1949

CANADA LAW REPORTS

Exchequer Court of Canada

RALPH M. SPANKIE, K.C.
GABRIEL BELLEAU, K.C.
Official Law Reporters

Published under authority by Howard R. L. Henry, K.C.
Registrar of the Court

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1950

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGES:

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

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

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

THE HONOURABLE MAYNARD B. ARCHIBALD
(Appointed, July 1, 1948)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

The Honourable Sir ALBERT JOSEPH WALSH, Newfoundland Admiralty District—appointed September 13, 1949.

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

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

DEPUTY DISTRICT JUDGES:

The Honourable Sir JOSEPH A. CHISHOLM—Nova Scotia Admiralty District.
His Honour JOHN A. BARRY—New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable STUART S. GARSON, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Honourable JOSEPH JEAN, K.C.
The Honourable HUGUES LAPOINTE, K.C.

The Honourable Charles Gerald O'Connor,
Puisne Judge of the Exchequer Court of Canada,
died during the current year.

CORRIGENDUM:

At Page 339 in the headnote C. 114 should read C. 14.

TABLE OF CONTENTS

Memoranda *re* Appeals.. IX

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

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

Report of the cases adjudged.................................. I

Index... 409

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE EXCHEQUER COURT OF CANADA

To the Supreme Court of Canada:

1. *Adams, Henry W. et al* v. *The Ship Fanad Head* (1948) Ex. C. R. 360. Appeal allowed in part.
2. *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* (1948) Ex. C.R. 622. Appeal dismissed.
3. *Bagg, Carden S.* v. *Minister of National Revenue* (1948) Ex. C.R. 244. Appeal dismissed.
4. *Blackwell, Fred James* v. *Minister of National Revenue* (1949) Ex. C.R. 391. Appeal pending.
5. *Bureau, Gerard,* v. *The King* (1948) Ex. C.R. 257. Appeal allowed.
6. *Carroll, Juliette* v. *The King* (1949) Ex. C.R. 169. Appeal dismissed.
7. *Chisholm, Constance* v. *The King* (1948) Ex. C.R. 370. Appeal dismissed.
8. *Fitzgerald, Wendell Thomas* v. *Minister of National Revenue* (1947) Ex. C.R. 589. Appeal dismissed.
9. *General Motors Corporation* v. *Norman William Bellows* (1947) Ex. C.R. 568. Appeal dismissed.
10. *Irving Air Chute Co. Inc.* v. *The King* (1948) Ex. C.R. 278. Appeal allowed.
11. *Joggins Coal Co. Ltd.* v. *Minister of National Revenue* (1949) Ex. C.R. 361. Appeal pending.
12. *King, The* v. *Woods Manufacturing Co. Ltd.* (1949) Ex. C.R. 9. Appeal pending.
13. *McCool Ltd., T. E.* v. *Minister of National Revenue* (1948) Ex. C.R. 548. Appeal allowed. Cross appeal dismissed.
14. *McDonough, William John* v. *Minister of National Revenue* (1949) Ex. C.R. 300. Appeal pending.
15. *Might, Orrin H. E.* v. *Minister of National Revenue* (1948) Ex. C.R. 382. Appeal dismissed.
16. *Miller, Frank et al* v. *The King* (1948) Ex. C.R. 372. Appeal allowed in part.
17. *Minerals Separation North American Corpn.* v. *Noranda Mines Ltd.* (1947) Ex. C.R. 306. Appeal allowed.
18. *Morin, Cecile* v. *The King* (1949) Ex. C.R. 235. Appeal pending.
19. *Royal Trust Co. et al* v. *Minister of National Revenue* (1948) Ex. C.R. 34. Appeal dismissed.
20. *Walsh, Walter William* v. *The King* (1947) Ex. C.R. 589. Appeal dismissed.
21. *Wilder, James E.* v. *Minister of National Revenue* (1949) Ex. C.R. 347. Appeal pending.

51927—4

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

B

PAGE

Bernard Beverages Ltd., Coca-Cola Co. of Canada Ltd. v...... 119
Beyer's, W. O. Application, *In Re*. . 115
Blackwell, Fred James v. Minister of National Revenue.. 391
Bower, Frank C. v. Minister of National Revenue.. 61

C

Canadian Pacific Ry. Co. *et al*, Kalamazoo Paper Co. *et al* v 287
Carroll, Juliette *et al* v. The King .. . 169
Coca-Cola of Canada Ltd. v. Bernard Beverages Ltd 119
Consolidated Motors Ltd., The King v. 254
Cooper, Joseph A. v. Minister of National Revenue... 275
Cossitt, Edwin Comstock v. Minister of National Revenue ... 339
Cowper, Peter Boyd *et al*, The King v 214

