to swimming pools and especially if there is a shower-room therein. This water may make the floor more slippery, but the quantity or depth of the water would have little effect on the condition of the floor. True, matting on the floor may be less slippery, but would be, in my opinion, far from being sanitary, even with the best of care. As to a warning of danger I cannot bring myself to believe that it was necessary, because I cannot think that it would have been noticed or would have made any difference in the way the guests would have walked, ran or acted while in the dressing-room. The flooring described by the witness, in my view, compares with the flooring of most dressing-rooms servicing swimming pools and seems to be the standard type of floor in such establishments.

With regard to the contention that some servant of the respondent was negligent in the performance of his duties on the day of the accident, it is necessary to consider what those duties were.

Mrs. Agnes Truxler was in charges of the ladies' dressing-room on that day. Her duties were to attend people in the steam-rooms, on the deck, issuing towels, etc., and to maintain the ladies' dressing-room in a satisfactory manner and to preserve cleanliness. The floor was to be mopped as became necessary, the object being to keep it as dry and clean as possible.

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At the hearing, when counsel for the suppliants was asked to name the respondent's servants who could be held liable for the damages involved in the present instance, he mentioned Mrs. Truxler and the superintendent of the Park. His argument was that Mrs. Truxler, in charge of the dressing-room, should have mopped the floor so that the water should not have accumulated and that by neglecting to do so she had failed to fulfil her duty to care for the guests who used the dressing-room. The answer to that allegation was that the floor was in its ordinary condition when the place was being used by a large number of persons. A quarter of an inch of water on the floor presented no more danger than if the floor had only been damp. The condition of the floor was well known to Mrs. Meredith, who had been visiting the place regularly in season for the last fifteen years, and offered no danger to her or to other guests. There had never been an accident at this place before. Mrs. Meredith, though she saw the condition of the floor, did not complain to the authorities but took upon herself to use the facilities. Personally, I think she did not believe that the floor was dangerous. If she had thought it dangerous, she would not have used the dressing-room or would have put on shoes or sandals with rubber soles or would have seen to it that the floor had been wiped or mopped. Furthermore, if it was that dangerous, I believe she would have been more careful. I cannot forget the two witnesses who testified that she had said that it was her own fault—or words to that effect. She denied that fact, but the credibility of those witnesses was not challenged and I feel bound to give some weight to their evidence.

As to the superintendent of the Park, he was taken to task for not having seen that the matting was put on the floor. He had given instructions to an employee to do so, but it was not done. I fail to see that he had a duty to care for the respondent in the present instance, which would have included putting a matting on a standard normal floor of a dressing-room. Though I am not clear on this point, I believe that there never had been matting on the floor prior to the accident. The matting had been purchased and was to be put on the floor as an experiment or on trial. He had a duty to the respondent to see that covering

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was put on the floor, but his omission or neglect, in my opinion, did not constitute a breach of private duty toward the suppliants.

I find, therefore, that the floor of the ladies' dressing-room at Miette Hot Spring Bath House on June 21, 1953, when and where the suppliant was injured was not in a dangerous condition, but seemed to meet the standard specifications of similar rooms in such establishments, though there was water on the floor. Mrs. Meredith repeatedly said that the floor covered with water was a danger. If right, she should have avoided using the same or should have been more careful when doing so. Furthermore, the evidence has convinced me that at the time of the accident nobody thought it dangerous to be walking on the floor of the dressing-room.

I also find that the suppliants failed to establish that some servant of the respondent had been negligent while acting within the scope of his duties in taking care of the dressing-room where Mrs. Meredith was injured.

I am of opinion that the suppliant Mrs. Meredith suffered injury through her own fault and carelessness. I repeat, if she knew there was danger, she should have avoided it or have proceeded more carefully on the floor of the dressing-room. It is evident that the suppliants have failed to establish facts which would have been good grounds for their claims.

Therefore, the judgment of the Court is that the suppliants are not entitled to any of the relief sought by them in their petition of right and that the respondent is entitled to costs.

Judgment accordingly.

1955
Jan. 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

WILLIAM ROBERTSON .....PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE PRINCE* AND OLAF NELSON ..... } DEFENDANT.

Shipping—Practice—Disclosure of document held by a person not a party to action unnecessary as preliminary step to production.

Held: That disclosure in plaintiff's affidavit of documents is not necessary as a preliminary step to a subsequent application for its production when that document is in the possession of another person.

APPLICATION for production of a document.

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

J. I. Bird for the application.

C. C. I. Meritt contra.

SMITH D.J.A. now (January 22, 1955) delivered the following judgment:

The plaintiff claims damages resulting from a collision between his vessel and a barge in tow of the *Maple Prince*. He failed to disclose in his affidavit of documents a report prepared by J. H. Todd and Sons Ltd., for the underwriters, who became subrogated to part of the plaintiff's claim. The report was prepared by J. H. Todd and Sons Ltd., in their office, signed by the plaintiff and left there. He never had in his possession either the original or any copy.

In these circumstances the defendant submits that the report should have been disclosed in the plaintiff's affidavit of documents as a preliminary step to a subsequent application for its production. I do not think this is sound. It seems to me that in a case of this kind the underwriters are not to be regarded as the *alter ego* of the assured and that moreover the report was never in the possession or power of the plaintiff. This proposition is made good by such cases as *Fraser and Co.* v. *Burrows* (1) *Kearsley* v. *Philips et al* (2); *James Nelson and Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.* (3), *Vulcan Iron Works* v. *Winnipeg Lodge No. 122* (4).

(1) (1877) 2 Q.B. 624.
(2) (1882) 10 Q.B. 36.
(3) [1906] 2 K.B. 217.
(4) (1908) 18 Man. Rep. 137.

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It should be noted that the *Nelson* case is very similar to this in that the application was to have included in the plaintiff's affidavit of documents a particular report which came into existence in somewhat comparable circumstances. The point is well expressed by Counsel for the plaintiff *arguendo* at page 219:

> The persons in whose possession (the report) is, hold it not as solicitors for the plaintiffs but in their capacity of solicitors to the underwriters. The fact that the action is now being conducted by the solicitors of the underwriters does not make their possession of the document the possession of the plaintiffs on the record.

It follows that in my opinion the application must be dismissed with costs.

Order accordingly.

1954

Nov. 9

1955

May 5

BETWEEN:

INTERIOR BREWERIES LIMITED .....APPELLANT;

AND

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

Revenue—The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, s. 3, s. 11(1)(c) and s. 12(1)(c)—Interest paid on borrowed money to be deductible from income must be paid on money used to earn the income from the business or property—Not sufficient that such borrowed money be used to open up other lines of credit—Appeal dismissed.

Appellant borrowed money from subsidiary companies controlled by it and used such money for the purpose of paying off certain bank loans. Appellant contends that interest paid on the borrowed money was deductible from income as being money used for the purpose of earning the income from the business and not for the purpose of gaining income from property.

Held: That the appeal must be dismissed as the borrowed monies were not used for the purpose of earning income from the business or property.

2. That it is not sufficient that by the use of the borrowed monies in some way other than for the purpose of earning income in the business, other lines of credit are opened up or other monies are received which might be used for the purpose of earning income in the business.

3. That the provisions of s. 11(1)(c) of the Income Tax Act are not to be construed by themselves but must be read in connection with the provisions of s. 12(1)(c) of the Act and on the facts the whole of the outlays here in question may reasonably be regarded as having been incurred in connection with property the income of which would be exempt and they are therefore not deductible.

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INTERIOR BREWERIES LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL under the Income Tax Act.

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

Hon. J. W. De B. Farris, Q.C. and *C. H. Wills* for appellant.

A. H. J. Swencisky and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (May 5, 1955) delivered the following judgment:

In its income tax return for the fiscal year ending March 31, 1951, the appellant deducted certain items of interest said to have been paid or payable on bonds, debentures and notes in that year. In assessing the appellant, the respondent disallowed these deductions in full and added them to its taxable income. From that assessment the appellant now appeals to this Court.

The main facts are not in dispute. The appellant was incorporated under the British Columbia Companies Act (originally under the name of Interior Holdings Limited) on February 10, 1950. It was then a private company but on May 29, 1950, it became a public corporation. On June 8, 1950, it purchased all the outstanding shares of Kootenay Breweries Limited and thereby obtained control of Kettle Valley Investment Company which was a wholly owned subsidiary of Kootenay Breweries. On the same date it purchased 97·2 per cent. of the outstanding shares of Fernie Brewing Company, Ltd. (the remaining shares were acquired in August, 1950) and thereby obtained control of its two subsidiaries, Cranbrook Brewing Company, Ltd. and Brewery Investments Ltd. The consideration for the shares in Kootenay Breweries and Fernie Brewing thus acquired was the issue of certain Class "A" and Class "B" shares of the appellant company and $1,634,730. in cash. The funds for the cash payment were obtained to the extent of $1,500,000 from the Canadian Bank of Commerce in a form of a demand loan (Exhibit 9 dated June 8, 1950) and the balance from within the resources of the appellant company. As collateral security for the bank loan, all the shares

in Fernie Brewing and Kootenay Breweries were hypothecated to the bank. Subsequent to the acquisition of these shares on June 8, 1950, the appellant alleges that it effected certain borrowings in the form and on the dates as follows:

(*a*) $40,000 from the Cranbrook Brewing Company Limited by means of a demand note bearing interest at 5% per annum, dated June 9, 1950;

(*b*) $150,000 borrowed from Brewery Investments Limited by means of a demand note bearing interest at 5% per annum, dated June 13, 1950;

(*c*) On June 15, 1950, Interior Breweries Limited issued 4½% First Mortgage and Collateral Trust Bonds of a principal amount of $400,000 and 5½% Convertible Debentures of a principal amount of $400,000; said bonds and debentures were sold to Lauder, Mercer and Company, Vancouver, B.C. pursuant to an underwriting agreement, and the Company received as consideration therefor, the sum of $760,000 on the same day;

(*d*) $35,000 from the Cranbrook Brewing Company Limited by means of a demand note bearing interest at 5% per annum, dated August 25, 1950.

In its tax return the appellant included in its expenses for the fiscal year the sum of $31,616.84, representing interest paid or accrued on its said outstanding bonds and debentures, the sum of $6,184.93 being interest paid or accrued on the note due Brewery Investments Limited, and the sum of $2,661.65 being the amount of interest paid or accrued upon the notes due the Cranbrook Brewing Company, Ltd.

It is these interest payments totalling $40,463.42 which are now in dispute. I should note at once that after a careful reading of the record, I can find no evidence whatever relating to Item (*d*) above—namely—the note for $35,000 to Cranbrook Brewing Company dated August 25, 1950. In the Minister's reply to the Notice of Appeal it was not admitted that the appellant had effected any borrowings whatever. In the absence of any evidence that the sum of $35,000 was actually borrowed, or, if borrowed, the use to which it was put, the appeal as to interest on that note must be dismissed. It will be understood, therefore, that what is said hereafter has no reference to that particular item.

Certain other facts which have been fully established by the evidence may now be stated. Mr. Lauder, who gave evidence for the appellant and who was responsible for the formation of the company and the carrying out of its plans (but who is not now connected in any way with it), stated that it was formed for the sole purpose of buying the shares

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in the two brewing companies. The entire plan as it was eventually carried out, was conceived and provided for before any offer to purchase was made to the shareholders of the brewing companies. It was fully realized that the company's own assets were insufficient to pay for the shares and that until actual title to them was secured, it would not be feasible to sell its stock, bonds and debentures, or arrange for the loans from the subsidiaries of the two brewing companies to be acquired; and that as a very substantial amount of cash was required in part payment of the shares to be purchased, it would be necessary to secure a temporary loan from its banker. It was at all times contemplated that the bank loan would be paid off as soon as the bonds, debentures and stock were sold, and the dividends and loans made by the subsidiaries. The agreement with Mercer, Lauder & Company to purchase the bonds, debentures and stock of the appellant was actually entered into on May 31, 1950. The bank loan was made on June 8 and used on that day solely for the purpose of paying for the shares in the brewing companies. Within one week of that date the bank loan had been repaid in full and it is proven that the monies derived by the appellant from the sale of the bonds and debentures and from the loans from the Crankbrook Brewing Company and from Brewery Investments, Ltd. for $40,000 and $150,000 respectively (along with certain other funds), were used entirely to retire the bank loan.

The first section of the Income Tax Act which must be considered is section 11(1) (*c*), which was then as follows:

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

(*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property (other than property the income from which would be exempt), or

(ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt),

or a reasonable amount in respect thereof, whichever is the lesser.

It is not disputed that the several items claimed as deductions were paid or payable under a legal obligation to pay interest, and that the amounts in respect thereof were reasonable.

While the onus is on the appellant to establish the existence of facts or law showing an error in relation to the assessment imposed upon him (*Johnston* v. *Minister of National Revenue* (1)), it will be convenient to state briefly the grounds on which the deductions were disallowed by the Minister. It was considered that in substance, if not in form, the borrowings (the interest on which is here in question) were made to acquire shares in the brewing companies for the purpose of gaining income therefrom and that as such income would be exempt under section 27 of the Act (as being dividends paid by a taxable Canadian corporation to another), the deductions now claimed were barred under the provisions of subsection (1)(*c*)(ii) of section 11 (*supra*) and of section 12(1)(*c*).

For the appellant it is submitted that it is entitled to the deductions under subsection (1)(*c*)(i) of section 11 as being "interest on borrowed money used for the purpose of earning income from a business". While admitting that all of the proceeds of the borrowings were paid to the bank, it is said that the entire scheme of financing which was carried out (inclusive of the borrowings) enabled the company not only to acquire the shares, but also to carry out certain management contracts which resulted in producing earned income. These management contracts (Exhibits 10, 11 and 12, and all dated June 8, 1950) are with Fernie Brewing Company, Kootenay Breweries Limited, and Cranbrook Brewing Company, Ltd., and are said to be in similar terms. Thereby the appellant company undertook to supply management to the other contracting parties "on such terms as may from time to time be arranged", and to assist in furnishing materials and supplies. Provision was also made for mutual assistance and co-operation in financial matters affecting one or other of the parties and for the supply, or assistance in supplying, of working capital to the subsidiary companies by the appellant. The evidence indicates that the management fees received by the appellant from its subsidiaries thereafter were based on a charge of fifty cents

(1) [1948] S.C.R. 486.

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per barrel of beer manufactured and that very considerable amounts were received thereunder; such income, of course, would be taxable in the hands of the appellant. Mr. Lauder stated that with the very large bank loan outstanding, the appellant's credit was strained to the limit and that it was unable to carry out its contractual obligations under the management contracts to provide the subsidiary companies with working capital. In order to re-establish its credit, therefore, it was necessary to pay off the bank loan, extend its debts by means of long-term bonds and debentures, and thereby provide it with working capital and thus enable it to carry out the management contracts. The fact is that on the completion of the financing program, the appellant had only about $15,000 working capital and was itself indebted to several of its subsidiaries; taking all the companies into consideration, the consolidated working capital was about $480,000, mostly in inventories, receivables and the like.

In my view, this interesting submission cannot be supported. To be entitled to the deductions of interest under subsection (1)(*c*)(i) of section 11, a taxpayer must first establish that the borrowed money on which interest is payable is used for the purpose of earning income from a business or property. Counsel for the appellant submits that it was used for the purpose of gaining income from the *business* and insists that it was not for the purpose of gaining income from property.

In view of the facts which I have stated, I consider it impossible to find that in any real sense the borrowed monies were used for the purpose of earning income from a business. They were used entirely to pay off the bank loan as soon as they were received and were used in no other way. It is not possible to earn income merely by paying off an existing liability and no one could have had such a purpose in mind. The requirements of the subsection are fulfilled only if the borrowed monies themselves are used for the purpose of earning income from the business (or property), and it is not sufficient to say that by the use of the borrowed monies in some way other than for the purpose of earning income in the business, other lines of credit are opened up or other monies are received which might be used for the purpose of earning income in the business. My

conclusion on this point is that the borrowed monies were not used for the purpose of earning income from a business and the appellant therefore fails on that point.

A further point taken by counsel for the appellant is that subsection (ii) of section 11(1)(*c*) does not apply to the facts of this case and that the Minister was not empowered to disallow the deductions by virtue of that paragraph. He says that the interest deductions now claimed were not interest on amounts payable for property—that is, for the shares in the brewing companies. He points out that the shares were acquired and fully paid for by the proceeds of the bank loan *before* the borrowings now in question were made and that the share purchases were then at an end. In its tax return, the appellant had claimed the right to deduct interest paid to the bank on the temporary loan, but that item was disallowed and it is now admitted that as the proceeds of the bank loan were used to acquire shares, the income from which would be exempt, the disallowance was properly made. Reliance is placed on a decision of the Income Tax Appeal Board reported as *No. 108* v. *Minister of National Revenue* (1). In some respects that case is similar to the present one, but in others the facts are quite different. There the Board stated that it was questionable whether it could be said that even the call loan was used to obtain property the income from which would be exempt. In the instant case Mr. Lauder stated that the loan from the bank was negotiated for the sole purpose of acquiring title to the shares of the brewing company. In that case, also, the Board's decision states that the debentures were issued in the year following the bank loan which was used to pay for the shares, and there is nothing in the decision to indicate that at the time the shares were purchased there was any intention of issuing debentures to retire the bank loan. The Board was able to find, therefore, that the transactions were quite separate. It also came to the conclusion that notwithstanding the provisions of section 12(1)(*c*), on which the Minister now relies, section 11(1)(*c*) gave a taxpayer a positive right to the deductions stated therein, subject only to the exceptions contained in the words "other

(1) 8 T.A.B.C. 358.

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than property the income from which would be exempt". Section 12(1)(c) is as follows:

12. (1) In computing income, no deduction shall be made in respect of

(c) an outlay or expense to the extent that it may reasonably be regarded as having been made or incurred for the purpose of gaining or producing exempt income or in connection with property the income from which would be exempt,

It will be noted that this subsection is not referred to in the opening words of section 11(1):

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

It seems to me, therefore, that the statutory provisions of section 11(1)(c) are not to be construed by themselves but must be read in connection with the provisions of section 12(1)(c) thereof, which relates to deductions affecting exempt income as does section 11(1)(c). On the facts of this case I think I must find that the whole of the outlays here in question may reasonably be regarded as having been incurred *in connection* with property the income from which would be exempt, and that they are therefore barred from deduction. On page 49 of the record the following appears:

Q. And was it the primary purpose of this parent company, the appellant company, to acquire the shares of subsidiary companies?

A. Yes. Certainly that is what it was formed for.

While the borrowings in question were actually made within a few days after the shares were acquired and paid for, the entire scheme of operations was planned as a whole before the shares were purchased. There is therefore a direct and distinct connection between these borrowings and the property (the brewing company shares) which it was the sole purpose of the appellant to acquire.

If, however, I am wrong in this conclusion, I think the appeal would still fail. By section 3 of the Act, the income of a taxpayer for a taxation year is his income for the year from all sources. So far as I am aware, the only section which permits the deduction therefrom of interest on borrowed money or on amounts payable for property acquired, is section 11(1)(c). Counsel for the appellant relied entirely on Clause (i) thereof and as I have found that it is not

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applicable to the facts of this case and as there is no other section which permits these deductions from income, the assessment must stand.

Accordingly the appeal will be dismissed and the assessment affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

1954

Sept. 28

1955

May 6

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

LABORATOIRES MAROIS LIMITEE ....DEFENDANT.

Revenue—Excise—Sales tax—Old Age Security tax—Sale price—Manufacturer of pharmaceutical products not selling to wholesalers but transferring his products to his branches—Method of computing the tax—The Excise Tax Act, R.S.C. 1927, c. 179, as amended, ss. 85(b)(i)(ii)(iii), 86(1)(a), 99(1)(2)(3)—The Old Age Security Act, S. of C. 1951 (2nd sess.), c. 18, s. 10—Definition of "sale price" in s. 86(1)(a) of the Excise Tax Act—Regulation No. 782-C—Purpose of Regulation No. 782-C(b)—Regulation No. 782-C(b) intra vires powers of the Minister.

Defendant company is a Canadian licensed manufacturer of drugs, pharmaceutical preparations and other similar products. It does not sell to wholesalers but operates unlicensed wholesale branches to which it transfers its products at the regular selling prices allowed to ordinary retailers who do not obtain any preferred prices or special discount, less a discount of 20%, and applies the sales tax on the remainder. Thus on a sale of $100 defendant, after deducting the 20% discount, computes the tax at 8% on $80, $6.40, and invoices the goods as follows: "sale price tax included, $106.40". In so proceeding defendant relies on Regulation No. 782-C made by the Minister of National Revenue under the Excise Tax Act, R.S.C. 1927, c. 179, as amended, s. 99 (now R.S.C. 1952, c. 100, s. 38), which reads in part as follows:

No. 782-C (*a*) .....

(*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE:—Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

(*c*) .....

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Plaintiff brings action for a balance owing on sales taxes together with certain penalties claiming that the inclusion of the sales tax in the prices quoted by defendant company constitutes an "allowance" within the *Note* in Regulation No. 782-C(*b*) and that its computation of the sales tax is not in accordance with the provisions of the Regulation. Defendant denies liability.

Held: That the definition of "sale price" in s. 85(*b*)(i)(ii) and (iii) of the Excise Tax Act, cannot be construed as to include in the sale price the tax itself, for the purpose of computing the sales tax. The statute being silent on this matter, neither the Minister nor the departmental officers, by way of regulations, directives or otherwise, are authorized to impose, levy or collect, directly or indirectly, a sales tax computed on a sale price sales tax included.

2. That the purpose of Regulation No. 782-C(*b*) is to place a manufacturer not selling to wholesalers on the same footing as the manufacturer who does. In the latter case, the sale price is fixed in the light of the requirements of s. 85(*b*)(i), (ii) and (iii) of the Act and the sales tax then is computed on that price. In the former case, as the price is not yet fixed the Minister by means of a regulation does fix it by following the same requirements, and the computation of the tax is made on this price. Here the price is declared to be the regular selling price to ordinary retailers who do not obtain any preferred prices or special discount, less 20%, the sales tax to apply on the remainder.

3. That since it has complied with all the requirements of Regulation No. 782-C(*b*) defendant company is entitled to take advantage of its provisions and to compute the sales tax, as it did, on the sale price less the 20% discount. Whether the invoices are made out "sale price plus sales tax" or "sale price sales tax included", defendant company is not bound to deduct the 20% discount from the regular retailing price plus the sales tax because then there would be a sales tax on the sales tax itself.

4. That Regulation No. 782-C(*b*) is *intra vires* the power of the Minister under s. 99 of the *Excise Tax Act*. Its purpose is not to change the tax rate, or the definition of "sale price" in s. 85 but to construe the latter words for the benefit of a certain class of taxpayers so as to assist them in determining the sale price of their products.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover sales tax and penalties under the Excise Tax Act, R.S.C. 1927, c. 179, as amended.

C. A. Geoffrion for plaintiff.

B. Marchessault for defendant.

The action was tried before the Honourable Mr. Justice Fournier at Montreal.

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

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FOURNIER J. now (May 6, 1955) delivered the following judgment:

Dans cette cause, le sous-procureur général du Canada par voie d'information réclame de la défenderesse la somme de $4,982.63, solde dû pour taxes de ventes effectuées du 1er juin 1949 au 31 janvier 1952 inclusivement et certaines pénalités, le tout en vertu des dispositions de la Loi sur la taxe d'accise, S.R.C. 1927, chap. 179, et ses amendements, aujourd'hui chap. 100 des Statuts Refondus du Canada, 1952, et de l'article 10 de la Loi sur la sécurité de la vieillesse, Statuts du Canada, 1951, 2e session, chap. 18. Au 1er juin 1949, le taux de la taxe de vente était de 8% sur le prix de vente et cette taxe était imposée par l'article 86 de la Loi sur la taxe d'accise. A compter du 11 avril 1951, une taxe additionnelle de 2% fut ajoutée en vertu de la Loi sur la sécurité de la vieillesse, de sorte que depuis cette dernière date jusqu'au 31 janvier 1952 le taux de la taxe réclamée est de dix pour cent (10%).

Les dispositions de la Loi sur la taxe d'accise et de la Loi sur la sécurité de la vieillesse sur lesquelles la demanderesse base sa réclamation se lisent comme suit:

Article 86. 1. Il doit être imposé, prélevé et perçu une taxe de consommation ou de vente de huit pour cent sur le prix de vente de toutes marchandises

(a) produites ou fabriquées au Canada,

(i) payable, dans tout cas autre que celui qui est mentionné au sous-alinéa (ii) du présent alinéa, par le producteur ou le fabricant à l'époque où les marchandises sont livrées ou à l'époque où la propriété des marchandises est transmise, selon celle des deux dates qui est antérieure à l'autre, . . .

L'article 10 de la Loi sur la sécurité de la vieillesse suit:

10. (1) Est établi, prélevé et perçu un impôt de sécurité de la vieillesse de deux pour cent sur le prix de vente de toutes marchandises à l'égard desquelles une taxe est payable d'après l'article 30 de la Loi sur la taxe d'accise, en même temps, par les mêmes personnes et sous réserve des mêmes conditions que la taxe payable en vertu du dit article.

(2) Le paragraphe (1) doit se lire et s'interpréter comme si l'impôt établi de la sorte l'était par l'article 30 de la Loi sur la taxe d'accise; et toutes les dispositions de la dite loi doivent se lire et s'interpréter comme si l'impôt établi par le paragraphe (1) s'ajoutait à la taxe établie par les dispositions du dit article 30.

L'article 30 précité est identique à l'article 86 de la Loi sur la taxe d'accise plus haut cité et qui était en vigueur lors de l'imposition et de la perception de la taxe réclamée au taux de huit pour cent (8%).

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Fournier J.

Dans sa défense et à l'audition, la défenderesse admet avoir été et être assujettie à la Loi sur la taxe d'accise et à la Loi sur la sécurité de la vieillesse et tenue de payer les taxes de vente imposées par les susdites lois. Elle admet également que si elle n'a pas payé les taxes suivant la loi et les règlements elle est tenue aux pénalités prévues à l'article 18, chap. 60 S.R.C. 1947, qui se lit comme suit:

18. Est abrogé l'article cent six de ladite loi et remplacé par le suivant:

"106. (1) Toute personne tenue, en raison ou en conformité des Parties V, XI XII ou XIII de la présente loi, de payer ou de percevoir des taxes doit produire chaque mois un rapport véridique de ses ventes taxables effectuées pendant le mois précédent; ce rapport doit contenir les renseignements et être en la forme que prescrivent les règlements.

(3) Le rapport requis par le présent article doit être produit et la taxe qui aurait dû être perçue ou qui est exigible doit être versée au plus tard le dernier jour du premier mois qui suit celui pendant lequel les ventes ont été faites ou au plus tard à la date postérieure que le Ministre spécifie par écrit.

(4) A défaut de paiement de la taxe ou de toute partie de celle-ci exigible en vertu des Parties V, XI XII ou XIII de la présente loi dans le délai prescrit par le paragraphe trois du présent article, il devra être versé, en sus du montant manquant, une amende égale aux deux tiers de un pour cent du montant manquant à l'égard de chaque mois ou fraction de mois pendant lequel le défaut de paiement se continue."

Toutefois, la défenderesse nie devoir la somme réclamée et prétend avoir payé tout ce qu'elle devait en vertu de la loi et des règlements.

Au soutien de sa prétention elle cite l'article 99 de la Loi sur la taxe d'accise qui autorise le Ministre des Finances ou le Ministre du Revenu national à établir des règlements.

99. 1. Le ministre des Finances ou le ministre du Revenu national, selon le cas, peut établir des règlements qu'il juge nécessaires ou utiles pour appliquer les dispositions de la présente loi.

2. Le ministre du Revenu national peut par ce moyen autoriser le commissaire de l'accise ou tout autre fonctionnaire qu'il juge à propos de désigner pour exercer certains des pouvoirs que la présente loi confère au ministre et que, de l'avis du ministre, le commissaire ou ce fonctionnaire peuvent convenablement exercer.

3. Ces règlements sont appliqués tout comme les autres dispositions de la présente loi.

C'est en vertu de cette disposition de la loi que le Ministre du Revenu national a établi le règlement 782-C, dont je cite le paragraphe (*b*) que la défenderesse invoque au soution de sa défense.

N° 782-C(*b*) Lorsque les fabricants ne vendent pas aux grossistes indépendants, ou lorsque les ventes ne sont pas faites aux grossistes en

quantités suffisantes pour constituer des ventes types, les fabricants portant licence peuvent transférer leurs produits à leurs succursales de gros non munies de licence aux prix de ventes réguliers consentis aux détaillants ordinaires qui n'obtiennent aucun prix de faveur ou rabais spécial quelconque, moins 20 pour cent. La taxe de vente au taux courant s'applique au reste.

La défenderesse procède donc à son calcul sur cette base.

La demanderesse, au contraire, est d'avis que la défenderesse ne s'est pas conformée aux dispositions du paragraphe (*b*) du règlement N° 782-C et en particulier aux dispositions de la note apparaissant à la suite de ce paragraphe.

Tout le litige provient du fait que les parties ne s'entendent pas sur le prix de vente qui doit servir à déterminer la taxe de vente et sur la méthode à suivre pour calculer et établir le montant de la taxe de vente.

Il nous faut d'abord considérer ce qui constitue le prix de vente au sens de le Loi sur la taxe d'accise et ensuite examiner les méthodes adoptées par les parties dans leurs calculs pour déterminer laquelle est conforme à la loi et aux règlements. Le prix de vente au sens de la Loi sur la taxe d'accise est défini à l'article 85, sous-paragraphes (*b*), (i), (ii) et (iii):

(*b*) "prix de vente", en vue de déterminer la taxe de consommation ou de vente, signifie l'ensemble

(i) du montant exigé comme prix avant qu'un montant payable à l'égard de toute autre taxe prévue par la présente loi y soit ajouté,

(ii) de tout montant que l'acheteur est tenu de payer au vendeur en raison ou à l'égard de la vente, en sus de la somme exigée comme prix (qu'elle soit payable au même moment ou en quelque autre temps), y compris, sans restreindre la généralité de ce qui précède, tout montant prélevé pour la publicité, le financement, le service, la garantie, la commission ou à quelque autre titre, ou destiné à y pourvoir, et

(iii) du montant des droits d'accise exigibles aux termes de la Loi d'Accise, que les marchandises soient vendues en entrepôt ou non.

Il semble que, d'après cet article de la loi, le législateur a voulu inclure dans ce prix tout ce qui l'acheteur est tenu de payer au vendeur en raison ou à l'égard de la vente, même la taxe d'accise lorsqu'elle est exigible aux termes de la loi, mais non les autres taxes prévues par cette loi. La taxe de vente étant payable par le producteur ou fabricant, ce dernier doit établir son prix pour déterminer la taxe de vente en incluant dans ce prix tout ce que l'article 85 considère comme coût de production ainsi que les dépenses

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pour publicité, financement, service, garantie, commission ou à quelque autre titre. Mais je ne crois pas que cet article puisse s'interpréter comme comprenant dans le prix de vente, pour déterminer la taxe de vente, la taxe de vente elle-même. Il est bien dit que la taxe d'accise sera incluse dans ce prix, mais aucune autre taxe imposée par la Loi d'accise. Si le législateur avait eu l'intention d'imposer une taxe de vente sur le prix de vente, taxe de vente incluse, il aurait pu facilement le dire aussi clairement qu'il s'est exprimé concernant la taxe d'accise. Ne l'ayant pas fait, je suis d'opinion que ni le Ministre du Revenu national ni ses officiers, par règlements, directives ou circulaires, n'ont l'autorité nécessaire pour imposer, prélever ou percevoir directement ou indirectement une taxe de vente calculée sur un prix de vente comprenant la taxe de vente, mais je suis d'opinion que le Ministre a le pouvoir de réglementer le prix de vente des manufacturiers qui ne vendent pas aux grossistes mais transfèrent leurs produits à leurs succursales de gros non munies de licence. Je traiterai de ce point un peu plus tard.

Voyons d'abord comment la défenderesse a procédé à calculer sa taxe de vente et ensuite quelles sont les objections de la demanderesse à cette façon de procéder.

La demanderesse a produit au dossier comme pièce 1 un document qui indique le montant des ventes mensuelles taxe incluse de la défenderesse durant la période couverte par la réclamation; le taux qui doit servir au calcul de la taxe; le montant de la taxe payable; les paiements faits et la balance due. Va sans dire que les chiffres apparaissant à la première et à la quatrième colonne sont admis par la défenderesse, mais les autres sont le résultat des calculs de la demanderesse, lesquels, bien que mathématiquement exacts, ne sont pas admis par la défense.

La défenderesse expose que sur une vente de $100 elle enlève 20% en vertu du règlement N° 782-C (*b*) et calcule la taxe de 8% sur le reste, soit 8% de $80, ce qui donne $6.40, de sorte que sur une vente de $100 elle doit payer $6.40 de taxe de vente. Elle fait donc ses factures "Vente, taxe incluse, $106.40" au lieu de "Vente $100, taxe $6.40." Or, si sur une vente de $100 elle doit payer $6.40 de taxe, elle facture le client "Prix de vente taxe incluse, $106.40."

Le montant apparaissant à la deuxième colonne de la pièce 1 est le prix des ventes mensuelles taxe de vente incluse. Pour arriver à cette somme de $6.40 qu'elle doit payer sur un prix de vente comprenant la taxe de $106.40 elle se sert du taux suivant, soit 6.4/106.4, qui établit le montant de la taxe payée apparaissant à la quatrième colonne de la pièce 1 produite au dossier.

Ayant procédé au calcul de la taxe de vente selon la formule plus haut décrite, lorsque la défenderesse prépare son rapport sur la taxe de vente qu'elle doit payer elle renverse le procédé. Prenant comme exemple le premier montant apparaissant à la deuxième colonne de la pièce 1, savoir $9,295.57, prix des ventes, taxe incluse, pour le mois de juin 1949, elle calcule la taxe comme suit: $9,259.57 comprend $100 le prix de vente plus $6.40 la taxe de vente; par conséquent, la taxe payable sur le montant de $9,259.57 est 6.4/106.4. Or ce calcul donne le montant de $559.13 qui paraît au haut de la colonne 4 de la pièce 1, i.e. le montant que la défenderesse a payé au fisc pour taxe de vente.

D'un autre côté, la demanderesse considère que la taxe de vente comprise comme elle l'est dans les prix cotés par la défenderesse et formant partie de ces prix constitue une bonification au sens de la note:

> Il est interdit de déduire en plus du rabais de 20 p. 100, les bonifications pour frais de transport payés d'avance et (ou) les escomptes au comptant ou toute autre bonification.

qui suit le paragraphe (*b*) de la circulaire et que la taxe ne pouvait être déduite des prix de la défenderesse, en plus du rabais de 20% prévu au règlement, avant de calculer la taxe de vente. La demanderesse pour appuyer cette proposition dit que la défenderesse en calculant sa taxe comme elle l'a fait, plutôt que selon les dispositions du règlement N° .782-C (*b*) et de la note ci-dessus reproduite, se trouvait à épargner 41¢ par $100 nets de vente pour la période durant laquelle le taux de la taxe était de 8% et de 64¢ pour $100 nets de vente pour la période alors que le taux de la taxe était de 10%. Cette difference dans les calculs donne comme résultat le montant réclamé par la demanderesse dans l'information, plus les pénalités.

Pour arriver à ces montants de 41¢ et 64¢ que le procureur de la demanderesse mentionne dans son factum comme

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montants de taxes épargnés par la défenderesse, il a dû procéder de la manière suivante: prix de vente, $106.40; déduction, 20%; balance, $85.12; taxe à 8% de ce montant de $85.12, qui donne $6.8096 ou $6.81 de taxe. Or, si de ce montant de $6.81 il est soustrait $6.40, le résultat est de 41¢, la différence ci-dessus notée. Le même calcul se fait avec le taux de la taxe à 10%. Pour baser son calcul sur $106.40, il a fallu que la demanderesse prenne en considération le fait que $106.40 comprenait et le prix de vente et le montant de la taxe au taux de 8%; et pour arriver à ce prix de vente, taxe incluse, il n'y a pas d'autre calcul possible que de déduire 20% du prix de vente de $100 et de calculer la taxe au taux de 8% sur le reste, soit $80, d'où la taxe de $6.40. La taxe de vente imposée par l'article 86 de la Loi sur la taxe d'accise, S.R.C. 1927, chap. 179, et l'article 30, S.R.C., 1952, chap. 100, est une taxe de huit pour cent (8%) sur le prix de vente de marchandises produites et fabriquées au Canada et payable par le producteur ou fabricant; la taxe imposée en vertu de la Loi sur la sécurité de la vieillesse est de deux pour cent (2%).

Dans le cas qui nous intéresse, le procureur de la demanderesse, prenant pour acquis que le règlement est légal et *intra vires,* soumet que pour se prévaloir des dispositions d'un règlement édicté par le Ministre du Revenu national en vertu de l'article 99 de la Loi sur la taxe d'accise, tel le règlement N° 782-C, un contribuable doit se conformer strictement aux dispositions de ce règlement. A l'appui de cette prétention, le procureur de la demanderesse a cité plusieurs décisions; je n'en mentionnerai que quelques-unes.

Dans *Rex* v. *Laboratoires Désautels* (1) il s'agissait d'une réclamation pour taxes de ventes que la défenderesse prétendait ne pas devoir parce que dans les factures adressées à certains clients et dans les montants perçus elle avait fait erreur en ne mentionnant pas l'escompte qu'elle donnait aux grossistes et que par conséquent elle s'était chargé de la taxe de vente de 5% sur le prix de vente réel, alors qu'elle avait droit de calculer d'abord l'escompte et ensuite la taxe de vente sur le prix de vente réel, moins ledit escompte. La Cour rejeta cette prétention parce que

(1) (1930) R.J.Q. 68 C.S. 142.

la défenderesse n'avait pas de département de gros à qui elle vendait d'abord ses produits, moins l'escompte, et qui, lui les revendait au détaillant, et qu'elle n'avait pas deux comptabilités distinctes et séparées, la sienne et celle de son département de gros. Dans ce cas, l'honorable juge Archambault a décidé que

pour obtenir le bénéfice d'un règlement administratif allouant à un manufacturier une réduction consistant dans l'escompte sur les ventes faites à son département de gros, un fabricant doit observer strictement les conditions prescrites, savoir: la création d'un département de gros, l'emploi de factures séparées et la tenue d'une comptabilité distincte; faute de quoi, il ne peut réclamer aucune diminution sur le chiffre de la taxe de vente imposée par la loi spéciale des revenus de guerre.

Dans les autres causes citées, la même, règle fut suivie, particulièrement dans *Rex* v. *Goldberg* (1) où il a été décidé que

where a regulation has been made under a taxing Act which is in the nature of an exception to the general tax, a taxpayer must strictly comply with the regulation in order to claim the benefit of it.

La Cour a aussi pris connaissance des jugements dans les causes suivantes: *Rex* v. *Dominion Press Ltd.* (2); *Rex* v. *Coleman Products Co. Ltd.* (3); *Rex* v. *Canada Life Mills Limited* (4). Dans toutes ces causes, il a été établi et décidé que les défenderesses ne se trouvaient pas dans les conditions requises par les règlements pour faire le calcul de leurs taxes de ventes de manière à bénéficier des dispositions du règlement.

Il n'y a pas de doute que le contribuable qui désire bénéficier du règlement en question dans cette cause doit en observer strictement les conditions et la demanderesse a raison d'insister sur cette règle d'interprétation. Mais ce n'est pas la difficulté qui se présente dans le cas actuel.

La seule difficulté à résoudre dans le présent litige est de déterminer si la deuxième prétention de la demanderesse est valide en fait et en droit. Quelle est sa proposition?

La défenderesse en calculant la taxe de vente de la manière qu'elle l'a fait ne s'est pas conformée aux dispositions du règlement N° 782-C et conséquemment elle ne peut dire qu'elle s'est prévalue des dispositions de ce règlement.

(1) [1929] 1 D.L.R. 711.
(2) [1928] Ex. C.R. 122.
(3) [1929] 1 D.L.R. 658.
(4) [1938] Ex. C.R. 257.

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En fait, la demanderesse a admis dans son mémoire que tous les éléments nécessaires pour déterminer la responsabilité de la défenderesse pour taxes de ventes relativement à la période en question, en vertu de la Loi sur la taxe d'accise et de la Loi sur la sécurité de la vieillesse, ont été établis.

Dans ce cas, la défenderesse est soumise aux dispositions de ces lois et des règlements édictés en vertu de ces lois. Or en vertu de la Loi sur la taxe d'accise le Ministre a édicté le règlement N° 782-C (*b*) se rapportant aux manufacturiers de drogues, etc. A mon humble avis, si la défenderesse est fabricant de produits pharmaceutiques elle peut se prévaloir des dispositions de ce règlement, tant qu'il n'aura pas été annulé ou déclaré *ultra vires*, si elle s'est conformée strictement aux conditions dudit règlement.

La défenderesse rencontre-t-elle les conditions voulues. Elle est fabricant de drogues au Canada; elle est soumise aux taxes de ventes imposées, prélevées et perçues en vertu des lois ci-dessus mentionnées; elle ne vend pas aux grossistes indépendants; elle détient une licence de fabricant et elle a une ou des succursales de gros non munies de licence et elle transfert ses produits à ces succursales. Le procureur de la demanderesse admet dans son mémoire que c'est le paragraphe (b) de la circulaire N° 782-C qui s'applique à son cas.

Etant dans cette situation, elle peut calculer la taxe de vente sur les prix de vente réguliers consentis aux détaillants ordinaires qui n'obtiennent aucun prix de faveur ou rabais spécial quelconque, moins 20%. La taxe de vente au taux courant, huit ou dix pour cent, s'applique au reste.

Si le règlement 782-C (*b*) n'existait pas, la défenderesse, que ne vend pas aux grossistes, aurait calculé le montant de la taxe de vente sur le prix de vente au détaillant. Sur une vente de $100 elle aurait facturé son client pour $100 plus $8 pour taxe de vente, ou la facture aurait été "$108 prix de vente, taxe incluse."

Comme fabricant ou manufacturier ne vendant pas aux grossistes elle ne pouvait calculer la taxe de vente sur le prix de gros, car ce prix n'était pas établi. Je crois que le règlement qui nous intéresse a été édicté pour permettre aux

manufacturiers ne vendant pas aux grossistes de payer une taxe de vente qui pourrait se comparer à la taxe de vente payée par les fabricants vendant aux grossistes.

En d'autres termes, il semble que le but du paragraphe (*b*) du règlement est d'établir pour les fabricants ne vendant pas aux grossistes un prix de vente de gros (wholesale price) sur lequel prix serait calculée la taxe de vente. C'était permettre à ces manufacturiers de payer une taxe de vente qui serait comparable, sinon équivalente, à la taxe de vente payée par les fabricants vendant aux grossistes. Dans mon opinion ce règlement a pour but de corriger une anomalie, je m'explique. En général, le fabricant vend aux grossistes à un prix couvrant tout ce qui peut constituer le coût de production et les dépenses incidentes comme frais de transport, administration, profits, etc. Ce prix est connu comme le prix de gros (wholesale price). Ce prix de vente étant établi, la taxe est calculée sur ce montant. Lorsque ce prix de vente n'est pas établi, comme dans le cas des fabricants qui transfèrent leurs produits à leur succursale de gros, le Ministre peut par règlement déterminer la valeur du produit ou le prix de vente en suivant les dispositions de l'article 85, sous-paragraphes (*b*), (i), (ii) et (iii), et la taxe est calculée sur cette valeur ou ce prix de vente.

A mon avis le seul but du paragraphe (*b*) du règlement est d'établir un prix de gros pour les fabricants licenciés qui auparavant vendaient aux détaillants, mais qui aujourd'hui transfèrent leurs produits à leurs succursales de gros. Ce prix de gros, d'après le règlement, sera le prix de vente regulier aux détaillants qui n'obtiennent aucun prix de faveur ou rabais quelconque, moins vingt pour cent (20%) pour établir la valeur sur laquelle la taxe de vente est calculée.

Je crois que l'exposé des faits ci-dessus et de la loi qui s'applique au présent litige me justifie de conclure, prenant pour acquis que le règlement 782-C était en force pendant la période couvrant la réclamation et était *intra vires,* que la défenderesse pouvait se prévaloir des dispositions de ce règlement parce qu'elle s'était conformée strictement à ses dispositions, à savoir: qu'elle était fabricant au Canada de produits pharmaceutiques; qu'elle était soumise aux taxes

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de vente; qu'elle ne vendait pas aux grossistes indépendants; qu'elle avait une ou des succursales de gros non munies de licence; qu'elle transférait ses produits à ces succursales.

S'étant conformée aux conditions exigées par le règlement, elle pouvait calculer sa taxe de vente en déduisant vingt pour cent (20%) de ce prix de vente régulier au détaillant et en multipliant le reste par le taux de la taxe.

Je suis d'opinion qu'elle n'était pas tenue de déduire le vingt pour cent (20%) de ce prix régulier au détaillant plus la taxe, qu'elle ait facturé ses clients "Prix de vente plus taxe de vente" ou "Prix de vente, incluse", parce qu'en déduisant le vingt pour cent (20%) du prix de vente plus la taxe de vente la demanderesse se trouvait à imposer et percevoir la taxe de vente sur la taxe de vente.

Je crois de plus que la manière de calculer la taxe suivie par la défenderesse est conforme au sens du paragraphe (*b*) et de la note qui suit ce paragraphe, parce que dans la définition du prix de vente il n'est pas question, pour déterminer la taxe de vente, d'inclure dans le prix de vente la taxe de vente. De cette manière, la demanderesse percevra les taxes légalement dues et exigibles comme elle les perçoit des fabricants qui vendent leurs produits aux grossistes. Autrement elle se trouverait à percevoir un montant de taxe de vente non pas basé sur le prix de vente, mais sur le prix de vente plus la taxe de vente.

La demanderesse soumet une proposition subsidiaire à l'effet que le règlement N° 782-C est absolument nul et de nul effet comme excédent les pouvoirs accordés au Ministre du Revenu national en vertu de l'article 99 de la Loi sur la taxe d'accise. Il aurait été inutile de traiter de cet argument si la Cour en était arrivée à la conclusion que la défenderesse ne s'était pas conformée aux dispositions du règlement 782-C et ne s'était pas prévalue de ses dispositions. Mais comme je suis d'opinion que la défenderesse rencontre les conditions prévues, elle a droit de se prévaloir des dispositions du règlement. Je dois donc considérer cette dernière proposition de la demanderesse.

Cet article donne au Ministre du Revenu national le pouvoir d'établir les règlements qu'il juge nécessaires et utiles pour appliquer les dispositions de la présente loi.

Il n'y a pas de doute que le Ministre n'est pas autorisé à édicter des règlements qui auraient pour but de modifier ou de changer le taux de la taxe imposée par la Loi d'accise ou par la Loi sur la sécurité de la vieillesse ou de changer ou modifier le sens donné aux termes "prix de vente pour déterminer la taxe de vente" de l'article 85 de la loi.

Le procureur de la demanderesse a cité les causes suivantes: *Rex* v. *Laboratoires Désautels Limitée; Rex* v. *Goldberg; Rex* v. *Weir Manufacturing Company Limited* (*supra*).

Dans ces divers jugements des doutes ont été exprimés sur la validité du règlement 782-C et d'autres règlements de même nature parce que la loi n'autorise le Ministre qu'à établir des règlements "pour appliquer les dispositions de la présente loi". Or, réduire la taxe de vente payable par un contribuable en vertu de la loi, comme il est fait par le règlement 782-C et les autres règlements de même nature, va plus loin que l'application des dispositions de la loi et opère plutôt des changements dans les dispositions de la loi, chose que le Ministre n'est aucunement autorisé à faire.

J'ai précédemment exprimé l'opinion que le but du règlement n'était ni de changer le taux de la taxe de vente ni de modifier la définition des termes "prix de vente" de l'article 85 de la loi. Je crois plutôt que le règlement sert à expliquer les termes ci-dessus lorsqu'ils sont applicables à certaines catégories de contribuables. La taxe de vente est imposée et prélevée à un taux fixe, sur le prix de vente, des manufacturiers et fabricants et payable par eux lors de la livraison de leurs produits. En pratique, le fabricant ou le manufacturier vend ses produits à des grossistes ou établit ses propres succursales de gros ou encore vend directement aux détaillants.

Dans le premier cas, la taxe est calculée sur le pris du gros (Wholesale price).

"Wholesale price", with respect to the computation of the sale tax, means the price for which the manufacturer or producer regularly sells his taxable goods of like quality and value in representative wholesale quantities in the ordinary course of business to *bona fide* independent wholesalers in the zone or territory in which the sale is made.

Si cette définition du prix de gros est exacte, la taxe de vente est calculée sur ce montant.

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Dans le cas où le fabricant vend ses produits à des détaillants, son prix de vente est établi de la même manière que le prix de vente du fabricant aux grossistes.

Mais lorsque le manufacturier a établi des succursales pour l'écoulement de ses produits et qu'il tient une comptabilité distincte de ses opérations son prix de vente est déterminé par l'article 85 de la loi et par le règlement N° 782-C qui vient aider à l'interprétation des termes dudit article.

Il me semble que le manufacturier qui transfert ses produits à ses succursales de gros a le droit de vendre aux même prix de gros que le fabricant qui vend à des grossistes indépendants. Mais comme il n'a pas de prix de gros établi et que ce prix de gros est difficile à déterminer le Ministre du Revenu national, pour aider ce dernier à déterminer son prix de gros, a édicté le paragraphe (*b*) du règlement N° 782-C. Ce règlement ne modifie ni n'altère les termes des statuts qui imposent la taxe de vente à un taux fixe ou les termes "prix de vente" définis dans la même loi.

Si les procédures au dossier, les faits établis devant la Cour et les arguments du procureur de la demanderesse m'avaient convaincu que le règlement avait opéré des changements dans les dispositions de la loi j'aurais eu des doutes sérieux sur la validité de ce règlement. Mais le fait par le Ministre du Revenu national d'édicter un règlement pour assister les contribuables dans l'établissement de leur prix de vente, sur lequel prix sera perçue la taxe, me semble un règlement fait dans le but d'aider à l'application des dispositions de la loi. Vouloir interpréter la Loi sur la taxe d'accise de manière à permettre de prélever et percevoir des fabricants de produits semblables des montants différents parce qu'ils écoulent leurs produits par l'entremise de leurs succursales de gros plutôt que par l'entermise de grossistes, ou parce qu'ils facturent leurs ventes "Prix de vente taxe incluse" au lieu de "Prix de vente plus taxe", serait établir une distinction dans l'application de la loi à des contribuables placés dans les mêmes conditions et soumis aux mêmes dispositions de la loi. Je ne crois pas que le législateur ait voulu faire semblable distinction.

Je suis d'opinion que le règlement N° 782-C est valide en autant qu'il ne change ou modifie la loi, comme dans la

présente instance, et qu'il est applicable au cas de la défenderesse. Je crois que la procédure suivie par cette dernière dans le calcul de sa taxe est conforme aux dispositions et de la loi et du règlement.

Par ces motifs la Cour renvoie l'action de la demanderesse et maintient la défense de la défenderesse, avec dépens.

Judgment accordingly.

BETWEEN:

RICHARD L. REESE *et al.* .....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1954
Oct. 18
1955
May 12

Practice—Privilege of Crown to object to production of certain documents —Motion to compel production dismissed.

Held: That the Court will not order production of interdepartmental communications between public officials when the head of the department has in valid form objected to their production on the ground that they belong to a particular class of documents which it is not in the public interest to disclose.

2. That the right to the Crown privilege has not been waived by the production of some documents.

MOTION for an order requiring the Crown to produce certain documents.

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

G. H. Steer, Q.C. for the motion.

K. E. Eaton contra.

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

CAMERON J. now (May 12, 1955) delivered the following judgment:

In the course of the Examination for Discovery of one Hilton Holmes—an officer of the Crown—counsel for the suppliants asked him to produce certain documents, contracts, files and correspondence. Some were produced but

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objection was taken to others on the ground that it was contrary to public policy or not in the public interest to produce them. Counsel for the suppliants now moves for an order requiring the respondent to produce the said papers and that the said Hilton be required to again attend for examination, and answer certain questions in regard thereto.

In order to appreciate the issues raised, it is necessary to state briefly the nature of the action. The claim is for a declaration that the suppliants are entitled to a conveyance of the mines and minerals in certain lands in the province of Alberta.

The suppliants are said to be soldier settlers (or the personal representatives of deceased soldier settlers), all of whom entered into agreements with the Soldier Settlement Board to purchase certain lands in Alberta under the provisions of P.C. 299, dated February 11, 1919, and the Soldiers' Settlement Act, Statutes of Canada 1917, chapter 21. It is alleged that all of the said lands (inclusive of mines and minerals) were acquired by the Board by grant of letters patent dated December 8, 1920, but that on payment by the settlers of the agreed purchase price to the Board, the settlers received transfers of their lands, subject, however, to a reservation from each parcel of all mines and minerals.

The suppliants' main claim to entitlement to the mines and minerals in their respective properties is based on an offer alleged to have been made by the Board on January 20, 1949. On that date Mr. Cutler, District Solicitor for the Board at Edmonton, wrote each of the suppliants a letter stating that a recent Order in Council provided that settlers who had repaid their loans could obtain title to such mineral rights in their lands as were vested in the director of Soldier Settlement by completing and returning an enclosed application form, together with a fee of $25.00 "when a transfer covering such mineral rights will be requested". It is alleged that each of the suppliants duly accepted the said offer in accordance with its terms and is now entitled to the mines and minerals. Alternatively, it is claimed that the suppliants are entitled to the mines and minerals pursuant to their original agreements to purchase the land.

Many grounds of defence are raised by the Crown but I shall refer only to those which have some bearing on the particular matters mentioned in the present motion. The first two orders requested are:

(*a*) Directing the Respondent to produce and show to counsel for the Suppliants on the continued Examination for Discovery of the officer of the Respondent, the Contract between the Soldiers Settlement Board and the Superintendent General of Indian Affairs, and all correspondence relating thereto referred to in Questions 53 and 54 of the Examination for Discovery herein of Mr. Hilton Holmes.

(*b*) That the officer being examined for discovery do produce and show to counsel for the Suppliants on his Discovery herein the authority for the execution of the Contract referred to in (*a*) above, all as referred to in Question 58 of the Examination for Discovery of Mr. Hilton Holmes.

The questions mentioned in these two items refer to that part of the statement of defence in which it is alleged that the mines and minerals in question are reserves or parts of reserves surrendered to His late Majesty the King and required to be managed, leased and sold as the Governor in Council directs by virtue of section 54 of the Indian Act, R.S.C. 1927, chapter 98, and that the Governor in Council has given no direction with regard thereto; that neither the Soldier Settlement Board nor the Director of Soldier Settlement at any time had any interest therein. Exhibit 1 on the examination for discovery is the letters patent dated October 8, 1920, by which the ownership or the control of the land was passed to the Board and certain words therein suggest that there may have been a contract between the Soldier Settlement Board and the Superintendent General of Indian Affairs.

It now appears from the affidavit of L. A. Couture, departmental legal adviser, dated April 29, 1954, that no formal contract was entered into between the Soldier Settlement Board and the Superintendent General of Indian Affairs, but that the arrangements were entered into by an exchange of six letters between the Commissioner of the Soldier Settlement Board and the Deputy Superintendent General of Indian Affairs in September and October 1919. It is these six letters which the Crown is now asked to produce.

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The third and fourth orders requested in the Notice of Motion are as follows:

(*c*) That the officer being examined for discovery do produce and show to counsel for the Suppliants herein the complete files of the Suppliants referred to in Question 82 of the Examination for Discovery of Mr. Hilton Holmes.

(*d*) That the officer being examined for discovery do produce and show to counsel for the Suppliants herein the documents referred to in Questions 83 to 113 in the Transcript of the Examination for Discovery herein of Mr. Hilton Holmes.

Both of these relate to the alleged "offer" in 1949 to sell the mines and minerals for the sum of $25.00. In defence the Crown denies that there was a valid offer to sell the mines and minerals and that if any such offer was made it was made without proper authority, was never intended to have legal consequences and was never accepted. It is alleged that there was no Order in Council, nor a Minute of Cabinet, which authorized the transfer of the mines and minerals for the sum of $25.00. In the alternative it is said that the mines and minerals are part of the public lands of Canada which may not be disposed of without the authority of the Governor in Council and that no such authority has been given for their disposition.

Item (*c*) (*supra*) is for the production of the entire Soldier Settlement Board file for each of the suppliants. No objection is raised by the Crown to the production of the correspondence in these files between the settlers and the Board, but objection is taken to the production of the files as a whole on the ground that, other than the correspondence mentioned, the contents consist of interdepartmental memoranda.

Item (*d*) relates to documents which it is thought might disclose the authority of Mr. Cutler, District Solicitor of the Board at Edmonton, to write the letter of January 20, 1949. On the examination for discovery, Mr. Holmes admitted that certain instructions in writing were given by the Board to Mr. Cutler; that the Deputy Minister of Veterans' Affairs had given certain instructions in writing to the Director of Soldier Settlement and that the Secretary to the Cabinet had written a letter to the Department of Veterans' Affairs in regard to the matter. Counsel for the suppliants now asks for the production of these letters also.

The production of these two series of letters might possibly be of some assistance to the suppliants in endeavouring to establish that the mines and minerals did become the property of the Soldier Settlement Board and that there was authority for the "offer" contained in Mr. Cutler's letter of January 20, 1949. The question I have to decide is whether in this action—a civil action in which the Crown is a party —the Crown can be compelled to produce them.

Counsel for the Crown submits that in such a case, where the Crown is a party to a suit, it cannot be required to give discovery of documents at all as it is still a prerogative of the Crown to refuse discovery; that in any event the papers here requested are of a class which it is not in the public interest to disclose; and, finally, that the papers are not relevant to the issues raised.

In the United Kingdom it is now well settled that in such cases the Crown cannot be compelled to give discovery. In Halsbury, 2nd Edition, Vol. 10, 3352, the principle is stated thus:

> 423. Where the Crown is a party to the matter it has the same right to discovery as a subject has against a subject, but it cannot be compelled to give discovery though, in practice, it often does unless some principle of public interest is involved.

The principles and authorities were discussed in the well-known case of *Duncan* v. *Cammell, Laird & Co.* (1). That was a unanimous decision of the House of Lords delivered by Viscount Simon, L. C. A portion of the headnote reads as follows:

> When the Crown is a party to a suit, discovery of documents cannot be demanded by the other party as of right, although in practice, for reasons of fairness and in the interest of justice, all proper disclosure and production would be made.

At page 632 of the Report, Viscount Simon said:

> There is thus express authority in this House that a court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that, on grounds of public policy, the documents should not be produced. It is important to note what are the circumstances in which this specific objection may arise. When the Crown (which for this purpose must be taken to include a government department, or a minister of the Crown in his official capacity) is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed. The common law principle is well established: see *Thomas* v. *Reg.* (1874) L.R. 10 Q.B. 44. There is also the authority of Abinger C. B. for the view

(1) [1942] A.C. 624.

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that the former process in equity of a bill of discovery was not regarded as available against the Crown: *Deare* v. *Attorney-General* (1835) 1 Y. & C. 197, 208, but that learned judge went on to say: "At the same time it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceedings for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred." Similarly, in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* [1897] 2 Q.B. 384, 395, Rigby L. J. said: "The law is that the Crown is entitled to full discovery, and that the subject as against the crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. . . . Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded." Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made. The question which we have to decide can only arise as a matter of law in England in cases where a subpoena is issued to a minister or a department to produce a document (usually, but not necessarily, in a suit where the Crown is not a party), or where it intervenes in a suit between private individuals (as is the present case), to secure, on the ground of public interest, that documents in the hands of one of the litigants should not be produced. A similar situation might conceivably arise in litigation between the Crown and a subject where it was considered necessary to prevent the subject from producing a document in his possession on the ground that this would be injurious to public interests.

In the case of *Miller et al* v. *The King* (1), heard by me in 1951, counsel for the suppliants demanded the production of certain documents in the possession of the Crown. Counsel for the Crown objected to their production on the ground that it would be contrary to public policy to admit them in the Court. In making my ruling, I said at page 170:

> When an objection . . . is validly made, it is conclusive, and it is not for the Court to determine whether it is in fact against public policy.

And at page 175:

> I have said that the decision in the *Duncan* v. *Cammell, Laird* case is binding upon me. The result of that decision is that it is not for the Court but for the ministerial head of the department of government to determine whether or not it is in the public interest to refuse to produce documents.

Had there been no decision of the Supreme Court of Canada in the meantime on this question, I would have adhered to the opinion which I expressed in *Miller's* case. I would have considered Crown privilege in regard thereto as a prerogative of the Crown which has not been cut down or

(1) June 20, 1951 (unreported)

limited by any provisions of the Exchequer Court Act, the Petition of Right Act, or by any other statutory provision. Counsel for the suppliants, however, refers me to the recent decision of the Supreme Court of Canada in *Regina* v. *Snider* (1), and submits that the Crown privilege is not now in Canada as stated in the *Cammell, Laird* case, but must be determined by the decision in *Snider's* case.

The *Snider* case came before the courts in this way. At a trial under the Criminal Code, the Crown in the right of the province summoned by writ of subpoena the Director of Taxation of the District of Vancouver, requiring him to give evidence and to produce the income tax returns of the accused. The Minister of National Revenue in an affidavit, objected to the production of the documents and to the giving of oral evidence, basing his claim that it would be prejudicial to the public interest on section 81 of the Income War Tax Act and on section 121 of the Income Tax Act, which prohibit such communications to any person other than a person "legally entitled thereto". Consequent to the ruling of the trial judge that the returns must be produced, and, if relevant, given in evidence, certain questions were submitted for the opinion of the Court of Appeal for British Columbia pursuant to the Constitutional Questions Determination Act, R.S.B.C. 1948, chapter 66, including the following.

1. On the trial of a person charged with an indictable offence, where a subpoena *duces tecum* has been served on the appropriate Income Tax official to produce before the Court on such trial returns, reports, papers and documents filed pursuant to the provisions of the *Income Tax Act,* and the *Income War Tax Act* or the *Excess Profits Tax Act,* 1940, and to give evidence relating thereto, and where the Minister of National Revenue has stated on oath that in his opinion such evidence and the production of such returns, reports, papers and documents would be prejudicial to the public interest; ought such Court to order the production of such returns, reports, papers and documents and the giving of oral evidence relating thereto: (*a*) when such subpoena is served at the instance or on behalf of the Attorney General of the Province; (*b*) when such subpoena is served at the instance or on behalf of the accused?

Another question had to do with the effect of sections 81 and 121 of the Income War Tax Act and the Income Tax Act on the right of the Minister of National Revenue to object on the ground of prejudice to the public interest to the production of documents mentioned in Question 1, but that question need not here be considered.

(1) [1954] S.C.R. 480.

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On appeal to the Supreme Court of Canada, it was held in regard to Question 1:

1. (Per Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Fauteux JJ.). That the Court may order the production of the documents in question and the giving of oral evidence relating thereto, unless special facts or circumstances appearing in the Minister's affidavit make it clear to the Court that there might be prejudice to the public interest in the disclosure, but only to the extent of the document or documents within the special facts or circumstances.
2. (Per Locke J.). That the Court may order the production of the documents in question and the giving of oral evidence relating thereto to enable the Court to determine whether the facts discoverable by the production of the documents would be admissible, relevant or prejudicial or detrimental to the public welfare in any justifiable sense.
3. (Per Cartwright J.). That the Court may order the production of the documents in question and the giving of oral evidence relating thereto, limited however to a case in which the objection of the Minister is to the production of any documents belonging to the class consisting of returns, reports, papers and documents filed pursuant to the provisions of the *Income Tax Act*, the *Income War Tax Act* or the *Excess Profits Tax Act*, 1940, on the ground that they belong to that class.

Counsel for the suppliants does not suggest that the Court has the right to inspect the documents and papers in question in order to determine whether their production would be detrimental or prejudicial. That practice was followed in the Privy Council decision in the case of *Robertson* v. *State of South Australia* (1), but the House of Lords in the *Cammell, Laird* case expressly disapproved of the practice. In *Snider's* case only two of the judges referred to the practice; Locke J., who agreed with the opinion of the Chief Justice of British Columbia (2), approved, but Estey J. stated at page 494:

> The different opinions expressed by the authorities as to the right of a presiding judge to examine the documents appears to have been resolved by the observations of Viscount Simon in the *Cammell, Laird* case.

In *Snider's* case Rand J., while insisting that the Court had the right of preliminary determination of possible prejudice as a protection against executive encroachment upon the administration of justice, pointed out that in certain cases if the Minister asserts the existence of a public interest, the courts must accept his decision. At page 485 he said:

> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court

(1) [1931] A.C. 704. (2) [1953] 2 D.L.R. 9 at 11.

is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the Minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our policy. But I should add that the consequences of the exclusion of a document for reasons of public interest as it may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.

The problems raised on this motion can be determined by considering the question of Crown immunity from production of documents only in so far as it relates to the particular papers in question. As I have said, they are all of one class, namely, interdepartmental memoranda or interdepartmental correspondence.

I am invited by counsel for the suppliants to exercise the right of preliminary determination of possible prejudice (as referred to in the opinion of Rand J. in *Snider's case*). In so doing it is the function of the Court to examine the nature, general or specific, of the documents as disclosed by the evidence and the reasons assigned for claiming Crown privilege, and if it be found on any rational view that the public interest requires that they should not be revealed, the Court must accept the opinion of the Minister that such an interest exists. In such a case I do not think that the Court is required to re-examine the matter by applying the tests set out by Viscount Simon on page 642 of the *Cammell, Laird* case. As I read that case, the tests there stated are not intended to be applied by the Court but are rather general exhortations to the heads of departments as to the manner in which they should exercise the privilege of non-production.

It is settled law that there are particular classes of communications which the public interest requires should be

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protected from production. In the *Cammell, Laird* case Viscount Simon said at page 635:

> It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself. Several cases have been decided on this ground protecting from production documents in the files of the East India Company held in its public capacity as responsible for the government of India: see *Smith* v. *East India Co.*, 1 Ph. 50; *Wadeer* v. *East India Co.*, 8 De G. M. & G. 182. In the earlier of these cases Lord Lyndhurst L. C. said (1 Ph. 50, 55): "Now it is quite obvious that public policy requires, and looking to the act of parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated without infringing the policy of the act of parliament and without injury to the public interests." On the same principle, it has been held in *H.M.S. "Bellerophon"*, 44 L. J. Adm. 5, that where a collision occurs between a ship of the Royal Navy and a ship belonging to a private owner the Admiralty cannot be required to produce the report made by the officer who is in command of the former ship.

and at page 642:

> The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration.

In *Snider's* case Kellock J. said at page 487:

> There is, accordingly, not only a public interest in maintaining the secrecy of documents where the public interest would otherwise be damnified, as, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of document is necessary for the proper functioning of the public service, but there is also a public interest which says that "an innocent man is not to be condemned when his innocence can be proved"; per Lord Esher M. R., in *Marks* v. *Beyfus*, (1890) 25 Q.B.D. 494 at 498. It cannot be said, however, that either the one or the other must invariably be dominant.

It seems to me that there is a clearly discernible public interest in protecting from production correspondence and memoranda passing between members of one or more departments of government to the extent that the head of the department considers that they should not be disclosed. That interest need not be found in the contents of the particular communications. In fact, I think it reasonable to assume from the evidence as to the nature of the memoranda and correspondence here in question that they are concerned with matters the disclosure of which would not affect the safety of the state to any degree. The interest is to be found rather in the fact that public policy requires that such official communications between officers of the state should be completely unreserved. If they were made with the knowledge that they might later be subject to disclosure in the courts, they would in many cases be shorn of that candour, completeness and freedom of expression which is desirable in such matters. They would tend to become more cautious and reserved and expressions of opinion would be affected by the possibility of subsequent public disclosure. The officials of the state would be hampered in the performance of their proper functions.

It is my opinion, therefore, that even if the prerogative of the Crown in Canada in this regard, and in civil actions in which the Crown is a party, is not as absolute as it now is in England, there is a public interest which requires that interdepartmental communications between public officials should not be produced when the head of the department has in valid form objected to their production on the ground that they belong to a particular class of documents which it is not in the public interest to disclose. There is nothing novel in upholding such an objection for as far as I am aware it has been the constant practice in the Canadian courts to refuse to order disclosure of documents in such cases. Indeed, the Evidence Acts of several of the provinces have placed Crown privilege in relation to documents in statutory form, a list of which may be found in volume 8 of Wigmore on Evidence at page 2378, and at page 2378 of the supplement to that volume. For example, section 27, Revised Statutes of Ontario 1950, chapter 119, provides as follows:

27. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of

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the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to produce the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or head of the department were personally present and made the objection.

A provision which is almost precisely the same is found in section 33, Revised Statutes of Alberta, 1942, chapter 106. It is of some interest to note also the provisions of section 36 of the Canada Evidence Act, Revised Statutes of Canada 1952, chapter 307, which are as follows:

36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

I am of the opinion, also, that the objections to production were properly taken. In the affidavit of documents of T. J. Rutherford, Director of Soldier Settlement, dated November 2, 1952, a large number of documents were set out to the production of which no objection is taken. Then in the Second Part which states the documents in possession of the Crown, the production of which is objected to, there is the following:

1. Memorandum to Cabinet by Cabinet Committee, dated November 3, 1948.
2. Memorandum to Cabinet by Cabinet Committee, dated April 5, 1951.
3. All interdepartmental memoranda and correspondence. I object to produce the above documents, memoranda, and correspondence, as being contrary to public policy.

From the beginning, therefore, the objection has been taken that it is contrary to public policy to produce interdepartmental memoranda and correspondence. That position was taken by counsel for Mr. Holmes on examination for discovery and was substantially stated in the affidavits of the ministers having charge of the Departments of Veterans' Affairs and of Citizenship and Immigration.

Counsel for the appellant also submits that as some documents and papers have been produced by the respondent, the right to the Crown privilege has been waived and that all such documents should now be produced. I am unable to agree with this submission. In ordinary litigation a

party does not lose the right to claim privilege from production of certain documents merely because he has consented to disclose others, and the Crown's rights are not less than those of the subject. If, however, the objection is based on the ground that some documents, the production of which might validly have been objected to, have been produced, the short answer is to be found in the fact that in this case none of the documents which have been produced fall within the category of interdepartmental communications, and it is in respect of that class that the objection is taken.

The only remaining item of the Notice of Motion which need be referred to is:

> (*e*) that the said officer of the Respondent produced for examination for discovery do attend and answer the questions the answers to which were refused on the said examination for discovery.

In *Snider's* case, Kellock J. stated at page 487:

> In considering the applicability of the rule as to secrecy of documents in the public interest, it is to be remembered that where it does apply, not even a copy of a document, no matter from what source it may be forthcoming, nor any oral evidence as to its contents are admissible.
>
> In *Chatterton* v. *Secretary of State for India,* [1895] 2 Q.B. 189, A. L. Smith, L. J., laid down the rule at p. 195 as follows:
>
> The cases have gone the length of holding that, even if no objection were taken to the production of such a document by the person in whose custody it was, it would be the duty of the judge at the trial to intervene, and to refuse to allow it to be produced: and it has further been held that, if an attempt were made to get round that difficulty by giving secondary evidence of its contents, the judge ought also to prevent that from being done.
>
> Viscount Simon, L.C., referred to the above with approval in the *Cammell Laird* case at p. 595, where he said:
>
> The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of verbal evidence which, if given, would jeopardize the interests of the community.

On the principles so stated, this part of the Notice of Motion must also be dismissed. In view of my conclusions, it becomes unnecessary to discuss the further objection taken on behalf of the respondent, namely, that the documents were not relevant.

The opinion which I have expressed has been on the assumption that the Court has jurisdiction in proper cases to entertain an application such as this. Inasmuch as the powers of the Court are purely statutory, there may be

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some question whether it has the power to compel the production of books, documents and papers from the custody of the Crown. That question was not raised on the argument and in view of the conclusions which I have reached on the merits, I do not find it necessary to consider the general problem of jurisdiction. It will be understood, therefore, that nothing which I have said is to be construed as a finding that the Court has such jurisdiction and I specifically reserve that question for consideration until an occasion arises in which it is necessary to determine it.

In addition to the cases which I have cited above, I have read with interest the following: Wigmore on Evidence, 6th Edition, page 2378 ff., on Privilege for Secrets of State and Official Communications; The Solicitor's Journal (1943), Vol. 87, page 61, on Production Injurious to Public Interest; an article by Mr. John Willis in Vol. 33, Canadian Bar Review, page 352; and Vol. 58, Law Quarterly Review, page 436.

For the reasons which I have stated, the motion must be dismissed with costs to the respondent in any event of the cause.

Order accordingly.

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Feb. 28

May 27

BETWEEN:

EGBERT DOUGLAS HONEYMAN ..... APPELLANT;

AND

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

Revenue—Income—Income tax—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, s. 3(1)—The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 3, 4, 127(1)(e)—"Taxable income"—Shareholder buying material needed by his company for its operation and reselling to latter at profit—Whether transaction constitutes a trade or business —Transaction in a scheme for profit making—Appeal from Income Tax Appeal Board dismissed.

Having refused to give their personal guarantee for a bank loan to finance the purchase of a large quantity of sulphuric acid needed by their company for refining its product the shareholders including the appellant formed a syndicate with the object of purchasing the acid and selling it to the company, each member of the syndicate contributing

to the purchase price in proportion of his holding in the company. The price paid by the syndicate for the acid was $10 per ton of acid and it was sold to the company at $30 per ton. In the years 1947, 1948 and 1949 appellant received his share of the sale price from the company and the amounts so received were added by the Minister to appellant's income for those years. An appeal from the assessments to the Income Tax Appeal Board was dismissed and from the Board's decision appellant appealed to this Court.

Held: That whether the gain or profit realized by appellant is "taxable income" is not to be determined solely by whether the transaction here constitutes a trade or business. All the facts and circumstances of the deal ought to be considered in relation to the general definition of "income" in s. 3 of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended, and of the *Income Tax Act*, S. of C. 1948, c. 52, as amended. *The Atlantic Sugar Refineries* v. *The Minister of National Revenue* [1948] Ex. C.R. 622; *McDonough* v. *The Minister of National Revenue* [1949] Ex. C.R. 300 referred to and followed.

2. That having the necessary funds to do so the shareholders of the company could have themselves readily loaned the required amount to the company. Instead, they preferred purchasing the acid and selling it at a profit. The whole operation was the carrying of a scheme for profit making. It was not a mere enhancement of value of an investment realized.

3. That the profits made as a result of the transaction by the appellant fall within the definition of "income" in both Acts and the amounts of these profits were properly added to appellant's income.

APPEAL from a decision of the Income Tax Appeal Board.

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

Allan Scarth for appellant.

F. J. Cross for respondent.

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

FOURNIER J. now (May 27, 1955) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 12, 1953, dismissing the appellant's appeal from income tax assessments levied against him for the years 1947, 1948 and 1949, whereby it was sought to hold him liable to tax on the profit made by him in those years from the purchase and sale of a certain quantity of sulphuric acid and oleum.

I will first state the facts as briefly as possible.

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HONEYMAN v. MINISTER OF NATIONAL REVENUE

Fournier J.

The appellant is a shareholder and director of a company known as Pembina Mountain Clays Limited, hereinafter called the company. The company was incorporated under the laws of the Province of Manitoba and carries on the business of refining and processing bleaching-clay in the city of Winnipeg. It commenced the refining and processing of Bentonite bleaching-clay during the last war. In processing its product it uses large quantities of sulphuric acid. The company is the sole producer of such clay in Canada and its only competitor is a large scale producer in the United States. During the war, this product was declared a strategic material and the company's only customer paid it a bonus for its production.

The price paid to the company was the equivalent of the laid down cost of the American product in Sarnia. During the war the price of the American product was increased as the result of a 10% war tax on United States products, a 7% surcharge in freight rates and a 10% or 11% discount on Canadian currency in terms of the United States dollar. With these advantages and the bonuses received from its customer, the company was able to operate successfully. But some time after the war these taxes were removed and the Canadian dollar eventually was at parity, or close to parity, with the United States dollar and the American firm lowered its price. The company had to meet the decreased price of its competitor to hold its market.

During the war years, most of the earnings of the company had been reinvested in capital equipment and in 1946 its working capital was less than satisfactory and the company's future was uncertain. To meet the requirements of its purchaser, it bought from week to week, through the ordinary trade channels, the sulphuric acid needed for the refining of its product. The above described situation had forced it to operate practically on a day-to-day basis.

Some time in the spring of 1946 the appellant, who was secretary-treasurer of the company, heard that the War Assets Corporation had for sale 2,000 tons of sulphuric acid and 200 tons of oleum. This sulphuric acid was on hand at the Defence Industries' plant at Transcona, five or six miles out of Winnipeg. He suggested to the directors of the company that it should purchase this acid, seeing that it was

at a short distance from its plant and that there would be added to its cost very little in the way of transportation charges. The company had always purchased the acid from a firm in Sudbury and the freight charges were the equivalent of the price of the sulphuric acid itself.

On March 19, 1946, the company received a letter (Exhibit A) from the War Assets Corporation stating in part:

> If your company has a definite use for 3,774,979 lbs. of sulphuric acid 92%, . . . we would be prepared to accept a reasonable offer.

On March 29, 1946, the company answered that it was making inquiries to ascertain whether the acid would meet its requirements. Before May 1, the company through the appellant, had made an offer of $17 a ton for the acid. to be delivered at the rate of two cars per month. It would appear that this offer was not acceptable. The War Assets Corporation wished to make a bulk sale of the sulphuric acid. On May 3, 1946, the company made another offer to purchase the acid at the price of $10 a ton, the acid and tanks to remain where they were at the buyers' risk and responsibility, but to be removed in two years. It would seem that this offer was agreeable to the War Assets Corporation.

The company then tried to finance the purchase through the medium of its Bank but without success. The Bank would not extend the necessary credit without collateral security or the personal guarantee of the directors of the company. The directors felt unable to guarantee the loan but discussed the matter of financing the purchase with the shareholders (only two shareholders of the company were not directors). The shareholders refused to give their personal guarantee for the loan but they agreed to form a group or syndicate of which they would all be members with the object of purchasing the acid and selling it to the company. The syndicate appointed one of the shareholders to act as its agent and to attend to the transactions with the War Assets Corporation and the company.

On June 27, 1946, the general manager and director of the company, who was also the agent for the syndicate, wrote to the War Assets Corporation that the company would accept delivery of the acid which was to be sold to

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the syndicate's agent at $10 per ton (Exhibit 8). On July 1, 1946, an agreement was entered into between the company on the one part and the syndicate's agent as vendor on the other part. The terms of this agreement read as follows:

(1) The Vendor hereby agrees to sell to the Company such of the acid and oleum purchased by the Vendor from War Assets Limited as the Company may from time to time require for the price of Thirty Dollars ($30) per ton.

(2) The Company agrees to transfer the said acid from its present site at Defence Industries'—(at a location named)—"to premises at or near the Factory of the Company at"—(location named)—"such transference to be at the company's own expense."

(3) *IT IS UNDERSTOOD AND AGREED,* however, that no title shall pass from the Vendor to the Company for the said sulphuric acid or oleum until the same has been transferred from the tanks of the Vendor to the tank of the Company.

(4) *IT IS MUTUALLY AGREED* that an inventory shall be taken by the Vendor of the amount remaining in its tanks at the end of every month to ascertain the amount of acid and oleum which has been transferred to the Company's tank during the preceding month, and the amount so transferred shall be paid for by the Company to the Vendor within thirty days thereafter.

A statement filed as Exhibit 6 shows that the purchase price of the acid was paid by instalments by the syndicate during the period of June 3 to October 22, 1946, and that the acid and oleum were delivered in varying quantities and on different dates from September 13, 1946, to January 7, 1947. The tanks were also delivered in varying numbers and on different dates.

All the shareholders of the company were members of the syndicate and contributed to the purchase price of the acid in proportion to their holdings in the company. In the years 1947, 1948 and 1949, they received their share of the sale price from the company. The syndicate had paid the acid at $10 per ton and had sold it at $30 per ton to the company. It is the excess of the price received over the amount paid that the respondent considered as income and to be assessable in the hands of the individual members of the group over the three years in question. When the assessments were made, the profits of the appellant from the transaction or transactions in sulphuric acid, oleum and tanks—the amounts of which are not disputed—were added to the amounts of the income shown on the appellant's income tax returns.

From such assessments an objection was made to the Minister on the ground that the profits were not income but capital gains. The Minister having reconsidered the assessments confirmed them on the ground that the amounts received by the taxpayer as his share of the profits from transactions in sulphuric acid and oleum were income within the meaning of section 3 of the Income War Tax Act, 1927 and sections 3, 4 and 127 (1) (*e*) of the Income Tax Act, 1948.

The issue on the appeal is whether the profits of the appellant on the transaction or transactions in sulphuric acid and oleum, as a member of the syndicate above described, were taxable income within the meaning of the Acts and sections referred to in the Minister's notification confirming the assessments.

Section 3 of the Income War Tax Act, R.S.C. 1927, c. 97, as amended defines taxable income as follows:

Sec. 3. "Income."—1. For the purposes of this Act, "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. . . .

In the Income Tax Act, Statutes of Canada, 1948, Chap. 52, effective January 1, 1949, sections 3, 4 and 127 (1) (*e*) read thus:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

127. (1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

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Counsel for the appellant based his argument on these sections of the law and submitted that the ultimate gain by the appellant to be taxable income would have to be the result of transactions amounting to a trade or business. The transaction considered in this case was an isolated operation which was in no way related to the appellant's ordinary occupation and had none of the characteristics of a business or trade. The deal was not a series of transactions, the subject matter had not been modified, altered or processed to make it saleable and the appellant had neither before nor after been engaged in a business or trade. When the appellant, together with others, made a bulk purchase and sale of the sulphuric acid, his motive was to assure the company of a continuous supply of acid to maintain its operations on such terms of credit as would enable it to pay for the acid as funds became available in the hands of the company. He was ready to lose his investment if the company was unable to pay. The charateristics of this transaction were contrary to normal and ordinary business.

In support of his contention, the best known decision he cited was that of *Jones* v. *Leeming* (1) where it was held:

> That having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax. . . .

In the last-mentioned case the Commissioners, masters of the facts, after considering the facts and arguments, found that the transaction was not a concern in the nature of trade.

Counsel quoted other decisions to which I shall refer later.

To his first proposition that a single transaction does not constitute a trade or business, I may agree that he is right; but I would not conclude, solely on that ground, that a profit resulting from such a transaction, meeting the necessary test or tests, would not be taxable income. He contended all through his submission that the gain realized by the appellant had to be the result of a transaction which could fall only within the ambit of the words of section 3 of the Act "as being profits from a trade or commercial or financial or other business."

(1) [1930] A.C. 415.

In my opinion I believe this is a too restrictive interpretation of the definition of the word "income" for the purposes of the Act. Such an interpretation was not admitted in many decisions.

In *Morrison* v. *Minister of Customs and Excise* (1) Audette J. says (page 81, in fine):

> Now the controlling and paramount enactment of sec. 3 defining the income is "the annual net profit or gain or gratuity". Having said so much the statute proceeding by way of illustration, but not by way of limiting the foregoing words, mentions seven different classes of subjects which cannot be taken as exhaustive since it provides, by what has been called the omnibus clause, a very material addition reading "and also the annual profit or gain from any other sources." The words "and also" and "other sources" make the above illustration absolutely refractory to any possibility of applying the doctrine of *ejusdem generis*. . . .

In *Shaw* v. *Minister of National Revenue* (2) Kerwin J. made the following comment (page 348, in fine): "In view of the evident intention to tax the annual profit or gain from any source, . . ."

And in *Blackwell* v. *Minister of National Revenue* (3) Cartwright J. says (page 425):

> It is suggested that the words in section 3 of the *Income War Tax Act* "profits from a trade, or commercial or financial or other business or calling" also show that the word "business" is used in contradistinction from the word "calling". It seems to me from reading the last mentioned section as a whole that the purpose of Parliament was not to subdivide earned income into classes according to its source but rather to use the words which would embrace earned income from every source. I do not think that the words "business" or "calling" are used in the section as terms of art intended to define mutually exclusive categories of sources of income but in the popular and ordinary sense and, so used, I think that the words "profits derived from a commercial or financial or other business" are wide enough to include the earnings of a commercial traveller.

It seems to me that in determining whether the gain is considered in this instance as "taxable income" one should not be limited to the question—does the transaction above described constitute a trade or business? I rather believe that all the facts and circumstances of the deal should be considered in relation to the general definition of "income" in section 3, to see if the transaction fits into the framework of the definition. In the affirmative, the gain derived therefrom would be "taxable income".

(1) [1928] Ex. C.R. 75. (2) [1939] S.C.R. 338.
(3) [1951] S.C.R. 419.

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This rule was clearly expounded by the President of this Court in *The Atlantic Sugar Refineries* v. *The Minister of National Revenue* (1). The headnote reads in part thus:

2. That whether the gain or profit from a particular transaction is an item of taxable income cannot be determined solely by whether the transaction was an isolated one or not. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and its surrounding facts.

This decision was affirmed by the Supreme Court of Canada (2).

The same view was expressed by Cameron J. in *McDonough* v. *The Minister of National Revenue* (3); it is worded as follows:

2. That the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

As set forth in the foregoing decisions, in the case of a single transaction the test to be applied is that which is laid down in *Californian Copper Syndicate* v. *Harris* (4) by Clerk, L.J. (pp. 165 *et seq.*):

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act of 1842* assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. . . .

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The transaction as explained by the appellant in his testimony would appear to be of the nature of transactions put through every day in the world of business or finance or commerce. Somebody lacks the necessary funds to purchase a necessary supply of material for his trade or business; he negotiates a loan; gets a line of credit; failing these, he finds a person to purchase the goods who will, for a consideration, sell him the goods on terms he can meet. This description in my mind covers "trading and business transactions" as understood in the ordinary sense.

(1) [1948] Ex. C.R. 622.
(2) [1949] S.C.R. 706.
(3) [1949] Ex. C.R. 300.
(4) (1904) 5 T.C. 159.

The appellant—shareholder, director and secretary-treasurer of the company—knew, as all the members of the syndicate, the financial position and the needs of the company. When the occasion presented itself that it could purchase sulphuric acid at a low price, it lacked the necessary funds. Through its board of directors, it tried to negotiate a loan from the Bank. The Bank required collateral securities or the personal guarantee of the directors. This was not forthcoming and the loan was refused. All the shareholders joined in a syndicate to finance the purchase of the acid and sell the same to the company as required by the company from time to time. The company did not undertake to purchase part or all the acid. It agreed to take delivery and pay on terms and conditions for the acid needed in its operations. Title remained with the syndicate up to the time the company took physical possession of the acid for its needs. Payment was made later on. The price paid for the acid was $10 per ton. It was sold in varying quantities and on different dates to the company at $30 per ton, the price having been agreed upon on or before the purchase of the acid by the syndicate. The members of the syndicate received payment for the acid at the agreed price and realized a gain on the transaction.

This transaction in my opinion has all the earmarks of a business or trading transaction, which, if it had been undertaken by any businessman, would have been considered as such. Why if undertaken by the shareholders of the company would it be considered otherwise, I do not know. Any person who would have made this transaction would have had uppermost in his mind the profit or loss which could have resulted from such a deal. To believe that the shareholders had no such thought in mind does not appeal to me. If they were motivated by altruistic sentiments, they could have readily themselves loaned the required amount to the company, with or without interest. They had the necessary funds to do so. Instead, they preferred purchasing the acid and selling it at a profit to their company.

I am of the opinion the the whole operation as described above was the carrying of a scheme for profit making. It certainly was not a mere enhancement of value of an investment realized.

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For these reasons I find that the profits made as a result of this business transaction by the appellant fall within the definition of "income" in the Acts applicable to the issue and that the amounts of these profits were properly added to the appellant's income tax returns for the years 1947, 1948 and 1949.

The appeal is dismissed with costs.

Judgment accordingly.

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May 7

May 16

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

OWNERS OF *CHINOOK* .....APPELLANT;

AND

DAGMAR SALEM .....RESPONDENT.

Shipping—Practice—O. 12, R. 21A of Supreme Court Rules (England)—Exchequer Court Rule 300—Limitation on amount recoverable as costs when security given in lieu of bail bond.

Held: That the successful party in a collision action is entitled only to one per cent of the amount of security given in lieu of bail bond as costs, and not any greater amount as damages.

2. That Rule 300 of the Exchequer Court Rules does not give jurisdiction to increase the amount recoverable established by O. 12 R. 21A of the Supreme Court Rules (England).

APPEAL from the ruling of the Deputy Registrar for the British Columbia Admiralty District.

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

John I. Bird for appellant.

F. A. Sheppard, Q.C. for respondent.

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

SIDNEY SMITH D.J.A. now (May 16, 1955) delivered the following judgment:

I had the benefit of very helpful argument on the point involved here which is narrow, unusual but interesting. It arises by way of appeal from the finding of the Deputy Registrar of this Court at Vancouver.

The owners of the defendant ship, who have partially been successful in a collision action and have been awarded damages and costs, appealed from the Registrar's finding that they are only entitled to 1% of the amount of security given in lieu of bail bond as their costs under this head of expense. Their actual expense of the item amounted to more than $7,000. The owners, instead of putting in bail, borrowed money at interest and give bank securities instead, this course being due to their inability to get a bond here since they were foreigners with no assets in this jurisdiction. They say they should be allowed their actual expense either as (1) damages or (2) costs.

Although the issue was not directly raised before me it may be of service if I say something about these alternatives. The claim for the allowance by way of damages is, I think, answered by the rulings that damages to cover the expense of bailing can only be given where the ship has been arrested wrongfully, for example, where the arrest is malicious or is due to gross negligence, *The Numida* (1). Negligence in this regard refers to the arrest (e.g. the arrest of the wrong ship) and not to the basis of the cause of action; see *The Evangelismos* (2). *The Orion* (undated) ibid, 378n. Here there was no negligence in the procedure. Indeed the ship was not arrested at all, wrongfully or otherwise. Therefore any expenses that the defendant is to be recouped for giving security must be recouped as costs.

Apart from statutory rules, none of these expenses could be recovered even as costs, *The Numida* (*supra*); but there has been a change in England since that decision. The change affects this Court also because of the rule which now appears as O. 12, R21 A of the ordinary Supreme Court Rules (England). This is as follows:

> A commission or fee paid to a person becoming surety to a bail bond or otherwise giving security may be recovered on taxation; provided that the amount of such commission or fee shall not in the aggregate exceed one pound per centum on the amount in which bail is given.

Our Exchequer Court Act, section 35, makes the practice of the English High Court as it stood on 1st January 1928 apply to whatever our own rules do not cover; so the above-cited Rule 21 A applies here; see *The Cape Breton* (3). I am afraid the Rule is intractable and that there is no

(1) (1885) 10 P. 158. (2) (1858) Swabey Adm. 378.
(3) (1907) 11 Ex. C.R. 227.

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OWNERS OF *Chinook* v. *Dagmar Salem*

Sidney Smith D.J.A.

departing from it. I think it was Lord Birkenhead who said that one should not leave the safe anchorage of a sure rule. However the defendant points out that our Admiralty Rules make the Exchequer Court Rules apply wherever the Admiralty Rules are silent; and that Rule 300 of the Exchequer Court Rules provides as follows:

> The Court or a Judge may, under special circumstances depart from any limitation in these rules upon the inherent right or power of the Court or a Judge .....

Therefore he submits that I have the power to allow more for the costs of security than 1% of the sum secured and that I should allow more; should in fact allow the full costs.

This is an attractive argument but I am far from satisfied that I have this power. I am not convinced that the 1% limitation is one "in these Rules" (i.e. in the Exchequer Court Rules), or that this limitation is one on my "inherent right or power". If anything I am inclined to think that the cases I have cited show otherwise. Then again is the express prohibition in Rule 21 A to be swept away by virtue of such general expressions? I think not; no matter how meritorious may be the defendants' claim.

Even if I have the power to increase the 1% I do not think it would be proper for me to do so in this case. The unusual expense that defendants had to incur to put up security was due to their impecuniosity. The House of Lords decided in *Liesbosch* v. *S.S. Edison* (1), that extra expenses of a litigant due to his own impecuniosity cannot be recovered as damages; and I think the same principle must apply to the recovery of costs. Suppose for example, the defendant had been an individual and had travelled here to give evidence, but because he had no ready money had to borrow his passage money at interest, could the interest be allowed as costs? It seems to me the answer must be "No".

I therefore affirm the Registrar's finding. Costs will follow the event.

Judgment accordingly.

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(1) [1933] A.C. 449.

BETWEEN:

THE CALGARY & EDMONTON CORPORATION LIMITED ..... APPELLANT;

1954
Mar. 2
1955
June 3

AND

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

Revenue—Income—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 12(1)(b), 16—Income from business or property—Capital outlay—Indirect payments—Appeal from Income Tax Appeal Board dismissed.

In 1947 one S. granted a lease to the California Standard Co. of all the hydrocarbons (except coal) in certain lands that he then owned but which were to be divided upon the death of his parents into four equal shares among himself and his three sisters. The sisters registered a caveat on the lands and some months later gave an option to an agent of a syndicate of three companies, one of which was the appellant, under which the syndicate became entitled to a lease of the sisters' interest in the hydrocarbons. On September 22, 1948, the California Standard Co. and the syndicate, having reached an understanding and settled their difficulties with the sisters, entered into an agreement whereby the "Standard" lease was approved by the sisters in consideration of a cash payment by the syndicate of $75,000 and payment of 10% of the gross proceeds of the sale of production from the lands until a further $75,000 had been paid to them. By the same agreement one-half undivided interest in the lease granted by S. was vested in the California Standard Co. and the other one-half in the syndicate, each member thereof acquiring a one-third interest in the syndicate's share.

In 1949 and 1950 appellant received its share of the sale of the oil produced and, in accordance with the terms of the 1948 agreement, paid 10% of the amounts so received over to the sisters. Appellant included the amounts in its income tax returns for those years and was assessed accordingly but later objected to the assessments on the ground that through an accounting error its gross income from production for those years was overstated by the amounts paid the sisters. The Minister reviewed and confirmed the assessments which were appealed to the Income Tax Appeal Board and the appeal was dismissed. Hence, the present appeal to this Court.

Held: That the 1948 agreement superseded and replaced the agreement entered into in 1947 between the sisters and the agent of the syndicate. By approving the lease granted by their brother the sisters were not in a position to execute and deliver the lease contemplated by the 1947 agreement.

2. That whatever rights or interest the sisters may have had in the lands or in the oil therein were transferred to the syndicate. Once the 1948 agreement was signed and the cash payment of $75,000 effected the sisters had received full compensation for their rights and

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interest, provided, however, there was no oil and in that event the cash payment was a capital outlay within s. 12(1)(*b*) of the *Income Tax Act*, 1948.

3. That the lands being oil-producing, the proceeds of production became the property of the California Standard Co. and the syndicate, whereupon the sisters became entitled to a further sum of $75,000 payable by the syndicate at the rate of "10% of the gross proceeds of the sale of the petroleum substances produced, sold and marketed from the lands". These words do not purport to give a right or title to a share of the proceeds of production but merely indicate how, when and where the additional sum of $75,000 would be paid to them.

4. That the amounts received by appellant company were instalments of its share of the proceeds from oil production and therefore were income from rights or interest in a property which produced oil and from the ordinary business it carried on of exploring for and producing oil.

5. That the amounts were payments or transfers of money made pursuant to the direction or with the concurrence of appellant company in satisfaction of its obligation to the sisters as a member of the syndicate and were so paid or transferred for its benefit.

APPEAL from a decision of the Income Tax Appeal Board.

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

R. A. MacKimmie for appellant.

F. J. Cross for respondent.

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

FOURNIER J. now (June 3, 1955) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dismissing the appellant's appeal from its income tax assessments for the years 1949 and 1950, whereby the respondent sought to hold it liable to tax on certain amounts it received from the gross proceeds of the sale of production of oil from lands in which it had an interest.

The facts are not disputed and are found in admitted copies of seven documents filed by counsel for the appellant as exhibits numebered 1 to 7. The only oral evidence adduced was by a geologist who dealt with the nature and condition of the oil in the ground. This evidence had no bearing on the facts involved in this appeal.

On August 24, 1943, Kost Sereda, who was the owner of a quarter section of land in the Leduc area, in the Province of Alberta, transferred it to his son Andrew H. Sereda, in fee simple. The same day the son gave back an encumbrance whereby the lands became charged with the provision of a livelihood for his father and mother. He further encumbered the said lands so that on the death of his father and mother they would be divided in four equal shares. He would retain one share and his three sisters, after complying to the terms of the encumbrance, would each receive a one-fourth in interest in the lands, as owners in fee simple. On February, 8, 1947, Andrew H. Sereda gave a written lease of all the petroleum, natural gas and other hydrocarbons (except coal) within, upon or under the said lands to the California Standard Company. On February 11, 1947, the father gave a written consent to this lease and agreed to the postponement of his caveat. On April 16, 1947, the sisters registered a caveat on the lands. On July 28, 1947, the Court issued an order continuing their caveat. This order was registered the same day in the Land Titles office. They had previously notified the company that they had a three-quarter interest in the property and that the lease was invalid.

On November 7, 1947, the sisters, for a sum of $5,000 and other considerations, gave a 30-day option to George H. Cloakey, acting as agent for Home Oil Company, whereunder Cloakey became entitled to a lease of the sisters' interest in the said hydrocarbons other than coal. This agreement, filed as Exhibit 2, at section 6 thereof, establishes clearly the position of the parties in the event that the difficulties with The California Standard Company were settled. Section 6 reads thus:

6. Notwithstanding anything herein elsewhere contained or implied, it is agreed by and between the parties hereto that if, during the continuance of the option hereby granted, the Optionee shall make a settlement with THE CALIFORNIA STANDARD COMPANY and shall as a result of such settlement request the Optionors, by notice in writing given to them or to their said solicitor, to ratify, consent to, approve and/or affirm the Standard lease and the right of the said THE CALIFORNIA STANDARD COMPANY to take, recover and market the petroleum substances from the optioned area thereunder, then and in such case, upon payment to them of the said sum of Seventy-five Thousand Dollars ($75,000) in manner hereinbefore provided for and contemporaneously with such payment, and upon the delivery to them of a

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covenant in writing on the part of the Optionee to pay or to cause to be paid to them Ten per-cent (10%) of the gross proceeds of the sale of the petroleum substances produced, sold and marketed from the optioned area until they shall have received therefrom the sum of Seventy-five Thousand Dollars ($75,000), (payments on account thereof to be made to or for the account of the Optionors, at such place as they shall jointly in writing from time to time appoint, until the said sum of Seventy-five Thousand Dollars ($75,000) shall be fully paid and satisfied), the Optionors shall execute and deliver such documents of consent, approval, affirmation and/or ratification as counsel for the Optionee may reasonably require.

This option was duly exercised and Cloakey assigned all his rights derived therefrom to Home Oil Company, Anglo Canadian Oil Company and the appellant. The three companies were called "The Syndicate".

Meantime, the California Standard Company, through Court action, was seeking to obtain a declaration that their lease was valid. On September 22, 1948, the California Standard Company and the Syndicate having reached an understanding and having settled their difficulties with the three sisters, an agreement was executed by all the parties concerned. The effect of the agreement was to vest a one-half undivided interest in the Andrew Sereda lease of the hydrocarbon (except coal) in the California Standard Company and the other one-half in the Syndicate, each member thereof acquiring a one-third interest in the Syndicate's share.

Clause 5 of this agreement reads as follows:

5. The Syndicate hereby agrees to pay to the claimants the sum of seventy-five thousand ($75,000) dollars in cash on the execution hereof and 10% of the gross proceeds of the sale of production from the said lands until a further sum of seventy-five thousand ($75,000) dollars has been paid to the claimants (sisters) and in consideration thereof the claimants (sisters) hereby ratify, consent to, approve and affirm the said lease and shall join with California Standard Company in obtaining a consent judgment of the said Court declaring the said lease to be valid and to be the first charge upon all the interest of the said Andrew H. Sereda, the said Kost Sereda and the claimants (sisters) in the petroleum and natural gas underlying the said lands.

In my opinion, this agreement superseded and replaced the agreement entered into by the sisters and George H. Cloakey on November 7, 1947, and filed as Exhibit 2, wherein it was agreed by the parties that the said Cloakey was given an option to acquire from the sisters a lease of all their rights, title, estate and interest in or to the petroleum substances within, upon or under the said lands. The

agreement of September 22, 1948, recognized as legal and valid the lease between Andrew Sereda and The California Standard Company. The sisters having consented to, accepted and approved this lease were in no position to execute and deliver to Cloakey the lease contemplated by section 5 of the agreement of November 7, 1947, and annexed thereto.

After the above agreement was duly signed and executed, the companies in which were vested the interests in the lease of the hydrocarbons by an agreement dated October 8, 1948, with the Saskatchewan Federated Co-Operatives Limited, arranged for the production, refining, delivery and marketing of whatever oil found under the leased land. The Co-Operative was to receive 30% of all the moneys realized from the sale of oil and the remaining 70% was to be paid monthly to the companies through the Home Oil Company Limited. On this basis the California Standard Company would receive 35% of the proceeds of production and the Syndicate 35%. The appellant would then receive one-third of the Syndicate's share.

During the taxation years under review, the appellant did receive certain amounts from the proceeds of the sale of production of oil from the said lands. On receipt they were entered in the appellant's books as being part of its income. But as the sisters, according to the terms of the agreement dated September 22, 1948, were entitled to receive $75,000 at the rate of 10% of the gross proceeds of the sale of production, in 1949 they received from the appellant the sum of $8,018.82 and in 1950, $16,981.81.

Having in its income tax returns of 1949 and 1950 included these amounts as income, the appellant was assessed for same. In December 1950, the appellant, through its manager, advised the respondent by letter that an error in accounting procedure had been made and that the appellant's gross income from production had been overstated by the above sums in its income tax returns for 1949 and 1950. Then on June 20, 1952, the appellant gave notice of objection to the assessments dated May 3, 1952, on the ground that through an error in accounting procedure the appellant's income from production for the two above fiscal years was overstated and that no part of these sums was ever in the hands of the appellant. The Minister

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having reconsidered these assessments confirmed them on the ground that they were income within the meaning of sections 3, 4, 5, 6, 16 and 125 of the *Income Tax Act*, Statutes of 1948, chap. 52. These assessments were appealed to the Income Tax Appeal Board and the appeal was dismissed.

The appellant contends that the amounts of $8,018.82 and $16,981.81 included in its income tax returns for the taxation years 1949 and 1950 were not taxable income within the meaning of the Act and the sections referred to by the respondent.