D

De Jaczynski, Rene *et al* v. Lemieux, Louis Joseph 108

H

Hunt, Harry E., The King v. 1

I

International Vehicular Parking Ltd. v. Mi-Co Meter (Canada) Ltd. *et al* 153

J

Joggins Coal Co. Ltd. v. Minister of National Revenue .. 361
Joy Oil Co. Ltd. *et al* v. The King . . 136

K

Kalamazoo Paper Co. *et al* v. Canadian Pacific Ry. Co. *et al* 287
King, The, Carroll, Juliette *et al* v .. 169
King, The v. Consolidated Motors Ltd 254
King, The v. Cowper, Peter Boyd *et al* 214
King, The v. Hunt, Harry E 1
King, The, Joy Oil Co. Ltd. *et al* v .. 136
King, The, Morin, Cecile v . . 235

D

PAGE

King, The, Porter Bros. Ltd. v.. 103
King, The v. Shore, Reuben......... 225
King, The, v. Woods Mfg. Co. Ltd.... 9

L

Lemieux, Louis Joseph, De Jaczynski, Rene *et al* v.. 108
Luscar Coals Ltd. v. Minister of National Revenue................. 83

Mc

McDonough, William John v. Minister of National Revenue. 300
McDougall, Dorothy J. v. Minister of National Revenue... 314

M

Mi-Co Meter (Canada) Ltd. *et al*, International Vehicular Parking Ltd. v.. 153
Minister of National Revenue, Blackwell, Fred James v. 391
Minister of National Revenue, Bower, Frank C. v 61
Minister of National Revenue, Cooper, Joseph A. v 275
Minister of National Revenue, Cossitt, Edwin Comstock v 339
Minister of National Revenue, Joggins Coal Co. Ltd. v 361
Minister of National Revenue, Luscar Coals Ltd. v 83
Minister of National Revenue, McDonough, William John v 300
Minister of National Revenue, Mcdougall, Dorothy J. v. 314
Minister of National Revenue, Moose Jaw Flying Club Ltd. v 370
Minister of National Revenue, Morch, Jacob John v 327
Minister of National Revenue, Pan-American Trust Co. v 265
Minister of National Revenue, Russell, Elphinstone Mather v 91
Minister of National Revenue, Wilder, James E. v . . 347
Moose Jaw Flying Club Ltd. v. Minister of National Revenue 370
Morch, Jacob John v. Minister of National Revenue 327
Morin, Cecile v. The King 235

51927—4½

P

PAGE

Pacific Express, Owners of the M.S. v. *Salvage Princess*, The Tug.......... 230
Pan-American Trust Co. v. Minister of National Revenue................. 265
Porter Bros. Ltd. v. The King........ 103

R

Registrar of Trade Marks *et al*, Union Oil Co. of California v............. 397
Reliable Toy Co. Ltd. *et al*, Renwal Mfg. Co. Inc. v................... 188
Renwal Mfg. Co. Inc. v. Reliable Toy Co. Ltd. *et al*..................... 188
Russell, Elphinstone Mather v. Minister of National Revenue........... 91

S

PAGE

Salvage Princess, The Tug, *Pacific Express*, Owners of the M.S. v...... 230
Shore, Reuben, the King v........... 225

U

Union Oil Co. of California v. Registrar of Trade Marks *et al*.............. 397

W

Wilder, James E. v. Minister of National Revenue................. 347
Woods Mfg. Co. Ltd., The King v.... 9

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

NAME OF CASE	WHERE REPORTED	PAGE
Absolom v. Talbot	(1944) 1 A.E.R. 642	90
Algoma Central Railway Co. v. The King	(1901) 7 Ex. C.R. 239, 267; (1902) 32 S.C.R. 277	187
Anderson v. Anderson	(1895) 1 Q.B. 749	222
Arbuckle *et al* v. Cowtan	(1803) 3 B. & P. 321	224
Archer-Shee v. Baker	(1927) 11 T.C. 749; (1927) A.C. 844	272
Aristoc Ld. v. Rysta Ld	(1945) A.C. 68	131, 401, 407
Atlantic Sugar Refineries Ltd. v. Minister of National Revenue	(1948) Ex. C.R. 622 at 631	312
Attorney General v. Till	(1910) A.C. 50	330
Attorney General of the Province of Quebec v. Kenneth Gordon Fraser *et al*	(1906) 37 S.C.R. 577	187