The sections of the *Income Tax Act*, chap. 52, Statutes of Canada 1948, which are pertinent to the dispute are sections 3, 4 and 16. They read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside of Canada and, without restricting the generality of the foregoing, includes income from all

(*a*) business,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

16. *Indirect payments.*—A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

For agreeing to and approving of the above mentioned lease of Andrew Sereda to the California Standard Company and the transfer of their rights or interest, if any, in the lands in question to the Syndicate, the sisters were paid $75,000 in cash and were to receive another $75,000 out of the Syndicate's share of the proceeds of production of petroleum from the said lands at the rate of 10% of the gross production.

In my mind, whatever rights or interest the three sisters had in the lands or hydrocarbons, thereon or therein, were transferred, for the aforesaid consideration, to the Syndicate. After signing the above agreement and receiving $75,000 in cash, in my view they had received full compensation for all their rights and interest, if the lands did not contain hydrocarbons or if no oil was produced from the

lands. In that case, the payment by the Syndicate—of which the appellant was a member—was a capital payment under paragraph (*b*) of subsection 1 of section 12 of the *Income Tax Act*.

But the lands having become productive of petroleum, the sisters became entitled to a further sum and the Syndicate became obligated to pay to them a further sum up to a maximum of $75,000, at the rate of 10% of the gross production. This amount of $75,000 was to be paid by the members of the Syndicate out of the proceeds of the production at the rate of 10% of said proceeds. In 1949, ten per cent (10%) of the proceeds to which the appellant was entitled to receive amounted to $8,018.82 and in 1950 to $16,981.81.

The Syndicate of which the appellant was a member received its share of the gross production of petroleum in accordance with the terms of paragraph 2 of Exhibit 5, an agreement signed and agreed to by the sisters, which reads:

> 2. All moneys received by California Standard Company and the Syndicate under the said agreement with the said Co-Operative shall, after the payment of the royalty provided for in the said lease, be divided one-half (½) to California Standard and one-half (½) to the Syndicate.

The sisters having divested themselves of whatever interest they may have had in the lands agreed that the proceeds of the production should go to the California Standard and the Syndicate. They reserved no right in the production of the petroleum. They only agreed that they would be entitled to a further sum of $75,000 if the lands were productive of oil.

In my opinion, the words "ten per cent of the gross production of the leased substances that were produced, sold or marketed" were put in the agreement not to give the sisters a right or title to a share in the proceeds of the production, but merely to indicate how, when and where the sum of $75,000 would be paid to them.

I have come to the conclusion that, even if the sisters had actual rights or interest in the lands or in the petroleum within contained at the time Andrew Sereda leased the said lands with all petroleum to The California Standard Company, or at the time they signed the agreement of September 22, 1948 (Exhibit 5), by the signing of this agreement they transferred to the Syndicate all their rights and

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interest without reservation. For the above mentioned consideration, they renounced to any share in the gross production of hydrocarbons from the said lands and agreed that the lease between Andrew Sereda and California Standard Company was valid. After the signing of this agreement all they were entitled to was a sum of $75,000 if the proceeds of the production of oil from the said lands were such as to meet such obligation on the part of the appellant.

Being of that view, I wish now to examine the appellant's position at the time it received the amounts of $8,018.82 and $16,981.81. The Company amongst its activities is directly or indirectly interested in the exploration, drilling, production and disposal of hydrocarbons. It is one of its business activities. It acquired or leased certain rights, titles and interests in certain lands with the above objects in view. For the acquisition or leasing of the said lands it paid a cash sum and obligated itself to pay a further specified sum if it derived benefit or income from the said lands. The lands were productive of oil and the appellant received in cash its share of the proceeds of the production and sale of oil. Out of the amounts received or out of its other income it met its obligation to pay the share of the amount of $75,000 which it had undertaken to pay under the agreement of September 22, 1948.

I am of opinion that the amounts the appellant received were income within the meaning of section 3 of the *Income Tax Act*. The amounts received were income from its business and from its titles, rights or interests in a property which produced oils and other hydrocarbons.

Furthermore, I find that the aforesaid amounts were received by the appellant pursuant to the agreement of September 22, 1948, and represented instalments of the appellant's share of the proceeds of production of petroleum from the lands mentioned in that agreement.

I also believe that the amounts received by the sisters from the appellant out of the proceeds from the sale of production from the lands in question were payments or transfers of money made pursuant to the direction of or with the concurrence of the appellant to the sisters in satisfaction of its share of the obligation of the Syndicate to the sisters and were paid or transferred for its benefit.

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For these reasons, I have found that the amounts of $8,018.82 and $16,981.81 were properly included in the appellant's income tax returns for the years 1949 and 1950 as income and that the Minister of National Revenue was right in deciding that these sums were capital outlays within the meaning of section 12 (1) (*b*) of the *Income Tax Act*, 1948. My conclusion is that the assessments and the decision of the Income Tax Appeal Board should stand.

The appeal is dismissed with costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955

Apr. 29 & 30
May 2

May 26

BETWEEN:

WILLIAM ROBERTSON .....PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE PRINCE* AND OLAF NELSON .....} DEFENDANTS.

Shipping—Collision—National Harbour Regulation No. 35(3)—Failure to place a light as required by Regulation 35(3)—No contributory negligence.

In an action arising out of a collision in Vancouver Harbour between the *Sarawak II* and defendant the Court found that defendant's negligence was the sole cause of the collision.

Held: That the failure of defendant to keep a proper look-out was negligence on its part.

2. That there was no contributory negligence on the part of the plaintiff since defendant had failed to comply with National Harbour Board Regulation No. 35(3) governing the placing of navigation lights.

ACTION for damages for loss of plaintiff's vessel.

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

C. C. I. Merritt for plaintiff.

John I. Bird for defendant.

Glen McDonald for Master of the *Maple Prince*.

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

SIDNEY SMITH D.J.A. now (May 26, 1955) delivered the following judgment:

This case concerns a collision in Vancouver Harbour between the plaintiff's seine fishing vessel, the *Sarawak II* and the railway car barge *York No. 4* which, with car barge *York No. 5* was being towed alongside the tug *Maple Prince,* on March 25, 1953. I am glad to be able to say that I thought all witnesses dealt fairly with the Court; and while I am unable to accept the whole of their evidence, I regard any discrepancy as being due to dim recollection of incidents happening over two years ago. In saying this I do not overlook that some memoranda of evidence were no doubt taken shortly after.

About 4.30 that morning, in darkness, and in rainy, cloudy weather, the vessels left their respective wharves:— the *Sarawak II,* left the National Harbour Board's fishing dock; the *Maple Prince,* the Great Northern Pier. The collision followed just after. But while the former was running free on a voyage to Victoria and thence to the fishing grounds on the west coast, the *Maple Prince* had in tow the two barges. These were made fast "end on" to each other, the No. 4 being the leading barge. The tug was secured to the after end of barge No. 5, and had that barge on her starboard side. The speeds given were merely estimates, but for what they are worth were stated as being 2 knots for the *Maple Prince* and 4 to 5 knots for the *Sarawak II.*

The wharves in question are situated on the south side of the harbour and their head-line runs roughly east and west. The tug was bound in a north-easterly direction and therefore had the line of wharves on her starboard side with the two barges between her and the wharves. This is of paramount importance in the case, because owing to the height of the railway cars on the barges the tug lights were completely hidden from any vessel approaching the unit from its starboard side. And it was thus with the *Sarawak II.* Both fishing vessel and tug carried the regulation navigation lights. The crux of the controversy is whether the barge *York No. 4,* as claimed, exhibited, on the fore starboard

corner of *York No. 4* or at all, the white light required by National Harbour Regulation No. 35(3) which reads as follows:

> (3) Every vessel being towed and lashed alongside the towing vessel shall—
>
> (*a*) when the view from the wheelhouse of the towing vessel is obstructed by the tow, carry a lookout man on her outboard side;
>
> (*b*) between sunset and sunrise, display a white light on her outboard side.

Robertson, the Master and owner of the *Sarawak II*, left the Great Northern Pier and had nothing to do but get on his course westerly for the First Narrows Bridge and keep a good look-out. His mate was occupied astern putting things ship-shape. On the other hand, the Master of the *Maple Prince* had much to do before he could set his course for the Second Narrows Bridge and his destination up Burrard Inlet. The fish dock lies about 300 feet to the east of the Great Northern Pier and so these courses were crossing, the tug being the give-way ship. Her Master had to attend to the coupling of his two barges "end on"; he had to manoeuvre away from the dock; he had to stay on his two barges and give instructions by whistle to the engineer who was then in the wheelhouse performing the double function of engineer (the tug had wheel-house control) and helmsman; and he had to check by a neighbouring lighted wharf, the course of his vessel to make sure there was no undue deviation of the compass caused by the railway cars on the barges. The third man on duty was the deck-hand and he was occupied with the coupling-up of the barges.

Just after having straightened out on his first course to the eastward, the Master of the *Maple Prince* rounding the port forward corner of barge No. 4 saw ahead the stern of the *Sarawak II* 20 feet away from the starboard forward corner of the barge and heading for that corner. Collision was then inevitable. As a signal to his tug he blew three blasts—one to stop, the other two to go full astern. Before way was lost the collision happened. By an unfortunate circumstance gasoline caught fire on the fishing vessel and she was almost immediately devoured in flames. The two men onboard were rescued by those on the barge.

It is plain that the *Maple Prince* was not keeping a good look-out, or indeed any look-out at all on the unit's starboard side. I think those on board, with all the other duties

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they had on hand, simply forgot there might be other vessels in the vicinity though all knew traffic was to be expected. But she pleads that the *Sarawak II* was guilty of contributory negligence in that she too failed to keep a good look-out. I have given this submission my prolonged and anxious consideration. In the end I have concluded that it is unwarranted. I was impressed by the straightforward manner in which the plaintiff gave his evidence. I think the light on barge *York No. 4* was not so placed on the deck that it could be seen by him. There was conflicting evidence on the exact position of this light and whether it had been moved by the Master or deck-hand. Whatever its exact position I am of opinion that it could not be seen at the crucial time by the *Sarawak II* and that no blame can be attached to that vessel. As I have pointed out, she could not see the navigation lights of the tug *Maple Prince* because these were obscured by the bulk of the box-cars carried on the barges being towed alongside. With no light visible it was too dark to see the unit. Much was made of Robertson looking at the tachometer. But this was only a passing glance and without significance. He concedes there would have been no collision had the white light required by Regulation 35(3) above been properly displayed. The plaintiff applied to amend the answer to question 9 of his Preliminary Act by inserting "40 feet" instead of "25 yards". In the circumstances I grant this. He had some criticisms of the defendants' Act but I need not deal with these.

I find therefore for the plaintiff. The Master of the tug was quite properly joined as a co-defendant. There will be judgment against both defendants. Damages will be ascertained by the learned Registrar.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT 1955 Aug. 3

BETWEEN:

WILLIAM ROBERTSON .....PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE PRINCE* and OLAF NELSON ..... } DEFENDANTS.

Shipping—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Limitation of liability—Tug and tow not owned by same persons—Limitation fixed on tonnage of tug only.

In an action resulting from the collision of a barge towed by a tug with a fishing vessel owned by the plaintiff it was held that the plaintiff was entitled to judgment for damages against the owners of the tug because of its improper navigation. The tow was not owned by the owners of the tug.

Held: That the tug is entitled to limitation of liability under the Canada Shipping Act, R.S.C. 1952, c. 29, s. 657.

2. That s. 657(1) of the Canada Shipping Act is not restricted to actual collision by the ships of the ship-owner but applies in terms to all damage caused to another vessel by the improper navigation of the owner's ship.

3. That the tug-owners are entitled to restrict their liability to the amount allowed by the Canada Shipping Act for each ton of the tug's tonnage and not for the combined tonnage of the tug and tow.

4. That the liability of a defendant is measured by considering only the ships which are owned and navigated by him, his liability being limited by the size of his individual ships.

DETERMINATION OF LIMITATION of liability.

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

C. C. I. Merritt for plaintiff.

John I. Bird for defendants, owners of the ship *Maple Prince.*

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

SIDNEY SMITH, D.J.A. now (August 3, 1955) delivered the following judgment:

On May 26 last I gave the plaintiff judgment for damages caused by collision of his fishing vessel *Sarawak II* with

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a barge *Yorke No. 4* which with another barge *Yorke No. 5* was being towed alongside by the tug *Maple Prince* (*ante* page 221). It will be sufficient to say that the two barges were made fast "end on"; that the No. 4 was leading; that the tug was made fast to the port after end of the tow; that both barges were loaded with railroad cars to such a height as to obscure the tug's lights from any vessel approaching in the dark from the starboard side, as was the *Sarawak II*.

I found the collision due to a failure on the tug's part to comply with the provisions of National Harbour Regulation 35 (3). These called for a lookout man and the display of a white light, both on the outboard side of the tow. There was neither; at all events any white light there could not be seen by the *Sarawak II*.

The tug pleaded that, if found in fault, she was entitled to limitation of liability under Sec. 657 of the Canada Shipping Act. Argument on this submission was postponed till after a finding on the facts. The issue now comes forward for decision.

The defendants did not own either of the barges, whose owner was not sued. The writ in the action is against the "owners" of the *Maple Prince,* which means that this is an action *in personam*: see Admiralty form No. 3. (This would not appear to be so in England, where an action against "owners" as such is an action *in rem*: see Roscoe Admiralty Pract. 5th Ed. 452.).

The barges in this case were not manned or self-controlled in any way; they were wholly under the control of the tug. The material parts of Sec. 657 read:

> (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say:
>
> .....
>
> (*d*) where any loss is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;
>
> liable to damages ..... to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

Though this section refers only to the owner's liability and not to the ship's liability, it is construed as applying to claims *in rem* as well as *in personam*.

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The plaintiff contended that Sec. 657 did not apply to this case at all; that it was the improper navigation of the barge, and not of the tug, that caused the collision; and that the section only applies to an owner whose ship is in collision. The exact submission was made in this way:

> The Defendant's tug *Maple Prince* was not itself in contact with the *Sarawak II*, and where the combined mass of the two scows and the tug was in different ownership, and where the barges as well as the tug were being improperly navigated; the Defendant cannot bring itself under the limits or terms of the statute.

The plaintiff also argued that the owner of the barges was privy to this improper navigation because he knew that they were not fitted with brackets for carriage of the white lights.

On reflection I do not think either of these arguments can be supported. The first reads language into the statute that is not there. Sec. 657 (1) is not restricted to actual collision by the ship of the "ship-owners", but applies in terms to all damage caused to another vessel by the improper navigation of the owner's ship. Here the damage to the *Sarawak II* was caused by the improper navigation of the tug, regardless of whether there was actual collision between the two. Nor can I accept the argument that the owner of the barges was privy to their improper navigation. It was the duty of the tug to adjust the white light in such place and manner as it could properly be seen. It was not the responsibility of the bargeowner, who was entitled to leave this to the tug.

I do not think it can be suggested that the barges were in any way "guilty". It was settled by the House of Lords in *Owners of S.S. Devonshire* v. *Owners of Barge Leslie* (1) that where a collision takes place between a tow and a third vessel, and the tow is completely under the control of the tug, then the tow is an "innocent" ship, in no sense identified with a delinquent tug. I must therefore reject these contentions.

However there is another and more difficult question: namely, whether the measure of the tug's liability should be calculated on the tug's tonnage alone, or on the combined tonnage of the tug and the barge *Yorke No. 4* which actually collided with the *Sarawak II*. In several cases, such as

(1) [1912] A.C. 634.

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The Ran, The Graygarth (1), *The Harlow* (2) and my own decision in *The Pacific Express* (4), it was held that where the tug and the tow belong to the same owner, then the tow may be made liable for the negligence of the tug, when the tow either comes into collision or makes the collision more serious by its added weight. In such cases the plaintiff can proceed against the tow because it is being navigated negligently by the servants of the owner. But here the *Yorke No. 4* was not being navigated by the servants of the owner, and the *Devonshire* decision would appear to bar any action against her.

However, the tug was responsible for the damages done by the barge and the question remains whether, that being so, the liability of the tug-owners is limited by the tonnage of the tug or by this plus the tonnage of the barges or one of them.

I can see that there is some anomaly in holding that the tug-owner is more protected when handling a stranger's barge than when handling his own. But to hold the opposite could have even more startling results. If a tug were helping to shift, say the *Mauretania,* the tug-owner's limitations might be measured by millions. On the other hand in this case the plaintiff will recover from the tug only a fraction of his loss. Actually anomaly is inherent in the whole concept of the statutory limitations which are bound to produce irrational results. There is nothing logical in holding that a tug-owner can limit his liability by the tonnage of the one tug involved in an accident when he may have a whole fleet of ships available to make amends for his negligence. But we must take the policy of Parliament as we find it; though it may be that the entire question is now ripe for re-consideration.

I think the language of the decisions on limitations taken in its full effect indicates that the ships that must be brought into account in fixing a tonnage-basis of liability are the defendant's ships that are "guilty" in the affair of the collision. Thus in *The Harlow, (supra)*, the tug was towing six barges belonging to the tug-owner; but only two were involved in damaging the plaintiff, so only those two

(1) [1922] P. 80. (2) [1922] P. 175.
(3) [1949] Ex. C.R. 230.

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were taken into the reckoning of the tug-owner's limited liability. Where the barges do not belong to the tug-owner, they are not "guilty", and so are not to be considered.

I think this result is indicated by the very language of the Act which measures the liability of a defendant by looking only at ships which are both owned and navigated by him. His liability is limited by the size of his individual ships. As I have said, this is anomalous, and it is not surprising that particular workings of the rule emphasize the anomaly.

There is no submission that the owners of the tug contributed to the collision by their "actual fault or privity". Their servants were responsible. I find the tug-owners are entitled to restrict their liability to $38.92 for each ton of the tug's tonnage calculated in the prescribed manner.

Judgment accordingly.

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May 24, 25

May 30

BETWEEN:

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LIMITED, FIRESTONE TIRE AND RUBBER COMPANY OF CANADA LIMITED AND B. F. GOODRICH COMPANY OF CANADA LIMITED ..... APPELLANTS;

AND

THE T. EATON CO., LIMITED, SIMPSON - SEARS LIMITED, ATLAS SUPPLY COMPANY OF CANADA LIMITED, GENERAL TIRE AND RUBBER COMPANY OF CANADA LIMITED AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENTS.

Revenue—Customs and Excise—"Special brand" automobile tires—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(a) (ii), 23 (1) (a), 30 (1) (a) (i), 57, 58—Meaning of "manufacturer or producer"—Jurisdiction of Tariff Board to determine whether person is manufacturer or

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producer—Relationship between Eaton's and its supplier that of purchaser and vendor—Only one set of costs against unsuccessful appellant—Costs payable to respondent carrying burden of case.

On a reference to the Tariff Board by the Deputy Minister of National Revenue for Customs and Excise the Tariff Board declared that The T. Eaton Co., Limited was not the producer or manufacturer of the "special brand" automobile tires sold by it under the names "Bulldog" and "Trojan" and not liable for excise tax or sales tax on the sales of such tires. From this declaration the appellants appealed with leave on a question of law.

Held: That the Tariff Board had jurisdiction to determine whether Eaton's was the manufacturer or producer of the special brand tires sold by it.

2. That since the statutory definition of a "manufacturer or producer" involves a departure from its ordinary meaning and since the liability to tax of a person, firm or corporation depends on whether he or it comes within its meaning it must be established in the case of a person, firm or corporation who is not a manufacturer or producer in the ordinary meaning of the term that before he is held to be a manufacturer or producer within the statutory meaning all the conditions requisite to the applicability of the statutory meaning are present. If any of them are absent the statutory meaning is not applicable and must give way to the ordinary meaning.

3. That the relationship between Eaton's and its supplier was that of purchaser and vendor of the tires.

4. That the appellants have failed to show that Eaton's held or used or claimed a sales or other right to the tires at any stage in their manufacture by its supplier.

5. That the unsuccessful appellant should be charged with only one set of costs and that these are payable to the respondent carrying the burden of the case.

APPEAL with leave on a question of law from a declaration of the Tariff Board.

The appeal was heard before the President of the Court at Ottawa.

Hon. S. A. Hayden, Q.C., K. E. Kennedy and *J. B. Lawson* for appellants.

G. F. Henderson, Q.C. for respondent The T. Eaton Co., Limited.

B. M. Sedgewick for respondent Simpson-Sears Limited.

A. S. Pattillo, Q.C. for respondent Atlas Supply Company of Canada Limited.

S. Thom for respondent General Tire and Rubber Company of Canada Limited.

K. E. Eaton for respondent Deputy Minister of National Revenue for Customs and Excise.

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

THE PRESIDENT now (May 30, 1955) delivered the following judgment:

This is an appeal on a question of law from a declaration of the Tariff Board, dated December 7, 1954, made after a hearing by the Board of a reference by the Deputy Minister of National Revenue for Customs and Excise relating to "special brand" automobile tires. The reference was by a letter from the Deputy Minister to the Chairman of the Board, dated August 19, 1954, the essential paragraphs reading as follows:

> For some years certain Canadian rubber companies have been manufacturing "special brand" automobile tires for sale to various retail corporations as well as to other rubber companies. These tires bear the names of the purchasers and the treads are molded with special markings which are not sold to others. The former companies have been regarded by the Department as the manufacturers or producers of the tires for the purposes of the Excise Tax Act.
>
> However, competing manufacturers of automobile tires object to our ruling and contend that the "special brand" customs should be treated as the manufacturers or producers of the tires within the meaning of Section 2(*a*)(ii) of the Excise Tax Act and subjected to sales and excise taxes on their sales.
>
> I am therefore referring this case to the Board in accordance with Section 57 of the Excise Tax Act for a declaration as to the correctness or otherwise of the Department's ruling.

The reference was made under section 57 of the Excise Tax, R.S.C. 1952, Chapter 100, the relevant portion reading as follows:

> 57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

When the reference came up for hearing it was in the general terms set out in the letter but during the course of the hearing it was decided to deal with the question as it affected The T. Eaton Co., Limited, hereinafter called Eaton's, and the Board proceeded to determine whether it was liable to excise tax and sales tax on the sale price of the tires sold by it carrying its registered trade marks "Bulldog" and "Trojan" which had been manufactured by Dominion Rubber Company Limited, hereinafter called

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Thorson P.

the supplier, and sold by it to Eaton's. At the hearing counsel for the appellants herein sought to establish that Eaton's was the manufacturer or producer of the said tires within the meaning of the term "manufacturer or producer", as set out in paragraph 2(*a*)(ii) of the Excise Tax Act, and as such subject to excise tax under section 23(1)(*a*) of the Act and sales tax under section 30(1)(*a*)(i). The Board found that Eaton's was not the producer or manufacturer of the tires and consequently not liable for tax on the sales of such tires. It also held that other sellers of "special brand" tires whose position was similar to that of Eaton's were likewise not subject to tax on the sales of their "special brand" tires.

From this declaration the appellants sought leave to appeal under section 58 of the Excise Tax Act and leave was granted by Cameron J. (*ante* page 98) to appeal on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that the T. Eaton Co. Ltd. was not the producer or manufacturer of the special brand tires "Bulldog" and "Trojan" and was not liable for tax on sales of such tires and that, in so far as any other "special brand" customer may have a relationship with his supplier which parallels that of the T. Eaton Co. Ltd., he is not liable to account for tax on the sale of such "special brand" tires?

Before I deal with the question of law on the merits I must consider the submission made by counsel for the respondent Atlas Supply Company of Canada Limited and counsel for the respondent General Tire and Rubber Company of Canada Limited that the Board did not have jurisdiction to deal with the matter referred to it and that, consequently, its declaration was a nullity. This submission was based on the language of section 57(1) of the Excise Tax Act which I have already quoted. It was contended that this section applies only in cases where there is doubt whether any tax is payable on an article or what rate of tax is payable on it and that in the present case neither of these doubts exists since it is clear that in the case of rubber tires the rate of excise tax that is payable is 10 per cent. It was submitted that the section did not give the Board jurisdiction to decide who should pay the tax in respect of which there was no doubt either of its incidence or of its rate. Put somewhat differently, the submission was that the purpose of the Act is to impose a tax on a person who is the manufacturer or producer of goods on the sale of such

goods by him, that the determination of this raises two questions, the first being whether the person is a manufacturer or producer of the goods and the second whether the goods are subject to tax and, if so, what rate of tax is applicable and that section 57 gives the Board jurisdiction to deal with the second question but not with the first. It was urged that the question of who should pay the tax is exclusively a matter for the Court to decide and that the Board does not have jurisdiction to deal with it.

While the language of section 57(1) is not as apt as desirable I am of the view that there is no substance in the submission put forward. There is a simple answer. Section 23(1)(*a*) of the Act, which is the charging section in respect of excise tax, reads:

> 23. (1) Whenever goods mentioned in Schedules I and II are . . . manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.
>
> (*a*) in Schedule I, at the rate set opposite to each item in the said Schedule computed on . . . the sale price, . . .;

The rate applicable to rubber tires as fixed by Schedule I, as amended by section 14 of Chapter 56 of the Statutes of Canada 1953-54, is 10 per cent. This section makes it clear that the tax is exigible when the goods are manufactured or produced and delivered to a purchaser thereof. Section 30(1)(*a*)(i), which is the charging section in respect of sales tax, is somewhat more clear. The relevant portion reads as follows:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (*a*) produced or manufactured in Canada
>
> (i) payable, . . . by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, . . .

Thus it is manifest that sales tax is exigible when the goods have been produced or manufactured and are delivered to the purchaser or at the time when the property in the goods passes and that the sales tax is payable by the producer or manufacturer at such time. It is clear, therefore, that although section 57 speaks of the tax as being payable on an article, the reality is that the tax, whether excise tax or sales tax, is payable by the producer or manufacturer of an article in respect of it. That the tax is imposed on a person

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in respect of an article and not on the article itself, notwithstanding the wording of section 57, seems clear: *vide* such cases as *Provincial Treasurer of Alberta* v. *Kerr* (1); *Kerr* v. *Superintendent of Income Tax and Attorney-General for Alberta* (2); *Smith* v. *Vermillion Hills Rural Council* (3). The articles that were the subject of the reference were "special brand" automobile tires. As the hearing developed the specific articles before the Board were the special brand "Bulldog" and "Trojan" tires sold by Eaton's. Since there was difference or doubt whether Eaton's was the manufacturer or producer of the tires there was difference or doubt whether tax was payable on them on their sale by Eaton's. The Board could not determine such difference or doubt and decide whether tax was payable on the tires or whether they were exempt from tax on their sale by Eaton's without deciding whether Eaton's was the manufacturer or producer of them. Failure to recognize this basic fact was the fallacy in the submission of lack of jurisdiction. Since there was difference or doubt whether any tax was payable on the "Bulldog" and "Trojan" tires on their sale by Eaton's the Board had jurisdiction to resolve such doubt or difference. And since the Board could not resolve such doubt or difference without deciding whether Eaton's was the manufacturer or producer of the tires it follows, as a matter of course, that it had jurisdiction to decide that question. The submission that it did not have such jurisdiction is, therefore, rejected.

Before I deal with the contentions of counsel for the appellant I should set out the Board's statement of the relationship between Eaton's and its supplier, as outlined before the Board by counsel then appearing for Eaton's. It is set out in the Board's decision in quotation marks as follows:

> Tires and tubes are merchandised under the Companys' own private brand names, "Bulldog" and "Trojan" . . .
>
> Under these two brands there is carried a wide variety of tires for cars, also for commercial and farm vehicles . . .
>
> The intricacies involved in the manufacturing of tires are not known to the Company. Tires are made for the Company by Dominion Rubber Co. Limited. They provide all the know-how, manufacturing skill, specifications, molds, designs, raw material, etc. required.
>
> There is no written agreement with the supplier other than contained in orders.

(1) [1933] A.C. 710. (2) [1942] S.C.R. 435.
(3) [1916] 2 A.C. 569.

Dealings with this supplier have continued over a period of twenty-five years. During that time they have confined to Eaton's use certain tread designs which they originated and own. They supply the molds and have continued to own the molds from which these treads are made.

The T. Eaton Co. Limited do not set down any manufacturing specifications for these tires except that they must be equal to or better than the supplier's own standard first-line and second-line tires respectively. The Eaton Company do not own any patents, designs, formulae, etc. pertaining to these tires, except the Trade Marks, nor does the Company supervise in any way their manufacture.

The tires are entirely at the risk of Dominion Rubber Company until they are shipped and invoiced to Eaton's.

The question of rejects and substandards is the responsibility of the manufacturer and they remain the property of the manufacturer.

Eaton's do not finance any inventory for the supplier nor has it any financial interest in Dominion Rubber Company.

The relationship with the supplier is strictly one of buyer and seller and these tires are bought strictly for re-sale at retail or for use on Eaton's own trucks.

These tires are advertised not as something Eaton's manufacture but as a line of merchandise that is exclusive with the Company. This is a normal merchandising practice applying to many lines of merchandise.

In addition there is the following paragraph:

It was further asserted that Dominion Rubber Company Limited make "Bulldog" and "Trojan" tires in advance of orders and supply Eaton's from stock. In this connection it was stated in argument that Eaton's gives no undertaking to buy any, let alone a specified quantity of, tires, and that the tires made for stock were entirely at the risk of the Dominion Rubber.

These statements are referred to by the Board as facts. They must, therefore, be regarded as findings of facts by the Board. As such they are not open to question in these proceedings for there is no right of appeal from the Board's findings of fact.

Counsel for the appellants sought to show that Eaton's was the manufacturer or producer of its "Bulldog" and "Trojan" tires within the statutory meaning of the term "manufacturer or producer", as set out in section 2(*a*)(ii) of the Act, which, so far as relevant here, reads as follows:

2. In this Act,

(*a*) "manufacturer or producer" includes

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

Counsel had to bring Eaton's within this statutory meaning if the appellants were to succeed in the appeal, for it is

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obvious that it was not the manufacturer or producer of the tires within its ordinary meaning. In an effort to do so counsel contended that Eaton's owned or held a sales right in the tires that were being manufactured for it by its supplier and was, consequently, a manufacturer or producer of them within the statutory meaning of the term and that the Board had erred in finding that such was not the case. He relied upon statements in Eaton's advertising, samples of which were before the Board, to the effect, *inter alia,* that the tires were being manufactured exclusively and specially for it with special features which had been decided upon by it as proof that the tires were being manufactured for it by its supplier. This was stressed with a view to showing that the relationship between Eaton's and its supplier was not exclusively that of purchaser and vendor but that the supplier was manufacturing the tires for Eaton's in the sense that Eaton's was the manufacturer within the statutory meaning of the term and the supplier the instrument which it used. The submission was then made that since the supplier was making the tires for Eaton's it held or used a sales right to the tires being so manufactured for it.

Counsel also referred to the evidence bearing on the stages of manufacture of the tires. One of these was the working of Eaton's trade mark and name into the molds and curing them into the tires. It was submitted that when Eaton's trade mark was worked into the tire it could not be sold to anyone other than Eaton's without its consent and that the sales right to the tire then belonged to it. The argument was that the only person who can have a sales right to goods on which a trade mark is put is the owner of the trade mark. Thus the submission was that since the tires were being manufactured for Eaton's and since its trade mark was worked into them it could prevent their sale to anyone else and, that being so, it held or used a sales right to them.

In support of his submission counsel relied upon the decision of Cameron J. in *The King* v. *Shore* (1). Put briefly, his submission was that the relationship between the defendant in that case and the manufacturer there

(1) [1949] Ex. C.R. 225.

referred to was not materially different from the relationship between Eaton's and its supplier in the present case and that as in that case the defendant was held liable to tax as being the manufacturer or producer of the articles within the meaning of the statutory definition there should have been a similar finding by the Board as to Eaton's.

In my judgment, there is no substance in the submissions thus made on behalf of the appellants. Since the statutory definition of a "manufacturer or producer" involves a departure from its ordinary meaning and since the liability to tax of a person, firm or corporation depends on whether he or it comes within its meaning it must be established in the case of a person, firm or corporation who is not a manufacturer or producer in the ordinary meaning of the term that before he is held to be a manufacturer or producer within the statutory meaning all the conditions requisite to the applicability of the statutory meaning are present. If any of them are absent the statutory meaning is not applicable and must give way to the ordinary meaning. That is the situation in the present case.

That facts of the relationship between Eaton's and its supplier, as found by the Board, establish that it was that of purchaser and vendor of the tires. It was not a case of the supplier manufacturing the tires for Eaton's in the sense that it was working for Eaton's as its instrument or *alter ego* in their manufacture and that Eaton's was in reality the manufacturer of them. There was no relationship of principal and agent or master and servant between them. The supplier was the manufacturer of the tires and the vendor of them to Eaton's after they had been manufactured. There was no prior commitment by Eaton's that it would buy them and if it could be said that the supplier manufactured the tires for Eaton's it was only in the sense that it did so in the expectation that after their manufacture it would be able to sell them to Eaton's. Eaton's became the purchaser of the tires only after it had ordered them and the supplier had filled the order by delivering them to Eaton's. Up to that time Eaton's did not have any sales or other right to the tires. There was no overriding contract or agreement between Eaton's and its

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supplier, such as suggested by counsel for the appellants, whereby Eaton's acquired any sales or other right to the tires prior to their delivery to it nor did Eaton's have any such right by any rule of law It is not open to the appellants to question the findings of fact made by the Board for there is no right of appeal from them. It is clear from these facts that the only relationship between Eaton's and its supplier was that of purchaser and vendor. There was no other relationship and no collateral or subsidiary contract or agreement or rule of law whereby Eaton's had any right to the tires at any stage of their manufacture or prior to their delivery to it.

Nor did the putting of Eaton's trade marks into the molds and curing them into the tires give Eaton's any sales or other right to them. It is not established that the supplier could not sell the tires to some one else if Eaton's did not buy. It could have buffed off Eaton's trade mark and name and sold the tires. Indeed, the evidence shows that the supplier did sell rejected and sub-standard tires with Eaton's trade mark and name on them. But even if Eaton's had a cause of action against the supplier for infringement of its trade mark if it sold the tires to some one else without its consent and obtained an injunction restraining the supplier from selling the tires with its trade mark on them it does not follow that it had any sales or other right to the tires. Even if Eaton's could have put an impediment in the way of the supplier selling the tires carrying its trade mark this did not give Eaton's any right in the tires. The owner of a trade mark has the exclusive right to its use and may prevent others from using it on their goods but he has no right to the goods on which his trade marks have been unlawfully used. This proposition is an elementary one.

And there is no merit in the contention put forward by counsel for the appellants that Eaton's claimed a sales right in the tires that were being manufactured. He submitted that the word "claims" in section 2(*a*) (ii) means only "asserts" and that Eaton's had asserted a sales right to the tires when its name was cured into them and in the course of its advertising. I do not agree. It is not necessary, in my opinion, to decide what the word "claims" means for even if counsel's suggestion as to its meaning is

accepted there is no evidence that Eaton's asserted any sales or other right to the tires that were being manufactured. The putting of Eaton's name on them was not an assertion by Eaton's of anything. The supplier put the name on the tires in the expectation of selling them to Eaton's and in order that they would be ready to deliver to Eaton's if it sent in an order for them. And I am unable to find anything in the advertising that could be construed as an assertion that it had a sales or other right to the tires while they were being manufactured.

In view of my conclusion that the appellants have failed to show that Eaton's held or used or claimed a sales or other right to the tires at any stage in their manufacture by its supplier it is not necessary in this case to consider the interpretation of other terms in section 2(*a*) (ii), such as the meaning of the word "for".

And I have no hesitation in finding that the decision in *Shore* v. *The King* (*supra*) is not applicable to the facts of this case. The relationship of the defendant and the manufacturer in that case was so essentially different from that of Eaton's and its supplier in this one that the decision has no bearing on it.

It follows from what I have said that the appellants have failed to show that Eaton's was a manufacturer or producer of its "Bulldog" and "Trojan" tires within the statutory meaning of the term and liable to excise tax and sales tax on their sale to its customers.

There is another aspect of the matter. The facts show beyond dispute that the supplier was the manufacturer of the "Bulldog" and "Trojan" tires which it subsequently sold to Eaton's. That being so, the charging sections of the Act, section 23 for excise tax and section 30 for sales tax, make it clear in each case that the tax is to be paid at the time of the sale by the producer or manufacturer to the purchaser. Only one excise tax and only one sales tax are exigible on the same article. Each tax was payable by the supplier when it sold the tires to Eaton's. That being so it could not be payable by Eaton's when it sold them to its purchasers.

Under the circumstances, I am unable to see how it could reasonably be said that the Board erred as a matter of law

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in deciding that Eaton's was not the producer or manufacturer of its special brand "Bulldog" and "Trojan" tires and not liable for tax on the sales of such tires. There must also be a negative answer to the second portion of the question of law under consideration.

There remains only the matter of costs. In the case of *General Supply Company of Canada Limited* v. *Deputy Minister of National Revenue for Customs and Excise et al* (1), I had occasion to consider the question of costs in a case where an appeal from the Tariff Board was dismissed and there were several respondents. After hearing argument I came to the conclusion that it would be oppressive to order the unsuccessful appellant to pay costs to each of the respondents and that such appellant should be charged with only one set of costs. It was my view that this decision was in line with the run of decisions on the subject as set out by Angers J. in *The King* v. *Fraser et al* (2) where the subject was carefully considered. I referred particularly to the statement of Lindley L.J., in delivering the judgment of the Court of Appeal, in *Harbin* v. *Masterman* (3) in which he said:

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

and applied the principles of the statement to the case before me. Counsel for the respondent Deputy Minister contended that he had carried the burden of the respondent's case and submitted that the Deputy Minister was entitled to the full amount of the costs which the unsuccessful appellant was ordered to pay. I agreed with this submission. The result was that the appellant was required to pay only one set of costs, namely, those of the

(1) (December 23, 1954, unreported). (2) [1944] Ex. C.R. 97.
(3) [1896] 1 Ch. 351 at 364.

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Deputy Minister and that the other respondents had to pay their own costs. There should be a similar disposition of costs in the present case. Counsel for Eaton's had the main conduct of the case against the appellants. The appellants will, therefore, be required to pay only one set of costs and these are payable to Eaton's. The respondents other than Eaton's will pay their own costs.

The result is that the appeal herein will be dismissed with costs payable as stated.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955

May 18

May 27

BETWEEN:

DONALD H. BAIN LIMITED .....PLAINTIFF;

AND

THE SHIP *MARTIN BAKKE* .....DEFENDANT.

Shipping—Practice—No jurisdiction to extend time for service of writ.

Held: That the Court has no jurisdiction to order an extension of time to effect service of a writ beyond time provided by the rules.

APPLICATION for order extending time to serve a writ.

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

W. D. C. Tuck for the plaintiff.

SIDNEY SMITH D.J.A. now (May 27, 1955) delivered the following judgment:

The plaintiff applies for an extension of time for serving its writ. The action concerns damage to cargo discharged from the defendant, a Norwegian ship, on June 22, 1953. The writ which is *in rem* was issued on May 28, 1954. The Bill of Lading required action to be brought within one year.

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BAIN LTD. v. THE SHIP *Martin Bakke*

Sidney Smith D.J.A.

Have I any power to renew the writ? Admiralty Rule No. 17 says:

> The writ of summons, whether *in rem* or *in personam*, may be served by the plaintiff or his agent within *twelve months* from the date thereof, and shall, after service, be filed with an affidavit of such service. (Italics are in the Rule).

The Rules are silent as to any extension of time for service. Rule 215 says that in cases not provided for by the Admiralty Court Rules the Exchequer Court Rules shall govern. But the Exchequer Court Rules also are silent on the subject of extending time for service of writs. One must go to section 35 of the Exchequer Court Act which states that the practice of the Court shall

> unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in her Majesty's High Court of Justice in England on the 1st day of January, 1928.

In England admiralty jurisdiction is exercised by a branch of the High Court and the same rules govern extension of time for service of writs as govern ordinary civil actions. The appropriate rule is Order viii rule 1. Under it the Judge, if satisfied that reasonable efforts have been made to serve the defendant, may order that the writ be renewed for six months, and so from time to time during the currency of the renewed writ. The time may be extended in England even after the year for obtaining an extension has already expired. *Re Jones* (1), a case dealing with an ordinary civil action which was cited in *The Espanoleto* (2). In the latter case Hill J. allowed renewal of a writ *in rem* even after a statute of limitations had run. This ruling, however, turned on section 8 of the Maritime Conventions Act, 1911, which in express terms allowed an extension of time where there had been no reasonable opportunity within the time limit of arresting the defendant vessel. This section is now substantially copied in section 655 of the Canada Shipping Act, R.S.C. 1952, but the decision does not help me because the extension clause applies only to claims arising out of collisions which is not the present case. There is no general section containing any such saving clause.

Is the plaintiff entitled to have the English practice applied? This cannot be so if the Admiralty Rules furnish

(1) (1877) 25 W.R. 303. (2) [1920] P. 223.

any guide. I think here they do. Rule 17 distinctly says within what time a writ may be served and in the absence of any qualification that seems to me comprehensive. But there is an even stronger indication of this. Forms 5 and 6 which are authorized by Rule 5, and are forms of writs *in rem* and *in personam* respectively, both include an endorsement as follows:

> This writ may be served within 12 months from the date there inclusive of the day of such date and *not afterwards*. (My italics).

These forms must be considered statutory; and in view of this express language I do not see how I can invoke any inconsistent English rules. It is significant to contrast the language used in the general form of Writ of Summons used in the Supreme Court of British Columbia (R.S.C. App. A, Form 1) to wit:

> N.B. This writ is to be served within *twelve calendar months* from the date thereof, or, if renewed, within *twelve calendar months* from the date of the last renewal, including the day of such date, and not afterwards. (My italics).

I must hold that I have no power to extend the time in the absence of any Canadian authority to the contrary. Counsel could refer me to none.

I should probably have to reach the same conclusion on the further ground that the Writ of Summons was improperly issued in the first place in that this is a writ *in rem* issued against a ship which was not "within the district or division" of this Registry when the writ was issued. This would appear to contravene section 20(1)(*a*) of the Admiralty Act R.S.C. 1952, Ch. 1. It is true Hill J. held in *The Espanoleto* (*supra*) that a writ *in rem* can be issued even though the *res* was not within the jurisdiction of the arrest; but that ruling is rendered inapplicable here by our legislation which has no parallel in England.

I regret the less my decision because the plaintiff is not without its remedy. The plaintiff commenced in the Supreme Court a personal action against the owners of the defendant ship, service was effected in Norway, appearance entered and pleadings exchanged, so that the issues involved are on a fair way to trial.

I might add, without deciding, that even if I had power in this matter I would have to consider whether it should be exercised in view of the fact that the ship was again in this

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BAIN LTD. v. THE SHIP *Martin Bakke*

Sidney Smith D.J.A.

jurisdiction six months after the discharge of the damaged cargo and no attempt was made to arrest her here, or elsewhere. It is true that solicitors at that time had not been instructed by the plaintiff but it would seem the plaintiff, seeking the special remedies of Admiralty, should be active in its own interests.

The application is dismissed.

Judgment accordingly.

1953

Oct. 8, 9

1955

Aug. 23

BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... PLAINTIFF;

AND

SANDHOLM HOLDINGS LIMITED, NAT SANDLER AND THOMAS HOLMES ..... DEFENDANTS.

Copyright—Right of performing rights society to sue for fees in Exchequer Court—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 22(c)—The Copyright Act, R.S.C. 1927, c. 32, s. 20(c)—The Copyright Amendment Act, 1931, S. of C. 1931, c. 8, ss. 10, 10A, 10B(7), 10B(8), 10B(9)—Powers of Copyright Appeal Board—Right to fix fees, charges and royalties for licenses taken from performing rights societies and vested in Copyright Appeal Board—Right to license fees not contractual but statutory—Plaintiff not entitled to damages or injunction.

The defendant corporation operated a cabaret in Toronto in which it provided entertainment of which music formed a part. It obtained a license from the plaintiff for the performance of the musical works in which the plaintiff owned the performing rights, the license being for the year 1951-52 and thereafter from year to year until terminated. On November 5, 1952, the plaintiff sent the defendant a letter purporting to cancel this license as at November 15, 1952 for nonpayment of license fees but on November 10, 1952, the defendant paid the fees for 1952. On November 13, 1952, the plaintiff issued another license to the defendant. The defendant did not pay the license fees for 1953, and on April 7, 1953, the plaintiff sent the defendant a letter purporting to cancel the second license. Notwithstanding the nonpayment of license fees the defendant continued to perform the plaintiff's musical works and the plaintiff brought action claiming the unpaid license fees, damages for infringement of copyright and an injunction.

Held: That the Exchequer Court has been vested with jurisdiction to hear and determine an action for license fees in respect of the issue of a license by a performing rights society for the performance of musical works in which it owns the performing rights.

2. That it was within the competence of Parliament to vest this Court with such jurisdiction.

3. That since the establishment of the Copyright Appeal Board the performing rights societies have no right to fix the fees, charges or royalties for the issue or grant of their licenses but in lieu of their former right have been given a statutory right to sue for or collect the fees certified as approved by the Copyright Appeal Board. It is the only fee fixing body.

4. That the plaintiff has a statutory right to license fees for the license issued by it and if, during the currency of this license, the defendant performed any of the plaintiff's musical works it did so with the plaintiff's consent and could not be an infringer of its copyright.

5. That in fact the defendant's license was never cancelled and the plaintiff is not entitled to damages or an injunction.

6. That the only right to license fees given to a performing rights society by The Copyright Amendment Act, 1931, is in respect of the issue or grant of licenses for the performance of all or any of its works in Canada during the calendar year in respect of which the statement of fees was filed by the society. There is thus a statutory right to license fees for a license for that calendar year. That is the only right to license fees conferred by the Act. Consequently, once the plaintiff issued or granted its license it was entitled to sue for and collect the license fees for the calendar year and that was its only remedy.

7. That the fact that a licensee might have to pay more for a license under Tariff No. 6 than the original amount or be entitled to a refund does not affect the validity of the Tariff.

8. That the provision in Tariff No. 6 that the plaintiff had the right to examine the defendant's books did not affect its validity. The said provision was incorporated into the Tariff by the plaintiff and not by the Copyright Appeal Board. All that it was called upon to do and all that it did was to fix the fees, charges or royalties which the plaintiff could lawfully charge for an annual license containing such a provision and subject to such condition.

ACTION by plaintiff for license fees, damages and injunction.

The action was tried before the President of the Court at Toronto.

H. E. Manning, Q.C. and *D. W. Mundell, Q.C.* for plaintiff.

E. A. Goodman for defendants.

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

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COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED v. SANDHOLM HOLDINGS LIMITED et al.

THE PRESIDENT now (August 23, 1955) delivered the following judgment:

The main issue in this action is whether the plaintiff is entitled to recover in this Court from the defendant Sandholm Holdings Limited, hereinafter simply called the defendant, unpaid license fees in respect of the issue by it to the defendant of a license to perform in public all or any of the musical works in which it owned the performing rights and, if so, whether it is entitled to any other remedy.

The facts are not in dispute. The defendant has since December 1, 1951, operated a cabaret on Adelaide Street in Toronto, known as the Club One-Two, in which it has provided entertainment of which music forms a part and has performed in public musical works in which the plaintiff owns the performing rights. On February 9, 1952, the plaintiff's licensing manager requested that the defendant should take out a license from it and on February 21, 1952, the defendant paid the plaintiff $100 on account of the fees for such a license. On February 22, 1952, the plaintiff issued its license No. G3349 to the defendant whereby it became entitled for the year 1951-52 and thereafter from year to year until the license was terminated as set out therein to perform at the Club One-Two non-dramatic renderings of all or any of the musical works in which the plaintiff had the performing rights, subject to payment of the license fees as approved from time to time by the Copyright Appeal Board under Section 10B of The Copyright Amendment Act, 1931, Statutes of Canada, 1931, Chapter 8, as enacted by section 2 of Chapter 28 of the Statutes of Canada, 1936.

The fees approved for 1952 were as set out in *The Canada Gazette,* Vol. 86, Extra No. 5, dated March 27, 1952, and for 1953 as set out in *The Canada Gazette,* Vol. 87, Extra No. 3, dated February 23, 1953. In each case the fees payable by such a person as the defendant were as set out in Tariff No. 6. In all cases to which this tariff applied the fee was a proportion of the total amount paid for all entertainment of which music formed a part, including the amount paid to the orchestra, vocalists and all other entertainers. Tariff No. 6 for the year 1952 contained, *inter alia,* the following terms:

> On or before the last day of January, 1952, a payment shall be made to the Association on account of the 1952 fee, such payment to be the annual license fee due on the basis of the actual amount expended on

entertainment during the year 1951. Payment of this fee shall be accompanied by a report of the actual expenditure or entertainment during the year 1951.

.....

A report shall be made of the actual amount expended on entertainment during the calendar year 1952, and an adjustment of license fee paid to the Association shall be made. Any additional fees due on the basis of actual amount expended shall be paid to the Association. If the fee due is less than the amount paid in advance, the licensee shall be credited with the amount of such overpayment.

Tariff No. 6 for the year 1953 contained similar terms, the only differences being those of dates.

On May 20, 1952, the defendant sent the plaintiff a statement of the estimated amount actually paid by it for entertainment for the year 1951, namely, $5,000, and the estimated amount to be paid for the year ending December 31, 1952, namely, $50,000. On May 21, 1952, the plaintiff billed the defendant for $392.50, being the amount of fees payable for the first half of 1952, and on July 31, 1952, the defendant sent the plaintiff a cheque for $392.50 in payment thereof. On August 6, 1952, the plaintiff sent the defendant a statement of the fees payable for the six months ending December 31, 1952, namely $392.50. The defendant delayed payment of this amount and on November 5, 1952, the plaintiff sent the defendant a letter purporting to cancel the license as at November 15, 1952, and directing it to discontinue performances of its copyright music. On November 10, 1952, the defendant sent the plaintiff a cheque for $392.50 which paid the fees for 1952, subject to the amounts estimated as paid for entertainment in that year proving to be correct.

On November 13, 1952, the plaintiff wrote the defendant enclosing its license No. 1375 for 1952 and thereafter from year to year until terminated. On January 22, 1953, the plaintiff billed the defendant for $785 on account of the license fee for 1953 and requested it to report its actual expenditure on entertainment during 1952 so that the necessary adjustment of the fee for that year could be made. On April 7, 1953, the plaintiff's licensing manager spoke to the defendant's secretary-treasurer, the defendant Holmes, requesting a statement of the defendant's actual expenditure for 1952 and a payment on account of the fees for 1953 and the said Holmes promised to comply with this request

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within a week but on April 26, 1953, he denied that he had made any such promise. In any event, the defendant has never sent the desired statement or made any payment of fees for 1953. On April 16, 1953, the plaintiff wrote the defendant notifying it that License No. 1375 was suspended and requesting it to discontinue all performances of the copyright music which the plaintiff was empowered to license.

Although the defendant did not pay any license fees for 1953 it continued after the purported suspension of its license by the letter of April 16, 1953, to perform in public, that is to say, in its cabaret, musical works in which the plaintiff owned the performing rights.

The plaintiff then brought the present action. It alleged in the original statement of claim that the said performances by the defendant after the suspension of the license constituted infringements of its copyright and that it had suffered damage by reason thereof and it sought to recover damages for the said infringements in addition to the unpaid license fees. It also sought an injunction restraining the defendant from further performance of the musical works in which it owned the performing rights until all fees payable by the defendant and all further fees payable in respect of any performances by the defendants or any of them should have been paid.

The plaintiff succeeded in obtaining an interlocutory injunction as prayed in its statement of claim but this was lifted on payment into Court by the defendant of the sum of $1,000.

It is clear that if the plaintiff had sued in the appropriate court, as it had a right to do, it would have been entitled to judgment for the unpaid license fees for 1953 and 1952 if any fees for that year over and above the amounts already paid by the defendant were found payable. The amount of the fees which it was entitled to charge respectively for 1952 and 1953 was fixed by Tariff No. 6 in the statements of fees approved for each of such years by the Copyright Appeal Board. Its right to sue for the amounts so approved was conferred by subsection (8) of section 10B of The

Copyright Amendment Act, 1931, as enacted by section 2 of Chapter 28 of the Statutes of Canada, 1936, which provided as follows:

10B.(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licenses for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

Under this provision the plaintiff's right to recover fees from the defendant in respect of the issue of license No. G.3349 to it does not depend on a contract between it and the defendant but it is a statutory right. Nor is the amount of its entitlement dependent on any promise or contractual obligation on the part of the defendant. It is fixed by the section at the amount certified as approved by the Copyright Appeal Board, being in this case the amount as determined under Tariff No. 6.

At the commencement of the trial I had doubt whether the plaintiff had a right to sue for license fees in this Court. This was based on the assumption that the plaintiff's cause of action was based on a contract between subject and subject. My doubt was twofold, firstly, whether this Court had been vested with jurisdiction to entertain such an action and, secondly, if so, whether it was within the competence of Parliament to vest such jurisdiction in it.

I am now satisfied that there is no reason for this doubt. A consideration of the relevant statutes makes it clear that this Court has been vested with jurisdiction to hear and determine such an action as this. I refer first to section 22(*c*) of the Exchequer Court Act, R.S.C. 1927, Chapter 34, as amended by section 3 of chapter 23 of the Statutes of Canada, 1928, which reads as follows:

22. The Exchequer Court shall have jurisdiction as well between subject and subject as otherwise,

(*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade mark, or industrial design.

In my view, the present action is within the ambit of this enactment for the plaintiff seeks a remedy respecting copyright under the authority of an Act of the Parliament of Canada, namely, subsection (8) of section 10B of The

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Copyright Amendment Act, 1931, which I have already cited. The plaintiff issued a license to the defendant to perform musical works in which it owned the performing rights, a segment of copyright, and Parliament has given it a statutory remedy against its licensee. The action is thus not an action to enforce a contractual right but to enforce a statutory remedy. In my view, this sufficiently distinguishes the present case from *McCracken* v. *Watson* (1).

My next reference is to subsection 6 of section 20 of the Copyright Act, R.S.C. 1927, chapter 32, as enacted by section 7 of The Copyright Amendment Act, 1931, which reads as follows:

> 20(6) The Exchequer Court of Canada shall have concurrent jurisdiction with provincial courts to hear and determine all civil actions, suits, or proceedings which may be instituted for violation of any of the provisions of this Act or to enforce the civil remedies provided by this Act.

This section disposes of any doubt that Parliament has given this Court jurisdiction to hear and determine such an action as this for it is clearly a civil action to enforce the civil remedy provided by subsection (8) of section 10B of The Copyright Amendment Act, 1931. In view of the enactments to which I have referred I have now no hesitation in finding that this Court has been vested with jurisdiction to hear and determine an action for license fees in respect of the issue of a license by a performing rights society such as the plaintiff for the performance of musical works in which it owns the performing rights.

I now come to the question whether it was within the competence of Parliament to vest this Court with such jurisdiction. This involves a consideration of the scheme of the legislation under consideration. By section 10 of The Copyright Amendment Act, 1931, it was provided, *inter alia,* that every performing rights society should from time to time file with the Minister, being the Secretary of State, at the Copyright Office, statements of all fees, charges or royalties which it proposed from time to time to collect in compensation for the issue or grant of licenses for or in respect of the performance of its musical works in Canada and that, under certain circumstances, the Governor in Council might from time to time revise or otherwise prescribe the fees, charges or royalties which it

(1) [1932] Ex. C.R. 83.

might lawfully sue for or collect in respect of the issue or grant of such licenses. And it was also provided that the society was not entitled to sue for or collect any fees, charges or royalties in excess of those specified in the statements filed by it or of those revised or otherwise prescribed by Order of the Governor in Council. It is clear that under this scheme the right of the performing rights society to fix its fees was subject to governmental control but not wholly taken away. The Governor in Council was authorized to step in if the performing right society unduly withheld the issue of licenses or proposed to collect excessive fees or otherwise conducted its operations in a manner deemed detrimental to the interests of the public. The supervision of the license fees of performing rights societies and the safeguarding of the users of music against their monopolistic powers and their abuse lay with the government but, subject to such supervision, the performing rights societies were free to fix the amounts of their license fees as well as the terms of their licenses and the conditions to which they were subject. But in 1936 a drastic and fundamental change was made by An Act to Amend the Copyright Amendment Act, 1931, Statutes of Canada, 1936, Chapter 28. By section 2 of this Act, section 10 of The Copyright Amendment Act, 1931, as amended in 1935 by Chapter 18 of the Statutes of Canada, 1935, was repealed and sections 10, 10A, 10B and 10C substituted. These sections are still in force except that section 10C is spent The essential feature of the change was that the fixing of fees, charges and royalties for the issue or grant of licenses was taken away from the performing rights societies and vested in the Copyright Appeal Board, an administrative body established under section 10B. The new scheme may be outlined briefly. Section 10 requires every performing rights society, on or before the first day of November in each and every year, to file with the Minister at the Copyright Office statements of all fees, charges or royalties which it proposes during the ensuing calendar year to collect in compensation for the issue or grant of licenses for or in respect of the performance of its works in Canada. The requirement of an annual filing of proposed fees for the ensuing calendar year was new Section 10A requires the Minister to publish the proposed statements in the *Canada Gazette* and to notify that any person having any objection

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to the proposals contained in them must lodge particulars in writing of his objections with the Minister at the Copyright Office on or before a date specified in the notice. After this date the Minister must refer the statements and any objection received to the Copyright Appeal Board. Section 10B deals with the composition of this body, its powers and its duties. Subsection 6 of section 10B provides that as soon as practicable after the Minister has referred the statements and the objections, if any, the Board is to proceed to consider the statements and objections and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection. The Board must give the performing rights society an opportunity to reply to any objection. The Board's power to deal with the statements is so important that I set it out as it appears in subsection (7) of section 10B, which reads as follows:

> (7) Upon the conclusion of its consideration, the Copyright Appeal Board shall make such alteration in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister certified as the approved statements. The Minister shall thereupon as soon as practicable after the statements so certified publish them in the *Canada Gazette* and furnish the society, association or company concerned with a copy of them.

Then subsection (8) of section 10B, which I have already cited, sets out the right of the performing rights society to sue for and collect the fees certified as approved by the Copyright Appeal Board.

So far as I am aware the Copyright Appeal Board was a unique institution. Canada was the only country in which the fixing of the fees, charges or royalties of performing rights societies was taken from them and vested in an administrative body such as the Copyright Appeal Board. The change was a radical one. It is, I think, clear that it was considered undesirable that a performing rights society should be able to fix the fees which the user of its musical works must pay for a license. It is also apparent that it was thought wise that the function of exercising supervision over the license fees of performing rights societies should not be performed by the Government but be entrusted to an outside body under the chairmanship of a person who holds or has held high judicial office. It would not be unfair to say that the Copyright Appeal Board was set up

as a buffer between the Government and the users of performing rights societies' musical works. Their power to fix their license fees was taken from them. They were obliged to submit their proposed fees to public scrutiny and music users were given the right to lodge objections to the proposed fees and have their objections considered by the Copyright Appeal Board. It is the only fee fixing body. The result is that the performing rights societies have now no right to fix the fees, charges or royalties for the issue or grant of their licenses but in lieu of their former right have been given a statutory right to sue for or collect the fees certified as approved by the Copyright Appeal Board. The fees for a license to perform the musical works in which a performing rights society owns the performing rights are no longer a matter of contract between the society and the user of the music but a matter of statutory fixation by the Copyright Appeal Board. Consequently, we are not here concerned with any question of contract between subject and subject. Thus the assumption on which I based my doubt as to the competence of Parliament is without foundation. The legislation under consideration is clearly legislation on the subject of copyright and, as such, within the competence of Parliament under head 23 of section 91 of the British North America Act. That being so, it was within the competence of Parliament to vest this Court with jurisdiction to hear and determine such an action as this.

It follows from what I have said that the plaintiff is entitled to judgment for the license fees properly payable to it as computed in accordance with Tariff Item No. 6.

By its statement of claim as originally framed the plaintiff sought payment of its license fees and also damages for infringement of its copyright after the alleged suspension of its license by the letter of April 16, 1953, and an injunction to restrain such alleged infringement while the license fees remained unpaid.

Since the plaintiff is entitled to license fees for the years 1952 and 1953 it is obvious that it cannot also recover damages for infringement of copyright during these years. The two remedies are inconsistent. The plaintiff's entitlement to fees is a statutory remedy for the issue of its license to the defendant to perform in public the musical

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works in which it owned the performing rights. If, during the currency of this license, the defendant performed any of such musical works it did so with plaintiff's consent and could not be an infringer of its copyright. Counsel for the plaintiff properly conceded that if the plaintiff was entitled to the license fees it was not also entitled to damages for infringement of copyright. This is elementary. The defendant cannot be the plaintiff's licensee to perform its copyright musical works and at the same time infringe its copyright in them.

In the original statement of claim the plaintiff alleged suspension of its license and infringement of its copyright after such alleged suspension but at the trial this position was abandoned. In the amended statement of claim it was alleged that since the defendant had paid the license fees for 1952 prior to November 15, 1952, the date at which the alleged cancellation was to go into effect, license No. G.3349 was re-instated by the issue of license No. 1375 and was still in force and was continuously acted upon by the defendant. I do not agree that license No. G.3349 was re-instated by license No. 1375. The fact is that License No. G.3349 was never cancelled. The letter of November 5, 1952, was really a notice of cancellation on November 15, 1952, if the 1952 fees were not paid prior to that date. Since they were paid on November 10, 1952, the purpose of the notice was accomplished and the threatened cancellation, even if permissible, never went into effect. Consequently, the issue of license No. 1375 was unnecessary and had no effect, with the result that the purported suspension of it was a nullity. Thus, on the plaintiff's own allegations in its amended statement of claim, the defendant continued to be a licensee during the whole of the year 1953. That being so, its performance of the plaintiff's copyright musical works on April 27, 1953, and subsequently were done with the plaintiff's consent and could not constitute infringement of its copyright.

There is another reason for this conclusion. It was not within the competence of the plaintiff to suspend or cancel the defendant's license at any time during the year 1953. As I read subsection (8) of section 10B of The Copyright Amendment Act the only right to license fees given to a performing rights society, such as the plaintiff, is in respect

of the issue or grant of licenses for the performance of all or any of its works in Canada during the calendar year in respect of which the statements of fees were filed by the society. There is thus a statutory right to license fees for a license for that calendar year. That is the only right to license fees conferred by the Act. Consequently, once the plaintiff issued or granted its license it was entitled to sue for and collect the license fees for the calendar year and that was its only remedy. It could not in the absence of statutory authority suspend or cancel the license during the calendar year for which it had filed its statements of fees and thereby put the defendant in the position of being an infringer of its copyright. Subsection (9) of section 10B of the Act makes it clear that if any person had tendered or paid to the performing rights society the fees, charges or royalties which the Copyright Appeal Board had approved he could have performed the musical works in which the society claimed the performing rights and the society would not have had any right of action or any right to enforce any civil or summary remedy for infringement of its copyright. It seems clear to me that a person, such as the defendant, to whom a license had been issued and who had thereby become liable for the license fees for the calendar year for which the society had filed its statements cannot be in a worse position. As I see it, there was no statutory authority for the cancellation or suspension of the defendant's license either in 1952 or in 1953 and it could not, therefore, be an infringer of the plaintiff's copyright or liable to it in damages. It follows from what I have said that the plaintiff's claim for damages must be dismissed.

It also follows that the plaintiff's claim for the injunction sought by it must fall. Since the defendant was the plaintiff's licensee during the year 1953 it had a right to perform all or any of the musical works in which the plaintiff owned the performing rights, notwithstanding the fact that it had not paid the license fees. The plaintiff had a statutory right against the defendant to sue for and collect such fees and that was the only right against the defendant which it had. The plaintiff's claim for an injunction is, therefore, dismissed.

What I have said really disposes of the action but there are certain arguments advanced on behalf of the defendant which call for consideration.

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Pursuant to leave granted at the trial counsel for the defendant amended the statement of defence by alleging that there was a licensing agreement between the defendant and the plaintiff, that this was a contract not to be performed within the space of one year from the making thereof, that there was no memorandum in writing of the said contract within the meaning of section 4 of the Statute of Frauds, R.S.O. 1950, Chapter 371, and that, consequently, the licensing agreement was not enforceable. In my view, there is no substance in this contention. In the first place, as I have pointed out, the plaintiff's right to license fees does not depend on a contract between the plaintiff and the defendant or any promise by the defendant to pay them. The plaintiff's right, with the defendant's corresponding liability, is statutory. Consequently, section 4 of the Statute of Frauds does not apply to it. Secondly, even if it were conceded that there was a licensing agreement between the parties it was not a contract that was not to be performed within the space of one year from the making thereof within the meaning of section 4 of the Statute of Frauds. It was fully performed by the plaintiff on the issue of its license and nothing more remained to be done by it. Moreover, it was terminable by either party at the end of the year and could, therefore, be performed within the year. Consequently, the contract, even if it could be so described, was not within the ambit of section 4 of the Statute of Frauds and did not have to be in writing.

It was also urged that Tariff No. 6 was not authorized by the Act and was, therefore, invalid. Two attacks on its validity were made. The first contention was that it was essential that a prospective licensee should, at the beginning of the year, know exactly what the amount of his license fee for the year should be, that he should not be called upon to pay more than such amount or be entitled to any refund, that he could not know in advance by reference to Tariff No. 6 what his license fee for the year would be under it, and that, consequently, the tariff was not the kind of tariff contemplated by the Act. It followed, so it was contended, that it was not within the jurisdiction of the Copyright Appeal Board to approve it and that it was, therefore, invalid. A similar argument was made and rejected in *Composers, Authors and Publishers Association of Canada*

Limited v. *Maple Leaf Broadcasting Co. Ltd.* (1). There is also a simple answer to the attack in this case which would not have been applicable in the case cited. A prospective licensee under Tariff No. 6 would know in advance exactly the amount of money which he would have to pay in order to obtain a license under it, namely, the proper proportion of the amount actually expended by him for entertainment in the previous year. Payment of this amount would entitle him to a license. Thereafter, the matter of amount would be exclusively within his control. He could save himself from paying more or from getting any refund simply by holding the amount of his expenditure for entertainment at the same level as during the previous year. If he spent more or less the amount he would have to pay in addition to the initial amount or the amount he would be entitled to receive by way of refund would be entirely within his control and the result of his own actions.

The second attack on the validity of Tariff No. 6 was on the ground that there was no statutory authority for the inclusion in it of the provision giving the plaintiff the right to examine the defendant's books. The provision to which exception was taken reads as follows:

> The Association shall have the right, by its duly authorized representative, at any time during customary business hours, to examine books and records of account of the licensee to such extent as may be necessary to verify any and all such statements rendered by the licensee.

It was argued that the inclusion of this provision was not authorized by the Act, that the Copyright Appeal Board did not have jurisdiction to approve a tariff containing it and that Tariff No. 6 was, therefore, invalid.

A similar argument was made in the *Maple Leaf Broadcasting Company* case (*supra*) and rejected both in this Court and in the Supreme Court of Canada. The matter is of such importance that I quote the remarks of Cameron J. on the subject in full. After setting out the submission of counsel for the defendant in that case that the insertion of a similar provision in Tariff No. 2 was *ultra vires* the Copyright Appeal Board, he said, at page 147:

> This contention has caused me a good deal of concern. It is clear that the Board is not given any express power in the Act to incorporate such a provision in its approved statements. I have stated above that in

(1) [1953] Ex. C.R. 130; [1954] S.C.R. 624.

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my opinion the Board did have implied powers which were reasonably necessary to enable it to carry out the duties imposed upon it. Having found that the Board did have the power to fix a tariff of rates on the basis of the income or on the gross revenue of a licensee, it seems to me also that it must necessarily have power to impose reasonable conditions upon those licensees who desired to take advantage of an annual licence or other type of licence where the tariff was based in some way or other on income, on gross revenue, or in any way other than on a fixed dollar amount. The condition here imposed seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to the plaintiff. I do not suggest that any of the proprietors of the broadcasting stations are dishonest in any way. But it is patent that the plaintiff could be defrauded out of its just revenue by an unscrupulous proprietor unless it had an opportunity of verifying the licensee's statements and payments by inspection of its records. Indeed, counsel for the defendant, while arguing that the inclusion of this clause invalidated the whole of Tariff 2, practically conceded that if a tariff validly established were based on income, the Board must confer on the plaintiff some way of checking on the accuracy of the licensee's statements. It may well be that the broadcasting stations resent any one having knowledge of the particulars of their gross revenue, particularly as a substantial part thereof is derived from sources other than from the use of music. On the other hand, it is well known that in contracts providing for the use of patents or for the right to reproduce works in which copyright subsists, it is a very common, if not a general practice, to provide for verification of the amount of such user by conferring on the licensor the right to inspect the books of the licensee. In establishing a tariff for an annual licence under which the licensee was entitled to use any or all of the works of the plaintiff, the Board was conferring on the licensee something of a very useful and valuable nature. It was necessary in doing so that consideration should be given to the rights of the plaintiff and that was done by adding the clause in question. For these reasons I have reached the conclusion that it was not beyond the powers of the Board to append that clause to Tariff 2.

In the result I must hold that Tariff 2, including the concluding paragraph thereof, was *intra vires* the Board.

When the matter came before the Supreme Court of Canada the decision of Cameron J. was affirmed by a three to two decision. Cartwright J. delivered the majority opinion of the Court, speaking also for Kerwin C.J. and Taschereau J. After setting out the purpose of the action, namely, to determine whether the statements of fees, charges and royalties filed by the plaintiff and the statements as modified and approved by the Copyright Appeal Board were valid statements within the meaning of sections 10, 10A and 10B of The Copyright Amendment Act, he said that he agreed with the conclusions of the trial judge that the attacks on their validity should be rejected and that he was in substantial agreement with his reasons.

Later, he dealt with the validity of the inclusion in Tariff No. 2 of the provision giving the plaintiff the right to examine the licensee's books and said, at page 631:

> Once it has been held that the Board was acting within its powers in fixing fees at a stated percentage of the gross revenue of a licensee it appears to me to follow that it must be within its powers to approve or prescribe the manner in which the amount of such gross revenue is to be ascertained or verified.

In their dissenting judgments Rand J. would have deleted from Tariff No. 2 the provision in question on the ground that it was not a necessary provision and was severable and Locke J. was of the opinion that it was not within the power of the Copyright Appeal Board to approve a tariff containing such provision.

While I am in complete agreement with the conclusion reached by Cameron J. that Tariff No. 2 in the case before him was *intra vires* the Copyright Appeal Board I respectfully suggest that there are statements in his remarks that attribute to the Board action which, in my opinion, it was not called upon to take, and did not take. For example, it was not accurate to suggest that the Copyright Appeal Board incorporated the provision in question in Tariff No. 2 or that it imposed its condition upon the plaintiff's licensees. It did not do so. The provision was incorporated by the plaintiff itself in the statements which it filed with the Secretary of State and to the extent that it sought to impose a condition on licensees the condition was imposed by the plaintiff. All that the Board was called upon to do and all that it did was to fix the fees, charges or royalties which the plaintiff could lawfully charge for an annual license containing such a provision and subject to such condition. The provision is a common one in licensing agreements for the use of various forms of industrial property where the license fees, royalties or charges are computed on a basis other than a fixed dollar amount. Indeed, it would be quite astonishing to see a licensing agreement of that sort without such provision. But it would have been competent for the plaintiff to have filed a statement without it in which case the Board might well have fixed a higher scale of fees, charges or royalties than it did for a license subject to such a condition. It was also not accurate to suggest that the Board in establishing a tariff for an annual license was conferring on the defendant something of a very useful

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and valuable nature and that it was necessary in doing so that consideration should be given to the rights of the plaintiff and that was done by adding the clause in question. The Board did not confer any benefit on the defendant. Such benefit as it received from the right to use the plaintiff's musical works came to it by way of its license from the plaintiff to do so. All that the Copyright Appeal Board did was to fix the amount of the license fee which the plaintiff could sue for and collect from it. Nor is it correct to say that the Board added the provision out of consideration for the plaintiff's rights. It did not do so. It was the plaintiff that inserted the provision as one of the conditions of the issue of its license and the Board fixed the fees for such a license.

Moreover, I am of the opinion that it was not the purpose of the legislation to which I have referred to give the Copyright Appeal Board power to determine the terms and conditions of the licenses issued by a performing rights society to persons wishing to perform its copyright musical works. What Parliament was concerned with was to take away from such societies their right to fix the fees, charges or royalties for the issue of their licenses and vest the fee fixing function exclusively in the Copyright Appeal Board. This radical change was a drastic interference with the contractual rights of the performing rights societies. But the Act should not be construed as making any greater interference with such rights than was necessary to accomplish its purpose. Thus, as I see it, the rights of the performing rights societies, apart from their right to fix their fees, have not been taken away. They are still free, subject to the Act, to fix the terms of their licenses and stipulate the conditions to which they are subject.

It follows from what I have said that the Copyright Appeal Board, apart from its function of fixing the fees for the licenses issued by performing rights societies and its powers incidental to the performance of such functions, does not have power to determine the terms of such licenses or the conditions to which they are subject. Thus, it is for the performing rights society, subject to the Act, to determine the terms of its licenses and stipulate the conditions to which they are subject and for the Copyright Appeal Board to fix the amount of the fees, charges and royalties

which it may sue for and collect in respect of the issue of the license in the terms and subject to the conditions determined by it. It is, of course, within the power of the Copyright Appeal Board to do whatever may be necessary to the discharge of its statutory function.

Thus, I am of the view that it would not have been competent for the Board to insert the provision referred to if it had not been inserted by the plaintiff but that is quite a different thing from saying that it could not approve a statement of fees with such a provision contained in it.

For the reasons given I reject the submission of counsel for the defendant in the case at bar that the Copyright Appeal Board did not have power to approve Tariff No. 6 and that it was invalid.

I do not read the reasons for judgment of Cartwright J. in the *Maple Leaf Broadcasting Company* case (*supra*) as running counter to what I have said, nor do they expressly confirm it. I should also point out Locke J. was strongly of the opinion that the only license contemplated bv the legislation was a simple permission by the performing rights society to perform its musical works during the ensuing year and that neither it nor the Copyright Appeal Board has the power to impose further terms such as that of the provision in question.

While there is now no possible doubt, in view of the decision in the *Maple Leaf Broadcasting Company* case (*supra*), that a tariff, such as Tariff No. 6, including the provision under discussion is valid and within the jurisdiction of the Copyright Appeal Board to approve, there remains a conflict of judicial opinion on whether or to what extent the performing rights societies may fix the terms of their licenses or the conditions to which they are subject and whether the Copyright Appeal Board has any such powers, apart from its fee fixing duty and its right to do what is reasonably necessary to perform it. Under the circumstances, I suggest that there should be legislative clarification of the matter.

Only the license fees for 1952 and 1953 are involved in this action. Since the defendant has not sent the plaintiff a statement of the actual amount expended by it for entertainment in 1952 it is not possible to state the amount of license fees for 1952, if any, to which the plaintiff is entitled

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COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED v. SANDHOLM HOLDINGS LIMITED *et al.*

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or whether the defendant is entitled to a refund. There will, therefore, be a reference to the Registrar or a Deputy Registrar to ascertain this amount. The amount of the plaintiff's entitlement for 1953 will also be referred. There will, therefore, be judgment for the plaintiff as against the defendant for the amount of license fees for 1952 and 1953 to which it is entitled as computed in accordance with Tariff No. 6 on the report of the Registrar or Deputy Registrar.

There remains only the question of costs. The plaintiff is entitled to its costs as against the defendant to be taxed in the usual way, except as to the proceedings for the interim injunction and the payment into and out of Court.

The action as against the individual defendants herein will be dismissed, but without costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955

Mar. 9

Apr. 25

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE SHIP *M/V ISLAND CHALLENGER*, THE BARGE *LORD TEMPLETOWN* AND THE SHIP *M/V SWAN* ..... DEFENDANTS.

Shipping—Practice—Particulars.

Held: That the Court will order a plaintiff to furnish particulars requested by the defendant although the case is one within the doctrine of *res ipsa loquitur* and before the delivery of a statement of defence.

APPLICATION for particulars.

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

Alfred Bull, Q.C. and *John I. Bird* for the motion.

F. A. Sheppard, Q.C. contra.

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THE QUEEN
v.
THE SHIP
M/V Island Challenger
et al.

SIDNEY SMITH D.J.A. now (April 25, 1955) delivered the following judgment:

This case concerns a collision between the defendant vessels and the New Westminster Railway Bridge. The statement of claim sets up damage to the bridge due to the negligent navigation of the defendant vessels and alternatively that the damage indicated a *prima facie* case of negligence. Particulars of the negligent navigation were given. The defendants now ask further and better particulars.

The application is resisted on the ground that in a *res ipsa loquitur* case particulars need not be given at all, and secondly that the further particulars asked for are within the knowledge of the defendants. I am of opinion that on the material before me neither ground is valid.

In the further alternative the plaintiff contends that in the present case further and better particulars should not be ordered until after the statement of defence has been delivered. But I agree with the defendants' counsel that here they are desirable to enable the defendants to plead.

The order will therefore go. Costs to be spoken to at the trial.

Order accordingly.

BETWEEN:

HELMUT WILLIAM BRUNO SCHRODER and CHARLES GEOFFREY VICKERS Executors of the Will of EMMA CHRISTINE MARIA THEODORE SCHRODER ..... APPELLANTS;

1952
Apr. 28 & 29
1955
Apr. 18
Sept. 12

AND

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

Revenue—Succession duty—The Dominion Succession Duty Act, S. of C. 1940-41, c. 14, as amended, s. 2(e)—Death of a person domiciled outside of Canada—Fair market value at date of death of property situated in Canada—Debentures bearing no interest—Proper rate to be applied where face value of debentures to be discounted—Appeal from the Minister's assessment allowed.

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H. W. B. SCHRODER *et al.* *v.* MINISTER OF NATIONAL REVENUE

Baroness Schroder died testate on June 18, 1944, domiciled in England, and the Canadian assets of her estate consisted solely of $1,500,000 face value, non-interest-bearing debentures of Winley Limited, a Canadian company, being 300 debentures of $5,000 each, dated December 1, 1931, and all maturing on September 1, 1972. Because of the fact that the debentures bore no interest, the Minister valued them at $531,165 being on a discount basis of 3·75 per cent. On an appeal from the assessment on the ground that the valuation was excessive appellants contended that the value is the fair market value of the debentures and asked for a discount rate of 4·25 per cent, or, on that basis, a valuation of $445,000. On the evidence the Court found that there was no public market for the debentures nor was there any "special purchaser" thereof, including Winley Limited.

Held: That inasmuch as the debentures have not been listed on any stock exchange and there are no recent sales thereof or any "special purchaser", the proper approach to the problem is to ascertain the value of those securities which are most similar to the debentures in question and then make the proper allowances for the differences and, more particularly, for the "disabilities" which attached to the Winley debentures and which seriously affect their market value.

2. That on the whole of the evidence the Winley debentures at the date of death did not exceed in value the sum of $445,000.

3. That here the evidence relating to the origin and history of Winley Limited from its inception was relevant and therefore admissible. In the absence of any stock exchange listing a prospective investor in the debentures would make the most thorough inquiries into the history of the company, its management, the nature of its investments, the rights of the shareholders, and the manner in which the affairs of the company had been managed. In that way only would he be able to obtain information as to what the debentures were worth and the prospects for the future. Here the same information should be available to the respondent in determining the value of the debentures and in making the assessment.

APPEAL under the Dominion Succession Duty Act, S. of C. 1940-41, c. 14 as amended.

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

Hugh O'Donnell, Q.C. and *Donald Myers* for appellants.

Guillaume Geoffrion, I. G. Ross and *A. L. DeWolf* for respondent.

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

CAMERON J. now (September 12, 1955) delivered the following judgment:—

This is an appeal from an assessment to succession duty on the ground that the property, the subject matter of the succession, has been excessively valued by the respondent.

The deceased, Baroness Schroder, died testate on June 18, 1944, domiciled in England, and the Canadian assets of her estate consisted solely of $1,500,000 face value, non-interest-bearing debentures of Winley Limited, a Canadian company, being 300 debentures of $5,000 each, dated December 1, 1931, and all maturing on September 1, 1972. Because of the fact that the said debentures bore no interest, the Minister placed a total value thereon of $531,165, being on a discount basis of $3\frac{3}{4}$ per cent. It is admitted that that amount, if invested at the date of death (1944), would with accumulated interest compounded annually at $3\frac{3}{4}$ per cent, amount to $1,489,004 on September 1, 1972, the maturity date of the debentures, an amount which is $10,996 less than the face value of the debentures.

For the appellant it is contended that the value of the said debentures is the fair market value thereof; that such fair market value does not exceed $445,000, which amount, if invested at $4\frac{1}{4}$ per cent, would with accumulating interest compounded annually amount to $1,500,000 at the date of maturity of the debentures. It is in evidence that the Estate Duty Office, Inland Revenue Department of the United Kingdom, accepted a valuation of £100,000 (or $445,000 at the then current rate of exchange) for the said debentures (Exhibit A-2). It is also shown that a similar valuation was accepted by the Succession Duty Department of the Province of Quebec in assessing the duties payable to that province on the said debentures (Exhibit A-3).

The appeal was originally heard by St. Pierre, Deputy Judge of this Court, but due to delays in extending some of the evidence, it was found impossible to complete the argument before his retirement. By consent of both parties, the matter came before me and I heard argument of counsel in Montreal on April 18, 1955.

"Dutiable value" is defined by section 2(*e*) of The Dominion Succession Duty Act, Statutes of Canada, 1940-41, chapter 14 as amended, and is as follows:

> 2. In this Act, and in any regulation made thereunder, unless the context otherwise requires,
>
> (*e*) "dutiable value" means, in the case of the death of a person domiciled in Canada, the fair market value, as at the date of death, of all property included in a succession to a successor less the allowance as authorized by section eight of this Act and less the value of real property situated outside of Canada, and means, in the case of the death of a person domiciled outside of Canada,

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the fair market value of property situated in Canada of the deceased included in a succession to a successor less the allowances as authorized by sections eight and nine of this Act;

The sole question for determination is the fair market value of the debentures. It is agreed that because of the fact that no interest is payable thereon, the fair market value is not the face value of the debentures and that the face value should therefore be discounted. The whole enquiry is directed to the problem of determining the proper rate to be applied in such discount.

It is necessary, I think, to set out in some detail the history of Winley Limited and the connection of the Schroder family therewith. The deceased was the widow of Baron Schroder who died in 1940 and they had three children, Marga, Helmut and Dorothea, all of the family being resident in England. Winley Limited was incorporated by Dominion charter in 1931 by or on behalf of the Schroder family. It was authorized to issue 240 Class A and 210 Class B shares at $10 each, along with $3,000,000 in non-interest-bearing debentures due September 1, 1972. The shares were issued to Marga (apparently on behalf of herself and her sister Dorothea) and to Helmut, or to their nominees. In 1933 Marga sold 140 Class B shares and Helmut sold 70 Class B shares to associated companies of Winley Limited, namely, Maculata Limited, Alta Limited, and Mithra Limited. At the death of the testatrix, all the shares of Winley Limited were beneficially owned by these three companies and the shares in the three companies were in turn held by separate trusts set up by Marga, Dorothea and Helmut for the benefit of their children; the trustee of these three trusts is "Trustee One-Forty-Five Limited" of London, England.

In 1919 and later, Baron Schroder made certain settlements of his funds, the benefit of which after his death would pass to his children. In 1932 Winley Limited purchased the then reversionary interest of the Schroder family settlement for $60,000.00 face value of its debentures. These debentures were appointed to the three children of the deceased; they were redeemed at par by Winley Limited in 1938 under circumstances later to be mentioned and which satisfied the respondent's officers that the redemption at par had no direct bearing on the valuations now to be made.

In April, 1933, the funds of the family settlement were appointed as follows: one-third to Helmut and two-thirds to Marga (apparently to be held by Marga and Dorothea equally). In the same year Marga sold her two-thirds interest in the funds of the family settlement to Winley Limited, receiving $1,400,000.00 of its debentures, and Helmut sold his interest therein to Winley Limited for $700,000.00 of its debentures.

Later, in the same year, Marga sold to Alta Limited $720,000.00 Winley debentures and 70 B shares of Winley Limited in consideration of Alta paying $100.00 and assuming certain potential debts and possible indemnity obligations of Marga and in consideration of Alta Limited granting to Helmut an option to purchase the $720,000.00 Winley debentures for $100.00 and assuming the above obligations. Marga also sold like amounts of debentures and stocks to Maculata Limited for the same consideration, except that the option to re-purchase was in favour of Dorothea. Likewise, Helmut sold to Mithra Limited like amounts of debentures and stocks for the same consideration except that the option to repurchase was in favour of Marga.

Until 1938 all of the debentures so issued were held by Alta Limited, Maculata Limited and Mithra Limited. In that year Marga exercised her option on $520,000.00 of Winley debentures held by Mithra Limited and directed that $500,000.00 of the debentures be delivered to her mother, the deceased, and in consideration of Winley Limited redeeming at par $20,000.00 of its debentures, Marga agreed to release Mithra Limited from her option on the remaining $200,000.00 of Winley debentures. At the same time Dorothea and Helmut exercised their options upon similar terms and conditions. It was said that these gifts to the deceased of $1,500,000.00 of Winley debentures by her three children were intended to make provision for her inasmuch as she was otherwise poorly endowed.

While Winley Limited purchased the reversionary interest of the three children in 1933, the distribution of the funds of the family settlement did not take place until 1936. That particular interest, in respect of which $2,100,000.00 in debentures was issued, was valued by Winley Limited at $1,537,500.00. The total discount on the debentures so

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issued was therefore $562,500.00, of which amount $401,800.00 represented the discount on the debentures owned by the deceased at her death, or a value of approximately $73.00 per $100.00 face value of the debentures which, as they were to mature in 1972, gave a yield-to-maturity rate of approximately 1 per cent. In 1936 the funds of the Schroder Family Trust were distributed and Winley Limited substituted cash and investments for its interest therein at a valuation which reduced the original discount of $562,500.00 to $26,007.02.

At the time of her death the testatrix was not a shareholder of Winley Limited, her only interest therein being that of a creditor to the extent of the value of her debenture holdings and there is no evidence which establishes that she ever had any other interest. At that time the total debentures outstanding had a par value of $2,100,000.00.

The valuation of these debentures presents difficulties not usually found in assessing values of securities. Of special importance is the fact that no interest was payable thereon and that they would not mature until twenty-eight years after the death of the testatrix. They constituted only a floating charge on the assets of the company which had full power to deal with the assets as it deemed fit in the ordinary course of its business. The company of its own volition could pay them off in whole or in part at any time upon one month's notice. They became payable upon a court order or a company resolution for winding up, or if execution issued against the company's property or a receiver were appointed. Certain special powers were conferred on the holders of a majority of the issued debentures such as to sanction any modification or compromise of the rights of the debenture holders, including the extension of time for payment beyond 1972, and to accept securities other than the debentures themselves; such a majority also had power to appoint a receiver if the debentures remained unpaid at maturity.

The debentures are not listed on any security exchange and are so unusual in their terms that not one of the witnesses who gave evidence was able to say that he had at any time been called upon to value a security of similar nature. All were in agreement, however, that in accordance with the provisions of the Succession Duty Act, it was their duty to

endeavour to ascertain the fair market value as at the date of the death. They were also in general agreement that the proper approach was to endeavour to arrive at a value at the date of death which, with interest at a proper rate, would, when accumulated to maturity, total the sum of $1,500,000.00.

The assets of Winley Limited are, of course, of great importance in determining the value of its debentures. As of December 31, 1943—the year prior to the date of the deceased's death—the assets had an estimated value in Canadian dollars as follows:

Cash in banks and in transit	$ 786,110.10
Investments	
Quoted securities at market value	571,912.00
Other securities at current value as estimated by the financial advisers	1,113,236.00
Interest under Trust Deed dated August 26, 1932, at cost	60,000.00
Discount on debentures	20,950.08
	$ 2,552,208.18

The balance sheet showed that after due allowance of a small amount for debts, for the balance of income tax, and for the outstanding debentures and capital stock, there was a capital surplus of $202,944.14 and an earned surplus of $240,083.50. The total income for the year was $34,903.35 and after allowance for cost of administration and for income taxes in the United Kingdom, the United States and in Canada, there was a net profit for the year of $14,781.27.

The quoted securities consisted mainly of foreign bonds and shares having a market value substantially less than their book value. "Other investments" consisted mainly of 5,714 shares in J. Henry Schroder Banking Corporation of New York, having a book value of $674,026.55 and an estimated current value of $1,099,945.00. The cash in bank was very substantial, consisting in the main of deposits in J. Henry Schroder & Co., London, of approximately $770,000.00, a substantial part of which was in blocked sterling.

The first witness for the appellant was Gordon S. Small of Montreal, for many years a partner in the well-known firm of chartered accountants, Messrs. Riddle, Stead, Graham and Hutchison. Since 1935 he has been a director and

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vice-president of Winley Limited; he is a director of several industrial companies and many private investment companies, having specialized in investment company administration. In analyzing the assets of Winley Limited, he pointed out that the largest holding was that in the J. Henry Schroder Banking Corporation of New York and that these shares are closely held and are not listed or traded on any market. He placed a value thereon of $192.00 per share for 1943 and 1944 and that valuation was accepted as accurate by the respondent. He stated that certain of the other assets consisted of Sterling securities and sterling cash which in the hands of any one outside the sterling area were blocked under the rulings of the United Kingdom Foreign Exchange Control Board. For that reason he valued them at $3.38 to the pound instead of at the official or fixed rate of exchange of $4.43 to the pound at that time. Taking into account the reduced value of the blocked sterling securities and cash, he valued the assets as of December 31, 1943, at $2,232,345.42 (instead of $2,526,577.56), and at December 31, 1944, at $2,331,612.38 (instead of $2,655,656.49).

He was of the opinion that to an investor these debentures would be unattractive when compared with those of an ordinary investment company. In the latter, the debentures are usually secured by assets valued at $2\frac{1}{2}$ to 3 times the par value of the debentures, whereas on his valuation the outstanding debentures of Winley Limited ($2,100,000.00) had a coverage of only 106 per cent. The main asset—the shares in J. Henry Schroder Banking Corporation—were not readily marketable, paid no interest, and represented about one-half of the total assets. There was inadequate diversification. The bonds and stocks held would be unattractive and unfamiliar to an investor as they consisted of "tag ends of German, Chinese and South American bonds". There was no ready market for the debentures themselves and the purchaser could not readily dispose of them, but would have his funds frozen for a period of twenty-eight years and receive no interest in the meantime. He would have no control over the operation of Winley Limited which could at any time declare dividends to its shareholders of its entire income, thus prejudicing seriously the possibility that the debentures would be paid in full at maturity.

Mr. Small compiled a list of Canadian investment company debenture yields as of May—June, 1944 (Exhibit A-9), which, while not truly comparable to Winley securities, were as nearly comparable as could be found. All were interest-bearing, readily marketable, well managed and secured by well diversified portfolios. In each case, the company assets were valued at two or three times the face value of the debenture issue. On the average, these debentures had 12½ years to run and at the quoted prices the average yield-to-maturity rate was 5·13 per cent. and the average issue rate was 4½ per cent. He pointed out that consideration should be given to the fact that the longer the period to maturity, the higher would be the yield-to-maturity rate, a factor in this case where the debentures had 28 years to run. After mentioning the disadvantages and risks regarding the Winley debentures which I have set out, he reached the conclusion that a possible purchaser would expect a substantially higher return than could be obtained from the listed Canadian investment companies. In his opinion the Winley debentures should be discounted at a rate of not less than 5½ per cent. He characterized the rate of 3¾ per cent. fixed by the respondent as altogether too low. On his estimate of a discount rate of 5½ per cent., the present value of the debentures owned by the deceased at the time of her death was $331,315.60.

The next witness for the appellant was William Collier, president of a firm of investment dealers in Montreal and a partner in a brokerage firm having seats on various exchanges. He is a past president of the Investment Dealers Association of Canada and a governor of the Investment Bankers Association of America for many years. He was a governor of the Montreal Stock Exchange for two years. From 1910 to 1919 he was connected with the Royal Trust Company as manager of its investment department, and from 1919 to 1931 was with Wood, Gundy & Company. While with the latter firm he valued all securities of the insurance companies of Canada for the Dominion Department of Insurance. During the late war he was with the National War Finance Committee, arranging the financing of victory loans and the sale of securities for institutions and large investors throughout Canada. Throughout his

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entire business life he has been closely connected with dealings with securities, underwritings, issuings and buying, selling and valuing securities.

Mr. Collier examined the annual statements of Winley Limited for 1943 and 1944 and of the Schroder Banking Corporation of New York. He found very little equity behind the debentures—only about 120 per cent.—without taking into consideration the effect of the blocked sterling assets—a coverage far too low, in his opinion, for any debenture to sell in Canada. He agreed with Mr. Small that the coverage should be between 200 and 300 per cent. He was of the opinion, also, that the profits shown were too low to pay interest on the debentures had they been interest-bearing. He thought that the provision whereby the debentures could be paid off at par at any time by the company was not a factor of any importance to a purchaser as the company would be very unwilling to exercise that power which would deprive it of a large amount of capital on which it paid no interest. He was of the opinion that a purchaser of the debentures would have no assurance that they would be paid at maturity and that to compensate him for all risks involved, he would buy them only at a very substantial discount. He did not think they could be sold readily at any price and for that reason it was difficult to accurately assess their value. He found that three well-known Canadian investment corporation bonds were then selling at a price to yield an average return to date of maturity of $5\frac{1}{4}$ per cent. The average return on the higher grade interest-bearing and readily marketable corporation bonds such as those of Shawinigan Power Company was 4 per cent. Taking everything into consideration, he was of the opinion that the discount rate should be 5 per cent., a rate which gave a value to the deceased's debentures at the date of her death of $382,635.00. Mr. Collier was not cross-examined.

The last witness for the appellant was John Pemberton, the Associate Treasurer of the Sun Life Assurance Company of Montreal, with which company he became associated in 1927 after graduation from McGill University. At first he was with the Investment Department, of which he became supervisor; he was appointed Assistant Treasurer in 1945 and Associate Treasurer in 1949. He was one of the four senior investment officers of the company responsible for the

administration of the company's entire investments of over two billion dollars and for twenty-five years has had wide experience in all phases of investment. He is also a director and officer of various other corporations.

In the main, his conclusions were the same as those of Mr. Small. After referring to the special characteristics of these debentures, he compared them with quotations of such other securities as seemed to resemble them and made adjustments for the differences. He stated that in June, 1944, moderate to good grade investment trust debentures were selling in Canada to yield between 5 and 6 per cent.

He considered that in estimating the value of a security, it is customary to take four principal matters into account. The first is the degree of equity behind the debentures. He found the coverage for the total value of the debentures to be 106 per cent. compared with a normal equity of 200 to 300 per cent. He thought that the shares of the J. Henry Schroder Banking Corporation were considerably overvalued at $192.50 and should have been valued at a figure closer to their book value of $152.00. The second important matter is the earnings of the company. He considered the earnings of Winley Limitel very low in relation to the earnings to be expected from an investment company of its size. One reason for the low earnings was the large amount of uninvested cash and another was the fact that the J. Henry Schroder Banking Corporation paid no dividends on its stock and its shares were therefore not earning assets. He found no reason to assume on the basis of past performance that one could look for increased earnings in the future to build up the amount required to pay the debentures at maturity.

The third point was the quality of the corporation's assets. He considered these of doubtful quality; a large amount was in blocked sterling; there was inadequate diversification. The last point is that of marketability. He considered the debentures quite unmarketable and that it would be difficult to find a buyer who would be willing to lock up his investment in the debentures for a period of twenty-eight years without interest. He also gave his opinion that the assets of Winley Limited were not readily marketable, particularly the share holdings in the J. Henry Schroder Banking Corporation. He would not have allowed

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his company to purchase the debentures at a discount of $3\frac{3}{4}$ per cent. He found it necessary to place the discount rate at a figure in excess of the yields from normal investment trust securities. His conclusion was that a conservative discount rate would be $5\frac{1}{2}$ per cent. in estimating the present value of the debentures, thereby agreeing with the rate set by Mr. Small. He had not seriously considered the possibility that Winley Limited itself might be a buyer of the debentures and could see no advantage in its doing so unless they could be purchased at a very, very substantial discount.

The first witness for the respondent was George Ovens, Chief Valuator in the Succession Duties Branch of the Department of National Revenue and the officer responsible for the assessment under appeal. He is a certified public accountant of Ontario; prior to the Second World War he had spent nine years with International Business Machines and one year with Dominion Worsteds and Woollens in industrial accounting. After war service with the Royal Canadian Air Force, he joined the Department of National Revenue as a junior valuator. With the exception of one year, he has been with the Department engaged exclusively in valuation of securities. The unit which he now heads values the securities of about two hundred companies each month. His opinion was that the debentures owned by the deceased should be valued at $531,165.00, or approximately $36.00 per $100.00 of face value; that figure was arrived at by applying a discount rate of $3\frac{3}{4}$ per cent. for the 28 years prior to maturity. The assessment was made accordingly.

He tested his valuation of $36.00 per $100.00 in face value by comparison with the issue price of $73.00 some eleven years earlier, and which price he assumed was bona fide and arrived at on an arms' length transaction. He considered that by using the figure of $73.00 per $100.00 as a starting point and after eliminating the increase in value of the company's assets between 1933 and 1944 and the adjustment inherent in the issue price, the valuation made by him was more than adequate to offset changed conditions due to war and all possible contingencies.

Then he considered other valuations of the company's assets, but I need say little as to that for in the main he was in general agreement with the valuation placed upon

them by Mr. Small, except that he would not have allowed any deductions for blocked sterling securities and cash. His valuations are therefore the same as I have set out in detail above, namely, a total of $2,526,577.56 as of December 31, 1943, and of $2,655,656.49 as of December 31, 1944. These valuations represent a coverage of approximately 120 per cent. in terms of the whole debenture issue and of 342·5 per cent. on the valuation of $531,165.00 established by the Department (when applied to the whole of the issued debentures). He was unable to see that in any set of circumstances the debenture holders would not receive at least the departmental valuation at date of death or the Department's valuation increased at any subsequent date as the company's net assets increased, were the company wound up. He also thought that the company could redeem the debentures at par either in cash or securities both at or before maturity, leaving a substantial profit for the common shareholders who purchased their interests at $10.00 per share.

His next approach to the valuation was on a discount basis, that is, by discounting the debentures at an appropriate rate from maturity date backwards to date of death. While inclined to the view that the debentures might be paid off at par prior to maturity because of the fact that Winley Limited is a "private" holding company with all its securities held in a close family group which might be expected to work very closely together, he decided, for lack of definite assurance that the debentures would not be redeemed prior to maturity, to use the maturity date as the discounting date. In his initial attempts to find a suitable yield-to-maturity rate, he compared quotations and yields from a list (Exhibit R-6) of long-term Canadian bonds and debentures, dominion, provincial and municipal bonds, but assumed that these yields-to-maturity rates did not of themselves suggest a fair rate of discount for the Winley debentures. The average yield of 3·28 per cent. thereon was therefore increased at first to 3½ per cent. and finally to 3·75 per cent. to allow for the differences between debentures which are long term issues of this nature and those of Winley Limited. The first part of the list was made up of seven public utility company bonds with interest rates bearing from 3¼ to 5 per cent. and averaging a

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yield-to-maturity rate of 3·55 per cent. Then seven provincial bond issues were chosen with an average yield-to-maturity rate of 3·70 per cent.; if the Saskatchewan and Alberta issues were eliminated, the average rate was 2·91 per cent. Seven municipal issues showed an average yield of 3·51 per cent. Dominion of Canada and Dominion Guaranteed bonds showed an average yield of 3·28 per cent. The list also contained a number of United Kingdom municipal bonds of long maturity showing a yield of 3·13 per cent. Finally, a list of twenty British Investments Trusts (Exhibit R-7) showed an average indicated yield-to-maturity rate of 3·75 per cent.

Mr. Ovens was of the opinion that the discount rate should not be increased by reason of non-marketability of the debentures. While admitting that it would be difficult, if not impossible, to induce a member of the public to purchase the debentures, he was strongly of the opinion that there was a ready and special market for them, namely, by Winley Limited or its shareholders. With that in mind, he was at first of the opinion that the debentures should be valued at par, but finally came to the conclusion that as the shares were held in trust, the trustees might commit a breach of trust by causing Winley Limited to redeem the debentures at par.

Mr. Ovens considered that it would have been mutually advantageous to the company and its shareholders to purchase, and to the executors to sell at a proper figure at the date of death. His computation is shown in Exhibit R-8 and therein it is assumed that the sale price of the $1,500,000.00 debentures would be $550,000.00, a figure somewhat in excess of the value placed thereon in the assessment. From the company reports, he estimated that the average return on capital employed from 1936 (when the company exchanged its former holdings in the reversionary interests of the Schroder Family Trust for securities) to December 31, 1943, was 2·43 per cent. and he therefore assumed a somewhat higher return of 2·5 per cent. for purposes of his calculations. Assuming that the company continued to earn at that rate to the maturity date of the debentures with all the debentures remaining outstanding, the capital employed at maturity would be $4,086,138.93 and after redeeming the debentures at par, nearly $3,000,000.00 would

remain for the shareholders. If, however, the deceased had sold the debentures to the company at December 31, 1943, for $550,000.00, then on the same assumptions the capital employed in 1972 would be $3,988,063.93, and after providing for payment of the remaining $600,000.00 in debentures, the net amount available to the shareholders would then be $3,388,063.93, or $401,925.00 more than if all the debentures were redeemed in 1972. The further advantage to Winley Limited if it purchased the debentures in 1943 at $550,000.00, would be the making of a tax-free investment at $3\frac{3}{4}$ per cent. until maturity, against which no income tax allowances need be made. Its rate of tax in 1944 was approximately $22\frac{1}{2}$ per cent. Mr. Ovens pointed out, also, that at the date of death the company was in a position to redeem the debentures either in cash or in securities at his valuation of $550,000.00. Finally, the witness filed a statement entitled "Information re Indicated Yields to Maturity on Canada and Foreign Investment Trusts as Compared with Net Yields to Maturity, After Estimated Allowances for Income Tax" (Exhibit R-9). By applying an estimated income tax rate of $33\frac{1}{3}$ per cent, he reduced the indicated net yield-to-maturity rate to 3·37 per cent.

The only other witness for the respondent was H. C. Kent, employed by A. E. Ames & Company, investment dealers in Montreal. For twenty years he was employed by the Guaranty Trust Company of New York, in England, engaged in its operative and executive duties. In 1940 he came to Canada to organize the United Kingdom Securities Deposit under the British Treasury. Since 1946 he has been with Ames & Company in a general capacity, concentrating mainly on underwriting operations and general management of the Montreal office. He had read Mr. Ovens' report (which corroborated his evidence as set out above) and agreed with it. He was not prepared to comment on the processes used by Mr. Ovens in reaching his conclusions but stated the result of his own survey of reports which showed the yield-to-maturity rates of a large number of Canadian and foreign securities. In Canada, ninety-six cases were used comprising bonds and debentures of the Dominion, provinces, municipalities, industrial corporations and bank shares, and these showed an average yield-to-maturity rate of 3·60 per cent. A list of sixty-eight

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United States securities of like nature showed an average yield of 3·02 per cent. Long dated British Government bonds yielded 3·25 per cent. The result of this survey confirmed his opinion that from the point of view of average returns from representative securities in 1944, the proposed discount rate of 3·75 per cent. on the debentures as submitted by Mr. Ovens was reasonable.

It is clear from the evidence as a whole that there was no public market for the debentures. The average investor, whether an individual or a corporation, would not be interested in purchasing debentures which bore no interest and which were not repayable for 28 years. Neither the debentures themselves, nor the securities of Winley Limited, were readily marketable. The assets were not of a quality to attract the ordinary investor and compared with those of the normal investment trust, were insufficiently diversified; the coverage for the *face value* of the debentures—and that is what an investor would be most interested in since no interest was payable—was inadequate. The debentures formed only a floating charge on the assets, the directors having full power to change investments at will. The control of the company was entirely with the shareholders or the directors representing them, and their interests might very well clash with those of the debenture holders. The directors could at any time declare dividends to the shareholders to the full extent of the earned income, thereby putting in jeopardy the possibility that the debentures would be paid in full at maturity. It is significant to note that if an amount of $531,165.00—the Department's valuation of the deceased's debentures—were invested in 1944 with accumulating interest compounded at $3\frac{3}{4}$ per cent, per annum (the discount rate fixed by the respondent), it would amount to $1,489,004.00 on September 1, 1972—the maturity date of the debentures. The most that a purchaser could then receive would be $1,500,000.00, and I am quite satisfied that the possible gain of approximately $11,000.00 over a period of 28 years would not be sufficient to attract an investor when all the other risks and factors which I have mentioned are taken into consideration.

This point needs no further elaboration inasmuch as all the witnesses were of the opinion that it would be extremely difficult and probably impossible to sell the debentures to

the general public. From the capital structure of the company and the nature of the debentures which bore no interest and which ran for 41 years, it is apparent, I think, that the result of the issue of the debentures in that particular form—if not one of its purposes—was to make the debentures non-marketable to the general public.

As I have stated above, the main contention of the respondent is that there is, however, a market for the debentures and that it is to be found either in Winley Limited or its shareholders. No effort was made to substantiate that contention so far as the shareholders were concerned. I think what was intended was that if the debentures were purchased by the company at the valuation made by the Department, the shareholders, under the assumption made, would be eventually benefited to a substantial extent.

Mr. Ovens pointed to the fact that the beneficial shareholders of Winley Limited are members of the Schroder family and that at the date of death all its shares and debentures were held by or on behalf of members of the same family. He suggested that the provision in the debentures relating to compromises was designed to secure a flexibility in the operation of the company for the purpose of making mutual adjustments from time to time as the family interests might warrant. He pointed to the redemption at par of $60,000.00 of debentures in 1938 as an instance which showed the flexibility with which the owners of both debentures and shares conducted their affairs in their mutual interests. From that he was of the opinion that if similar situations arose in the future, they could and would be handled to the mutual advantage of both groups.

To demonstrate his point that Winley Limited would be financially better off in 1972 if the company bought the debentures of the deceased in 1944 at the valuation he put upon them than they would be by redeeming them at par at maturity, Mr. Ovens made the mathematical calculations set out in Exhibit R-8, the details of which I have given above (he assumed a sale price of $550,000.00 or slightly in excess of his estimate). On the assumptions he made therein, that part of the computation appears to be correct. It also proved that, on the same assumptions, the company would be a great deal better off if it were able to purchase

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the debentures at the value placed upon them by the appellants' witnesses (or at the valuation I am asked to make by the appellants) than at the valuation made by the respondent.

Now the evidence of Mr. Ovens on this point is made with the view of establishing that in this case there is a "special purchaser", namely, Winley Limited. That class of purchaser is referred to in Green's Death Duties, Third Edition, at p. 278, as well as in Hanson's Death Duties, Ninth Edition, at p. 164, and certain authorities are there referred to. In the former text the principle is stated thus: "One of the possible elements in valuation is the existence of a person or class of persons to whom the property in question is more valuable or more desirable than to the general public", and it is stated that the principle would apply to shares in a private company, as respects surviving members, or to partnership assets, as respects a surviving partner, or to professional goodwill, as respects a son who acted as the deceased's professional assistant. In Hanson's text the principle is put in this way: "It seems to follow that an estimate of the price which property would fetch in a market in which all would-be purchasers are present must allow for the prices which persons particularly interested would be prepared to give".

In making the assessment now under appeal, the assessor places very great weight on the possibility that Winley Limited would be within a class of "special purchasers". In the mathematical calculations that he submitted, he endeavoured to establish that it would be in the interests of the company to purchase the debentures in 1944 for $550,000.00. All that he did establish, however, was that on the assumptions he made the company would make a substantial profit. On the evidence as a whole I must find, however, that Winley Limited was not a "special purchaser" of its own debentures.

The evidence of Mr. Small, one of its vice-presidents who has been intimately associated with its affairs for many years, is most convincing on that point and I accept it without any reservation. He says that it was never the intention of the company to traffic in its own debentures and that with the exception of a small amount redeemed at par in 1938 under very special circumstances, it had never done so. He emphasizes his view (which was concurred in by the

other witnesses for the appellants) that under no circumstances would it be advisable for the company to purchase the debentures and thereby deprive itself of capital on which it paid no interest, unless the discount rate to maturity was very substantial and not less than 6 per cent. The direct evidence of Mr. Small as to the intention of the company in regarding its unwillingness to offer $550,000.00 for the debentures in 1944 entirely refutes the theory of the assessor that the company was in the position of a "special purchaser" because it would have made some profit by doing so, if all the assumptions of the assessor proved to be correct.

Further, Mr. Small stated (and his evidence is not contradicted) that it was the main intention of the company to use its funds for the purchase of stock in the Schroder Banking and Investment Company as that stock became available. As of December 31, 1943, the stock in that firm was the company's largest asset. The evidence is that over a period of six years the company had made a capital gain of aproximately $400,000.00 on that stock alone. That fact also is sufficient proof of the wisdom of the directors in preferring to invest its funds in the bank rather than to purchase its own debentures at a value fixed in the assessment. As stated in Hanson at p. 166: "In such a case, however, the existence of other competing forms of investment may substantially mitigate the influence of a 'special purchaser' when the property is not of a unique character such as are, for example, specific items of real estate, collectors' pieces, or (in relation to a life tenant) a reversion."

It is to be noted, also, that the interests of the deceased (as well as those of his beneficiaries) in the debentures were distinct and separate as a matter of law from those of the beneficial owners of the shares in Winley Limited. The officials of the company had full knowledge of the trusts under which the shares were held and would be obliged to carry them out in the best interests of the beneficiaries rather than in the interests of the debenture holders.

On the evidence as a whole I must reject the suggestion put forward by the respondent that Winley Limited was within the class sometimes known as a "special purchaser", particularly at the value put upon the debentures by the

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respondent, and a further suggestion that, as the debenture holders and beneficial owners of the shares in Winley Limited were all members of the Schroder family, they would, merely because of that fact, be willing to arrange their affairs in such a way that the former would sell and the latter purchase the debentures at the valuation made by the respondent. In each case the evidence is to the contrary.

The finding which I have just made is of great importance in considering the evidence of the witnesses for the respondent. Mr. Kent admitted that if Winley Limited was not interested in buying the debentures, his views as to their value would be changed, and Ovens agreed that it would affect his computations also.

It is not suggested that there is any other "special purchaser" and it therefore becomes necessary to endeavour to envisage a hypothetical market based on the evidence of those qualified to give an opinion, and, after taking all relevant matters into consideration, to fix a rate of discount based on ordinary commercial principles.

I shall first consider three points raised by counsel for the respondent in support of his valuation. It was said that as the debentures were issued in 1933 at a rate of $73.00 per $100.00 face value, the assessment at $36.00 for $100.00 face value in 1944 is more than sufficient to take care of any changes occasioned in the meantime by the war, higher taxes, or otherwise. What I have to determine, however, is the value in 1944 and the price paid by another purchaser eleven years earlier and under conditions which have not been fully disclosed is of no practical assistance. Then it is said that the debentures were adequately secured, the gross assets of the company being in excess of the face value of all debentures and having a value of over three times the debentures if the latter were priced at $36.00 per $100.00 face value. It is therefore suggested that under any circumstances it was highly improbable that a purchaser of the debentures when discounted at 3·75 per cent. would not in any event receive his investment, together with interest at that rate. I fully agree that the value of the assets is of great importance in determining the value of any security. But, as I have pointed out above, the small gain of $10,000.00 (over and above the return of his capital and

interest) is the most a purchaser could expect to receive after twenty-eight years, when the debentures matured, and would be insufficient to attract purchasers when all the other factors which I have mentioned—such as the tying up of his capital over an unusually long period and the lack of any control over the management of the company's affairs—are taken into consideration. The third point is the possibility that the debentures might be paid off at par before maturity and that that possibility might be an inducement to purchase the debentures. The evidence is convincing, however, that such an event is highly improbable and I accept the evidence of the appellants' witnesses that it would be of little if any importance in valuing the debentures.

Inasmuch as the debentures have not been listed on any stock exchange and there are no recent sales of the debentures or any "special purchaser", the proper approach to the matter, in my opinion, is to ascertain the value of those securities which are most similar to the debentures in question and then to make proper allowances for the differences and, more particularly, for the "disabilities" in the debentures themselves which I think seriously affect their market value and which I have above set out. On this point I have no hesitation in accepting the evidence of the appellants' witnesses in preference to that of the respondent's. They have had a great deal of actual experience in buying and selling securities and in handling the investments of large corporations. Their long association with the security markets gives them a special knowledge of those factors which affect security prices and influence the attitude of possible purchasers of any security. Mr. Ovens, the main witness for the respondent, has had no practical experience in buying and selling securities, and while his experience in the Department of National Revenue has been extensive, I am unable to conclude that his opinion should outweigh those of the three witnesses for the appellants. The same may be said of the opinion of Mr. Kent who has not been a buyer or seller of securities and whose experience in investment firms has been mainly in the executive and administrative branches.

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I shall not attempt to re-state the details of the lists of those securities which the parties have submitted as being somewhat comparable to the Winley debentures. In my opinion, the quoted market values of Government, municipal and public utility bonds can be of but little assistance as that type of security is usually regarded as being in a class by itself by reason of its greater security. Investment trusts debentures are perhaps the most similar in nature to those of the Winley debentures. Exhibit A-9 is a list of six Canadian investment trusts, and at the prices quoted for May-June, 1944, the average yield-to-maturity rates on these debentures was 5·13 per cent., with the "years-to-maturity" averaging 12½ years. These debentures were all readily marketable, paid interest regularly and were well secured by well diversified portfolios.

Exhibit R-7 is a list of about twenty United Kingdom investment trusts, the debentures of which give an average yield-to-maturity of 3·75 per cent. It is shown that these companies were among the oldest and best managed of the investment trusts in the United Kingdom.

Counsel for the respondent submitted that these yields would be reduced by reason of income tax payable by the recipients, whereas a purchaser of the Winley debentures would be making a capital gain as the debentures bore no interest; and that, therefore, the latter would be willing to purchase at a price which would give a lower yield-to-maturity. Whatever merit there may be in this submission, I am satisfied that it is outweighed by the "disabilities" which attached to the debentures in question and which I have noted above. I accept the evidence of the appellants' witnesses as to the effect such "disabilities" would have on an intending purchaser and that the discount rate would have to be substantially in excess of 3·75 per cent. As I have said, Mr. Small and Mr. Pemberton placed that rate at 5½ per cent. But taking all the facts into consideration and giving some small weight to the possibility of the debentures being redeemed prior to maturity either at par or at a figure agreed upon between the debenture holders and the company, I have reached the conclusion that a discount rate of 5 per cent.—the rate set by Mr. Collier—is more nearly correct.

The appellants, however, have asked for a lesser discount rate and are content to have the debentures valued at $445,000.00, the discount rate at that valuation being 4¼ per cent. The appellants have satisfied me on the whole of the evidence that the debentures at the date of death did not exceed in value that sum.

Accordingly, the appeal will be allowed. The assessment made upon the appellants will be set aside and the matter referred back to the Minister to reassess the appellants upon the basis that the Canadian assets of the deceased at the date of death had a fair market value of $445,000.00. The appellants are also entitled to their costs after taxation.

While in the result the valuation I have now made upon the securities is the same as that fixed by the Estate Duty Office of the United Kingdom and the Succession Duty Department of the Province of Quebec, I should point out that in reaching my conclusions I have paid no attention whatever to the valuations accepted by those departments. Their valuators were not called to give evidence and for that reason I considered that the mere fact that they had accepted a valuation of $445,000.00 (which was in evidence) could be of no assistance to the appellants.

It will be noted, also, that I have given consideration to the origin and history of Winley Limited from its inception. That evidence was supplied to the respondent by the appellants during the course of negotiations and used by Mr. Ovens in expressing his opinion. Counsel for the appellants submitted that it was irrelevant and therefore inadmissible, mainly on the ground that the valuation of the debentures must be made as of the date of death, and under the conditions then existing. The trial Judge who heard the evidence reserved his ruling on the question. While in some cases such evidence may be irrelevant, I am of the opinion that on the special facts of this case it was relevant and therefore admissible. In the absence of any stock exchange listing, I think that a prospective investor in the debentures would make the most thorough inquiries into the history of the company, its management, the nature of its investments, the rights of the shareholders, and the manner in which the affairs of the company had been managed. In

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that way only would he be able to obtain information as to what the debentures were worth and the prospects for the future. In my opinion, the same information in this case should be available to the respondent in determining the value of the debentures and in making the assessment.

Judgment accordingly.

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June 13

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

E. & A. LEDUC LIMITEE .....DEFENDANT.

Practice—Extension of time to appeal—Motion initiated after expiration of statutory period to appeal—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 82(3)—Special circumstances—Requirements of justice—Motion dismissed.

On a motion for extension of the time to appeal from a judgment of this Court initiated almost four months after the expiration of the statutory period of sixty days and almost six months after the date of pronouncing judgment.

Held: That no rigid rules should be laid down which must be complied with before an extension of time to appeal will be granted but in specific cases the reasons in support of a motion for such an extension may be found insufficient.

2. That here the reasons advanced do not show any special circumstances nor any requirements of justice on which to found an order extending the statutory period allowed for instituting an appeal. *International Financial Society* v. *Moscow Gas Company* (1878) 47 L. J. Ch. 258; *Re Manchester Economic Building Society* (1883) 24 Ch. D. 488; *Nicholson* v. *Piper* (1907) 24 T. L. R. 16 referred to.

MOTION for extension of time to appeal.

The motion was heard before the Honourable Mr. Justice Ritchie at Ottawa.

P. M. Ollivier for the motion.

Louis A. Pouliot, Q.C. and *C. A. Séguin, Q.C. contra.*

RITCHIE J. now (June 13, 1955) delivered the following judgment:

The Crown has applied for an order extending the time within which to appeal from the judgment of Fournier, J., delivered herein on December 6, 1954. At the conclusion of

the argument I indicated, for reasons then stated verbally, I was not prepared to grant the extension applied for. Counsel for Her Majesty asked that I file written reasons for my refusal to grant the application and I acceded to that request.

In support of the application the Crown filed the affidavit of Paul Ollivier, sworn herein on May 3, 1955 and setting out the following five grounds to support the application.

1. The Crown wishes to submit to the Supreme Court that an amount of $30,000 awarded by the trial judge for loss of business and of a slaughtering permit is without foundation and in no wise justified by evidence given at the trial;
2. The Crown desires to submit that the defendant has no right to the amount of $13,800 allowed by the trial judge for forcible taking and that, in any event, such amount is excessive;
3. By reason of an increase of work in the Department of Justice, having regard particularly to the number of officers available and the delays caused by the period of Christmas holidays, the Crown was not able to institute an appeal from the judgment before February 4, 1955, the expiry date of the period allowed for filing and serving notice of appeal;
4. After the termination of the statutory period for instituting an appeal negotiations were entered into between officers of the Department of Transport and representatives of the defendant and that such negotiations together with a reorganization of the personnel of the Department at that time delayed presentation of the application for an extension of time in which to appeal;
5. The judgment raises important questions of law on which it is in the interests of justice and good administration of the law respecting expropriation to obtain a decision of the Supreme Court.

Only the last ground has any substance. The Supreme Court, however, has ruled on more than one occasion on the questions of law covered by the trial judgment.

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Ritchie J.

The statutory provision applicable in section 82(3) of the Exchequer Court Act which requires that a notice of appeal shall be served and filed within sixty days from the entry or pronouncing of the judgment appealed from or within such further time as a judge of the Exchequer Court may either before or after the expiry of the said sixty days fix or allow.

The time for serving the notice of appeal expired on February 4, 1955. This application was initiated by notice of motion dated May 31, 1955, just four days less than four months after expiration of the statutory period within which to appeal and just six days less than six months after the date of pronouncing judgment.

It is not desirable to lay down rigid rules which must be complied with before an extension of time within which to appeal will be granted but in specific cases the reasons advanced to support an application for such an extension may be held insufficient.

Two Court of Appeal cases, decided in 1877 and 1883 respectively, and which are regarded as leading cases in respect to extending the time to appeal are *International Financial Society* v. *Moscow Gas Company* (1) and *Re Manchester Economic Building Society* (2). One judgment stresses that the limitation of time should not be enlarged except under very special circumstances. The other judgment stresses that judicial discretion should be exercised in accordance with the requirements of justice. The two cases are complementary.

In the *International Financial Society-Moscow Gas* case an application for leave to appeal, notwithstanding the lapse of one year, was refused. In the course of an oft referred to judgment, James, L. J. said:

> The limitation of the time to appeal is a right given to the person in whose favour a judge has decided. I think we ought not to enlarge that time, unless under some very special circumstances . . .

In the *Manchester Economic Building Society* case Brett, M. R., in dealing with an application for extension of time to bring an appeal, said:

> I know of no rule other than this, that the court has power to give the special leave, and exercising his judicial discretion is bound to give the special leave, if justice requires that leave should be given.

(1) (1878) 47 L. J. Ch. 258. (2) (1883) 24 Ch. D. 488.

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Ritchie J.

In 1907 the Court of Appeal in *Nicholson* v. *Piper* (1) refused an application for an extension of time in which to appeal and emphasized the general rule that where an action has been adjudicated upon the successful litigant had, upon the termination of the time allowed for appealing, a vested interest in his order of which he ought not, in the absence of special circumstances, to be deprived.

I am unable to find, in the reasons advanced to support this application, any special circumstances or any requirement of justice on which to found an order extending the statutory period allowed for instituting an appeal.

The application is refused. The defendant will have the costs of the application, to be taxed.

Judgment accordingly.

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June 20

Oct. 28

BETWEEN:

BEN'S LIMITED .....APPELLANT;

AND

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

Revenue—Income—Income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 12(1)(a)(b)—Capital cost of property—Capital outlay—Income Tax Regulations, sections 1100(1)(a), 1102(1)(c) and Schedule B—Deductions in respect of property—Property not acquired for the purpose of gaining or producing income—Appeal from Income Tax Appeal Board dismissed.

Appellant whose expanding business required further accommodation purchased three adjoining properties for $42,832.65, each property consisting of land and a dwelling house. Sometime later the buildings were sold for $1,200 and removed, leaving the land as a site on which a concrete extension was added to the main plant. In its tax return for 1952 appellant claimed a 10% deduction for capital cost allowance in respect of the three buildings. This was disallowed by the Minister on the ground that the entire amount of $42,832.65 was paid for the purpose of acquiring the site on which the extension had been erected and that no portion of the payment was expended for the purpose of acquiring depreciable assets. An appeal from the assessment to the Income Tax Appeal Board was dismissed and on an appeal from the Board's decision this Court

(1) (1907) 24 T. L. R. 16.

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Held: That on the evidence as a whole the sole purpose in making the purchase was to acquire a site for the extension of the factory. There never was any intention to acquire the frame houses for gaining or producing income; the sole intention in regard to the houses was to have them torn down and removed at the earliest possible moment, and that purpose was carried out. The mere fact that certain amounts of rental were obtained from one is attributable to the existing leases and does not affect in any way the real purpose of acquisition. Section 1102(*a*)(*c*) of the Regulations therefore bars the frame houses, under the circumstances, from being property which was subject to capital cost allowance.

2. That although entitled under s. 1100(1) of the Regulations to the actual cost to it of erecting the cement extension appellant cannot here claim the net cost to it of the dwelling houses as part of the capital cost of the cement extension. What is to be ascertained is the capital cost of the "building", namely, the cement extension, and not the capital cost of some other buildings which were previously upon the property.

APPEAL from a decision of the Income Tax Appeal Board.

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

F. D. Smith, Q.C. for appellant.

G. S. Cowan, Q.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 28, 1955) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated September 7, 1954, whereby the appellant's appeal in respect of its income tax assessment for the taxation year 1952 was dismissed and a re-assessment made upon it and dated January 11, 1954, was affirmed.

The main facts are not in dispute. The appellant owns and operates a bakery on Pepperell Street in Halifax. In January, 1952, it purchased three adjoining residential properties, each consisting of land and a dwelling house; the total cost of acquiring the three properties was $42,832.65. Early in June of the same year it sold the three buildings for $1,200 and shortly thereafter they were removed from the land. The business of the appellant company had increased and it became necessary to provide additional accommodation for its bakery and equipment. The

three properties in question were acquired with the intention that the houses thereon would be removed and the land used as a site for the extension of the main building. At the time of the purchase, however, this scheme could not be carried out as all the properties were located in R2 Zone (Second Density Residential) under the existing by-laws of the city of Halifax and could not be changed from residential use to commercial or business purposes unless and until the property was re-zoned. Accordingly, on May 21, 1952, the appellant lodged a petition (Exhibit 10) with the council of the city of Halifax and the Town Planning Board to re-zone the properties to C2 Zone (General Business Zone). In the result the proposed amendment to the zoning by-law was passed by the City Council on September 11, 1952, and approved by the Minister of Municipal Affairs on September 20, 1952. Shortly thereafter a contract was awarded for the construction of a concrete extension to the main factory and office building and the new extension was completed early in 1953.

In its T2 income tax return for the year 1952, the appellant stated its costs of acquisition of the three properties (after allowing $1,200 for the amount received on the sale of the buildings) to be $41,632.85, which it apportioned as follows: land—$3,000; buildings—$38,632.85. In respect of these buildings it deducted 10 per cent of that amount ($3,863.28)for capital cost allowance, but the full amount thereof (*inter alia*) was disallowed and added to the declared income in the re-assessment dated January 11, 1954. The appellant was advised that the disallowance was made on the ground that the entire amount had been expended for the purpose of acquiring the site on which the plant addition had been erected and that no portion of the payment was expended for the purpose of acquiring depreciable assets.

Subsequently, in its Notice of Objection, the appellant admitted that the value of the land was $6,000 and the appeal to the Income Tax Appeal Board was on the basis of a capital cost allowance of $35,632.85. The appeal to this Court is based on the same amount.

In its Notice of Appeal to this Court the appellant first submits that it is entitled, for capital cost allowance purposes, to amortize the net amount expended by it in

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acquiring the dwelling houses ($35,632.85) at the rate of 10 per cent, that being the maximum amount applicable to frame dwellings under Class 6 of Schedule B of the Income Tax Regulations referable to capital cost allowances. That submission was also made in the appellant's Notice of Objections, but was abandoned in its Notice of Appeal to the Income Tax Appeal Board and was therefore not considered by the Board.

Alternatively, it is submitted that it is entitled to amortize the net cost to it of the dwelling houses as part of the capital cost of the extension to the cement building at the rate of 5 per cent, that being the maximum amount applicable to cement buildings under Class 3 of Schedule B of the Regulations. That was the submission made to and rejected by the Board.

The relevant sections of the 1948 Income Tax Act are:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> .....
>
> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year
>
> (*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation,

In order to succeed in the appeal, the appellant must therefore bring itself squarely within the regulations made by the Governor in Council under the authority of section 106(1) of the Act.

I shall first consider the main submission of the appellant, namely, that it is entitled to the maximum capital cost allowance of 10 per cent provided for "frame buildings" in Class 6 of Schedule B. The inclusion of that type of building in a class, however, is not conclusive of the right to

capital cost allowance in view of the provisions of section 1102 of the Regulations, the relevant parts of which are as follows:

> 1102. (1) The classes of property described in this Part and in Schedule B to these Regulations shall be deemed not to include property
>
> .....
>
> (*c*) that was not acquired by the taxpayer for the purpose of gaining or producing income,

(In passing it may be noted that subsection (2) thereof provides that the classes of property described in Schedule B to these Regulations shall be deemed not to include the land on which a property described therein was constructed or is situated.)

For the Minister it is contended that the property in question (namely, the frame houses) was not acquired by the appellant for the purpose of gaining or producing income, but was acquired merely as part of the land on which they stood; and that the entire outlay was incurred solely for the purpose of acquiring a site for the proposed extension of the main building.

If one were to approach the problem without paying strict attention to the precise wording of the Regulations, it might perhaps be said in general language that the whole of the *outlay* was "for the purpose of gaining or producing income". It was undoubtedly the intention of the appellant—as will be found later—to acquire a site for the purpose of extending its building and thereby increasing its business; in order to do so it had to purchase the land with the buildings. That, briefly, was the submission made on behalf of the appellant.

In my opinion, however, the Regulations require a somewhat different approach to the problem. All property which, *prima facie* at least, is entitled to the capital cost allowances, is broken up into "classes" as set out in Schedule B, and the rate of the applicable allowance for each such class is stated in section 1100 of the Regulations. Then, by section 1102(1)(*c*) of the Regulations (*supra*), these "classes of property" are deemed not to include property that was not acquired for the purpose of gaining or producing income. The only applicable item of property in Class 6 is "a building of frame".

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In my view, therefore, the question is not whether the appellant's outlay as a whole was for the purpose of gaining or producing income, but rather this: "Was the property referred to in Class 6 as 'a building of frame' acquired by the appellant for the purpose of gaining or producing income?"

In the case of *Montship Lines Limited* v. *Minister of National Revenue* (1) (later affirmed in the Supreme Court of Canada), I gave consideration to the meaning of the words "for the purpose of gaining or producing income from property or business of the taxpayer" as used in section 12(1)(*a*) of the 1948 Income Tax Act, words which closely parallel those used in section 1102(1)(*c*) of the Regulations. At page 381 I said:

> Section 12(1)(*a*) of the *Income Tax Act* is a positive enactment and excludes deductions which were not made or incurred by the taxpayer *for the purpose* of gaining or producing income from his property or business, subject, of course, to the specific deductions allowed under Section 11. It is not enough to establish that the dilapidations which occasioned the expenditures arose out of or in the course of the business. It must be established that the *purpose* of the taxpayer in making the outlays was that of gaining or producing income from the business. In the present case I am unable to find that that was the purpose of the officers of the appellant.

However difficult it may be in some cases to ascertain the intention or purpose of a transaction, no such problem here exists. It is abundantly clear from the evidence as a whole that the frame buildings located on the lands purchased were not acquired for the purpose of gaining or producing income and that the sole purpose in making the outlays was that of acquiring the land as a site for the extension of the factory. In the Notice of Objections prepared by or with the knowledge of the owner and the appellant company, the following statements appear:

> In the latter part of 1951 the taxpayer, which had for some time found the concrete building too small for its expanding business, decided to extend the building to the west along Pepperell Street as far as the intersection of Preston Street. Between that building and Preston Street, however, stood three dwelling houses. . . . In order to extend its building westward to cope with the needs of its business, the taxpayer therefore found it necessary to purchase from those persons the dwelling houses and the land on which they stood. The taxpayer did not intend to use the dwelling houses but intended to remove them and build an extension to its concrete building on the land on which they had stood.
>
> .....

(1) [1954] Ex. C.R. 376.

The taxpayer's motive in buying both of these separate items (the dwelling houses and the land) was to acquire a site for the extension of its factory building—it had a use for the land but no use for the dwelling houses.

.....

The chief assessor was quite right in saying, in the letter of February 16, 1954, referred to above, "that the entire amount of $41,632.85 was expended for the purpose of acquiring the site on which the plant addition was erected", that was, the taxpayer admits, its motive for acquiring the dwelling houses and its motive for acquiring the land on which they stood.

.....

It is quite immaterial that it never used or intended to use the buildings in its business and that from the beginning it intended and did sell them for removal from the land.

.....

The Notice of Appeal to the Income Tax Appeal Board contains similar statements, some of which are as follows:

The taxpayer did not intend to use the dwelling houses in its business but intended to remove them and build the extension to its concrete building on the land on which they stood.

.....

After acquiring the properties, the taxpayer carried out the intention with which it had acquired them, viz, to remove the dwelling houses and build on the land on which they had stood the extension to its concrete factory and office building.

.....

It is true that its motive in purchasing both land and dwelling houses was to acquire the land as a site for the extension of the concrete building, but that does not alter the fact that it intended to and did in fact purchase both land and dwelling houses.

The truth of these statements was not seriously challenged before me at the hearing. An attempt was made, however, to establish that there was also a second purpose, namely, to use the buildings as they were as storage space for the business or as rent-producing property, if the petition to re-zone the property were denied. It was admitted, however, that the houses could not be put to any commercial use, such as warehousing, unless the by-law were changed. It is a fact that the appellant received rentals from one of the properties for a few months after it became the owner, but that was undoubtedly due to the fact that at the time the properties were acquired the tenants in possession held leases expiring May 1. The appellant secured vacant possession of the other properties at the time of purchase. No attempt was made to re-rent any of the properties at any time and it is patent that the appellant was not interested in renting any of them. What it desired

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was vacant possession so that the buildings could be removed at the earliest possible moment in order to secure the site for the proposed extension. It was not anticipated that there would be any serious difficulty in having the area re-zoned; in fact, the buildings were sold and entirely removed some months before the petition was finally granted. No opposition was filed to the petition.

On the evidence as a whole, I am satisfied that the sole purpose in making the purchase was to acquire a site for the extension of the factory. There never was any intention to acquire the frame houses for gaining or producing income; the sole intention in regard to the houses was to have them torn down and removed at the earliest possible moment, and that purpose was carried out. The mere fact that certain amounts of rental were obtained from one is attributable to the existing leases and does not affect in any way the real purpose of acquisition. Section 1102(*a*)(*c*) of the Regulations therefore bars the frame houses, under the circumstances, from being property which was subject to capital cost allowance. The appeal on this point is therefore disallowed.

The alternative claim, as I have stated above, is that the net cost to the appellant of the dwelling houses is part of the capital cost of the extension to the cement building; and that such net cost—as well as the actual outlay for the construction of the extension itself—may be written off by capital cost allowances at the rate of 5 per cent under Class 3 of Schedule B of the Regulations, that being the maximum rate applicable for a building.

I think it may be assumed that if some portion of the frame building had been incorporated in the new extension, the appellant would have been entitled to a capital cost allowance in respect of the ascertained cost to him of such portion, but nothing of that sort took place here; the buildings in their entirety were removed by the purchaser and the appellant was left with nothing but the land itself.

The applicable allowance to a taxpayer in respect of his capital cost is found in section 1100(1) of the Regulations, as follows:

> 1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(a) such amount as he may claim in respect of property of each of the classes numbered 1 to 12 inclusive, in Schedule B to these Regulations not exceeding in respect of property

.....

(iii) of class 3, 5%

.....

(vi) of class 6, 10%

.....

of the amount remaining, if any, after deducting the amount determined in respect of the class under section 1107 from the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

In this case the appellant is therefore entitled to the capital cost to him of the property of the class; that is, of the building which is the cement extension. I have no doubt that he has been granted an allowance in respect of the actual cost to him of erecting that extension. I am quite unable to agree, however, that under the circumstances of this case any part of the purchase price which might be properly attributable to the buildings can in any sense be considered as a part of the capital cost of the cement extension. What is to be ascertained is the capital cost of the "building", namely, the cement extension, and not the capital cost of some other buildings which were previously upon the property. This alternative claim of the appellant must also be dismissed.

On the whole, I am satisfied that the entire outlay of the appellant in purchasing the three properties—except for such small amount as might be recovered by the sale of the buildings—was for the purpose of acquiring the land alone. That was practically conceded by the evidence of the president of the appellant company, who also added that had he not thought that he could claim capital cost allowances for what he considered to be the value of the frame buildings (even when torn down), he would not have been satisfied to pay the amounts actually expended. I think the whole of such costs—less salvage of the buildings —was attributable to the land, which, unfortunately for the appellant, is not property subject to capital cost allowances.

The findings which I have made seem to me on the evidence before me to be in accordance with sound accounting practices in Canada. Evidence was given on behalf of

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the respondent by Mr. W. Bermin, a chartered accountant and professor of accounting at Dalhousie University. He cited an extract from "The Accountants' Handbook" by Paton, Third Edition, where at p. 597 he states under the heading "Separation of Land and Building Costs", as follows:

Urban land is often purchased with buildings and other structures thereon which must be removed before the site can be utilized for the purpose intended. In such cases care must be taken that no large amount of the purchase price is attached to the improvements subject to removal. In fact the maximum value of the improvements in such conditions is their *net salvage value*, if any, the balance of the purchase price being the cost of the site.

In auditing Theory and Practice, Sixth Edition, by Montgomery, the following statement appears at page 233:

Cost of Demolished Buildings. When land and buildings are purchased with the intention of demolishing the buildings, the original cost, plus cost of (or less salvage from) the demolition of the buildings, represents the true cost of the land. When the intention to demolish is formed subsequent to purchase, the cost of demolition plus the value allocated to the buildings at time of purchase may represent a realized loss or additional cost of land, according to circumstances. When the demolition follows the discovery of unexpected defects in useful value, no part of the cost of removal of the buildings or of the original cost constitutes a benefit to be realized in the future. When land and buildings are purchased and the amount allocated to the land represents the full worth of the land, the book account for the land must not be increased by an expenditure which does not in fact add anything to the worth. Neither should the cost of new buildings, if any are built, be increased by costs which bear no relation to the additions.

And in Principles of Accounting—Intermediate, by Finney, Third Edition, it is stated at page 308:

Buildings. If a building is purchased, cost includes the purchase price plus all repair charges incurred in making good depreciation which occurred before the building was purchased, as well as all costs of alterations and improvements.

If a building is constructed instead of purchased, the cost includes the material, labor and supervision and other expenses, or the contract price, and a great variety of incidentals, some of which are mentioned below:

(1) If land and an old building which is to be razed are purchased at a flat price, the total cost may be charged to the land. The cost of wrecking, minus any proceeds from the sale of materials, should be charged to the land account.

If an old building, formerly occupied by the business, is replaced, the loss on the retirement of the old building should not be capitalized in the cost of the new.

Finally, the appellant submits that it is entitled to capital cost allowance on the net cost to it of the dwelling house at 149-151 Preston Street at the rate of 10 per cent applicable to frame buildings. This property was one of the three referred to above and it was from that property that a small amount of rent, totalling about $140, was received between the date of purchase and the time when the tenants went out of possession, namely, February 28 and April 30. It is submitted that as this property was purchased subject to the existing leases which expired May 1, the appellant acquired it "for the purpose of gaining or producing income". In view of the evidence which I have set out above as to the sole purpose of the appellant in purchasing all three properties, I am unable to conclude that the possibility of receiving rent for a few months from one of them formed any part of its purpose in making the purchases. There was only one purpose, namely, to secure a site for the extension. I regard the receipt of a few months' rent as a merely fortuitous event. The appellant could not eject the tenants until the leases terminated. The receipt of rent was referable to the existing leases and not to any purpose the officials of the company had in mind as to the use to be made of the buildings.

For these reasons, the appeal from the decision of the Income Tax Appeal Board will be dismissed and the assessment affirmed. The respondent is entitled to costs after taxation.

Judgment accordingly.

1955
May 30
Oct. 31

BETWEEN:

NORTH BAY MICA COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income —Income tax—Mining company—Income derived from mines—Exemption from income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 74(1)(b) and (2), 128(1)—References to the Income War Tax Act, R.S.C. 1927, c. 97—Definition of "mine"—Meaning of "new or old" mine in s. 4(x) of the Income War Tax Act—Meaning of "came into production" in s. 74(1)(b) of the Income Tax Act—Operation of a mine as distinct from the mine coming into production —Appeal from Minister's assessment dismissed.

Section 74 of the Income Tax Act, S. of C. 1948, c. 52, as amended, reads in part as follows:

74. (1) Where a corporation establishes that a mine was (*b*) an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone), that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of thirty-six months commencing with the day on which the mine came into production (other than any operation thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.

(2) In this section "production" means production in reasonable commercial quantities.

From October, 1942 to April, 1945 large commercial quantities of raw mica were mined by Purdy Mica Mines Ltd. on a property in Ontario. The operations were discontinued because the chief productivity dikes —the most important one being No. 3 dike—had been bottomed and were nearing exhaustion. Early in 1950 appellant company acquired the mine and a new dike, named No. 3 dike extension, was opened up for the purpose of mining a new concentration of mica discovered some months before and located a few feet from the old No. 3 dike, the latter being used as a base for operations in the new dike. Production of mica in commercial quantities from No. 3 dike extension by appellant company commenced on March 1, 1950, continued during the remaining months of 1950 and ran into 1951. In its income tax return for its 1951 taxation year appellant company claimed an exemption under s. 74 of the Income Tax Act but this was disallowed by the Minister on the ground that the company did not qualify for the exemption. An appeal from the assessment was taken to this Court which

Held: That the question to be determined here is when the "mine" came into production. The words "came into production" in s. 74 of the Act refer to the mine or mineral deposits coming into production,

not to the "operation" as distinct from the mine coming into production. When appellant company acquired the mine in 1950 it proceeded to explore and develop it from the point at which the Purdy company had ceased operations. The exploration, development and geological work were different but the mine is the same mine which previously had been operated and from which mica had been produced by the Purdy company during the years 1942-1945.

2. That the words "new or old" in s. 4(x) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, are not mere surplusage. The omission of these words in the Income Tax Act has significance. Under section 4(x) of the Income War Tax Act the question of whether a mine, old or new, came into production so as to qualify for tax exemption was a matter for the Minister, in his discretion, to determine. Under section 74 of the Income Tax Act no ministerial discretion is provided for. The question of whether a "mine" came into production on a date that entitles income derived by a company from such production to tax exemption must depend on the facts of the particular case and the application of section 74 to those facts. Wording contained in section 4(x) or in any other section of the Income War Tax Act has no bearing on the interpretation of section 74, other than to the extent required by section 128(1) of the Income Tax Act in respect to a reference to a transaction, matter or thing in a year to which the Income War Tax Act was applicable.

3. That the omission from section 74 of the Income Tax Act of the descriptive words "new or old" restricts the application of the section to a period of 36 months commencing with the day on which a mine, regardless of whether it is new or old, first came into production.

4. That the reference to "the day on which the mine came into production" as contained in section 74 relates to the day on which the mine first came into production and that the mica mine operated by the appellant company in 1950 first came into production of ore in reasonable commercial quantities in the year 1942, shortly after its discovery by one Purdy.

APPEAL from an assessment under the Income Tax Act, S. of C. 1948, c. 52, as amended.

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

H. Maxwell Bruce, Q.C. and *S. D. Thom* for appellant.

Peter Wright, Q.C. and *T. Z. Boles* for respondent.

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

RITCHIE J. now (October 31, 1955) delivered the following judgment:

This is an appeal from a reassessment of income tax, under date of September 21, 1951, made by the Minister of National Revenue in respect to the 1951 taxation year of the appellant, which ended on February 28, 1951.

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The relevant part of section 74, of the Income Tax Act, S. of C. 1948, c. 52, as applicable to the 1951 taxation year of the appellant, reads as follows:

74. (1) Where a corporation establishes that a mine was

(*b*) an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone), that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of thirty-six months commencing with the day on which the mine came into production (other than any operation thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.

(2) In this section, "production" means production in reasonable commercial quantities.

The reassessment made by the Minister disallowed the claim for exemption made by the appellant under section 74.

The appellant objected to the reassessment, but it was confirmed by the Minister as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayer did not qualify for the exemption.

It is common ground that the mine with which we are concerned was an industrial mineral mine and that it was certified by the Minister of Mines and Technical Surveys as required by clause (*b*) of section 74(1). Unfortunately, the actual certification had been mislaid and was not available at the hearing of the appeal.

The mine is situate in the township of Mattawan in the Province of Ontario and is generally referred to as the "Purdy mine", by reason of the mica deposits on the property having been discovered in the winter of 1941-42 by a young prospector named Justin Purdy.

Following his 1941-42 discovery, Purdy with two partners proceeded to take mica from surface outcrops and sold to dealers in Ottawa and Hull the initial production which appears to have been in commercial quantities.

In October, 1942 the Purdy claims were acquired by Inspiration Mining and Development Company Limited, which incorporated a subsidiary company, Purdy Mica Mines, Limited, for the purpose of developing the property. For convenience, this company will be referred to as "the Purdy company".

Production by the Purdy company, which soon attained important volume, continued until April, 1945, when mining was discontinued because consulting geologists advised

against expending further moneys in a search for commercial quantities of raw mica on the property and the Purdy company was convinced its chief productivity dikes had been bottomed and were nearing exhaustion. After April, 1945 the only interest of the Purdy company in the property was from the standpoint of salvage.

In 1949 James J. Kenmey, a geologist, learned of the Purdy property from Paul McDermott, a prospector who had worked on the property from 1942 until the discontinuance of mining operations in 1945. Following procurement of an article (Exhibit A) describing the mica deposits on the Purdy property and written for the American Institute of Mining and Metallurgical Engineers by Hugh S. Spence, Kenmey visited the property in company with McDermott and found the old pits filled with water, all machinery removed, no structures of any value standing and the road grown over. The property had not been worked since April, 1945. No commercial mica was in sight.

McDermott, at the request of Kenmey, secured from the Purdy company, under date of June 14, 1949 a letter lease (Exhibit 7), covering mining claims numbered S-36095, S-36137 and S-37975 for a term of three years from the date of the letter and stipulating royalty payments based on the value of production. The letter lease also gave McDermott an option to purchase the mining claims for the sum of $10,000 in cash plus a ten per cent interest in a new company which McDermott would cause to be incorporated to own and operate the claims. The royalty payments were to apply on the purchase price.

Kenmey and McDermott made four or five visits to the Purdy property during the summer of 1949, going over it in the light of the Spence article, and systematically inspecting each of the old pit workings. Mr. Kenmey's objective was to correlate the Spence description of the mica showings with other geological reports written by a Dr. Harding (Exhibit B) and a Dr. Lang.

The lease so obtained by McDermott was assigned to Kenmey, who formed a partnership consisting of three other parties and himself. From June, 1949, until about February, 1950, the partnership conducted exploration work by means of trenching and obtained some production but in less than commercial quantities.

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The appellant company was incorporated early in 1950 and subsequently acquired ownership of the mine. Kenmey became the president of the appellant company. Following incorporation of the appellant company development and exploration work on the property was pressed more vigorously.

The Purdy company had obtained its most important production from a vein of mica about ten feet in width and about four hundred feet in length which had been worked to a depth of around sixty feet from a dike or pit designated as No. 3 dike. Examination of No. 3 dike by Kenmey and his associates had not disclosed suitable mica in sufficient quantities to constitute an economic operation but had revealed stringers of the same pegmatite bearing mica that the Purdy company had mined.

The pegmatite stringers leading off in the wall rock of No. 3 dike suggested to Mr. Kenmey that another lens or concentration of mica might be located to replace the lens which had been mined out by the Purdy company. Under Kenmey's direction waste rock was removed to a width of from three to five feet west of the old No. 3 dike and such removal led to the discovery of a new lens or concentration of mica having a width of about eight feet and a length of about seventy-five feet.

A new dike, named No. 3 dike extension, was opened up by the appellant company for the purpose of mining the new discovery. The pit in No. 3 dike which had been opened up by the Purdy company was used by the appellant company as a base for operations in No. 3 dike extension which was mined to a depth of about one hundred and seventy feet, a level lower than the No. 3 dike Purdy company workings had been carried to.

Production of mica in commercial quantities from No. 3 dike extension by the appellant company commenced on March 1, 1950, continued during the remaining months of 1950 and ran into 1951.

Mr. Kenmey testified that the new find was a different deposit of mica than that worked by the Purdy company and said the designation "No. 3 dike extension" was used merely as a matter of convenience.

Substantially all the commercial mica mined by both the Purdy company and the appellant company came from a zone of mica-bearing pegmatite about 1,600 feet in length and 400 feet in width. From 90 to 95 per cent, or almost all of the mica production by the Purdy company came from No. 3 dike. A like percentage of the appellant company production came from No. 3 dike extension.

Professor George B. Langford, the head of the Department of Geological Sciences and professor of mining geology at the University of Toronto, who was called as an expert witness by the respondent, said that, in his opinion, the mica lens in No. 3 dike mined by the Purdy company and the mica lens in No. 3 dike extension discovered and mined by the appellant company were mineralogically and geologically the same and formed part of the same mica deposit.

In support of its appeal, the appellant company advanced the following seven grounds:

1. That section 74(1)(*b*) of the Income Tax Act applies to the operation rather than the existence of a mine;
2. That the word "mine", as used in the context of section 74, means "the excavation from which minerals are extracted" and does not mean "veins" or "deposits" of minerals in the earth;
3. That the mining operations conducted by the Purdy company during the years 1942 to 1945 ended in 1945 and at no time have been renewed;
4. That the mine was not in production or in operation from April, 1945 until the mining claims were acquired by Kenmey and his associates and operated on a commercial basis in 1950;
5. That mining operations by the appellant, as contemplated by section 74, brought the mine into production in 1950 so that the requirement of the statute is satisfied;
6. That for the purpose of this appeal no prior mining operation on the property has any significance or relevance in the interpretation or application of section 74;
7. That section 74 does not state mining operations qualifying for the exemption conferred by it must be

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a continuation of an old operation or must be a new operation. The only requirement is that there be a mine coming into production.

In respect to the first and second grounds above referred to it was contended that the word "mine", as used in the context of section 74, refers to a place—an excavation—from which minerals can be extracted and that the only concern of the section is with the operation of that place or operation. In other words, it is the activity constituting the operation of the mine, not the mine itself, that yields the income and it is with such activity that section 74 is concerned. From that basis, it was argued the words "came into production" refer to the activities carried on in a mine leading to the production of minerals, so that the question at issue in this appeal really is whether the activities having to do with operation of the mine by the appellant company resulted in mineral production in commercial quantities commencing on March 1, 1950. I am not prepared to accede to that submission. The question to be determined is when the "mine" came into production.

The Shorter Oxford English Dictionary describes "mine" as meaning "an excavation made in the earth for the purpose of digging out metallic ores or coal, salt, precious stones, etc. Also a place yielding these."

Murray's Dictionary describes "mine" as "an excavation made in the earth for the purpose of digging out metals or metallic ores or certain other minerals, as coal, salt, precious stones. Also the place from which such minerals may be obtained by excavation."

Halsbury (Hailsham Edition), Volume 22, at page 526 states the word "mine" may sometimes include not only mineral deposits but also so much of the adjoining strata, whether superjacent or subjacent, as may be necessary to remove for the purpose of working the mineral.

The Halsbury conception of a "mine" appears to best describe the area covered by the three mining claims acquired by the appellant company.

In *Spencer* v. *Scurr* (1) Lord Romley, Master of the Rolls, held that a seam of coal discovered to be lying at a depth of 118 fathoms below two known seams of coal, and

(1) (1862) 31 Bevan's 334.

which could only be worked by means of a new shaft made specially for the purpose and at very great expense, was part of the original mine.

In *Elias* v. *Snowdon* (1) Lord Selborne said at page 466:

> I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry.

The wording of section 74(1)(*b*) is clear. Its application is solely to an industrial mine which a corporation has established to be an industrial mineral mine certified to have been operating on mineral deposits and which came into production of ore during the calendar years 1946 to 1954 inclusive.

The words "came into production" refer to the mine or mineral deposits coming into production, not to the "operation" as distinct from the mine coming into production.

When Kenmey and his associates took over the Purdy property in 1949 and the appellant company acquired it in 1950 they proceeded to explore and develop it from the point at which the Purdy company had ceased operations. Exploration and development procedure and geological thinking were different but I must find that the mine operated by the appellant is the same mine which previously had been operated and from which mica had been produced by the Purdy company during the years 1942-1945.

The appellant, however, contends that any prior operation of the mine by the Purdy company or by Justin Purdy has no bearing on its claim for exemption and that section 74 grants exemption notwithstanding the production obtained by the prior operators. In support of that contention stress was laid on the wordings of similar exemptions granted to mining companies under the Income War Tax Act and to section 128(1), one of the transitional sections, of the Income Tax Act.

An exemption from tax, such as conferred by section 74, first was conferred by a 1936 amendment to the Income War Tax Act. By the addition of section 89 to the Income War Tax Act, the 1936 amendment exempted from tax, for its first three fiscal periods, the income of a company derived from the operation of a metalliferous mine that came into production after the 1st day of May, 1936 and prior to the

(1) (1879) 4 A.C. 454.

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1st day of January, 1940. The element of "ministerial discretion" was embodied in the legislation by authorizing the Minister to "determine which mines whether new or old" qualified for the exemption. Under the 1936 legislation, subject to the Minister so determining, it would seem the revival of production in an old mine could qualify for the exemption.

In 1939 section 89 of the Income War Tax Act was amended by substituting "1943" for "1940" so as to extend the exemption to mines which came into production after the 1st day of May, 1936 and prior to the 1st day of January, 1943. The "new or old" wording and the requirement of determination by the Minister remained.

In 1942 the exemption provision in respect to mines coming into production after the 1st day of January, 1943 was transferred to the Excess Profits Tax Act. Paragraph (*g*) was added to section 7 of the Excess Profits Tax Act so as to exempt from taxation under that Act the profits of a company derived from the operation of any base metal or strategic mineral mine which came into production in the three calendar years commencing the 1st day of January, 1943. Again the Minister was authorized to "determine which mines whether new or old" qualified for the exemption.

In 1945, the exemption under the Excess Profits Tax Act was continued by adding paragraph (*h*), section 7(*h*) so as to extend the exemption to profits of a company derived from the operation of any metalliferous or industrial mineral mine coming into production on or after January 1, 1946. No end date was set for the commencement of production but the Minister again was authorized to determine which mines, whether new or old, qualified for the exemption.

In 1946 section 3(8) of chapter 55 of the statutes of that year added paragraph (x) to section 4 of the Income War Tax Act and so revived the policy, under that Act, of granting to mining companies exemption from taxation of income derived during the first three years of production from a mine, whether new or old. The exemption was subject to regulations and to determination by the Minister. The commencement of production period covered by this amendment was from January 1, 1944 to December 31, 1949 but

in the case of a base metal or strategic mineral mine was subject to determination by the Minister that it came into production before January 1, 1946 and in the case of a metalliferous or industrial mineral mine was subject to a ministerial determination that it came into production on or after January 1, 1946.

When the Income Tax Act first was enacted, in 1948, it included section 74 in substantially the same language as that with which we now have to deal and, notwithstanding that the statute applies only to 1949 and subsequent taxation years, dealt with commencement of production periods during the calendar years 1946 to 1949 inclusive.

In the 1948 enactment of the Income Tax Act the adjectival "new or old" classification of mine was, for the first time, not included in the wording granting tax exemption to those mines which might qualify for the exemption. No subsequent amendment of the Income Tax Act has restored the "new or old" wording.

It was strongly urged on behalf of the appellant that section 74(1) of the Income Tax Act and section 4(x) of the Income War Tax Act dovetail and that the interpretation of section 74(1) of the one Act must be the same as section 4(x) of the other Act. In other words that when Parliament revised the language granting the exemption it did not intend to alter the substance of the exemption.

Section 74(1) of the Income Tax Act provides tax exemption for income derived from mines that came into production "during the calendar years 1946 to 1954, inclusive" but excludes from the 36 months' production exemption period "any portion thereof in the year 1946."

I cannot accept the submission that the inclusion in section 74(1) of production period commencing in the years 1946-1949 means the Income War Tax Act exemption of either "new or old" mines as contained in the Income War Tax Act is carried forward into section 74(1). The interpretation of section 74(1) must be confined to the interpretation of the actual wording contained therein. The words "new or old" cannot be read in.

Inclusion of the 1946-1949 years in the commencement of production periods permissible under section 74(1) was, as I see it, to permit the continuation of tax exemption granted to metalliferous or industrial mineral mines that

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came into production after January 1, 1946 and prior to January 1, 1949 and which had been granted the ministerial certificates required under section 4(x) of the Income War Tax Act.

Section 128(1) of the Income Tax Act, the transitional section stressed by counsel for the Minister, reads:

> 128. (1) A reference to this Act or a regulation to this Act or any provision thereof shall be construed, as regards any transaction, matter or thing in a year to which the Income War Tax Act was applicable, to include a reference to the provisions of the Income War Tax Act relating to the same subject matter.

If exemption periods of three years, granted under the Income War Tax Act to mines that commenced production in 1946, 1947 and 1948 ran into 1949 and subsequent taxation years the companies operating such mines had the right to invoke the protection of section 128(1) of the Income Tax Act but that transitional section, in my opinion, has no application to mines qualifying for protection under section 74 of the Income Tax Act.

Inclusion of the 1946-1948, inclusive, period in section 74(1) is nothing more than a provision relating to years in which the Income War Tax Act was applicable and so must be construed as including a reference to section 4(x) of the Income War Tax Act. Section 128(1) does not go further. The section has no application to mines that came into production in 1949 and subsequent taxation years.

I am unable to persuade myself that the words "new and old" as included in the Income War Tax Act are mere surplusage. The omission of the descriptive words in the Income Tax Act, to me, has significance. Under section 4(x) of the Income War Tax Act the question of whether a mine, new or old, came into production so as to qualify for tax exemption was a matter for the Minister, in his discretion, to determine. Under section 74 of the Income Tax Act no ministerial discretion is provided for. The question of whether a "mine" came into production on a date that entitles income derived by a company from such production to tax exemption must depend on the facts of the particular case and the application of section 74 to those facts. Wording contained in section 4(x) or in any other section of the Income War Tax Act has no bearing on the interpretation

of section 74, other than to the extent required by section 128(1) of the Income Tax Act in respect to a reference to a transaction, matter or thing in a year to which the Income War Tax Act was applicable.

A mine can be new or it can be old. A reference to the date, on which a mine, "whether new or old", came into production is wide enough to include the date on which there is a revival of production from an old mine that has been dormant. A reference to the date on which a mine (without the descriptive adjectives "new or old") came into production has, in my opinion, a much narrower application and does not include the date on which there is a revival of production from an old mine that has been dormant.

As I see it the omission from section 74 of the descriptive words "new or old" restricts the application of the section to a period of 36 months commencing with the day on which a mine, regardless of whether it is new or old, first came into production.

While the original purpose of the exemption from income tax granted to mining companies clearly was to encourage mineral production from new mines and the revival of mineral production from old mines, I must, for the reasons stated, hold that the reference to "the day on which the mine came into production" as contained in section 74 relates to the day on which the mine first came into production and that the mica mine operated by the appellant company in 1950 first came into production of ore in reasonable commercial quantities in the year 1942, shortly after its discovery by Justin Purdy.

The appeal, therefore, will be dismissed with costs.

Judgment accordingly.

1955
Sept. 12
Nov. 7

BETWEEN:

MONTREAL TRUST COMPANY *et al.* (Emily Rhoda Bathgate Estate) ..... APPELLANTS;

AND

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

Revenue—Succession duty—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(4), 6(1)(a)—Will—Power to draw from capital—General power to appoint or dispose of property—Appeal from Minister's assessment dismissed.

By his will one Bathgate left his estate to his trustees to pay to his wife during her lifetime the net income thereof and "to pay to my wife the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of the wife the residuary estate was to be divided equally between his two children. Mrs. Bathgate died in 1953. In assessing the value of the successions arising on her death the Minister included the amount then comprising the residue of Mr. Bathgate's estate on the ground that under his will his widow had at the time of her death a general power to appoint or dispose of property within the meaning of s. 3(4) of the Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended. On an appeal from the assessment this Court

Held: That although the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased the will of her husband conferred on her a general power of appointment in respect of the residue of his estate. *Re Richards, Uglow* v. *Richards* [1902] L.R., 1 Ch. D. 76; *Re Ryder, Burton* v. *Kearsley* [1914] L.R., 1 Ch. D. 865; *Re Shuker's Estate, Bromley* v. *Reed* [1937] 3 A.E.R. 25; and the opinions of Rinfret C.J. and Locke J. dissenting in *Wanklyn* v. *Minister of National Revenue* [1953] 2 S.C.R. 58 at page 60 and following, referred to and followed.

APPEAL under the Dominion Succession Duty Act, R.S.C. 1952, c. 89.

The appeal was heard before the Honourable Mr. Justice Ritchie at Winnipeg.

A. E. Johnston, Q.C. for appellants.

J. A. MacAulay, Q.C., D. C. McGavin and *A. L. DeWolf* for respondent.

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

RITCHIE J. now (November 7, 1955) delivered the following judgment:

This is an appeal from an assessment made by the Minister of National Revenue levying succession duty in respect of the estate of Emily Rhoda Bathgate and the successions arising therefrom.

The appellants Montreal Trust Company, successor to The Northern Trusts Company, and Mary Loghrin Calder and William Campbell Bathgate, in their representative capacities, are the executors and trustees under the last will and testament of Emily Rhoda Bathgate (herein referred to as "Mrs. Bathgate"), late of the city of Winnipeg and the widow of James Loghrin Bathgate (herein referred to as "Mr. Bathgate"), who also was resident in Winnipeg.

The Montreal Trust Company is the successor to The Northern Trusts Company by reason of having absorbed The Northern Trusts Company and taken over its business.

By "An Act Respecting Montreal Trust Company and the Northern Trusts Company", Chapter 61, Statutes of Manitoba, 1954, the Montreal Trust Company, as of March 25, 1954 ,was substituted, in the place and stead of The Northern Trusts Company, as executor and trustee in respect of the last wills and testaments of Mr. and Mrs. Bathgate and the letters probate of their respective wills.

The appellants Mary Loghrin Calder and William Campbell Bathgate, in their personal capacities, are respectively the daughter and the only son of Mr. and Mrs. Bathgate.

Mr. Bathgate died at Winnipeg on or about October 5, 1934 and letters probate of his last will and testament on October 12, 1934 were issued to The Northern Trusts Company and to Mrs. Bathgate, the executors named therein.

Mrs. Bathgate, then the lawful widow of Mr. Bathgate, died at Winnipeg on or about March 8, 1953 and letters probate of her last will and testament were issued on April 11, 1953 to The Northern Trusts Company and Mary Loghrin Calder and William Campbell Bathgate, the executors named therein.

At the time of the death of Mrs. Bathgate there were in the hands of Mr. Bathgate's executors assets of his estate totalling $170,045.30, of which $1,032.99 was in revenue account and $169,012.31 was in capital account.

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In computing the value of the successions arising on Mrs. Bathgate's death, the Minister of National Revenue included in his computation the $170,045.30 then comprising the residue of Mr. Bathgate's estate and, under a notice of assessment dated September 29, 1953, levied succession duties in respect thereof.

On November 4, 1953, the succession duties demanded by the Minister were paid by Mrs. Bathgate's executors, but under protest, conditionally and with a denial of liability in respect to the succession duties levied on the said sum of $170,045.30 and the interest upon the succession duties levied thereon which, including interest, totalled $65,702.

Under date of November 17, 1953 the appellants appealed to the Minister from the assessment. The Minister affirmed the assessment by his decision dated April 21, 1954.

The paragraphs of Mr. Bathgate's will which deal with the appointment of his executors and trustees and dispose of the residue of his estate and which have the most relevance to this appeal read as follows:

I appoint The Northern Trusts Company and my wife, Emily Rhoda Bathgate, to be executors and trustees of this my last will and testament, desiring, however, that The Northern Trusts Company shall take upon itself the burden of the actual administration of my estate and the trusts hereafter created and shall have the custody of all the assets of my estate, that my wife, Emily Rhoda Bathgate, shall be consulted by the said The Northern Trusts Company and shall act in advisory capacity only without incurring the responsibility of collecting in, managing and administering my estate, and that the administration of the trusts thereof shall rest with the said The Northern Trusts Company.

Sixthly: UPON TRUST as to all of my residuary estate including lapsed legacies, should my wife, Emily Rhoda Bathgate, survive me, to pay the net income thereof to my wife, Emily Rhoda Bathgate, for the term of her natural life, and to pay to my wife, Emily Rhoda Bathgate, the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire; and I further direct that upon the death of my said wife, Emily Rhoda Bathgate, my said residuary estate (including undistributed income) or so much thereof as shall not have been paid to my wife during her lifetime shall be divided equally between my children Mary Loghrin Calder and William Campbell Bathgate, or the same shall go wholly to one if only one of such children shall survive me, subject to the provision that if either of my said children shall have predeceased me leaving issue who shall be living at my death, such issue shall take, and if more than one equally among them, the share which such deceased child would have taken had such deceased child been living at my death.

Eighthly: I further direct that any share in my residuary estate to which a child of mine shall become entitled under this my will, shall, subject to any right as to income and/or corpus herein given for the benefit of my wife, be paid to such child as he or she shall respectively

attain the age of thirty-five years; and in the meantime subject to any right as to income and/or corpus herein given to my wife a child of mine shall be entitled to receive the income on his or her share of my residuary estate.

I further declare that although the time at which a child of mine shall be entitled to receive a share in my estate may be deferred until he or she has attained a stated age or that the amount thereof may not be determinable until the death of my wife as herein declared, yet any share to which a child of mine is entitled in my estate under the terms of this my will shall be deemed to vest and shall vest in him or her immediately at my death.

Harold R. Parker, the manager of estates of the Winnipeg branch of the Montreal Trust Company, who formerly was general manager of The Northern Trusts Company, testified that the latter company assumed the burden of the administration of Mr. Bathgate's estate and the trusts created by his will and held the assets of his estate in its custody but consulted Mrs. Bathgate when considered necessary. Mr. Parker also testified that no part of the capital of Mr. Bathgate's estate was paid to his widow and that at no time did Mrs. Bathgate request the executors to pay any part of the corpus of her husband's estate to her or indicate any desire that they do so.

The claim of the Minister to levy succession duty on the residue of his estate which, on the death of his widow, passed to his children, Mary Loghrin Calder and William Campbell Bathgate, is based on sections 6(1)(*a*) and 3(4) of the Dominion Succession Duty Act, chapter 89, R.S.C. 1952, which read:

6. (1) Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rates provided for in the First Schedule duties upon or in respect of the following successions, that is to say,

(*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated;

3. (4) When a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

Section 3(4), in the above form, was enacted by section 2(3) of chapter 317, Revised Statutes, 1952.

The Minister contends that under the paragraphs of Mr. Bathgate's will his widow had at the time of her death a general power to appoint or dispose of property.

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The appellants take the position that the terms of Mr. Bathgate's will did not confer on Mrs. Bathgate a general power of appointment or a general power of disposition in respect to the residue of his estate, that Mrs. Bathgate had only a special restricted power to require that the residue of the estate, in whole or in part, be paid to her and that the residue of Mr. Bathgate's estate had, on Mr. Bathgate's death, vested in Mary Loghrin Calder and William Campbell Bathgate, subject only to the right of Mrs. Bathgate to exercise the special or limited power held by her.

It was conceded by counsel for the appellants that if the right of Mrs. Bathgate to require a payment to her of the whole or a portion of the residue of Mr. Bathgate's estate fell within section 3(4) succession duty could be levied as contended by the Minister.

The question for determination, therefore, is whether at the time of her death Mrs. Bathgate had a general power to appoint or dispose of the property comprising the residue of Mr. Bathgate's estate.

At page 8 of *Farwell on Powers*, 3rd Edition, it is said:

> Powers may be either general or limited. General powers are such as a donee can exercise in favor of such person or persons as he pleases, including himself. Limited powers, which are sometimes also called special powers, are such as a donee can exercise only in favor of certain specified persons or classes.

And at page 9:

> The donee of a general power may appoint to himself.

In Halsbury, 2nd Edition, Volume 25, at page 516, it is said:

> A gift of income for life, with liberty to use the capital if the income is not sufficient, creates a general power of appointment by deed or writing, but probably not by will, over the capital, where the word "sufficient" means sufficient for the desires of the beneficiary, but not where it means sufficient for his needs.

In *Re Richards, Uglow* v. *Richards* (1) Farwell J. dealt with a bequest of the income of an estate to the testator's wife for life with a direction that

> In case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient.

and held that the wife had a general power of appointment over the capital of the estate during her lifetime.

(1) [1902] L.R., 1 Ch. D. 76.

In *Re Ryder, Burton* v. *Kearsley* (1) Warrington J. held that under a clause in a will reading

> I authorize my husband so long as he is entitled to the income of part or the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit.

there was conferred on the husband power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime.

Re Shuker's Estate, Bromley v. *Reed* (2) is a case where a testator gave all his property, both real and personal, to his wife, upon trust,

> to retain the income thereof for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she may think fit of the capital of my said real and personal estate or the investments of sale proceeds thereof.

After the death of the wife the real and personal property, or so much thereof as had not been converted by the wife to her own use, was devised and bequeathed to trustees for the benefit of themselves and other nephews and nieces. Upon the death of the testator the widow made a declaration that she had converted the whole of the property to her own use. Simonds J. held that a general power of appointment had been given to the widow and that she had duly and validly exercised that power and made the property her own.

Wanklyn v. *Minister of National Revenue* (3) is a case where the Supreme Court of Canada had to deal with a clause in a will reading as follows:

> (*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

The question of whether, under the terms of his wife's will, Dr. Chipman acquired a general power of appointment in respect to the residue to her estate, was considered, but the majority of the Court held it was not necessary to decide the point in order to dispose of the appeal. Rinfret C.J.C.

(1) [1914] L.R., 1 Ch. D. 865. (2) [1937] 3 A.E.R. 25.
(3) [1953] 2 S.C.R. 58.

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and Locke J. were of the opinion that a general power of appointment had been conferred on Dr. Chipman, but the majority of the Court (Estey, Cartwright, and Fauteux JJ.) were doubtful.

Rinfret C.J.C., at page 61, said:

The learned Judge of the Exchequer Court (Saint Pierre J.) . . .. held that in the present case Dr. Chipman received from his wife the general power by which the Executors of the Estate would pay him from time to time and at any time such portions of the capital of the Estate as he might wish or require and upon his simple demand, he being the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, without he or the Executors or Trustees being obliged to account for any capital sums so paid to him.

In my view this is the equivalent of a bequest of the whole property of the deceased to her husband and Section 31 of *The Dominion Succession Duty Act* duly covers a situation of that kind. In the words of O'Connor J. in *Cossit* v. *Minister of National Revenue* (1949) Ex. C.R. 339 at 343:

> There was a succession within section 31. And under section 31, the duty levied in respect of such succession is payable in the same manner and at the same time as if the property itself had been given to the appellant.

Locke J., at page 68, said:

By s. 3(1)(i) a succession includes the disposition of property of which the person dying was at the time of his death competent to dispose and the beneficiary of such a disposition is deemed to be a successor. Dr. Chipman was competent to dispose of the capital of his wife's estate, after providing for the debts and the specific legacies within the meaning of s. 3(*i*)(i) and s. 4(1) (*In Re Penrose,* (1933) 1 Ch. 793 at 807: *Re Parsons,* (1942) 2 A.E.R. 496). As pointed out by Lord Greene, M.R. in *Parson's case,* the phrase "competent to dispose" is not a phrase of art and, taken by itself and quite apart from the definition clause in the Act, conveys the ability to dispose, including the ability to make a thing your own. In my opinion, this right vested in Dr. Chipman by his wife's will gave him a beneficial interest in the property and this disposition by the will was a succession, within the meaning of ss. (*m*) of s. 2.

I am further of the opinion that the disposition gave to Dr. Chipman a general power of appointment, within the meaning of ss. (1) of s. 4 and s. 31.

Estey J., at page 63, said:

There is much to be said in principle for the contention that a power of appointment that permits one to appoint only to himself is not a general power of appointment. However, it seems unnecessary to decide that point as, even if we assume, for the purpose of this decision, that the testatrix, in clause 3(*f*), has created a general power of appointment, it would still appear that respondent, within the meaning of the statute, cannot impose a duty upon or in respect to a succession to Doctor Chipman except as to the sum of $33,164.41.

The judgment of Cartwright and Fauteux JJ. contains, at page 72, the following paragraph:

For the appellants it is argued that clause 3(*f*) of the will does not give Dr. Chipman any general power of appointment over the capital of the residue. In my opinion no power to appoint any part of the capital of the residue by will was given to Dr. Chipman. The clause contemplates the exercise of judgment by him as to the amount or amounts that he wishes to take from capital and payment thereof to him in his lifetime. It is payment to him that relieves the executors from further liability to account. Under clause (*g*), upon his death, the capital "as it may then exist" falls to be divided under the terms of Mrs. Chipman's will. Be this as it may, counsel for the respondent contends that during Dr. Chipmans' lifetime his power is unlimited as to the amounts that he may take, that the obligation of the executors is to pay to him from time to time and at any time, upon his simple demand, such portions of the capital as he may wish or require, and that consequently Dr. Chipman was given a general power to appoint *inter vivos*. If it were necessary to decide this question, careful consideration would first have to be given to the appellant's argument that the wide terms in which the power given to Dr. Chipman is expressed in clause 3(*f*) are modified and restricted by clause "Fifthly", quoted above. Even if the respondent's contention that Dr. Chipman was entitled to take the whole capital be accepted, the power given to him does not at first sight appear to fall within the text-book definitions of a general power. See, for example, Halsbury 2nd Edition, Vol. 25 at page 211:—

> A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors or administrators.

We were, however, referred to the following three cases, in which powers similar to that given to Dr. Chipman were held to be general powers to appoint *inter vivos*: *Re Richards, Uglow* v. *Richards,* (1902) 1 Ch. 76, a decision of Farwell J.; *In re Ryder, Burton* v. *Kearsley,* (1914) 1 Ch. 865, a decision of Warrington J.; and *In Re Shukers Estate, Bromley* v. *Reed,* (1937) 3 A.E.R. 25, a decision of Simonds J. (as he then was). The earliest of these decisions is now fifty years old and no authority questioning them has been cited to us. On the other hand it is to be observed that in the last mentioned case Simonds J. indicated that, while he decided he ought to follow *re Richards* and *re Ryder,* his own inclination was to hold that such a power was not a general power of appointment. In the case at bar I do not find it necessary to decide this question, which I regard as difficult and doubtful, because, even on the assumption that the will of Mrs. Chipman gave to Dr. Chipman a general power to appoint the capital of the residue *inter vivos* I have reached the conclusion that the appeal must succeed.

The three English cases, each of which is the decision of a single judge, were rendered in the Chancery Division by Farwell J. in 1901, by Warrington J. in 1914 and by Simonds J. in 1937. The three judgments are not binding but the earliest, as remarked by Cartwright and Fauteux JJ., is now fifty years old and no authority questioning them has been cited.

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While the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased, I have decided to follow the three English cases and the opinions expressed by Chief Justice Rinfret and Mr. Justice Locke in the Wanklyn case and hold that the will of Mr. Bathgate conferred on Mrs. Bathgate a general power of appointment in respect to the residue of his estate.

The appeal therefore will be dismissed. The respondent is entitled to the costs of the appeal, to be taxed.

Judgment accordingly.

1955

June 15 & 16

Nov. 10

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

MALCOLM MacCAULEY AND NORMAN MacCAULEY ..... } DEFENDANTS.

Crown—Action to recover damages—Negligence—Accident to an employee of Canada—The Government Employees' Compensation Act, S. of C. 1947, c. 18, s. 9 (now R.S.C. 1952, c. 134, s. 8)—Right of action by employee against wrong-doer—Employee's election to claim under the Act—Subrogation of employee's rights to Her Majesty—Liability at common law of owner in possession of car for damages—Action per quod servitium amisit brought by the Crown—Meaning of words "in the course of employment"—Right of subrogation of the Crown depending on employees election under the Act—Claim allowed in part.

The action is to recover certain sums alleged to be due to the Crown under the Government Employees' Compensation Act, S. of C. 1947, c. 18, by reason of a motor car accident in which three of its employees were injured and certain hospital, medical and salary expenses were incurred, the employees having elected to claim compensation under the Act and the Crown being subrogated to their right of action "against the person against whom the action lies". The accident occurred between a car owned and driven by one S, a Crown employee, who, with two other employees as passengers, were on the way to their work, and a car owned by one of the defendants who at the time was in the car while his brother and co-defendant was driving it. On the facts the Court found that the negligence of the driver of the MacCauley car was the sole cause of the collision.

Held: That Malcolm MacCauley as owner in possession of the car is also liable at common law for the damages occasioned to the Crown employees. *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 81 referred to and followed.

2. That the Crown is entitled to bring an action *per quod servitium amisit* in respect of the loss of the services of its servants and employees. *Attorney-General of Canada* v. *Jackson* [1946] S.C.R. 489 at 497; *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 62 referred to and followed. Here the Crown is entitled to recover from the defendants the salary paid by it to its employee S during his liability.

3. That the accident did not occur "in the course of employment" of the three Crown employees. There was no duty of their part to travel by S' car to the hatchery. Their duty was to report for work at a specific time, and while they were entitled to free passage in S' car to and from the hatchery, there was no obligation upon them to use that car and none of them would have been discharged from employment had they reached the hatchery by means other than by the use of S' car. *St. Helen's Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59 referred to and followed.

4. The Crown's right to subrogation does not depend on the disposition made of the employee's application by the Workmen's Compensation Board. This right of subrogation arises upon the employee's electing to claim compensation under the Act. Upon such election the Crown is entitled to bring such action against the wrong-doer as the employee could have taken.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover damages under the Government Employees' Compensation Act, S. of C. 1947, c. 18 (now R.S.C. 1952, c. 124, s. 8).

The action was tried before the Honourable Mr. Justice Cameron at Saint John.

K. P. Lawton and *K. E. Eaton* for plaintiff.

S. Roy Kelly for defendant.

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

CAMERON J. now (November 10, 1955) delivered the following judgment:

Under the provisions of section 9 of the Government Employees' Compensation Act, chapter 18, of the Statutes of Canada, 1947 (now section 8 of chapter 134, R.S.C. 1952), when an accident has happened to an employee of Canada (as defined in the Act), such employee or his dependents, under the circumstances mentioned therein, may claim compensation under the Act or may bring action against persons responsible for such accident. If compensation is claimed, Her Majesty is subrogated to the rights of the employee and may maintain an action "against the person against whom the action lies". In this Information Her Majesty seeks to

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recover from the defendants certain sums, a part of which is said to be due Her Majesty under the above Act by reason of a motor accident in which three such "employees" received injuries and certain expenses were incurred, the said employees having elected to claim compensation under the Act. It is alleged that the three employees were injured because of the negligent operation of a motor car owned by the defendant Malcolm MacCauley and at the time operated by his brother and co-defendant, Norman MacCauley.

The accident in question occurred between 7:30 and 8 o'clock on the morning of October 7, 1952, on the Loch Lomond Road near the city of Saint John, province of New Brunswick. On that morning one Ronald Smith, a permanent employee of the Department of Fisheries (Canada) and employed at the Saint John Hatchery about five miles east of Saint John, was driving to the hatchery when his car was in collision with the MacCauley car on the Loch Lomond Road. With him in the car were two temporary employees of the Department of Fisheries, namely, Edward J. Laughlin, a carpenter, and Eldon C. Paisley, a labourer, both of whom were employed temporarily on special work at the hatchery. They also resided in Saint John and by pre-arrangement had been picked up by Smith for the purpose of being conveyed to the hatchery.

All three employees were injured in the collision. Smith was unable to perform any of his duties from the date of the accident to March 15, 1953, during which period he received from Her Majesty salaries totalling $937.93. The Crown seeks to recover that amount on the ground that it was deprived of Smith's services for that period and that the salary so paid represents the amount of the damage and loss sustained thereby. All three employees applied to the Workmen's Compensation Board of the province of New Brunswick for compensation, that Board being the authority appointed by section 3 of the Government Employees' Compensation Act, 1947 (hereinafter referred to as "the Act"), to determine the right to and the amount of such compensation.

On October 15, 1952, the claims were disallowed by the Board, but on the 17th of October they were reopened and allowed. In the result, while the Board paid Smith nothing

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in respect of his salary, it paid his medical and hospital expenses amounting to $376.50. It paid Laughlin compensation of $150, covering the period from the date of the accident to November 17, 1952, when he was again able to work, and also paid $203 for his medical and hospital expenses. Similarly, it paid Paisley $315.37 as compensation to November 26, 1952 (when he was able to return to work) and disbursed $102 for his medical and hospital expenses. There is no dispute as to the amounts that were so paid either for salary, compensation or for medical and hospital expenses. The Crown seeks to recover the last five items, aggregating $1,146.87, under the provisions of section 9 of the Act.

The first question to be determined is this—whose negligence caused or contributed to the accident? For the Crown it is alleged that Norman MacCauley as driver and Malcolm MacCauley as the owner in control of the vehicle were solely responsible for the collision and that their negligence consisted in travelling at an excessive and unreasonable rate of speed, in crossing to the left side of the travelled portion of the road, in failing to keep a proper lookout, and in operating the motor car without due regard to the rights of others on the highway. The defendants denied all negligence on their part and alleged that Smith alone was negligent, or at least that his negligence contributed to the collision. In argument the only ground of negligence attributed to Smith was his excessive speed.

[Here the learned Judge reviews the evidence and continues]:

On the whole of the evidence, I am convinced that the cars came into collision when the MacCauley car was well over on the south half of the road, if not completely so. Whether it reached that position because of the situation which I have suggested in the last preceding paragraph or whether MacCauley deliberately intended to cross to the south side in order to pass the Dalling truck is of minor importance. In the former case, Norman MacCauley had created the emergency by reason of his failure to keep a proper lookout and by his inattention to traffic and by his excessive speed under the circumstances. In the latter case, which in the light of Smith's evidence I think is more probable, MacCauley's actions were contrary to section

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42(2)(*a*) of the Motor Vehicle Act. In either situation the driver of the MacCauley car was negligent and that negligence I must find was the sole cause of the collision.

I find not a tittle of evidence to suggest that Smith was negligent in any manner whatsoever or that anything he did caused or contributed to the accident. On the contrary, Smith did everything possible to give way to the MacCauley car which, had it been under proper control, could have passed safely. I am satisfied on the whole of the evidence that Norman MacCauley did not observe the Smith car until it was very near him and that he then suddenly turned his car further to the left to avoid an emergency which he himself had created, by crossing to the south side of the road.

The damage to the two cars as shown by the photographs filed amply bears out the evidence of Smith as to the manner in which the accident occurred. These photographs were taken by a police officer who arrived shortly after the accident but after all eye-witnesses had left the scene; some attempt was made on behalf of the defendants to establish that the cars had been moved after the collision and before the photographs were taken; both MacCauleys insist that such was the case. But on the whole of the evidence, I am satisfied that the photographs clearly show the position of the cars as they were when they came to rest after the collision. It is shown that the cars were so damaged that they could not be moved without the aid of a wrecking truck. None of the witnesses who saw the accident observed anyone moving the cars and the wrecking truck arrived shortly after the photographs were taken.

It may be noted here that as a result of the said collision, Norman MacCauley was charged with reckless driving under section 285(6) of the Criminal Code, was convicted by the Magistrate and fined $50 and costs.

Accordingly, I find that the three employees would have had a right of action against Norman MacCauley for the damages they sustained. I think that his co-defendant is also liable as owner in control of the vehicle which caused the damage. It is admitted that he was in law the owner. There was at that time no provision in the statutory law of

New Brunswick by which the owner of a motor car was made liable for damage occasioned by it to others, when the vehicle was operated by someone other than the owner.

Malcolm MacCauley had no driver's license. He allowed his brother Norman to drive the vehicle from time to time. Both defendants on the date in question had employment in Saint John and while Norman MacCauley stated that on that morning Malcolm had not asked him to drive, it was clear that he was expected to drive and had the full consent of the owner to drive. Malcolm sat throughout in the front seat with the driver and I have no doubt that under the circumstances he was in such a position as to be able to exercise full control in the sense that he had the authority to direct how the vehicle should be used or whether it should be used at all. As owner he had a duty to control the driver. On the authority of the decision in *The King* v. *Richardson and Adams* (1), and the cases therein referred to, I find that Malcolm MacCauley as owner in possession was also liable at common law for the damages occasioned to the three Government employees.

As noted at the outset, the Crown's claim is based on two different grounds. That which relates to the payment by the Crown to Smith of his salary during the time of his inability to perform any services ($937.93) is an action *per quod servitium amisit.* In *Attorney-General of Canada* v. *Jackson* (2), Kellock J. stated:

> A convenient statement of the action *per quod* is to be found in Blackburn and George on Torts, 1944 ed., p. 181, namely,
>
> > If A deprives B of his servant's services by a *tort* committed against the servant, B may sue A. In such a case B must prove (i) that A's actions are a tort against the servant; (ii) that B has thereby lost his servant's services.

That the Crown is entitled to bring an action *per quod* in respect of the loss of the services of its servants and employees was stated by Kerwin J. (now C.J.C.) in the case of *The King* v. *Richardson and Adams* (3) at page 62:

> Although the services to be performed by a member of the Forces differ in kind from those expected from the servant of a private employer, that circumstance, in my opinion, affords no ground for denying to the Crown the benefits of a form of action established many years ago and constantly allowed ever since. It may be anomalous, as stated by Lord Porter and Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika,*

(1) [1948] S.C.R. 57 at 81. (2) [1946] S.C.R. 489 at 497.
(3) [1948] S.C.R. 57 at 62.

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(1917) A.C. 38, but that it still persists cannot be gainsaid. Any opinion of these learned judges is entitled to the greatest respect but their observations as to the action not lying at the suit of the Crown are *obiter* and, with respect, I find myself unable to agree with them. On the particular point with which I am now dealing, the decision of McKinnon J. in *Attorney General* v. *Valle-Jones,* (1935) 2 K.B. 209, is not of assistance as there it was admitted, page 213:—"It is not denied that an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as an employer as well as to a subject", but the dissenting opinions of Chief Justice Latham and Williams J., in *The Commonwealth* v. *Quince,* (1944) 68 C.L.R. 227, express the same conclusions as that at which I have arrived.

In the same case, at page 63, he said also in referring to the right of recovery of pay to a soldier:

> Under section 48 of the *Militia Act,* R.S.C. 1927, c. 132, a soldier is entitled to his pay and although his right may not be enforceable by action in the Courts, the fact that he received his pay is some evidence (and therefore sufficient evidence) of the value of his services that were lost by the Crown. I am content to decide the matter on that basis.

It is clear, also, that Smith's salary would have been recoverable in an action by him against the defendants. In the *Jackson* case (*supra*), Rand J. said at page 493:

> The *injuria* to the master is, then, a loss of service arising from an act which is an actionable wrong against the servant: and its effect is to permit the master to recover damages to a large extent the same as those in a proper case recoverable by the servant.
>
> This view is indirectly supported by the reasoning in *Attorney-General* v. *Valle-Jones,* [1935] 2 K.B. 209, where it is said that if the wages and expenses had not been paid by the Crown they could have been recovered from the defendant by the injured serviceman.

For these reasons I think the Crown is entitled to recover from the defendants the first item of its claim, namely, $937.93, being the salary paid by it to Smith during his disability.

The balance of the Crown's claim is based on the provisions of the Government Employees' Compensation Act, 1947. Section 9 thereof is as follows:

> 9. (1) Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to an action against some person other than Her Majesty the employee or his dependants if entitled to compensation under this Act may claim 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 employee or his dependants are entitled under this Act the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such employee or his dependants.

(3) If the employee or his dependants elect to claim compensation under this Act Her Majesty shall be subrogated to the rights of the employee or his dependants and may maintain an action in his or their names or in the name of Her Majesty against the person against whom the action lies and any sum recovered shall be paid into the Consolidated Revenue Fund of Canada.

(4) Notice of the election shall be given within three months after the happening of the accident, or in case it results in death, within three months after the death, or within such longer period either before or after the expiration of such three months as may be allowed by the board, officers or authority having power to determine the right to and the amount of the compensation under this Act.

This claim is resisted on two grounds, the first of which is that the accident which gave rise to the right of action by the employee and to which right the Crown is subrogated upon the election of the employee to claim compensation under the Act, must have been one happening "in the course of his employment". It is submitted that on the facts of this case it arose otherwise than in the course of employment, namely, on the way to work.

The evidence on this point is given by K. G. Shillington, the superintendent of the fish hatchery. He said that Smith at the time of the accident was a permanent full-time employee of the Department of Fisheries, holding the position of Hatchery Assistant. Paisley, a carpenter, and Laughlin, a labourer, were temporary employees then engaged for the particular job of building a fence at the hatchery; they were employed by Shillington through the Unemployment Insurance Office. As they lived in Saint John, it was necessary to provide some means of transportation to the hatchery. Shillington therefore arranged that Smith, who also lived in Saint John, and who drove to and from his work each day, should drive them to and from the hatchery, Smith to be paid mileage out of authorized Government funds. If that arrangement had not been entered into, other plans to bring them to work would have been necessary, such as Shillington himself driving them in and out. Shillington considered that it was essential that they should be so transported.

When hiring Laughlin and Paisley, Shillington arranged with them that they should receive pay and also transportation from Saint John to the hatchery and return without cost to them. Shillington stated also that it was customary to provide such transportation for all carpenters doing

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similar work at the hatchery. The work day for both Laughlin and Paisley started at 8 a.m. and their pay commenced at that time. There was no bus or railway service from Saint John which could have brought them to the hatchery in time to start work at 8 o'clock. Both men were paid by the hour.

Section 3 of the Act provides for the payment of compensation to an employee who is caused personal injury by accident *arising out of and in the course of his employment.* Section 9, however, alone contains the provisions by which an injured employee is given the right to elect whether he will claim compensation or bring an action; if he elects to claim compensation, the Crown is subrogated to his rights and may bring action against the responsible persons either in the name of the employee or in the name of Her Majesty. The opening words of section 9(1)—(*supra*)—clearly refer to an accident which happens to an employee *in the course of his employment.* In my opinion, therefore, the question here is whether the accident occurred "in the course of employment" of the three employees, all of whom applied for compensation.

The principles to be applied in deciding whether an accident occurred "in the course of the employment" are stated in the following paragraphs in Halsbury, Second Edition, Volume 34:

1161. The words "in the course of the employment" means in the course of the work which the workman is employed to do and what is incidental to it. They do not mean during the currency of the engagement. . . .

1163. In general, the employment begins as soon as the workman has reached the place where he is employed, or the means of access thereto, and continues until he again reaches the same point at the end of his work.

1164. If, on his way to or from his work, the workman proceeds by a permitted route over his employer's premises, or over other premises which he would have no right to traverse but for his employment, the employment continues while he is so doing, but while he is going to or from his work by a route which is open to him as a member of the public or by reason of some right or permission not connected with his employers, he is not within the statutory protection.

1165. A workman who is engaged in performing the duty owed to his employer under the terms of his employment is in the course of the employment whether he is on his employer's premises, in the public streets, or elsewhere. A workman, however, who has a right, by the terms of his employment, to the use of certain facilities, but is under no duty to avail himself of them, is not entitled to the statutory protection while so doing.

In *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (1), a miner was injured while travelling to work on a train, not owned by the employers, but specially provided for their workmen, upon which he had a right to travel by the terms of his employment. It was held that while so travelling he was not in the course of his employment, as he had no duty to his employers to travel by the train. In that case, Lord Renbury said at page 95:

> A man is not in the course of his employment unless the facts are such that it is in the course of his employment and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment, there is no liability.

In a footnote (*b*) to paragraph 1165 of Halsbury, volume 34, it is stated at page 829:

> As a result of the decision in *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (*supra*), it is now settled that the test to be applied in such cases is that of duty on the part of the workman to use the conveyance or other convenience provided, and not, as was formerly held, the obligation upon the employer to provide it. "The test of duty . . . is the accepted basis on which these questions ought to be dealt with." (*Newton* v. *Guest, Keen and Nettlefolds, Ltd.* (1926) 135 L.T. 386, 387.

Reference may also be made to *Taylor* v. *McAlpine & Sons* (2) and *M'Pherson* v. *Reid, M'Farlane & Co.* (3), in both of which cases workmen travelling by train with tickets provided by or through the employer, were held not to be in the course of their employments.

Reference may also be made to the judgment of Urquhart J. in *Bowers et al.* v. *Hollinger et al.* (4), the headnote of which in part is as follows:

> Where an employer provides free transportation of his employees to his plant (in this case by bus) when the time spent in transit is not paid for and the employees are under no obligation to use this means of transport, an injury received by employees on the way to or from work (due to a collision of the bus and another vehicle) cannot be said to arise in the course of their employment.

In the instant case I am unable to reach the conclusion that there was any duty on the part of the employees to travel by Smith's car to the hatchery. Their duty was to report for work at the time specified, and while arrangements had been made for the convenience of Laughlin and Paisley by which they were entitled to free passage in

(1) [1924] A.C. 59.
(2) (1924) 130 L.T. 793.
(3) [1926] S.C. 359.
(4) [1946] 4 D.L.R. 186.

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Smith's car to and from the hatchery, there was no obligation upon them to use that car. They received no compensation until they commenced to work at the hatchery itself. It is true that there was no convenient public transportation by railway or bus which would permit them to reach the hatchery at 8 o'clock, but a public road ran from Saint John to the hatchery and it was possible for all three of the employees to reach the place of employment in any other way open to them, such as by walking, on bicycle, by taxi or by any other conveyance. It was not a term of their employment that Smith's car must be used and certainly none of them would have been discharged from employment had they reached the hatchery by means other than by the use of Smith's car.

Reference may be made to *Gaskell* v. *St. Helen's Colliery Co. Ltd.* (1). In that case a miner had been injured while using pithead baths, as he had been instructed to do; there being no evidence that it was a term of his employment that he should use the baths, or that he was subject to dismissal if he did not, the claim failed. In my view, therefore, it cannot be said that the accident occurred while the employees were in the course of their employment and it follows that the Crown's claim on this point must be disallowed.

As a matter of interest only, it may be noted that under section 9(1) of the National Insurance (Industrial Injuries) Act, 1946, of the United Kingdom, provision is now made for cases similar to the instant one. In cases arising thereunder it would appear that in an accident arising under the same set of circumstances as in this case, it could be found to have occurred "in the course of the employment".

One other defence on this matter may be mentioned briefly, although strictly speaking it may not be necessary to refer thereto in view of my conclusions as above stated. Counsel for the defendants took the point that as the Workmen's Compensation Board had at first refused the applications for compensation, it had no right under the circumstances of this case to re-open and later make orders allowing them. Reference was made to *The King* v. *The Workmen's Compensation Board of New Brunswick* (2). In my opinion, this defence cannot be supported for a number of

(1) (1934) 150 L.T. 506. (2) 8 M.P.R. 25.

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reasons. The only one that need be stated is that the Crown's right to subrogation does not depend on the disposition made of the employee's application by the Board. The right of subrogation in favour of the Crown arises upon the employee's electing to claim compensation under the Act (section 9 (3)). Upon such election the Crown is entitled to bring such action against the wrong-doers as the employee could have taken.

Accordingly, there will be judgment for the plaintiff against each of the defendants for the sum of $937.93, together with the taxed costs of the proceedings.

Judgment accordingly.

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Sept. 7

Nov. 16

BETWEEN:

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

AND

ALBERT PAPER COMPANY INCORPORATED ..... RESPONDENT.

Revenue—Income—Income tax—Corporation—"Taxation year" of corporation ending after commencement of 1953—Method of computation of tax—Taxation rates—Deductions from corporation tax—"Ultimate amount of tax"—The Income Tax Act, R.S.C. 1952, c. 148, as amended, ss. 39(1)(a)(b), 40(1)(a)(b) and (2), 46(1), 139(1)(ba) and (2)—An Act to amend The Income Tax Act, S. of C. 1952-53, c. 40, s. 58(4)—Pro-rating provision in s. 58(4) of the amending Act—Meaning of "except where otherwise provided" in s. 39(1) of the Income Tax Act—Appeal to Income Tax Appeal Board dismissed.

Sections 39(1)(*a*) and (*b*) and 40(1)(*a*) and (*b*) and (2) of the Income Tax Act, R.S.C. 1952, c. 148, as amended, and section 58(4) of An Act to Amend the Income Tax Act, S. of C. 1952-53, c. 40, read as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,

(*a*) 18% of the amount taxable, if the amount taxable does not exceed $20,000, and

(*b*) $3,600 plus 47% of the amount by which the amount taxable exceeds $20,000, if the amount taxable exceeds $20.000.

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40. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to

(a) in the case of a corporation of a class prescribed by a regulation made on the recommendation of the Minister of Finance for the purposes of this paragraph, 5%, and

(b) in the case of any other corporation, 7%, of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance.

(2) This section is applicable to the 1953 and subsequent taxation years.

58. (4) This section is applicable to the 1953 and subsequent taxation years but, where a corporation has a taxation year part of which is before and part of which is after the commencement of 1953, the tax payable by the corporation under Part I of the *Income Tax Act* for that taxation year is the aggregate of

(a) that proportion of the tax computed under Part I of the *Income Tax Act* as it was before being amended by this Part that the number of days in that portion of the taxation year that is in 1952 is of the number of days in the whole taxation year, and

(b) that proportion of the tax computed under Part I of the *Income Tax Act* as amended by this Part that the number of days in that portion of the taxation year that is in 1953 is of the number of days in the whole taxation year.

Respondent company's 1953 taxation year ended on January 31, 1953. In determining the amount of tax payable by the company upon its taxable income for that year the Minister computed the tax payable for two full years by applying separately to its full income the 1952 and 1953 corporation tax rates and corporation tax deductions in ss. 39 and 40 of the Income Tax Act, before and after the 1952-53 amendments, and then applying the formula set out in the amending statute. 1-2 Eliz. II, c. 40, s. 58(4) (which section forms part only of the latter and is not carried into the Income Tax Act). An appeal from the Minister's assessment to the Income Tax Appeal Board was allowed and the Minister now appeals to this Court.

Held: That the computation of tax by the Minister is not in accord with s. 40 of the Income Tax Act, as amended. The section contemplates a deduction "from the tax otherwise payable by a corporation under this Part for a taxation year." In the course of his computation the Minister makes a deduction of 5% of the income for the 1953 taxation year of the respondent from an amount ascertained by applying 1952 tax rates to the full taxable income for the 1953 taxation year. Because the amount so ascertained was not at any stage of the computation an amount of tax payable by the respondent that method of computation cannot be correct. The Minister likewise is in error when he deducts 7% of the taxable income from an amount ascertained by applying 1953 taxation year rates to the full taxable income of the respondent for the 1953 taxation year.

2. 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 intention of Parliament here is indicated by the

fact that in chapter 40 of the 1952-53 Statutes the twelve sections, 46 to 57 inclusive, which precede section 58 and the fourteen sections, 59 to 72 inclusive, which follow section 58 all contain unqualified pronouncements respecting the years to which they apply. In twenty-seven consecutive sections, 46 to 72 inclusive, it is only in section 58 that the applicability wording is subject to qualification. Had Parliament intended that the qualification of the applicability wording of section 58(4) of the 1952-1953 amending statute should extend to sections of the Income Tax Act other than section 39 surely Parliament would not have taken such care to spell out the specific application of the twelve preceding and the fourteen following sections and would not have omitted from the section 40 amendment the provision which previously had required pro-rating of the corporation tax deduction.

3. The words of sections 39 and 40 of the Income Tax Act and of subsection (4) of section 58 of chapter 40 of the 1952-1953 Statutes are clear and unambiguous when read in their ordinary and natural sense. The qualification in s. 58(4) of the amending statute, 1-2 Eliz. II, c. 40, relates only to the applicability of s. 39 of the Income Tax Act, R.S.C. 1952, c. 148, as amended.

APPEAL from a decision of the Income Tax Appeal Board.

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

W. R. Jackett, Q.C. and *F. J. Cross* for appellant.

P. F. Vineberg and *Neil F. Philipps* for respondent.

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

RITCHIE J. now (November 16, 1955) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board, rendered on December 1, 1954, allowing an appeal from the assessment by the Minister on the income of the respondent company under the Income Tax Act in respect to its 1953 taxation year, which ended on January 31, 1953.

Eleven months of the appellant's taxation year were included in the 1952 calendar year while one month was included in the 1953 calendar year.

The sole point of difference between the parties is in respect to the application and effect of sections 39 and 40 of the Income Tax Act, firstly as enacted by chapter 148,

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R.S.C. 1952 and secondly as amended by chapter 40 of the 1952-1953 Statutes. Section 39 deals with taxation rates. Section 40 permits a deduction from tax.

The difference, or issue, concerns the amount of deduction which the respondent may make from tax otherwise payable on its income for the 1953 taxation year by reason of section 40 and regulation 400 made thereunder on the recommendation of the Minister of Finance because of the corporation income tax levied by the Province of Quebec.

The amount of deduction first allowed by section 40 in respect to Quebec corporation tax was 5% of the taxpayer's taxable income. By virtue of a 1952-1953 amendment to section 40, the amount of the deduction was increased to 7% for the 1953 and subsequent taxation years.

Subsection (1), the only relevant part of section 39, as enacted in chapter 148, R.S.C. 1952 read as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,

(*a*) 20% of the amount taxable, if the amount taxable does not exceed $10,000, and

(*b*) $2,000 plus 50% of the amount by which the amount taxable exceeds $10,000, if the amount taxable exceeds $10,000.

The relevant parts of the amendment to section 39 are subsections (1) and (4) of section 58 of chapter 40 of the 1952-1953 Statutes which read:

58. (1) Paragraphs (*a*) and (*b*) of subsection (1) of section 39 of the said Act are repealed and the following substituted therefor:

(*a*) 18% of the amount taxable, if the amount taxable does not exceed $20,000, and

(*b*) $3,600 plus 47% of the amount by which the amount taxable exceeds $20,000, if the amount taxable exceeds $20,000.

(4) This section is applicable to the 1953 and subsequent taxation years but, where a corporation has a taxation year part of which is before and part of which is after the commencement of 1953 the tax payable by the corporation under Part I of the Income Tax Act for that taxation year is the aggregate of

(*a*) that proportion of the tax computed under Part I of the Income Tax Act as it was before being amended by this Part that the number of days in that portion of the taxation year that is in 1952 is of the number of days in the whole taxation year, and

(*b*) that proportion of the tax computed under Part I of the Income Tax Act as amended by this Part that the number of days in that portion of the taxation year that is in 1953 is of the number of days in the whole taxation year.

It should be noted that subsection (4) of section 58 forms part only of the amending statute and is not carried into the Income Tax Act. The pro-rating provision or rule in subsection (4) is of particular importance in the consideration of this appeal.

Section 40 of the Income Tax Act, c. 148, R.S.C. 1952, as applicable to the 1952 taxation year, was as follows:

40. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to 5% of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance.

(2) In this section, "taxable income earned in the year in a province" means the amount determined under rules prescribed for the purpose by regulations made on the recommendation of the Minister of Finance.

Section 40 was formerly section 37 of the 1948 Income Tax Act and first was enacted in the form above quoted by section 13(1) of chapter 29, Statutes of 1952, being, by subsection (2), made applicable as follows,

(2) Subsection (1) is applicable to the 1952 and subsequent taxation years but, where a corporation has a taxation year part of which is before and part of which is after the commencement of 1952, the amount that may be deducted under section thirty-seven of the Income Tax Act, as enacted by subsection one of this section, for the 1952 taxation year is that proportion of the amount that would otherwise be deductible thereunder that the number of days in that portion of the taxation year that is in 1952 is of the number of days in the whole taxation year.

I regard as important the inclusion of the rule or formula for computing the amount of deduction by corporations having taxation years which overlap the 1951 and 1952 calendar years.

Subsection (1) of section 40, chapter 148, R.S.C. 1952 was amended by section 59 of chapter 40 of the 1952-1953 Statutes so as to read as follows:

40. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to

(*a*) in the case of a corporation of a class prescribed by a regulation made on the recommendation of the Minister of Finance for the purposes of this paragraph, 5%, and

(*b*) in the case of any other corporation, 7%, of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance.

Subsection (2) of section 59 of the 1952-1953 amending Act provides

This section is applicable to the 1953 and subsequent taxation years.

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Subsection (2) of section 59 of chapter 40 of the 1952-1953 Statutes also is of special importance in the consideration of this appeal because there is contained in it no provision for pro-rating the deduction such as is contained in the basic section 37 as enacted by section 13(2) of chapter 29, Statutes of 1952, above quoted.

The effect of the 1952-1953 amendment of section 40 is to continue the applicability of the 5% rate of deduction to a corporation of a class prescribed by a regulation but to create a higher rate of 7% to apply in the case of any other corporation. Because section 40, as worded in the 1952 Revised Statutes, remains applicable to the 1952 taxation year, there was not an absolute or complete repeal of the section as enacted in chapter 148 of the 1952 Revised Statutes.

It was agreed by counsel

1. that the respondent does not belong to a class that has been prescribed for the purposes of paragraph (*a*) of subsection (1) of section 40 of the Income Tax Act as enacted by section 59 of chapter 40 of the 1952-1953 Statutes;
2. that the taxable income of the respondent for its 1953 taxation year is $36,936.38.

It is common ground that the effect of the agreement between counsel in respect to the non-applicability of section 40(1) (*a*) to the respondent company is to make clause (*b*) of section 40 (1) applicable to it and so entitle the respondent to the 7% rate of deduction.

The question for determination is whether the effect of the special rule enacted by subsection (4) of section 58 of chapter 40 of the 1952-1953 statutes for corporations that have fiscal years overlapping the calendar years 1952 and 1953 is that such a corporation is entitled to the benefit of the reduction in tax rates and the increase in the rate of deduction for provincial tax for only that portion of its taxable income related to the part of its taxation year that is within the 1953 calendar year.

The first submission on behalf of the Minister was that the tax which section 46(1) of the Income Tax Act requires the Minister to assess is the final amount of tax, after

applying all computations—or, as counsel put it, "the ultimate amount of tax". Subsection (1) of section 46 of the Income Tax Act, R.S.C. 148, reads:

> The Minister shall, with all due dispatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

Counsel for the Minister next directed attention to section 139(1) (*ba*), which provides that the tax payable by a taxpayer under Part I or Part II means the tax payable by him as fixed by assessment or by reassessment, subject to variation on objection or appeal, if any, in accordance with the provisions of Part I or Part II, as the case may be.

Using sections 46(1) and 139(1) (*ba*) as a base, it then was argued that the words "tax payable", wherever used in the Income Tax Act, mean the "ultimate amount of tax", after all deductions, determined by the assessment to be payable by the taxpayer.

The main argument advanced on behalf of the Minister in support of the appeal dealt with the manner in which the tax payable should be computed and was that, while the wording of section 40 after amendment as above quoted, is expressed to apply only to 1953 and subsequent taxation years, it must, nevertheless, be read with the 1952-1953 amendment to section 39 of the Income Tax Act and also with sections 46(1) and 139(1) (*ba*) and that when so read it is clear that, to determine the tax payable, regard must be had to both taxation and deduction rates applicable to the 1952 and 1953 taxation years.

In substance, the position of the Minister is that, notwithstanding the non-qualification of the applicability of the amendment to section 40 as expressed in the 1952-1953 amending statute, both the 1952 rates of tax and the 1952 rate of deduction for corporation tax continued to apply until the end of the 1952 calendar year and therefore must be aplied to that part of the income earned in the 1952 calendar year when determining the income of corporations that had a taxation year part of which was before and part of which was after the commencement of the 1953 calendar year.

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The viewpoint of the Minister is that under the wording of section 39, as amended in 1952-1953, the tax payable by the respondent for its 1953 taxation year must be determined by computing the tax payable for two full years by applying separately to the full income the 1952 and 1953 taxation and corporation tax deduction rates contained in sections 39 and 40 of the Income Tax Act, before and after amendment, and in section 10 of the Old Age Security Act, 1951 (second session), c. 18, and then applying the formula set out in section 58(4) of chapter 40 of the 1952-1953 Statutes.

To compute the tax in accordance with his interpretation of sections 39 and 40, as amended, the Minister

Firstly, applies to all of the $36,936.38 taxable income the following tax rates applicable during the 1952 taxation year:

20% of $10,000.00	2,000.00
50% of $26,936.38	13,468.19
2% of $36,936.38 (Old Age Security Act Assessment)	738.73
	16,206.92

Secondly, deducts an amount of $1,846.82, being 5% of $36,936.38, the credit for Quebec corporation tax allowed by section 40 in respect to the 1952 taxation year, and so determined the tax payable for a full taxation year at 1952 rates to be 1,846.82

$ 14,360.10

Thirdly, applies to all of the $36,936.38 taxable income the following tax rates applicable during the 1953 taxation year:

18% of $20,000.00	3,600.00
47% of $16,936.38	7,960.10
2% of $36,936.38 (Old Age Security Act Assessment)	738.73
	12,298.83

Fourthly, deducts an amount of $2,585.55, being 7% of $36,936.38, the credit for Quebec corporation tax allowed by section 40 in respect to the 1953 taxation year, and so determines the tax payable for a full taxation year at 1953 rates to be 2,585.55

$ 9,713.28

Fifthly, applies the pro-rating rule or formula contained in paragraphs (*a*) and (*b*) of section 58 of chapter 40 of the 1952-1953 statutes and by taking

$\frac{335}{366} \times 14{,}360.10 =$ 13,143.80

then adding

$\frac{31}{366} \times 9{,}713.28 =$ 822.71

determines the tax payable by the respondent for the 1953 taxation year to be $ 13,966.51

Under the above method of computation the tax payable is not pro-rated item by item. Likewise the deduction for corporation tax is not pro-rated. The apportionment in respect to the two periods, one of eleven months and the other of one month, into which the Minister divides the 1953 taxation year of the respondent, is of the two end results of the separate computations made at 1952 and 1953 rates for two full years. Tax is computed at 1952 tax rates for a full year and the corporation tax deduction made at the 1952 rate of 5% of the full taxable income for the 1953 taxation year. The 1953 tax rates then are applied to the full income for the 1953 taxation year and from the result there is subtracted the corporation tax deduction at the 1953 deduction rate of 7%. It is only then that the pro-rating rule or formula is applied. For computation of the final, or ultimate, amount of tax payable 335/336 of the tax computed at 1952 rates for a full year is added to 31/366 of the tax computed at 1953 rates for a full year. The sum of the two amounts is claimed to be the tax payable or, as counsel for the Minister put it, the ultimate amount of tax payable.

In support of the above method of computation the Minister contends

(*a*) that it is in accord with the formula or rule contained in section 58(4) of chapter 40 of the 1952-1953 statutes; and

(*b*) that the statutory formula or rule is not confined to computations under section 39, as amended, but is an over-all formula having application to all steps in assessing tax payable under Part I of the Income Tax Act, by any corporation having a taxation year part of which is before and

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part of which is after the commencement of the 1953 calendar year. To put it another way, the Minister says the formula, contained in section 39, as amended, is not confined to apportioning the tax computed as payable under section 39 alone and because of its overall nature is not intended to be applied until after the deduction permitted by section 40 has been made.

The argument advanced on behalf of the respondent company consisted, as I understand it, of the following six principal submissions.

1. Subsection (2) of section 139, the interpretation section, says that, in the case of a corporation, a "taxation year" is a fiscal period but does not contain any provision for pro-rating or for dividing the fiscal period for the purpose of tax computations.

2. Regard must be had to the inclusion of the expression "except where otherwise provided" in the introductory words of section 39(1), which are, "The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided." Stress was laid on the fact that the words "tax payable" are qualified immediately by the words "except where otherwise provided". In reply to that submission the Minister says the use in section 39(1) of the qualifying words "otherwise provided" supports his method of computation because the qualification extends to section 58(4) of chapter 40 of the 1952-1953 Statutes, which section is completely outside the Income Tax Act.

3. The opening words of section 40, which are, "There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year", are especially designed to fit in with the opening words of section 39, because the deduction allowed by section 40 is to be made from "the tax otherwise payable," the same expression used in section 39,

4. Parliament when amending those sections of the Income Tax Act which affect the tax computation or tax deduction provisions contained in Part I of the Act has, with few exceptions, set out at the end of, or in, each section

the year or years to which that particular section of the amending statute is to apply and that in the 1952-1953 amending statute section 58 (amending the basic section 39) is the only section in which the applicability is qualified or in which there is a provision for pro-rating. Reference to the amending statutes seems to confirm this submission.

5. Particular significance is to be attached to the contrast in the wording of the applicability references of sections 39 and 40 because

(*a*) subsection (4) of section 58 of the 1952-1953 statute amending the basic section 39 says "This section is applicable to the 1953 and subsequent taxation years" but immediately qualifies the application by setting out a pro-rating formula for computation of the tax payable under Part I in the case of a corporation having a 1953 taxation year part of which is before and part of which is after the commencement of the 1953 taxation; while

(*b*) the qualifying words in subsection (4) of section 58 of the 1952-1953 amending statute are those which follow the word "but" so that the qualification relates only to the words contained in the section which precede the word "but". The only amendments contained in section 58 of the 1952-1953 amending statute, affecting the assessment forming the subject matter of this appeal, are the changes made in paragraphs (*a*) and (*b*) of the basic section 39. The qualification subtracts from the rule contained in paragraphs (*a*) and (*b*) of the basic section 39 as amended but does not add to the rule so as to make it applicable to any section of the Act other than "this section".

(*c*) subsection (2) of section 59 of the 1952-1953 Statutes, amending the basic section 40, reads simply, "This section is applicable to the 1953 and subsequent taxation years," without qualification or provision for payment on a pro-rating or other basis.

6. The computation of tax made by the Minister does not comply with section 40 because the deductions of 5% and 7% have not been made from an amount of tax otherwise payable by a corporation for a taxation year.

The respondent company's method of computing the ultimate or actual amount of tax payable by it in respect of the 1953 taxation year differs from that adopted by the Min-

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ister. The respondent applies the pro-rating formula contained in section 39 to the initial computation of the tax payable but does not pro-rate the corporation tax deduction under section 40. The deduction is made after computation of what the respondent contends is "the tax otherwise payable".

The respondent computes the tax payable at 1952 taxation rates for 335/366 of the 1953 taxation year and at 1953 rates for 31/366 of the 1953 taxation year and so arrives at what it terms a "tax otherwise payable" amount of $15,875.91 from which it deducts $2,585.55, or 7% of its taxable income and secures an end result of $13,290.36 as the actual amount, or the ultimate amount, of tax payable.

The submission of the respondent company that the computation of tax made by the Minister is not in accord with section 40 appeals to me as sound. Section 40 contemplates a deduction "from the tax otherwise payable by a corporation under this Part for a taxation year." In the course of his computation the Minister makes a deduction of 5% of the income for the 1953 taxation year of the respondent from an amount ascertained by applying 1952 tax rates to the full taxable income for the 1953 taxation year. Because the amount so ascertained was not at any stage of the computation an amount of tax payable by the respondent that method of computation cannot, (in my opinion) be correct. The Minister likewise (in my opinion) is in error when he deducts 7% of the taxable income from an amount ascertained by applying 1953 taxation year rates to the full taxable income of the respondent for the 1953 taxation year.

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. (*Craies on Statute Law*, p. 64). The intention of Parliament is indicated by the fact that in chapter 40 of the 1952-1953 Statutes the twelve sections, 46 to 57 inclusive, which precede section 58 and the fourteen sections, 59 to 72 inclusive, which follow section 58 all contain unqualified pronouncements respecting the years to which they apply. In twenty-seven consecutive sections, 46 to 72 inclusive, it is only in section 58 that the applicability wording is subject to qualification.

When section 37 (now section 40) was enacted by section 13 of the 1952 Statutes it was specifically provided that in the case of a corporation having a taxation year part of which is before and part of which is after the commencement of 1952 the deduction for the 1952 taxation year should be that proportion of the amount that would otherwise be deductible that the number of days in the portion of the year that is in 1952 is of the number of days in the whole taxation year. The omission of a similar pro-rating provision in the amendment of section 40 as enacted by section 59 of chapter 40 of the 1952-1953 Statutes must have significance.

Had Parliament intended that the qualification of the applicability wording of section 58(4) of the 1952-1953 amending statute should extend to sections of the Income Tax Act other than section 39 surely Parliament would not have taken such care to spell out the specific application of the twelve preceding and the fourteen following sections and would not have omitted from the section 40 amendment the provision which previously had required pro-rating of the corporation tax deduction.

"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 law giver." (*Craies on Statute Law*, 5 Ed., p. 64).

The words of sections 39 and 40 of the Income Tax Act and of subsection (4) of section 58 of chapter 40 of the 1952-1953 Statutes are clear and unambiguous when read in their ordinary and natural sense.

I am unable to accord to section 58(4) of chapter 40 of the 1952-1953 Statutes the extended application which results from the manner in which the Minister interprets it, and I can find no justification for the Minister computing the income tax payable by the respondent in the manner in which he did compute it. The qualification contained in section 58(4) relates only to the applicability of the basic section 39, as amended.

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In my view section 58(4) of chapter 40, Statutes of 1952-1953, permits only one possible interpretation and that is the interpretation advanced by the respondent.

The appeal, therefore, will be dismissed, with costs to be taxed.

Judgment accordingly.

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Nov. 9

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

MARY McLEOD ..... PLAINTIFF,

AND

THE ONTARIO-MINNESOTA PULP AND PAPER COMPANY LIMITED and GORDON K. GAGE ..... DEFENDANTS.

Shipping—Motion to dismiss plaintiff's action—The Admiralty Act, R.S.C. 1952, c. 1, s. 2(1), Schedule A, section 22—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 726—"Any claim for damage done by a ship" —"Any claim for damage received by a ship"—Inboard motor boat is a ship—Right of action given to ship extends jurisdiction of Court in respect of claim for loss of life.

Held: That a boom of logs is not a ship.

2. That an inboard motor boat is a ship within the meaning of the Admiralty Act, R.S.C. 1952, c. 1, s. 2(1).

3. That the Court has jurisdiction to entertain a claim for the death of a passenger in an inboard motor boat caused by the boat being in collision with a boom of logs.

MOTION by defendant The Ontario-Minnesota Pulp and Paper Company Limited to have action dismissed.

The motion was heard before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

J. D. Arnup, Q.C. and *J. B. Gillespie* for the motion.

F. C. Hayes contra.

P. W. Isbister for defendant Gage.

BARLOW D.J.A. now (November 9, 1955) delivered the following judgment:

A motion by the defendant The Ontario-Minnesota Pulp and Paper Company Limited to dismiss the action as against it on the ground that there is no jurisdiction in this Court to entertain the action.

Counsel for the defendant Gage was present but took no part in the motion.

This action is brought by the widow of John Erastus Jerome McLeod on behalf of herself and Marilyn Joy McLeod.

The deceased John Erastus Jerome McLeod, on the 17th day of July, 1954, was a passenger in an inboard motor boat *Red Devil* operated by the defendant Gage which, on a voyage from Keewatin to Kenora came into collision with a boom of logs owned by the defendant The Ontario-Minnesota Pulp and Paper Company Limited, as a result of which McLeod was drowned.

Counsel for the applicant contends that a boom of logs is not a "ship" and that no action lies in this Court. "Ship" is defined in the Admiralty Act, R.S.C. 1952, chapter 1, section 2(i) as follows:

"ship" includes any description of vessel used in navigation not propelled by oars.

It is clear to me that a boom of logs is not a ship. For reference see *The Mac,* (1); *Paterson Timber Co. Ltd.* v. *The S. S. British Columbia* (2), and *Pigeon River Lumber Co.* v. *Mooring* (3) and affirmed 14 O.W.R. 639.

The finding that a boom of logs is not a ship, however, does not dispose of the matter. The jurisdiction of this Court is to be found in the Admiralty Act, R.S.C. 1952, chapter 1, Schedule A, section 22, the pertinent parts of which are as follows:

(1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:

(*a*) Jurisdiction to hear and determine any of the following questions or claims:

(iii) Any claim for damage received by a ship, whether received within the body of a county or on the high seas;

(iv) Any claim for damage done by a ship.

(1) (1882) 7 P. 131. (2) (1913) 16 Ex. C.R. 305.
(3) (1909) 13 O.W.R. 190.

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(2) The provisions of paragraph (*a*) of subsection (1) of this section which confer on the High Court admiralty jurisdiction in respect of claims for damage shall be construed as extending to claims for loss of life or personal injuries.

See also the Canada Shipping Act, R.S.C. 1952, chapter 29, section 726, which is as follows:

Where the death of a person has been caused by such wrongful act, neglect or default as if death had not ensued would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependents of the deceased may, notwithstanding his death, and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court against the same defendants against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of such wrongful act, neglect or default if death had not ensued.

The jurisdiction as set out above which gives a right of action for "any claim for damage received by a ship" and for "any claim for damage done by a ship" is the same as the jurisdiction of the English Courts.

An inboard motor boat comes within the definition of a "ship". As such there would be jurisdiction in an action by the motor boat or its owner for damage received as a result of the collision with the boom of logs against the owner of the boom of logs and it follows that a passenger on the motor boat would have an action for injuries received against both the motor boat and the owner of the boom of logs or either of them by reason of the collision. The plaintiff has the same right of action that the passenger McLeod would have had if he had lived. See *The Zeta* (1). This was an action by the owners of the *SS. Zeta* against The Mersey Docks and Harbour Board by reason of the negligence of a dock official which resulted in *The Zeta* coming into collision with the dock. In this case the jurisdiction was the same as in the case at bar. Lord Herschell at page 478 says:

It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question.

It would be a strange result if, in the case of a ship striking against a dock wall, the Court of Admiralty had jurisdiction to entertain a claim for damage done to the dock wall by the ship, and not for damage done to the ship by its contact with the dock wall.

(1) [1893] A.C. 468.

See also pages 484, 485 and 490, where Lord Macnaughton says:

> There was, therefore, at the time when Admiralty jurisdiction was given to county courts, legislation in force which seems to have been intended, as Fry, L.J. observes, "to give reciprocal rights in cases of damage done by a ship and to a ship," and in both those cases, as his Lordship pointed out, and as the Lord Chancellor has now more fully shewn, it had been determined that it was not necessary that the body receiving or doing damage should be a ship.

It is clear to me on the above authority that the inboard motor boat would have a right of action in this Court against the boom of logs. This right of action by Schedule A, section 22 (2) extends the jurisdiction in respect of claims for loss of life.

For further reference see *The Bernina* (1) and *Elizabeth J. Monaghan* v. *Sarah Horn, in re The Garland* (2).

It is therefore clear to me that this Court has jurisdiction to entertain this action.

The motion will be dismissed with costs to the plaintiff. No costs to or for the defendant Gage.

Judgment accordingly.

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(1) (1887) 12 P. 36.

(2) (1881) 7 S.C.R. 409.

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COPYRIGHT—*Right of performing rights society to sue for fees in Exchequer Court—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 22(c)—The Copyright Act, R.S.C. 1927, c. 32, s. 20(c)—The Copyright Amendment Act, 1931, S. of C. 1931, c. 8, ss. 10, 10A, 10B(7), 10B(8), 10B(9)—Powers of Copyright Appeal Board—Right to fix fees, charges and royalties for licenses taken from performing rights societies and vested in Copyright Appeal Board—Right to license fees not contractual but statutory—Plaintiff not entitled to damages or injunction.* The defendant corporation operated a cabaret in Toronto in which it provided entertainment of which music formed a part. It obtained a license from the plaintiff for the performance of the musical works in which the plaintiff owned the performing rights, the license being for the year 1951-52 and thereafter from year to year until terminated. On November 5, 1952, the plaintiff sent the defendant a letter purporting to cancel this license as at November 15, 1952, for nonpayment of license fees but on November 10, 1952, the defendant paid the fees for 1952. On November 13, 1952, the plaintiff issued another license to the defendant. The defendant did not pay the license fees for 1953, and on April 7, 1953, the plaintiff sent the defendant a letter purporting to cancel the second license. Notwithstanding the non-payment of license fees the defendant continued to perform the plaintiff's musical works and the plaintiff brought action claiming the unpaid license fees, damages for infringement of copyright and an injunction. *Held:* That the Exchequer Court has been vested with jurisdiction to hear and determine an action for license fees in respect of the issue of a license by a performing rights society for the performance of musical works in which it owns the performing right. 2. That it was within the competence of Parliament to vest this Court with such jurisdiction. 3. That since the establishment of the Copyright Appeal Board the performing rights societies have no right to fix the fees, charges or royalties for the issue or grant of their licenses but in lieu of their former right have been given a statutory right to sue for or collect the fees certified as approved by the Copyright Appeal Board. It is the only fee fixing body. 4. That the plaintiff has a statutory right to license fees for the license issued by it and if, during the currency of this license, the defendant performed any of the plaintiff's musical works it did so with the plaintiff's consent and could not be an infringer of its copyright. 5. That in fact the defendant's license was never cancelled and the plaintiff is not entitled to damages or an injunction. 6. That the only right to license fees given to a performing rights society by The Copyright Amendment Act, 1931, is in respect of the issue or grant of licenses for the performance of all or any of its works in Canada during the calendar year in respect of which the statement of fees was filed by the society. There is thus a statutory right to license fees for a license for that calendar year. That is the only right to license fees conferred by the Act. Consequently, once the plaintiff issued or granted

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its license it was entitled to sue for and collect the license fees for the calendar year and that was its only remedy. 7. That the fact that a licensee might have to pay more for a license under Tariff No. 6 than the original amount or be entitled to a refund does not affect the validity of the Tariff. 8. That the provision in Tariff No. 6 that the plaintiff had the right to examine the defendant's books did not affect its validity. The said provision was incorporated into the Tariff by the plaintiff and not by the Copyright Appeal Board. All that it was called upon to do and all that it did was to fix the fees, charges or royalties which the plaintiff could lawfully charge for an annual license containing such a provision and subject to such condition. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED v. SANDHOLM HOLDINGS LIMITED, NAT SANDLER AND THOMAS HOLMES **244**

CORPORATION.

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2. ACT OF A CUSTOMS OFFICER IN GRANTING PERMISSION IN VIOLATION OF INSTRUCTIONS NOT AN ACT OF NEGLIGENCE IN PERFORMANCE OF HIS DUTIES. No. 1.
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5. ARTICLE 1056 C.C. LIMITS RIGHT OF ACTION UNDER ARTICLE 1053 TO A CERTAIN CATEGORY OF PERSONS UNDER SPECIFIED SITUATIONS AND CONDITIONS. No. 2.
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9. COLLISION BETWEEN R.C.A.F. AMBULANCE AND TRAMCAR. No. 2.
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13. FAILURE OF A CUSTOMS OFFICER TO OBEY INSTRUCTIONS NOT A BREACH OF DUTY TOWARD SUPPLIANTS. No. 1.
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33. THE EXCHEQUER COURT ACT, R.S.C. 1952, c. 98, s. 18(1)(c). No. 3.
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CROWN—*Petition of Right—Damages for injury as result of a fall on stairway in a Customs building—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Statutory conditions of Crown's liability to be proven—Onus of proof on suppliants—Crown's liability under s. 19(c) of the Exchequer*

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Court Act a vicarious liability—Act of a Customs officer in granting permission in violation of instructions not an act of negligence in performance of his duties—Failure of a Customs officer to obey instructions not a breach of duty toward suppliants. Returning to Canada from a motor trip in U.S.A., suppliants reported at the Customs office at Highwater, P.Q., to make the usual declarations. It was then 1 a.m. One B. was the only Customs officer on duty at the time. In the office there was a door and close to the door a poster with the words "for employees only" thereon. Suppliant Mrs. Harris asked B. permission to use the toilet facilities in the building. B. granted the permission, told her that the facilities were in the basement and indicated the door with his hand. Mrs. Harris, who wore glasses at the time, then proceeded to the door, opened it and fell down ten steps to the basement. The defence to an action seeking damages as a result of this accident is that B. was not acting within the scope of his duties when he granted the permission to Mrs. Harris. On the facts the Court found that for the last fifteen years respondent had refused the use of that door to the public; that the employees were aware of this prohibition and had been instructed not to admit the public to the basement. It also found that the stairway was in good condition and lighted at the time of the accident. *Held:* That the onus of proof that B. was an officer of the Crown; that he was acting within the scope of his duties when he gave permission to use the toilet facilities; that he was negligent in the performance of his duties and that the injuries to suppliant Mrs. Harris resulted from his negligence, rests upon suppliants. No presumption or assumption can displace this statutory obligation imposed by s. 19*(c)* of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended. Conjectures, suppositions, speculations or surmise are not sufficient to discharge the duty which lies with suppliant to establish those facts. *Labelle* v. *The King*, [1937] Ex. C.R. 170; *The King* v. *Moreau*, [1950] S.C.R. 18; *Ginn et al* v. *The King*, [1950] Ex. C.R. 208; *Diano* v. *The Queen*, [1952] Ex. C.R. 209; *Magda* v. *The Queen*, [1953] Ex. C.R. 22, referred to and followed. 2. That the act of B. in granting the permission to suppliant Mrs. Harris cannot in any way be treated as an act of negligence committed while acting within the scope of his duties. It was his own wilful act, done through kindness perhaps, but outside the range of what may be even considered as part of his duties or incidental thereto. *Anthony* v. *The King*, [1946] S.C.R. 569, followed. 3. That B.'s failure to follow the instructions of his superior officer was not a breach of his private duty toward suppliants. Section 19*(c)* of the Exchequer Court Act creates a liability against the Crown through negligence of its servants but does not impose duties on the Crown in favour of the subject. *Anthony* v. *The King*, [1946] S.C.R. 569, followed. Here B. had no duty to care for suppliant Mrs. Harris. There being no duty, he was not negligent when he indicated the door leading to the basement. GRACE ELIZABETH (BOWDEN) HARRIS AND HOWARD HARRIS v. HER MAJESTY THE QUEEN..... **75**

2.——*Action to recover damages—Negligence—Civil Code of Quebec, Articles 1053, 1054 and 1056—Collision between R.C.A.F. ambulance and tramcar—Medical and hospital expenses incurred by the Crown on behalf of a serviceman—Pay and allowances paid by the Crown to serviceman during his incapacity—Right to recover under Article 1053 c.c.—Article 1056 c.c. limits right of action under Article 1053 to a certain category of persons under specified situations and conditions.* An R.C.A.F. ambulance while transporting one S., an airman, to a military hospital came into collision, at the corner of Bordeaux and Ontario streets in Montreal, with a tramcar owned by the defendant and operated by its employee. Alleging negligence on the part of defendant's employee the Crown, under Articles 1053 and 1054 of the Civil Code of Quebec, seeks to recover the loss of its ambulance; the medical and hospital expenses incurred on behalf of the injured serviceman; and the pay and allowances which it continued to give him during his incapacity. One of the defences is that the language of Article 1056 c.c. restricts the right of recovery under Article 1053 to the person bodily injured by the wrongful act of a third party. On the facts the Court found that both drivers were equally negligent and fixed their share of responsibility at fifty per cent. *Held:* That the R.C.A.F. ambulance was an emergency vehicle within the meaning of By-law No. 1319 of the City of Montreal, para. 36: "Fire department apparatus, police patrol wagons, hospital ambulances and all authorized vehicles on their way to save life or prevent property loss." 2. That the words used in Article 1053 c.c. are not ambiguous and should not be given a meaning other than their ordinary meaning. The rule of legal construction applicable to all writings should be applied. 3. That Article 1053 c.c. gives a general right of action to all persons sustaining damage through the wrongful act of another person capable of discerning right from wrong. *Regent Taxi and Transport Co.* v. *Congrégation des Petits Frères de Marie* [1929] S.C.R. 650. Article 1056 c.c. does not give a general right; it limits the right of action under Article 1053 to a certain category of persons under specified situations and conditions. Thus persons entitled to a claim for damages under Article 1053 are not deprived of this right by Article 1056 when they are not related to the person fatally injured. HER MAJESTY THE QUEEN v. THE MONTREAL TRANSPORTATION COMMISSION.. **83**

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3.——*Petition of Right—Negligence—Pedestrian struck by motor vehicle owned by the Crown and driven by its servant acting within the scope of his duties—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 3(2), 4(2) and (3)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(c)—Onus of proof on suppliants—Liability of the Crown a statutory one and limited to express terms of the statute creating it.* Suppliants claimed special and general damages for personal injuries and losses sustained by them as a result of an accident in which one of the suppliants while walking on a highway was struck by a motor vehicle owned by the Crown and driven by one of its servants who was then acting within the scope of his duties. On the facts the Court found that both the pedestrian and the driver of the motor vehicle were negligent and fixed the former's share of responsibility at 30 per cent and the latter's at 70 per cent. *Held:* That the law applicable to claims against the Crown for damages caused or losses sustained as the result of the negligence of one of its servants while acting within the scope of his duties or employment is the same under the Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)*(a)* and 3(2) as it was under the Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)*(c)*. 2. That the onus of proof of the following facts rests upon the suppliants: *(a)* that the driver of the respondent's motor vehicle was a servant of the Crown and was acting within the scope of his duties at the time and at the place of the collision; *(b)* that he was negligent in the performance of his duties; *(c)* that the suppliant suffered injury and sustained losses; *(d)* that the injuries and losses to the suppliants resulted from his negligence. No presumption or assumption can displace this statutory obligation. 3. That although the liability of the Crown under this Act is to be determined by the law of negligence in force in the province in which the alleged negligence occurred such provincial law shall apply only so far as it is not repugnant to the statute by which the liability was imposed and does not seek to place a liability upon the Crown different from that imposed by Parliament. This liability is a statutory one and is limited to the express terms of the statute creating it. PETER VALENTINE GAETZ *et al* v. HER MAJESTY THE QUEEN..... **133**

4.——*Petition of Right—Claim for damages as a result of a fall on a floor in a building owned and operated by the Crown—Negligence—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 4(2)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(c)—Liability of the Crown only vicarious—Onus of proof on suppliants.* On leaving the shower-room suppliant, Mrs. Meredith, slipped and fell on the floor of the ladies' dressing room at the

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Miette Hot Springs Bath House, Jasper National Park, the property of respondent and operated at the time by its servants. Suppliants sought to recover damages for personal injuries and losses alleging that the fall was caused by the dangerous condition of the floor because of the negligence of respondent's servants in omitting to remove the water on it or to place matting on its concrete surface or to give proper warning of its dangerous condition. *Held:* That in a claim against the Crown under the Crown Liability Act, S. of C. 1952-53, c. 30, for damages resulting from the negligence of its servant while in the performance of his duties it must be established conclusively that the servant himself could be held liable for the damages sustained and claimed. S. 4(2) of the Act affirms the principle that the Crown's liability is a vicarious and not a direct liability. *The King* v. *Anthony* [1948] S.C.R. 569; *Magda* v. *The Queen* [1953] Ex. C.R. 22 referred. 2. That the Crown's liability under that Act is a statutory one and the suppliants in order to succeed against respondent must bring their claim within the ambit of the terms of the Act. The onus of proof in respect of that matter rests upon suppliants and no presumption or assumption can displace this statutory obligation. If suppliants do not discharge this obligation their claim fails. This rule applies under s. 3(1)*(a)* of the Act as it applied to claims made under s. 18*(c)* of the Exchequer Court Act, R.S.C. 1952, c. 98. 3. That suppliants failed to establish any negligence on the part of some servant of respondent in the performance of his duties on the day of the accident. 4. That suppliant, Mrs. Meredith, suffered injury through her own fault and carelessness. FREDERICK R. MEREDITH *et al* v. HER MAJESTY THE QUEEN..... **156**

5.——*Action to recover damages—Negligence—Accident to an employee of Canada—The Government Employees' Compensation Act, S. of C. 1947, c. 18, s. 9 (now R.S.C. 1952, c. 134, s. 8)—Right of action by employee against wrong-doer—Employee's election to claim under the Act—Subrogation of employee's rights to Her Majesty—Liability at common law of owner in possession of car for damages—Action per quod servitium amisit brought by the Crown—Meaning of words "in the course of employment"—Right of subrogation of the Crown depending on employee's election under the Act—Claim allowed in part.* The action is to recover certain sums alleged to be due to the Crown under the Government Employees' Compensation Act, S. of C. 1947, c. 18, by reason of a motor car accident in which three of its employees were injured and certain hospital, medical and salary expenses were incurred, the employees having elected to claim compensation under the Act and the Crown being subrogated to their right of action "against

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the person against whom the action lies". The accident occurred between a car owned and driven by one S, a Crown employee, who, with two other employees as passengers, were on the way to their work, and a car owned by one of the defendants who at the time was in the car while his brother and co-defendant was driving it. On the facts the Court found that the negligence of the driver of the MacCauley car was the sole cause of the collision. *Held:* That Malcolm MacCauley as owner in possession of the car is also liable at common law for the damages occasioned to the Crown employees. *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 81 referred to and followed. 2. That the Crown is entitled to bring an action *per quod servitium amisit* in respect of the loss of the services of its servants and employees. *Attorney-General of Canada* v. *Jackson* [1946] S.C.R. 489 at 497; *The King* v. *Richardson and Adams* [1948] S.C.R. 57 at 62 referred to and followed. Here the Crown is entitled to recover from the defendants the salary paid by it to its employee S during his liability. 3. That the accident did not occur "in the course of employment" of the three Crown employees. There was no duty on their part to travel by S' car to the hatchery. Their duty was to report for work at a specific time, and while they were entitled to free passage in S' car to and from the hatchery, there was no obligation upon them to use that car and none of them would have been discharged from employment had they reached the hatchery by means other than by the use of S' car. *St. Helen's Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59 referred to and followed. 4. The Crown's right to subrogation does not depend on the disposition made of the employee's application by the Workmen's Compensation Board. This right of subrogation arises upon the employee's electing to claim compensation under the Act. Upon such election the Crown is entitled to bring such action against the wrong-doer as the employee could have taken. HER MAJESTY THE QUEEN v. MALCOLM MACCAULEY AND NORMAN MACCAULEY..... **320**

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2.——*Extension of time to appeal—Motion initiated after expiration of statutory period to appeal—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 82(3)—Special circumstances—Requirements of justice—Motion dismissed.* On a motion for extension of the time to appeal from a judgment of this Court initiated almost four months after the expiration of the statutory period of sixty days and almost six months after the date of pronouncing judgment. *Held:* That no rigid rules should be laid down which must be complied with before an extension of time to appeal will be granted but in specific cases the reasons in support of a motion for such an extension may be found insufficient. 2. That here the reasons advanced do not show any special circumstances nor any requirements of justice on which to found an order extending the statutory period allowed for instituting an appeal. *International Financial Society* v. *Moscow Gas Company* (1878) 47 L. J. Ch. 258; *Re Manchester Economic Building Society* (1883) 24 Ch. D. 488; *Nicholson* v. *Piper* (1907) 24 T. L. R. 16 referred to. HER MAJESTY THE QUEEN v. E. & A. LEDUC LIMITEE..... **286**

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REVENUE—*Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, s. 5—Decision of Board not erroneous by reason of possible error in computation of amount of capital employed—Onus on appellant to establish that Board's decision based on wrong principles and that it did not act judicially.* The appellant made an application to the Minister pursuant to section 5 of The Excess Profits Tax Act, 1940, as amended, for a reference to the Board of Referees to determine its standard profits on the ground that its business was itself abnormally depressed during the standard period. The Board found that it was so depressed but did not recommend that the capital standard should be departed from and also reported that inasmuch as its standard profits exceeded 10 per cent upon the capital it was unable to make any recommendation for an increase of such standard profits. The appellant appealed from assessments based on such standard profits. *Held:* That there is no foundation for the objection that the Minister had failed to make a proper reference of the appellant's claim to the Board of Referees in that he failed to ask the Board for advice as to whether or not a departure from the basis of capital employed would be justified and that the Board had erred in recommending to the Minister that the capital employed basis should not be departed from. 2. That even if the Board made an error in computing the amount of the capital employed by the appellant it does not follow that its decision that the appellant's standard profits should not be increased was erroneous or that it was based on wrong principles or that the Board in making it had not acted judicially. 3. That it is pure speculation on the appellant's part, that, if the Board had found the capital employed to be the amount which the appellant contended was the correct one, it might then have recommended a departure from the capital employed basis. It is inconceivable that it would have done so. 4. That the appellant could not discharge the onus of establishing that the Board's decision was based on wrong

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principles and that it did not act judicially in arriving at it by proof of an error in the computation of the amount of capital employed by the appellant that could not possibly have had any effect on it. S. D. EPLETT & SONS LIMITED v. MINISTER OF NATIONAL REVENUE..... 2

2.—— *Income — Income Tax — The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 5(a), 5(b), 11(7) and 127(1)(a)—Income from office or employment—Marine engineer—Board and living accommodation on vessel supplied free of charge—Meaning of "income from an office or employment"—Expenses of transport officers—Meaning of "amount" in s. 127 (1)(a) of The Income Tax Act—Conditions of agreement with crew of vessel—The Canada Shipping Act, 1934, S. of C. 1934, c. 44, ss. 165, 226—Appeal from Income Tax Appeal Board dismissed.* In 1952 appellant was employed as a marine engineer on a vessel. With his wife and family, he resided on shore. In addition to his wages his employer supplied him with board and living accommodation on the vessel free of charge while she was making her daily trips. In his amended tax return for the taxation year 1952 appellant did not include the value of this board and living accommodation. The Minister, however, added it to appellant's income and he was taxed accordingly. An appeal from the assessment to the Income Tax Appeal Board was dismissed and from the Board's decision appellant appealed to this Court. On the evidence the Court found that appellant in 1952 received or enjoyed the board and lodging in respect of, in the course of or by virtue of his employment. *Held:* That section *5(a)* of the Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, does not distinguish between the value of board and lodging which is received or enjoyed by an employee—and which by the terms of another statute must be supplied to him by his employer or be set forth in a written agreement—and other cases where there is no such statutory requirement. The purpose of s. *5(a)* is to extend the meaning of "income from an office or employment" beyond the normal concept of "salary, wages and other remuneration, including gratuities" by including in that term the *value* of board, lodging and other benefits which an employee may receive or enjoy in the course of, or by virtue of, his office or employment. 2. That section 11(7) of the Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, relating to the expenses of transport officers has no application since the amounts here were not *disbursed* by appellant. 3. That neither the living accommodation which appellant was entitled to enjoy by reason of the terms of the Canada Shipping Act, 1934, S. of C. 1934, c. 44, ss. 165, 226, nor the board and provisions which he received by reason of his contract with his employer, was an

REVENUE—*Continued*
"amount" within the meaning of the Income Tax Act, 1948, S. of C. 1948, c. 52, s. *5(b)*. ROBERT SHORROCKS WILLIAMS v. MINISTER OF NATIONAL REVENUE 12

3.——*Income Tax — The Income Tax Act, S. of C. 1948, c. 52, ss. 42(1), 42(2), 50(6) —Examination of taxpayer's return—Nature of Minister's assessment function—Minister not precluded from accepting taxpayer's return as correct.* On July 27, 1951, the Minister sent the appellant a "notice of assessment" for the year 1950 showing the same amount of tax levied as it had shown on its return. On January 27, 1953, the Minister sent the appellant a "notice of re-assessment" for the same year showing a balance of tax unpaid and interest thereon from July 1, 1951, to January 27, 1953. The appellant contended that under section 50(6) of The Income Tax Act interest was payable only from July 1, 1951, to June 30, 1952, on the grounds that the Minister did not examine its income tax return within the meaning of section 42(1) and did not assess the tax for the taxation year or the interest payable by it within the meaning of the section and that, consequently, the notice dated July 27, 1951, was not a notice of assessment since there had not been an assessment prior to that date and that the notice dated January 27, 1953, was really the original assessment within the meaning of section 50(6). The contention was that the acceptance of the appellant's return, subject only to the checking of its computations, was not an assessment within the meaning of the Act. *Held:* That it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide. 2. That there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide. 3. That the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment. PROVINCIAL PAPER LIMITED v. MINISTER OF NATIONAL REVENUE..... 33

4.—— *Income Tax — The Income Tax Act, S. of C. 1948, c. 52, ss. 2(3), 3, 4, 20(1) 20(3)(a)—Profit from a business—Disposal of depreciable property.* The appellant was formed for the purpose of taking charge

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of the sales in Canada of all the products of Canadian Kodak Company Limited and sells a large range of cameras and photographic equipment and supplies. In 1940 it acquired the business and assets of Recordak Limited. This company had distributed and serviced special equipment known as recordaks. These were machines equipped with cameras and used for taking reduced photographs and microfilms of documents. They were leased to users on a monthly basis and not sold and Recordak Limited had always considered them as capital assets. The appellant handled the recordak portion of its business in substantially the same manner as Recordak Limited had done. It was identified as the Recordak Division and carried separately on its books of account. In every respect it treated the machines as capital assets in the same way as Recordak Limited had done. In January, 1951, the appellant changed its policy regarding recordaks and decided to sell them. In 1951 approximately 40 per cent of the recordaks which users had rented were purchased by them and in 1952 approximately a further 5 per cent were thus sold. The appellant continued to lease the recordaks which it did not sell and carried such recordaks as capital assets. The appellant's decision to sell recordaks was made by its general manager as a business decision in the course of its business. In assessing the appellant for 1951 and 1952 the Minister added the amounts of the profits made on the sale of the recordaks to the amounts of taxable income shown on its returns. The appellant objected on the ground that the machines were capital assets and any gain in their sale was a capital gain and that they were not sold in the ordinary course of its business and were not part of its profit-making activities. *Held:* That the fact that the appellant's recordaks were formerly leased and treated as capital assets subject to depreciation does not prevent the profit from their sale being profit from the appellant's business once it had made the business decision to sell them and sold them in the course of its ordinary business of selling photographic equipment and supplies. There was no difference in principle between its sales of recordaks and its sales of other photographic equipment and the profit made from such sales was profit from its business and taxable income. *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* [1925] A.C. 467 and 12 T.C. 720 followed. 2. That while the purpose of section 20(1) seems to be to ensure that under the circumstances specified in it some of the proceeds of the disposition of depreciable property, which, apart from the section, would not be income within the meaning of the Act, is included in income because of the fact that depreciation or capital cost allowances have been granted in respect of it, there is no need of resorting to the section for such purpose

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where the disposition of the property has been made in the course of the taxpayer's business as the result of a change of business policy in dealing with it and all of the proceeds of the disposition have been taken into account as income from the business and all the profit made in the disposition of the property is profit from a business. CANADIAN KODAK SALES LTD. v. MINISTER OF NATIONAL REVENUE.. **40**

5.—— *Practice — The Income Tax Act, R.S.C. 1952, c. 148, s. 119—Effect of registration of certificate under s. 119—Issue of writ of fieri facias—Seizure by sheriff—Opposition to seizure—Stay of execution—Code of Civil Procedure, Arts. 645, 648, 649—General Rules and Orders, Rules 201, 208—Articles of Code relating to stay of execution not applicable to execution of writ issued by Exchequer Court.* On the registration of a certificate under section 119 of the Income Tax Act a writ of *fieri facias* issued from the Exchequer Court and the Sheriff of Beauce made a seizure of the defendant's lands and goods. The defendant filed an opposition to the seizure under Article 645 of the Code of Civil Procedure of the Province of Quebec and the plaintiff filed a contestation of the opposition. *Held:* That the registration of a certificate under section 119 of the Income Tax Act gave it the force and effect of a judgment against the defendant-opposant. 2. That if the defendant-opposant had wished to show that there were errors in the assessments on which the amounts mentioned in the certificate were based he should have appealed against them and he is not permitted to contest such amounts indirectly by an opposition to the seizure. 3. That if all that the defendant-opposant wished to obtain was a stay of execution and consequently a suspension of the sale of his lands and goods he should not have chosen the procedure that he adopted. 4. That when a writ of execution has been issued by this Court and the party against whom a judgment has been pronounced wishes to obtain a stay of such execution he must apply to this Court or a judge of this Court. That is the only means by which he can obtain what he wishes. He cannot rely on Article 649 of the Code of Civil Procedure of the Province of Quebec, notwithstanding the provision therein contained that notification of the opposition according to Article 648 operates as a stay of the execution and the sale. In the case of a seizure made under a writ of *fieri facias* issued out of this Court such a notification has no such effect. The power to grant a stay of execution rests exclusively with this Court or a judge of this Court. MINISTER OF NATIONAL REVENUE v. ANTONIO TANGUAY..... **50**

6.—— *Income — Income Tax — The Income Tax Act, 1948, S. of C. 1948, c. 52, s. 11(1)(b)—Regulation 1205—Exploration*

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and development expenses incurred by a gold mining company prior to coming into production—Liability for such expenses—Purpose of Regulation 1205—Meaning of "expenses incurred by the taxpayer" in Regulation 1205—Appeal from Income Tax Appeal Board dismissed. Prior to May, 1938, appellant was engaged in the business of prospecting, exploring and mining for gold. Near its claims were other claims owned then by Albany River Mines Ltd. The two companies were entirely independent of each other and Albany River had spent substantial amounts on exploration and development of its claims but had not come into operation. Pursuant to an agreement entered into by the two companies in May, 1938, a new company—the Albany River Gold Mines Ltd.—was incorporated in July, 1938, and all the assets of Albany River were transferred to it and the shares of Albany Gold allotted to Albany River, appellant and another mining company as mentioned in the agreement. Between July, 1938 and October 31, 1945, appellant expended very large amounts in exploring and developing the claims acquired by Albany Gold from Albany River and these amounts were claimed and allowed as deductions from appellant's taxable income for the years 1946, 1947 and 1948. On October 31, 1945, Albany Gold agreed to sell and appellant agreed to purchase all the assets, rights and properties of Albany Gold in consideration for the issue to Albany Gold of 136,850 fully paid shares of appellant to be distributed among its shareholders (other than the appellant). In its income tax return for the year 1949 appellant sought to deduct 25 per cent of the amount disbursed by Albany River Mines Ltd. prior to July, 1938, for pre-production expenses. The claim was disallowed by the Minister and from the assessment an appeal was taken to the Income Tax Appeal Board which dismissed the appeal and from that decision appellant appealed to this Court. On the evidence the Court found that the 1945 agreement between the appellant and Albany Gold was a bona fide sale and purchase by which the appellant acquired the actual assets of Albany Gold, including the mining claims on which both Albany Gold and Albany River had incurred and paid certain exploration and development expenses; that the transaction involved no contractual relationship whatever between the appellant and Albany River or the latter's shareholders; that the only liability of the appellant thereunder (so far as this case is concerned) was to issue to Albany Gold the number of shares agreed upon. *Held:* That Regulation 1205 referable to section 11(1) *(b)* of the Income Tax Act, S. of C. 1948, c. 52 was to give special relief to the mines specified in paragraph (1) thereof because of the fact that in many cases they might incur substantial expenses prior to the year in which they come into

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production in reasonable commercial quantities. The Regulation enabled them to do what they could not otherwise have done, namely, to deduct these expenses from income in and following the year in which they came into production in reasonable commercial quantities, and therefore had income from which the deduction could be made. 2. That the words "expenses incurred by the taxpayer" in Regulation 1205 have a natural and ordinary meaning of expenses either paid out by the taxpayer or which he has become liable to pay. Here Albany River became liable for and did pay the costs or expenses of its prospecting, exploration for, and development of its mine and thereafter no other person or corporation became liable to pay them. The question of liability for or payment of these expenses was at an end before the appellant had anything whatever to do with the matter. 3. That the theory advanced by appellant that it reimbursed the shareholders of Albany Rvier for *their* outlay in the exploration and development of Albany River mine and that in this manner the appellant ran into or brought upon itself a liability in regard to the amount of pre-production expenses and thereby "incurred" them, is unsupportable on the proven facts of the case. PICKLE CROW GOLD MINES LTD. v. MINISTER OF NATIONAL REVENUE..... **55**

7.—— *Income — Income Tax — The Income War Tax Act, R.S.C. 1927, c. 97, s. 8(6)—Allowable deductions—Oil wells—Expenditures on dry oil wells—Wartime Oils Limited —Financial assistance given by Wartime Oils Limited in drilling oil wells—Effect of s. 8(6) of the Income War Tax Act—Interpretation of s. 8(6) of the Income War Tax Act—Appeal from Income Tax Appeal Board dismissed.* Section 8(6) of the Income War Tax Act, R.S.C. 1927, c. 97 is as follows: (6) A corporation whose principal business is the production, refining or marketing of petroleum products is entitled to deduct from *(a)* the aggregate of the taxes under this Act and The Excess Profits Tax Act, 1940, payable by it in respect of the year of expenditure, and *(b)* if the deduction permitted under this subsection exceeds the taxes so payable in that year, from the taxes so payable in subsequent years, an amount equal to *(c)* twenty-six and two-thirds per centum in the case of a corporation substantially all of whose income is subject to depletion under this Act, or *(d)* forty per centum in the case of any other corporation, of the aggregate of drilling and exploration costs, including all general geological and geophysical expenses, incurred by it directly or indirectly on oil wells spudded in during the period from the first day of January, nineteen hundred and forty-three to the thirty-first day of December, nineteen hundred and forty-six and abandoned within six months after completion of

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drilling. In 1943 appellant company which held certain oil leases on property in Turner Valley entered into an agreement with Wartime Oils Limited—a Crown corporation—by which it received subject to certain terms and conditions financial assistance in drilling, among other wells on its property, Well No. 20. The well was spudded in on January 18, 1944, and finally abandoned on December 18, 1944. The amounts received in 1944 and 1945 for drilling and cleaning up expenses totalled approximately $220,000.00 which more than covered its out-of-pocket expenses on the operation. Having faithfully carried out its part of the agreement appellant company, by reason of a clause to that effect therein, was under no liability to repay the moneys advanced by Wartime Oils Limited. It transferred the whole of the amount so received to capital surplus and in computing its tax for the taxation year 1946 claimed the benefit of the provisions of s. 8(6) of the Act. The claim was disallowed by the Minister on the ground that appellant company incurred no drilling or exploration costs in relation to that well and that if any such costs were incurred, they were incurred by Wartime Oils Limited. An appeal from the assessment was taken to the Income Tax Appeal Board which dismissed the appeal and from that decision appellant appealed to this Court. *Held:* That the effect of s. 8(6) of the Income War Tax Act is to enable a taxpayer who has incurred costs in drilling an oil well which has proven unproductive, to recover by means of tax deductions the amounts which he is out-of-pocket by reason of such costs and which he could not otherwise recover. The probability—if not the certainty—that such losses would be recovered, provides the incentive for extending his operations by further drilling. The general intent of the enactment is to place the taxpayer in such cases in the position where he would suffer no loss so far as the unproductive operation is concerned—that he would not be out-of-pocket. 2. That to construe s. 8(6) of the Act so as to enable a corporation which is not out-of-pocket on its operation, but on the contrary has had all its expenses paid for by another party—here a Crown Corporation—to be repaid for such expenses out of taxes which would otherwise accrue to the Crown, would mean that the legislation was intended to confer not only indemnity for such losses, but also an additional bonus of a like amount, an interpretation Parliament did not contemplate. OKALTA OILS LIMITED v. MINISTER OF NATIONAL REVENUE..... **66**

8.—— *Excise tax — Sales tax — The Excise Tax Act, 1952, c. 100, as amended, ss. 2(a)(ii), 57 and 58—"Special brand" automobile tires manufactured for and sold by retail agencies—Meaning of "manufacturer or producer" in s. 2(a)(ii) of the Act*

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—Tariff Board—Finding of the Board—Jurisdiction of the Board challenged—Application for leave to appeal from finding of the Board—Leave to appeal a matter of judicial discretion—Leave to appeal from Tariff Board granted. Certain Canadian rubber companies are making "special brand" automobile tires bearing the names of the purchasers or having treads which are molded with special markings and are sold only to various retailing agencies such as T. Eaton Co. Ltd. On a reference to the Tariff Board by the Deputy Minister of National Revenue, Customs and Excise, following objections by competing manufacturers to his ruling that the manufacturers of these "special brand" tires were the manufacturers or producers of the tires for the purposes of the Excise Tax Act, the Board before which the contention was renewed that the "special brand" customers should be considered as the manufacturers or producers of the tires within the meaning of s. 2(a)(ii) of the Act and subjected to tax on their sale, upheld the Deputy Minister's ruling. On an application under s. 58 of the Act for leave to appeal from the Board's decision. *Held:* That this is not a case in which such rights as the applicants may have should be summarily disposed of on an application of this nature by a finding that the Tariff Board exceeded its jurisdiction. The matter here is not so clear and indisputable that it would be the duty of a judge hearing an application such as this to declare the entire proceedings a nullity. 2. That under the circumstances of the case and in the exercise of the discretion conferred by the Excise Tax Act, R.S.C. 1952, c. 100, as amended, s. 58, the applicants here have a fairly arguable case to submit to the Court and should be permitted to do so. *Canadian Horticultural Council et al.* v. *J. Freedman and Sons Ltd.* [1954] Ex. C.R. 541 referred to. GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LTD. *et al* v. T. EATON CO. LTD. *et al*.... **98**

9.—— Income — Income tax — The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 3, 4, 11(1)(d) and (e), 14(1), 42(3) and (4)—Trader-sales made on credit—Accounts receivable—Notes receivable—Method for computing income—"Cash Receipts and Expenditure" method under which "receivables" excluded—"Receivables" part of income in the year in which goods sold and delivered—Deductions permitted only for doubtful and bad debts—Notice of assessment showing "nil" tax levied not an acceptance of "Cash Receipts and Expenditure" method—Meaning of word "accepted" in s. 14(1) of the Act—Minister's power of reassessment—Appeal from Income Tax Appeal Board dismissed. Appellant is engaged in the retail business of selling hearing aids, a substantial part of its sales being on credit. At the end of its fiscal year, January 31, 1951, the amounts

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remaining unpaid on the purchase price were represented by accounts receivable and notes receivable, the latter having been pledged at appellant's bank as security for a loan of an equivalent amount. In its income tax return for that year appellant used the form of accounting known as "Cash Receipts and Expenditure" method under which only cash actually received is taken into account as income, all accounts and notes receivable being excluded, and the expenditure includes not only disbursements actually made but also accounts payable. A first notice of assessment sent to appellant showed "nil" tax levied but subsequently the Minister reassessed appellant by adding back to its declared income the amount of those "receivables". An appeal from the assessment to the Income Tax Appeal Board was dismissed. Hence the present appeal to this Court. *Held:* That when trading stocks are sold and delivered the full price should be brought into account in the year in which the delivery is made irrespective of the time of payment, the trader in such cases having, however, the right to take advantage in proper cases of the provisions of The Income Tax Act, 1948, S. of C., 1948, c. 52, as amended, regarding bad and doubtful debts. *Absolom* v. *Talbot (H. M. Inspector of Taxes)* (1944) 26 T.C. 188; *British Mexican Petroleum Co. Ltd.* v. *Johnson* (1932) 16 T.C. 570 at 593; *Johnson (H. M. Inspector of Taxes)* v. *W. S. Try Ltd.* (1946) 27 T.C. 167 at 181. 2. That the "Cash Receipts and Expenditure" method purported to have been used by appellant is not permissible under the Income Tax Act. It excludes as an item of income all receivables which form a necessary part of any trader's profit and loss statement. Such a method is incomplete and misleading and one which fails entirely to show the true state of a taxpayer's position or to reflect his true profit and loss. It is not according to generally accepted accounting practice in Canada. Its use in many cases would show a loss when in reality there was a profit. It brings in nothing on the receipts side to balance outgoing inventory which has not been paid for in full. 3. That there is no evidence that the Minister reassessed appellant in order to prevent s. 14(1) of the Act being effective in respect of a subsequent year, and the burden of proof is on appellant. 4. That it is always open to the Minister by a reassessment to correct errors made in the original assessment within the time limited by s. 42(4) of the Act. 5. That the original Notice of Assessment which levied no tax was not an acceptance by the Minister of the "Cash Receipts and Expenditure" method purported to have been used by appellant. The word "accepted" as used in s. 14(1) of the Act connotes a taking or receiving with consenting mind—something in the nature of an admission. Here the notice of assessment

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was merely a statement that "nil" tax was levied; it said nothing whatever about any method. 6. That the provisions of s. 14(1) of the Act (which in terms are "subject to the other provisions of this Part") must be read with those of s. 42, including those of subsection 4 relating to the Minister's power of reassessment. Here there was a reassessment which entirely set aside the original assessment and which clearly denied to appellant the right to deduct from its accounts the amount of its receivables. KEN STEEVES SALES LIMITED v. MINISTER OF NATIONAL REVENUE **108**

10.—— *Income — Income tax —The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, ss. 3, 4, 127(1)(e)—Profit from sale of real estate by taxpayer—Whether capital gain—Whether profit from business —Question to be determined in the light of facts of each case—Burden on taxpayer to show error in taxation imposed upon him— Appeal from Income Tax Appeal Board dismissed.* Appellant was reassessed for the taxation year 1950 in respect of profits realized by him on the sale of a ten-suite apartment block which he built in May of that year and sold six months later. An appeal from the assessment to the Income Tax Appeal Board was dismissed. On an appeal from the Board's decision to this Court appellant contended that it was his intention to build the block and keep it as an investment but that he was forced to sell it in order to raise funds for the completion and expansion of another business—a children's wear retail store—which he owned. *Held:* That the question whether a profit realized on the sale of real estate by an individual is a realization or change of investment or an act done in the carrying on of a business is to be determined in the light of the facts in each case. *Californian Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 at 165 referred to. 2. That the burden is on the taxpayer to establish the existence of facts or law showing the error in relation to the taxation imposed upon him. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486 referred to. Here the assessment is based on the fact that the profit was one which arose in the course of appellant's business and to succeed in the appeal he must show that such is not the fact. 3. That on the evidence appellant at all material times was still engaged in the business of a builder or contractor and that the profit which he received from the sale of that apartment block was a profit from that business. He has not established to the satisfaction of the Court that the block was intended to be built and kept as an investment or that the reasons he gave for the sale were the real reasons. MAURICE TOUGAS v. MINISTER OF NATIONAL REVENUE **124**

11.——*Income Tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4 and 27(1)(e) —Profit made on devaluation of pound sterling—Income or capital gain—Profit made in course of taxpayer's business—Appeal from Income Tax Appeal Board allowed.* Through the devaluation of the pound sterling a profit accrued to the respondent on account of its financial transactions with a London, England, bank. Anticipating that the pound would be devalued, the respondent deliberately incurred a large overdraft with the London bank which was used in paying accounts in England. After the devaluation of the pound sterling the respondent paid its overdraft to the London bank at the reduced rate and its resulting profit amounted to a considerable sum of money. The cost of goods to the respondent was carried on its books at the rate of the pound sterling before devaluation. The Income Tax Appeal Board held that this profit was a capital gain. The Minister of National Revenue appealed to this Court. *Held:* That the profit received by respondent was one made in the course of its normal business operations while carrying out a scheme for profit-making. 2. That the use of the overdraft was a scheme for profit-making in one part of the respondent's trading operations, namely, the purchase of sterling funds, an essential part of an integrated commercial operation, namely, the purchase of supplies and the payment thereof by the method adopted by respondent. 3. That the loan by the bank was used to pay trade accounts and was circulating capital used in the trade; the fixed capital of the respondent was at no time employed in the transactions and the profit when made did not affect the capital structure of respondent in any way but was an increase in its trading profit and available for distribution to its shareholders. MINISTER OF NATIONAL REVENUE v. TIP TOP TAILORS LIMITED..... **144**

12.——*The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended, s. 3, s. 11(1)(c) and s. 12(1)(c)—Interest paid on borrowed money to be deductible from income must be paid on money used to earn the income from the business or property—Not sufficient that such borrowed money be used to open up other lines of credit—Appeal dismissed.* Appellant borrowed money from subsidiary companies controlled by it and used such money for the purpose of paying off certain bank loans. Appellant contends that interest paid on the borrowed money was deductible from income as being money used for the purpose of earning the income from the business and not for the purpose of gaining income from property. *Held:* That the appeal must be dismissed as the borrowed monies were not used for the purpose of earning income from the business or property. 2. That it is not sufficient hat by the use of the borrowed monies in some way other than for the purpose of earning income in the business, other lines of credit are opened up or other monies are received which might be used for the purpose of earning income in the business. 3. That the provisions of s. 11 (1) (*c*) of the Income Tax Act are not to be construed by themselves but must be read in connection with the provisions of s. 12 (1) *(c)* of the Act and on the facts the whole of the outlays here in question may reasonably be regarded as having been incurred in connection with property the income of which would be exempt and they are therefore not deductible. INTERIOR BREWERIES LIMITED v. MINISTER OF NATIONAL REVENUE..... **165**

13.——*Excise—Sales tax—Old Age Security tax—Sale price—Manufacturer of pharmaceutical products not selling to wholesalers but transferring his products to his branches —Method of computing the tax—The Excise Tax Act, R.S.C. 1927, c. 179, as amended, ss. 85(b)(i)(ii)(iii), 86(1)(a), 99(1)(2)(3) —The Old Age Security Act, S. of C. 1951 (2nd sess.), c. 18, s. 10—Definition of "sale price" in s. 86(1)(a) of the Excise Tax Act—Regulation No. 782-C—Purpose of Regulation No. 782-C(b)—Regulation No. 782-C(b) intra vires powers of the Minister.* Defendant company is a Canadian licensed manufacturer of drugs, pharmaceutical preparations and other similar products. It does not sell to wholesalers but operates unlicensed wholesal branches to which it transfers its products at the regular selling prices allowed to ordinary retailers who do not obtain any preferred prices or special discount, less a discount of 20 per cent, and applies the sales tax on the remainder. Thus on a sale of $100 defendant, after deducting the 20 per cent discount, computes the tax at 8 per cent on $80, $6.40, and invoices the goods as follows: "sale price tax included, $106.40". In so proceeding defendant relies on Regulation No. 782-C made by the Minister of National Revenue under the Excise Tax Act, R.S.C. 1927, c. 179, as amended, s. 99 (now R.S.C. 1952 c. 100, s. 38) which reads in part as follows: No. 782-C *(a)*..... *(b)* Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20 per cent, the sales tax at the current rate to apply on the remainder. NOTE:— Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20 per cent discount.

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(c).....
Plaintiff brings action for a balance owing on sales taxes together with certain penalties claiming that the inclusion of the sales tax in the prices quoted by defendant company constitutes an "allowance" within the *Note* in Regulation No. 782-C*(b)* and that its computation of the sales tax is not in accordance with the provisions of the Regulation. Defendant denies liability. *Held:* That the definition of "sale price" in s. 85*(b)*(i)(ii) and (iii) of the Excise Tax Act, cannot be construed as to include in the sale price the tax itself, for the purpose of computing the sales tax. The statute being silent on this matter, neither the Minister nor the departmental officers, by way of regulations, directives or otherwise, are authorized to impose, levy or collect, directly or indirectly, a sales tax computed on a sale price sales tax included. 2. That the purpose of Regulation No. 782-C*(b)* is to place a manufacturer not selling to wholesalers on the same footing as the manufacturer who does. In the latter case, the sale price is fixed in the light of the requirements of s. 85*(b)*(i), (ii) and (iii) of the Act and the sales tax then is computed on that price. In the former case, as the price is not yet fixed the Minister by means of a regulation does fix it by following the same requirements, and the computation of the tax is made on this price. Here the price is declared to be the regular selling price to ordinary retailers who do not obtain any preferred prices or special discount, less 20 per cent, the sales tax to apply on the remainder. 3. That since it has complied with all the requirements of Regulation No. 782-C*(b)* defendant company is entitled to take advantage of its provisions and to compute the sales tax, as it did, on the sale price less the 20 per cent discount. Whether the invoices are made out "sale price plus sales tax" or "sale price sales tax included", defendant company is not bound to deduct the 20 per cent discount from the regular retailing price plus the sales tax because then there would be a sales tax on the sales tax itself. 4. That Regulation No. 782-C*(b)* is *intra vires* the power of the Minister under s. 99 of the *Excise Tax Act*. Its purpose is not to change the tax rate, or the definition of "sale price" in s. 85 but to construe the latter words for the benefit of a certain class of taxpayers so as to assist them in determining the sale price of their products. HER MAJESTY THE QUEEN v. LABORATOIRES MAROIS LIMITÉE..... **173**

14.——*Income—Income tax—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, s. 3(1)—The Income Tax Act, 1948, S. of C. 1948, c. 52, as amended ss. 3, 4, 127(1)(e)—"Taxable income"—Shareholder buying material needed by his company for its operation and reselling to latter at profit—Whether transaction constitutes a trade or business—Transaction in a scheme for profit making—Appeal from Income Tax Appeal Board dismissed.* Having refused to give their personal guarantee for a bank loan to finance the purchase of a large quantity of sulphuric acid needed by their company for refining its product the shareholders including the appellant formed a syndicate with the object of purchasing the acid and selling it to the company, each member of the syndicate contributing to the purchase price in proportion of his holding in the company. The price paid by the syndicate for the acid was $10 per ton of acid and it was sold to the company at $30 per ton. In the years 1947, 1948 and 1949 appellant received his share of the sale price from the company and the amounts so received were added by the Minister to appellant's income for those years. An appeal from the assessments to the Income Tax Appeal Board was dismissed and from the Board's decision appellant appealed to this Court. *Held:* That whether the gain or profit realized by appellant is "taxable income" is not to be determined solely by whether the transaction constitutes a trade or business. All the facts and circumstances of the deal ought to be considered in relation to the general definition of "income" in s. 3. of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended, and of the *Income Tax Act*, S. of C. 1948, c. 52, as amended. *The Atlantic Sugar Refineries* v. *The Minister of National Revenue* [1948] Ex. C.R. 622; *McDonough* v. *The Minister of National Revenue* [1949] Ex. C.R. 300 referred to and followed. 2. That having the necessary funds to do so the shareholders of the company could have themselves readily loaned the required amount to the company. Instead, they preferred purchasing the acid and selling it at a profit. The whole operation was the carrying of a scheme for profit making. It was not a mere enhancement of value of an investment realized. 3. That the profits made as a result of the transaction by the appellant fall within the definition of "income" in both Acts and the amounts of these profits were properly added to appellant's income. EGBERT DOUGLAS HONEYMAN v. MINISTER OF NATIONAL REVENUE..... **200**

15.——*Income—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4 12(1)(b), 16—Income from business or property—Capital outlay—Indirect payments—Appeal from Income Tax Appeal Board dismissed.* In 1947, one S. granted a lease to the California Standard Co. of all the hydrocarbons (except coal) in certain lands that he then owned but which were to be divided upon the death of his parents into four equal shares among himself and his three sisters. The sisters registered a caveat on the lands and some months later gave an option to an agent of a syndicate of three companies, one of

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which was the appellant, under which the syndicate became entitled to a lease of the sisters' interest in the hydrocarbons. On September 22, 1948, the California Standard Co. and the syndicate, having reached an understanding and settled their difficulties with the sisters, entered into an agreement whereby the "Standard" lease was approved by the sisters in consideration of a cash payment by the syndicate of $75,000 and payment of 10 per cent of the gross proceeds of the sale of production from the lands until a further $75,000 had been paid to them. By the same agreement one-half undivided interest in the lease granted by S. was vested in the California Standard Co. and the other one-half in the syndicate, each member thereof acquiring a one-third interest in the syndicate's share. In 1949 and 1950 appellant received its share of the sale of the oil produced and, in accordance with the terms of the 1948 agreement, paid 10 per cent of the amounts so received over to the sisters. Appellant included the amounts in its income tax returns for those years and was assessed accordingly but later objected to the assessments on the ground that through an accounting error its gross income from production for those years was overstated by the amounts paid the sisters. The Minister reviewed and confirmed the assessments which were appealed to the Income Tax Appeal Board and the appeal was dismissed. Hence, the present appeal to this Court. *Held:* That the 1948 agreement superseded and replaced the agreement entered into in 1947 between the sisters and the agent of the syndicate. By approving the lease granted by their brother the sisters were not in a position to execute and deliver the lease contemplated by the 1947 agreement. 2. That whatever rights or interest the sisters may have had in the lands or in the oil therein were transferred to the syndicate. Once the 1948 agreement was signed and the cash payment of $75,000 effected the sisters had received full compensation for their rights and interest, provided, however, there was no oil and in that event the cash payment was a capital outlay within s. 12(1)*(b)* of the *Income Tax Act*, 1948. 3. That the lands being oil-producing, the proceeds of production became the property of the California Standard Co. and the syndicate, whereupon the sisters became entitled to a further sum of $75,000 payable by the syndicate at the rate of "10 per cent of the gross proceeds of the sale of the petroleum substances produced, sold and marketed from the lands". These words do not purport to give a right or title to a share of the proceeds of production but merely indicate how, when and where the additional sum of $75,000 would be paid to them. 4. That the amounts received by appellant company were instalments of its share of the proceeds from oil production and therefore were income from rights or

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interest in a property which produced oil and from the ordinary business it carried on of exploring for and producing oil. 5. That the amounts were payments or transfers of money made pursuant to the direction or with the concurrence of appellant company in satisfaction of its obligation to the sisters as a member of the syndicate and were so paid or transferred for its benefit. THE CALGARY AND EDMONTON CORPORATION LIMITED v. THE MINISTER OF NATIONAL REVENUE..... **213**

16.—— *Customs and Excise — "Special brand" automobile tires—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(a) (ii), 23 (1) (a), 30 (1) (a) (i), 57, 58—Meaning of "manufacturer or producer"—Jurisdiction of Tariff Board to determine whether person is manufacturer or producer—Relationship between Eaton's and its supplier that of purchaser and vendor—Only one set of costs against unsuccessful appellant—Costs payable to respondent carrying burden of case.* On a reference to the Tariff Board by the Deputy Minister of National Revenue for Customs and Excise the Tariff Board declared that The T. Eaton Co. Limited was not the producer or manufacturer of the "special brand" automobile tires sold by it under the names "Bulldog" and "Trojan" and not liable for excise tax or sales tax on the sales of such tires. From this declaration the appellants appealed with leave on a question of law. *Held:* That the Tariff Board had jurisdiction to determine whether Eaton's was the manufacturer or producer of the special brand tires sold by it. 2. That since the statutory definition of a "manufacturer or producer" involves a departure from its ordinary meaning and since the liability to tax of a person, firm or corporation meaning on whether he or it comes within its meaning it must be established in the case of person, firm or corporation who is not a manufacturer or producer in the ordinary meaning of the term that before he is held to be a manufacturer or producer within the statutory meaning all the conditions requisite to the applicability of the statutory meaning are present. If any of them are absent the statutory meaning is not applicable and must give way to the ordinary meaning. 3. That the relationship between Eaton's and its supplier was that of purchaser and vendor of the tires. 4. That the appellants have failed to show that Eaton's held or used or claimed a sales or other right to the tires at any stage in their manufacture by its supplier. 5. That the unsuccessful appellant should be charged with only one set of costs and that these are payable to the respondent carrying the burden of the case. GOODYEAR TIRE AND RUBBER CO. OF CANADA LIMITED *et al* v. THE T. EATON COMPANY LIMITED *et al*..... **229**

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17.—— *Succession duty — The Dominion Succession Duty Act, S. of C. 1940-41, c. 14, as amended, s. 2(e)—Death of a person domiciled outside of Canada—Fair market value at date of death of property situated in Canada—Debentures bearing no interest—Proper rate to be applied where face value of debentures to be discounted—Appeal from the Minister's assessment allowed.* Baroness Schroder died testate on June 18, 1944, domiciled in England, and the Canadian assets of her estate consisted solely of $1,500,000 face value, non-interest-bearing debentures of Winley Limited, a Canadian company, being 300 debentures of $5,000 each, dated December 1, 1931, and all maturing on September 1, 1972. Because of the fact that the debentures bore no interest, the Minister valued them at $531,165 being on a discount basis of 3·75 per cent. On an appeal from the assessment on the ground that the valuation was excessive appellants contended that the value is the fair market value of the debentures and asked for a discount rate of 4·25 per cent, or, on that basis, a valuation of $445,000. On the evidence the Court found that there was no public market for the debentures nor was there any "special purchaser" thereof, including Winley Limited. *Held:* That inasmuch as the debentures have not been listed on any stock exchange and there are no recent sales thereof or any "special purchaser", the proper approach to the problem is to ascertain the value of those securities which are most similar to the debentures in question and then make the proper allowances for the differences and, more particularly, for the "disabilities" which attached to the Winley debentures and which seriously affect their market value. 2. That on the whole of the evidence the Winley debentures at the date of death did not exceed in value the sum of $445,000. 3. That here the evidence relating to the origin and history of Winley Limited from its inception was relevant and therefore admissible. In the absence of any stock exchange listing a prospective investor in the debentures would make the most thorough inquiries into the history of the company, its management, the nature of its investments, the rights of the shareholders, and the manner in which the affairs of the company had been managed. In that way only would he be able to obtain information as to what the debentures were worth and the prospects for the future. Here the same information should be available to the respondent in determining the value of the debentures and in making the assessment. HELMUT WILLIAM BRUNO SCHRODER *et al* v. THE MINISTER OF NATIONAL REVENUE..... **263**

18.—— *Income — Income tax — The Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 12(1)(a)(b)—Capital cost of property—Capital outlay—Income Tax Regulations, sections 1100(1)(a), 1102(1)(c) and Schedule B—Deductions in respect of property—Property not acquired for the purpose of gaining or producing income—Appeal from Income Tax Appeal Board dismissed.* Appellant whose expanding business required further accommodation purchased three adjoining properties for $42,832.65, each property consisting of land and a dwelling house. Some time later the buildings were sold for $1,200 and removed, leaving the land as a site on which a concrete extension was added to the main plant. In its tax return for 1952 appellant claimed a 10 per cent deduction for capital cost allowance in respect of the three buildings. This was disallowed by the Minister on the ground that the entire amount of $42,832.65 was paid for the purpose of acquiring the site on which the extension had been erected and that no portion of the payment was expended for the purpose of acquiring depreciable assets. An appeal from the assessment to the Income Tax Appeal Board was dismissed and on an appeal from the Board's decision this Court *Held:* That on the evidence as a whole the sole purpose in making the purchase was to acquire a site for the extension of the factory. There never was any intention to acquire the frame houses for gaining or producing income; the sole intention in regard to the houses was to have them torn down and removed at the earliest possible moment, and that purpose was carried out. The mere fact that certain amounts of rental were obtained from one is attributable to the existing leases and does not affect in any way the real purpose of acquisition. Section 1102*(a)(c)* of the Regulations therefore bars the frame houses, under the circumstances, from being property which was subject to capital cost allowance. 2. That although entitled under s. 1100(1) of the Regulations to the actual cost to it of erecting the cement extension appellant cannot here claim the net cost to it of the dwelling houses as part of the capital cost of the cement extension. What is to be ascertained is the capital cost of the "building", namely, the cement extension, and not the capital cost of some other buildings which were previously upon the property. BEN'S LIMITED v. THE MINISTER OF NATIONAL REVENUE..... **289**

19.—— *Income — Income tax — Mining company—Income derived from mines—Exemption from income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 74(1)(b) and (2), 128(1)—References to the Income War Tax Act, R.S.C. 1927, c. 97—Definition of "mine"—Meaning of "new or old" mine in s. 4(x) of the Income War Tax Act—Meaning of "came into production" in s. 74(1)(b) of the Income Tax Act—Operation of a mine as distinct from the mine coming into production—Appeal from Minister's assessment dismissed.* Section 74 of the Income Tax Act, S. of C. 1948, c. 52,

as amended, reads in part as follows: 74. (1) Where a corporation establishes that a mine was *(b)* an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone), that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of thirty-six months commencing with the day on which the mine came into production (other than any operation thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation. (2) In this section "production" means production in reasonable commercial quantities. From October, 1942, to April, 1945, large commercial quantities of raw mica were mined by Purdy Mica Mines Ltd. on a property in Ontario. The operations were discontinued because the chief productivity dikes —the most important one being No. 3 dike—had been bottomed and were nearing exhaustion. Early in 1950 appellant company acquired the mine and a new dike, named No. 3 dike extension, was opened up for the purpose of mining a new concentration of mica discovered some months before and located a few feet from the old No. 3 dike, the latter being used as a base for operations in the new dike. Production of mica in commercial quantities from No. 3 dike extension by appellant company commenced on March 1, 1950, continued during the remaining months of 1950 and ran into 1951. In its income tax return for its 1951 taxation year appellant company claimed an exemption under s. 74 of the Income Tax Act but this was disallowed by the Minister on the ground that the company did not qualify for the exemption. An appeal from the assessment was taken to this Court which *Held:* That the question to be determined here is when the "mine" came into production. The words "came into production" in s. 74 of the Act refer to the mine or mineral deposits coming into production, not to the "operation" as distinct from the mine coming into production. When appellant company acquired the mine in 1950 it proceeded to explore and develop it from the point at which the Purdy company had ceased operations. The exploration, development and geological work were different but the mine is the same mine which previously had been operated and from which mica had been produced by the Purdy company during the years 1942-1945. 2. That the words "new or old" in s. 4(x) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, are not mere surplusage. The omission of these words in the Income Tax Act has significance. Under section 4(x) of the Income War Tax Act the question of whether a mine, old or new, came into production so as to qualify for tax exemption was a matter for the Minister, in his discretion, to determine. Under section 74 of the Income Tax Act no ministerial discretion is provided for. The question of whether a "mine" came into production on a date that entitles income derived by a company from such production to tax exemption must depend on the facts of the particular case and the application of section 74 to those facts. Wording contained in section 4(x) or in any other section of the Income War Tax Act has no bearing on the interpretation of section 74, other than to the extent required by section 128(1) of the Income Tax Act in respect to a reference to a transaction, matter or thing in a year to which the Income War Tax Act was applicable. 3. That the omission from section 74 of the Income Tax Act of the descriptive words "new or old" restricts the application of the section to a period of 36 months commencing with the day on which a mine, regardless of whether it is new or old, first came into production. 4. That the reference to "the day on which the mine came into production" as contained in section 74 relates to the day on which the mine first came into production and that the mica mine operated by the appellant company in 1950 first came into production of ore in reasonable commercial quantities in the year 1942, shortly after its discovery by one Purdy. NORTH BAY MICA COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE..... **300**

20.—— *Succession duty — The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(4), 6(1)(a)—Will—Power to draw from capital—General power to appoint or dispose of property—Appeal from Minister's assessment dismissed.* By his will one Bathgate left his estate to his trustees to pay to his wife during her lifetime the net income thereof and "to pay to my wife the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of the wife the residuary estate was to be divided equally between his two children. Mrs. Bathgate died in 1953. In assessing the value of the successions arising on her death the Minister included the amount then comprising the residue of Mr. Bathgate's estate on the ground that under his will his widow had at the time of her death a general power to appoint or dispose of property within the meaning of s. 3(4) of the Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended. On an appeal from the assessment this Court *Held:* That although the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased the will of her husband conferred on her a general power of appointment in respect of the residue of his estate. *Re Richards, Uglow* v. *Richards* [1902] L.R. 1 Ch. D. 76; *Re Ryder, Burton* v. *Kearsley* [1914] L.R.,

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1 Ch. D. 865; *Re Shuker's Estate, Bromley* v. *Reed* [1937] 3 A.E.R. 25; and the opinions of Rinfret C.J. and Locke J. dissenting in *Wanklyn* v. *Minister of National Revenue* [1953] 2 S.C.R. 58 at page 60 and following, referred to and followed. MONTREAL TRUST COMPANY *et al* v. THE MINISTER OF NATIONAL REVENUE..... **312**

21.—— *Income — Income tax — Corporation—"Taxation year" of corporation ending after commencement of 1953—Method of computation of tax—Taxation rates—Deductions from corporation tax—"Ultimate amount of tax"—The Income Tax Act, R.S.C. 1952, c. 148, as amended, ss. 39(1)(a)(b), 40(1)(a)(b) and (2), 46(1), 139(1)(ba) and (2)—An Act to amend The Income Tax Act, S. of C. 1952-53, c. 40, s. 58(4)—Pro-rating provision in s. 58(4) of the amending Act—Meaning of "except where otherwise provided" in s. 39(1) of the Income Tax Act—Appeal to Income Tax Appeal Board dismissed.* Sections 39(1)*(a)* and *(b)* and 40(1)*(a)* and *(b)* and (2) of the Income Tax Act, R.S.C. 1952, c. 148, as amended, and section 58(4) of An Act to Amend the Income Tax Act, S. of C. 1952-53, c. 40, read as follows: 39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided, *(a)* 18% of the amount taxable, if the amount taxable does not exceed $20,000, and *(b)* $3,600 plus 47% of the amount by which the amount taxable exceeds $20,000, if the amount taxable exceeds $20,000. 40. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to *(a)* in the case of a corporation of a class prescribed by a regulation made on the recommendation of the Minister of Finance for the purposes of this paragraph, 5%, and *(b)* in the case of any other corporation, 7%, of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance. (2) This section is applicable to the 1953 and subsequent taxation years. 58. (4) This section is applicable to the 1953 and subsequent taxation years but, where a corporation has a taxation year part of which is before and part of which is after the commencement of 1953, the tax payable by the corporation under Part I of the *Income Tax Act* for that taxation year is the aggregate of *(a)* that proportion of the tax computed under Part I of the *Income Tax Act* as it was before being amended by this Part that the number of days in that portion of the taxation year that is in 1952 is of the number of days in the whole taxation year, and *(b)* that proportion of the tax computed under Part I of the *Income Tax Act* as amended by this

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Part that the number of days in that portion of the taxation year that is in 1953 is of the number of days in the whole taxation year. Respondent company's 1953 taxation year ended on January 31, 1953. In determining the amount of tax payable by the company upon its taxable income for that year the Minister computed the tax payable for two full years by applying separately to its full income the 1952 and 1953 corporation tax rates and corporation tax deductions in ss. 39 and 40 of the Income Tax Act, before and after the 1952-53 amendments, and then applying the formula set out in the amending statute, 1-2 Eliz. II, c. 40, s. 58(4) (which section forms part only of the latter and is not carried into the Income Tax Act). An appeal from the Minister's assessment to the Income Tax Appeal Board was allowed and the Minister now appeals to this Court. *Held:* That the computation of tax by the Minister is not in accord with s. 40 of the Income Tax Act, as amended. The section contemplates a deduction "from the tax otherwise payable by a corporation under this Part for a taxation year." In the course of his computation the Minister makes a deduction of 5% of the income for the 1953 taxation year of the respondent from an amount ascertained by applying 1952 tax rates to the full taxable income for the 1953 taxation year. Because the amount so ascertained was not at any stage of the computation an amount of tax payable by the respondent that method of computation cannot be correct. The Minister likewise is in error when he deducts 7% of the taxable income from an amount ascertained by applying 1953 taxation year rates to the full taxable income of the respondent for the 1953 taxation year. 2. 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 intention of Parliament here is indicated by the fact that in chapter 40 of the 1952-53 Statutes the twelve sections, 46 to 57 inclusive, which precede section 58 and the fourteen sections, 59 to 72 inclusive, which follow section 58 all contain unqualified pronouncements respecting the years to which they apply. In twenty-seven consecutive sections, 46 to 72 inclusive, it is only in section 58 that the applicability wording is subject to qualification. Had Parliament intended that the qualification of the applicability wording of section 58(4) of the 1952-1953 amending statute should extend to sections of the Income Tax Act other than section 39 surely Parliament would not have taken such care to spell out the specific application of the twelve preceding and the fourteen following sections and would not have omitted from the section 40 amendment the provision which previously had required pro-rating of the corporation tax deduction. 3. The words of sections 39 and 40 of the Income

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Tax Act and of subsection (4) of section 58 of chapter 40 of the 1952-1953 Statutes are clear and unambiguous when read in their ordinary and natural sense. The qualification in s. 58(4) of the amending statute, 1-2 Eliz. II, c. 40, relates only to the applicability of s. 39 of the Income Tax Act, R.S.C. 1952, c. 148, as amended. MINISTER OF NATIONAL REVENUE v. ALBERT PAPER COMPANY INCORPORATED 331

RIGHT OF ACTION BY EMPLOYEE AGAINST WRONG-DOER.

See CROWN, No. 5.

RIGHT OF ACTION GIVEN TO SHIP EXTENDS JURISDICTION OF COURT IN RESPECT OF CLAIM FOR LOSS OF LIFE.

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RIGHT OF PERFORMING RIGHTS SOCIETY TO SUE FOR FEES IN EXCHEQUER COURT.

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RIGHT OF SUBROGATION OF THE CROWN DEPENDING ON EMPLOYEES ELECTION UNDER THE ACT.

See CROWN, No. 5.

RIGHT TO FIX FEES, CHARGES AND ROYALTIES FOR LICENSES TAKEN FROM PERFORMING RIGHTS SOCIETIES AND VESTED IN COPYRIGHT APPEAL BOARD.

See COPYRIGHT, No. 1.

RIGHT TO LICENSE FEES NOT CONTRACTUAL BUT STATUTORY.

See COPYRIGHT, No. 1.

RIGHT TO RECOVER UNDER ARTICLE 1053 C.C.

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SALE PRICE.

See REVENUE, No. 13.

SALES TAX.

See REVENUE, NOS. 8 AND 13.

SEIZURE BY SHERIFF.

See REVENUE, No. 5.

SHAREHOLDER BUYING MATERIAL NEEDED BY HIS COMPANY FOR ITS OPERATION AND RESELLING TO LATTER AT PROFIT.

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1. AGREEMENT IN BILL OF LADING ON FORUM. No. 1.
2. AMENDMENT OF WRIT AND STATEMENT OF CLAIM TO CORRECT MISNOMER OF PLAINTIFF ALLOWED. No. 3.
3. "ANY CLAIM FOR DAMAGE DONE BY A SHIP". No. 10.
4. "ANY CLAIM FOR DAMAGE RECEIVED BY A SHIP". No. 10.
5. BURDEN OF PROOF. No. 2.
6. CLAIM FOR BOTTOM DAMAGE. No. 2.
7. COLLISION. No. 6.
8. DISCLOSURE OF DOCUMENT HELD BY A PERSON NOT A PARTY TO ACTION UNNECESSARY AS PRELIMINARY STEP TO PRODUCTION. No. 4.
9. EXCHEQUER COURT RULE 300. No. 5.
10. EXPENSES OF ADJUSTING GENERAL AVERAGE EXPENDITURES AS BETWEEN SHIP AND CARGO NOT RECOVERABLE BY CARRYING SHIP FROM WRONG-DOING SHIP. No. 2.
11. FAILURE TO PLACE A LIGHT AS REQUIRED BY REGULATION No. 35(3). No. 6.
12. INBOARD MOTOR BOAT IS A SHIP. No. 10.
13. LIMITATION FIXED ON TONNAGE OF TUG ONLY. No. 7.
14. LIMITATION OF LIABILITY. No. 7.
15. LIMITATION ON AMOUNT RECOVERABLE AS COSTS WHEN SECURITY GIVEN IN LIEU OF BAIL BOND. No. 5.
16. MOTION TO DISMISS PLAINTIFF'S ACTION. No. 10.
17. NATIONAL HARBOUR BOARD REGULATION No. 35(3). No. 6.
18. NO CONTRIBUTORY NEGLIGENCE. No. 6.
19. NO COSTS TO EITHER PARTY. No. 3.
20. NO JURISDICTION TO EXTEND TIME FOR SERVICE OF WRIT. No. 8.
21. O. 12, R. 21A OF SUPREME COURT RULES (ENGLAND). No. 5.
22. PARTICULARS. No. 9.
23. PRACTICE. Nos. 1, 3, 4, 5, 8 and 9.
24. RIGHT OF ACTION GIVEN TO SHIP EXTENDS JURISDICTION OF COURT IN RESPECT OF CLAIM FOR LOSS OF LIFE. No. 10.
25. STAY OF ACTION BROUGHT IN CANADA. No. 1.
26. THE ADMIRALTY ACT, R.S.C. 1952, c. 1, s. 2(1), SCHEDULE A, SECTION 22. No. 10.
27. THE CANADA SHIPPING ACT, R.S.C. 1952, c. 29, s. 657. No. 7.
28. THE CANADA SHIPPING ACT, R.S.C. 1952, c. 29, s. 726. No. 10.
29. TUG AND TOW NOT OWNED BY SAME PERSONS. No. 7.

SHIPPING — *Practice — Stay of action brought in Canada—Agreement in bill of lading on forum. Held:* That where the parties to a bill of lading have agreed to litigate any dispute arising thereunder by Italian law at Genoa, Italy, an action brought by this Court will be stayed in order that the parties may carry out the agreement. BIRKS CRAWFORD LIMITED v. THE SHIP *Stromboli*..... **1**

2.——*Claim for bottom damage—Burden of proof—Expenses of adjusting general average expenditures as between ship and cargo not recoverable by carrying ship from wrong-doing ship.* The plaintiffs brought action against the defendants for damages alleged to have resulted from a collision between their M.V. *Buckeye State* and the defendants' S.S. *Rapids Prince*. The defendants paid all the damages except the claims for bottom and detention damage sustained by the *Buckeye State* and the expenses incurred in adjusting general average expenditures between ship and cargo. Liability for these damages was denied. The action was dismissed by Smith D.J.A. of the Quebec Admiralty District. The plaintiffs appealed. *Held:* That the burden of proof that the *Rapids Prince* was responsible for the bottom damage sustained by the *Buckeye State* rests on the *plaintiffs*. The plaintiffs need not establish their case beyond all reasonable doubt. All that is needed is a preponderance of evidence that the damage complained of was caused as alleged so that the Court may be reasonably satisfied, having regard to all the circumstances, that it was so caused. 2. That where damage may have been due to one of several causes it is not to be assumed, in the absence of cogent reasons, that it was the result of any one particular cause. 3. That the expenses of adjusting the general average expenditures to determine the proportions to be paid by ship and cargo respectively were not collision damage. 4. That while cargo has an independent and direct right to recover from the wrong-doing ship its portion of the general average expenditures that were collision damages there is no justification for allowing the owners of the carrying ship the further expenditures involved in adjustments between the ship and cargo. *Owners of Cargo* ex. *"Greystoke Castle"* v. *Morrison Steamships Company Ltd.* (1947) 80 L. L. 55 discussed. ILLINOIS ATLANTIC CORPORATION AND FEDERAL MOTORSHIP CORPORATION v. THE S.S. *Rapids Prince* AND HER OWNERS..... **104**

3.—— *Practice — Amendment of writ and statement of claim to correct misnomer of plaintiff allowed—No costs to either party.* In a writ and statement of claim plaintiff was described as Pacific Coast Lime Company Limited whereas its correct name is Pacific Lime Company Limited there being no Pacific Coast Lime Company Limited. Plaintiff now moves to amend both documents by striking out the word "Coast". *Held:* That the amendment should be allowed the running of the Statute of Limitations not being a circumstance that should prevent the correction of a misnomer of parties. PACIFIC LIME COMPANY LIMITED v. VANCOUVER TUG BOAT COMPANY LIMITED..... **142**

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4.—— *Practice — Disclosure of document held by a person not a party to action unnecessary as preliminary step to production. Held:* That disclosure in plaintiff's affidavit of documents is not necessary as a preliminary step to a subsequent application for its production when that document is in the possession of another person. WILLIAM ROBERTSON v. THE OWNERS OF THE SHIP *Maple Prince* AND OLAF NELSON **164**

5.——*Practice—O. 12, R. 21A of Supreme Court Rules (England)—Exchequer Court Rule 300—Limitation on amount recoverable as costs when security given in lieu of bail bond. Held:* That the successful party in a collision action is entitled only to one per cent of the amount of security given in lieu of bail bond as costs, and not any greater amount as damages. 2. That Rule 300 of the Exchequer Court Rules does not give jurisdiction to increase the amount recoverable established by O. 12 R. 21A of the Supreme Court Rules (England). Owner of *Chinook* v. *Dagmar Salem*..... **210**

6.—— *Collision — National Harbour Board Regulation No. 35(3)—Failure to place a light as required by Regulation 35(3)—No contributory negligence.* In an action arising out of a collision in Vancouver Harbour between the *Sarawak II* and defendant the Court found that defendant's negligence was the sole cause of the collision. *Held:* That the failure of defendant to keep a proper look-out was negligence on its part. 2. That there was no contributory negligence on the part of the plaintiff since defendant had failed to comply with National Harbour Board Regulation No. 35(3) governing the placing of navigation lights. WILLIAM ROBERTSON v. THE OWNERS OF THE SHIP *Maple Prince* AND OLAF NELSON..... **221**

7.——*The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Limitation of liability—Tug and tow not owned by the same persons—Limitation fixed on tonnage of tug only.* In an action resulting from the collision of a barge towed by a tug with a fishing vessel owned by the plaintiff it was held that the plaintiff was entitled to judgment for damages against the owners of the tug because of its improper navigation. The tow was not owned by the owners of the tug. *Held:* That the tug is entitled to limitation of liability under the Canada Shipping Act, R.S.C. 1952, c. 29, s. 657. 2. That s. 657(1) of the Canada Shipping Act is not restricted to actual collision by the

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ships of the ship-owner but applies in terms to all damage caused by another vessel by the improper navigation of the owner's ship. 3. That the tug-owners are entitled to restrict their liability to the amount allowed by the Canada Shipping Act for each ton of the tug's tonnage and not for the combined tonnage of the tug and tow. 4. That the liability of a defendant is measured by considering only the ships which are owned and navigated by him, his liability being limited by the size of his individual ships. WILLIAM ROBERTSON v. THE OWNERS OF THE SHIP *Maple Prince* AND OLAF NELSON..... **225**

8.—— *Practice — No jurisdiction to extend time for service of writ. Held:* That the Court has no jurisdiction to order an extension of time to effect service of a writ beyond time provided by the rules. DONALD H. BAIN LIMITED v. THE SHIP *Martin Bakke*..... **241**

9.——*Practice—Particulars. Held:* That the Court will order a plaintiff to furnish particulars requested by the defendant although the case is one within the doctrine of *res ipsa loquitur* and before the delivery of a statement of defence. HER MAJESTY THE QUEEN v. THE SHIP *M/V Island Challenger*, THE BARGE *Lord Templetown* AND THE SHIP *M/V Swan*..... **262**

10.——*Motion to dismiss plaintiff's action— The Admiralty Act, R.S.C. 1952, c. 1, s. 2(1), Schedule A, section 22—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 726—"Any claim for damage done by a ship"—"Any claim for damage received by a ship"—Inboard motor boat is a ship—Right of action given to ship extends jurisdiction of Court in respect of claim for loss of life. Held:* That a boom of logs is not a ship. 2. That an inboard motor boat is a ship within the meaning of the Admiralty Act, R.S.C. 1952, c. 1, s. 2(1). 3. That the Court has jurisdiction to entertain a claim for the death of a passenger in an inboard motor boat caused by the boat being in collision with a boom of logs. MARY MCLEOD v. THE ONTARIO-MINNESOTA PULP AND PAPER COMPANY LIMITED AND GORDON K. GAGE..... **344**

SIMILAR TRADE NAME.

See TRADE MARK, No. 1.

"SPECIAL BRAND" AUTOMOBILE TIRES.

See REVENUE, No. 16.

"SPECIAL BRAND" AUTOMOBILE TIRES MANUFACTURED FOR AND SOLD BY RETAIL AGENCIES.

See REVENUE, No. 8.

SPECIAL CIRCUMSTANCES.

See PRACTICE, No. 2.

STATUTORY CONDITIONS OF CROWN'S LIABILITY TO BE PROVEN.

See CROWN, No. 1.

STAY OF ACTION BROUGHT IN CANADA.

See SHIPPING, No. 1.

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SUBROGATION OF EMPLOYEE'S RIGHTS TO HER MAJESTY.

See CROWN, No. 5.

SUCCESSION DUTY.

See REVENUE, NOS. 17 AND 20.

TARIFF BOARD.

See REVENUE, No. 8.

"TAXABLE INCOME".

See REVENUE, No. 14.

TAXATION RATES.

See REVENUE, No. 21.

"TAXATION YEAR" OF CORPORATION ENDING AFTER COMMENCEMENT OF 1953.

See REVENUE, No. 21.

THE ADMIRALTY ACT, R.S.C. 1952, C. 1, S. 2(1), SCHEDULE A, SECTION 22.

See SHIPPING, No. 10.

THE CANADA SHIPPING ACT, 1934, S. OF C. 1934, C. 44, 165, 226.

See REVENUE, No. 2.

THE CANADA SHIPPING ACT, R.S.C. 1952, C. 29, s. 657.

See SHIPPING, No. 7.

THE CANADA SHIPPING ACT, R.S.C. 1952, C. 29, S. 726.

See SHIPPING, No. 10.

THE COPYRIGHT ACT, R.S.C. 1927, C. 32, S. 20 (C).

See COPYRIGHT, No. 1.

THE COPYRIGHT AMENDMENT ACT, 1931, S. OF C. 1931, C. 8, SS. 10, 10A, 10B(7), 10B(8), 10B(9).

See COPYRIGHT, No. 1.

THE CROWN LIABILITY ACT, S. OF C. 1952-53, C. 30, SS. 3(1)(A), 3(2), 4(2) AND (3).

See CROWN, No. 3.

THE CROWN LIABILITY ACT, S. OF C. 1952-53, C. 30, SS. 3(1)(A), 4(2).

See CROWN, No. 4.

THE DOMINION SUCCESSION DUTY ACT, R. S. C. 1952, C. 89, AS AMENDED, SS. 3(4), 6(1)(A).
See REVENUE, No. 20.

THE DOMINION SUCCESSION DUTY ACT, S. OF C. 1940-41, C. 14, AS AMENDED, S. 2(E).
See REVENUE, No. 17.

THE EXCESS PROFITS TAX ACT, 1940, S. OF C. 1940, C. 32, AS AMENDED, S. 5.
See REVENUE, No. 1.

THE EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 19(C).
See CROWN, No. 1.

THE EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 22(C).
See COPYRIGHT, No. 1.

THE EXCHEQUER COURT ACT R.S.C. 1952, C. 98, S. 18(C).
See CROWN, No. 4.

THE EXCHEQUER COURT ACT, R.S.C. 1952, C. 98, S. 18(1) (C).
See CROWN, No. 3.

THE EXCHEQUER COURT ACT, R.S.C. 1952, C. 98, S. 82(3).
See PRACTICE, No. 2.

THE EXCISE TAX ACT, R.S.C. 1927, C. 179, AS AMENDED, SS. 85(B) (I) (II) (III), 86(1)(A), 99(1)(2)(3).
See REVENUE No. 13.

THE EXCISE TAX ACT, R.S.C. 1952, C. 100, SS. 2(A) (II), 23(1)(A), 30(1)(A)(I), 57, 58.
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THE EXCISE TAX ACT, 1952, C. 100, AS AMENDED, SS. 2(A) (II), 57 AND 58.
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THE GOVERNMENT EMPLOYEES' COMPENSATION ACT, S. OF C. 1947, C. 18, S. 9 (NOW R.S.C. 1952, C. 134, S. 8).
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THE INCOME TAX ACT, R.S.C. 1952, C. 148, S. 119.
See REVENUE. No. 5.

THE INCOME TAX ACT, R.S.C. 1952, C. 148, AS AMENDED, SS. 39(1)(A)(B), 40(1)(A)(B) AND (2), 46(1), 139(1)(BA) AND (2).
See REVENUE, No. 21.

THE INCOME TAX ACT, 1948, S. OF C. 1948, C. 52, AS AMENDED, SS. 3, 4, 11(1)(D) AND (E), 14(1), 42(3) AND (4).
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THE INCOME TAX ACT, 1948, S. OF C. 1948, C. 52, AS AMENDED, SS. 3, 4, 127(1)(E).
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THE INCOME TAX ACT, 1948, S. OF C. 1948, C. 52 AS AMENDED, S. 3, S. 11 (1)(C) AND S. 12(1)(C).
See REVENUE, No. 12.

THE INCOME TAX ACT, 1948, S. OF C. 1948, C. 52, AS AMENDED, SS. 5(A), 5(B), 11(7) AND 127(1)(A).
See REVENUE, No. 2.

THE INCOME TAX, S. OF C., 1948, C. 52, SS. 2(3), 3, 4, 20(1), 20(3)(A).
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THE INCOME TAX, 1948, S. OF C. 1948, C. 52, SS. 3, 4, 12(1)(B), 16.
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See REVENUE, NOS. 11 AND 14.

THE INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 11(1)(A), 12(1)(A)(B).
See REVENUE, No. 18.

THE INCOME TAX ACT, 1948, S. OF C. 1948, C. 52, S. 11(1)(B).
See REVENUE, No. 6.

THE INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 42(1), 42(2), 50(6).
See REVENUE, No. 3.

THE INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 74(1) (B) AND (A), 128(1).
See REVENUE, No. 19.

THE INCOME WAR TAX ACT, R.S.C. 1927, C. 97, AS AMENDED, S. 3(1).
See REVENUE, No. 14.

THE INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 8(6).
See REVENUE, No. 7.

THE OLD AGE SECURITY ACT, S. OF C. 1951 (2ND SESS.), C. 18, S. 10.
See REVENUE, No. 13.

THE UNFAIR COMPETITION ACT, 1932, S. OF C. 1932, C. 38, SS. 2(G), 2(H), 2(K), 2(N), 7, 8, 10, 52(1).
See TRADE MARK, No. 1.

TRADE MARK.

1. EFFECT OF LICENSING TRADE NAME. No. 1.
2. EXPUNGEMENT OF TRADE MARK. No. 1.
3. INFRINGEMENT OF TRADE NAME. No. 1.
4. JURISDICTION OF COURT TO EXPUNGE TRADE MARK. No. 1.
5. KNOWLEDGE OF PLAINTIFF'S NAME IN CANADA. No. 1.
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14. USE OF TRADE MARK PRIOR TO APPLICATION FOR REGISTRATION NECESSARY. No. 1.

TRADEMARK — *Trade Name — Infringement of trade name—Expungement of trade mark—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(g), 2(h), 2(k), 2(n), 7, 8, 10, 52(1)—Similar trade name—Knowledge of plaintiff's name in Canada—Meaning of "knowingly adopts" in s. 7—Knowledge or ignorance of corporation that of its directors—Presumption of knowing adoption when trade name similar—Effect of licensing trade name—Likelihood of confusion through similar trade names not to be permitted—Use of trade mark prior to application for registration necessary—Jurisdiction of Court to expunge trade mark—Meaning of "person interested" in s. 52(1).* The plaintiff, a Delaware corporation with its head office at Los Angeles, was incorporated in 1936. It was the successor of two prior United States corporations, each carrying the word Richfield in its corporate name, and acquired all their assets including trade marks. It carried on business as an integrated oil company including the operation of service stations. The defendant was incorporated under the laws of Canada on June 1, 1951, with its head office nominally at Vancouver. It was intended that it should operate service stations to be known as Richfield stations in the same way as service stations were operated by other oil companies but it was not organized for business and did not do any business. Prior to the date of the

TRADE MARK—*Concluded*

defendant's incorporation the plaintiff had made its name known in Canada by advertisements of its petroleum products in publications circulated in the ordinary course among potential dealers and users of similar wares in Canada. The plaintiff sued for infringement of trade name, infringement of trade mark and passing-off and prayed for injunctions. The defendant counterclaimed for expungement of the plaintiff's trade mark on the ground that it was invalid by reason of the fact that there had not been any use of it prior to the application for its registration and also because the defendant had licensed its use on products other than its own. *Held:* That there was no evidence to support the plaintiff's allegations of infringement of trade mark and passing-off. 2. That the defendant's name is similar to the plaintiff's trade name. 3. That at the date of the defendant's incorporation the plaintiff's name was known in Canada by the advertisement of its wares in Canada in association with its trade name in printed publications circulated in the ordinary course among potential dealers in and users of similar wares in Canada. 4. That since a corporation cannot have any knowledge or be credited with ignorance of a fact otherwise than through its members it must have been intended by Parliament that when the Act speaks of the knowledge or ignorance of a person, including therein a corporation, it means in the case of a corporation the knowledge or ignorance of its directors which is attributed to it. 5. That the defendant has failed to discharge the onus cast on it by section 10 of the Act of rebutting the presumption that it knowingly adopted a trade name similar to the plaintiff's. 6. That although the plaintiff's conduct in allowing its trade names to be used on gasolines that were not its own but were purchased from someone else and charging a fee for such use is open to adverse comment it should not be allowed to defeat the plaintiff's claim. 7. That if the defendant used the name Richfield many persons in Canada to whom the plaintiff's name was known would be led to believe that the defendant was a Canadian subsidiary of the plaintiff and in the interest of both the plaintiff and the public the likelihood of such confusion should not be permitted. 8. That the plaintiff's trade mark was not in use prior to the application for its registration. 9. That this Court has jurisdiction to order the expungement of a trade mark only on the application of the Registrar or of any person interested and the defendant was not a "person interested" within the meaning of section *2(h)* of the Act. RICHFIELD OIL CORPORATION v. RICHFIELD OIL CORPORATION OF CANADA LIMITED.. **17**

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USE OF TRADE MARK PRIOR TO APPLICATION FOR REGISTRATION NECESSARY.
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WHETHER CAPITAL GAIN.
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"Receivables." *See* KEN STEEVES SALES LIMITED v. THE MINISTER OF NATIONAL REVENUE..... **108**

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