B

NAME OF CASE	WHERE REPORTED	PAGE
Bale & Church Ltd. v. Sutton, Parsons & Sutton	(1934) 51 R.P.C. 129	125
Banque Jacques-Cartier, La v. La Reine	(1895) 25 S.C.R. 84	187
Battle Pharmaceutical v. Lever Bros. Ltd	(1946) Ex. C.R. 277	404
Baymond Corp. Ltd. v. Minister of National Revenue	(1945) Ex. C.R. 11	388
Belanger v. Caron *et al* and Morin *et al*., t.s. and Caron Contestant	(1940) R.J.Q. 78 S.C. 429	225
Beynon Co. Ltd. T. v. Ogg	(1918) 7 T.C. 125	312
Binney v. Commissioner of Inland Revenue	(1920) 1 A.T.C. 155	394
Black *et al* v. The Queen	(1899) 29 S.C.R. 693	187
Bond v. Minister of National Revenue	(1946) Ex. C.R. 577	282
Boone v. The King	(1933) Ex. C.R. 33	187
Bouchard v. Gagne et La Corporation du village de Minstassini	(1933) 36 Q.P.R. 353	225
Bower v. Minister of National Revenue	(1949) Ex. C.R. 61	396
Bowman v. Secular Society Ltd	(1917) A.C. 406	390
British American Fish Corporation Ltd. v. The King	(1918) 18 Ex. C.R. 230; (1919) 59 S.C.R. 651	187
British Drug Houses Ltd. v. Battle Pharmaceuticals	(1944) Ex. C.R. 239; (1946) S.C.R. 50	130, 136, 401

C

NAME OF CASE	WHERE REPORTED	PAGE
Californian Copper Syndicate v. Harris	(1904) 5 T.C. 165	311
Canadian National Ry. Co. v. St. John Motor Line Ltd	(1930) S.C.R.	482, 488, 346
Canadian Wm. A. Rogers Ltd. v. International Silver Co. of Canada Ltd	(1932) Ex. C.R. 63	196
Carlisle & Silloth Golf Club v. Smith	(1913) 3 K.B. 75	390
Carr v. Inland Revenue Commissioners	(1944) 2 All. E.R. 163	67, 396
Cedar Rapids Water Co. v. Cedar Rapids	(1902) 118 Iowa 234 at 263	29
Cedars Rapids Mfg. & Power Co. v. Lacoste	(1914) A.C. 569	44
Chalifoux Ltee. S. v. Cote	(1944) B.R. 83	225
Charlton v. Attorney General	(1879) 4 A.C. 427	343
Chipman v. The King	(1934) Ex. C.R. 152	224
Christiansen's Trade Mark, *re*	(1886) 3 R.P.C. 54	131
City of Seattle, The	(1903) 9 Ex. C.R. 146, 149	231

C—Concluded

Name of Case	Where Reported	Page
Clatworthy v. Dale	(1928) Ex. C.R. 159, 164	196, 204
Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.	(1942) 2 D.L.R. 657 at 661	401
Collins v. The Firth-Brearley Stainless Steel Syndicate	(1925) 9 T.C. 564	303
Commissioner of Income Tax, Bengal v. Mercantile Bank of India Ltd. *et al.*	(1936) A.C. 478	386
Commissioners of Inland Revenue v. Blott	(1921) A.C. 171	385
Commissioners of Inland Revenue v. Fisher's Executors	(1926) A.C. 395	385
Commissioners of Inland Revenue v. Livingston	(1926) 11 T.C. 538	312
Commissioners of Inland Revenue v. Maxse	(1919) 1 K.B. 647	64, 396
Cooper v. Stubbs	(1925) 10 T.C. 29	311
Court of Appeal, The	(1886) 17 Q.B.D. 447	260
Cowper Essex v. Local Board for Action	(1889) 14 A.C. 154	260
Cox v. Rabbits	(1878) 3 A.C. 473, 478	388
Credit Protectors (Alberta) Ltd. v. Minister of National Revenue	(1947) Ex. C.R. 44	388
Currie v. Commissioners of Inland Revenue	(1921) 2 K.B. 332	65, 396

D

Name of Case	Where Reported	Page
DeGalindez *et al* v. The King	(1906) R.J.Q. 15 B.R. 320; (1907) 39 S.C.R. 682	187
Deslandes v. Saint-Jacques	(1908) 9 R.P. 215; 14 R. de J. 257	114
Deutche Nahmaschinen Fabrik vorm Wertheim v. Pfaff	(1890) 7 R.P.C. 251	161
Dupleix, The	(1912) P. 8	234
Dupuis Freres Ltee. v. Minister of Customs & Excise	(1927) Ex. C.R. 207	384

E

Name of Case	Where Reported	Page
Eno v. Dunn	(1890) A.C. 252, 257	407
Equator Manufacturing Co., *ex parte*, Pendlebury	(1926) 1 D.L.R. 1101	194

F

Name of Case	Where Reported	Page
Foreman & Ellams Ltd. v. Federal Steam Navigation Co. Ltd	(1928) 2 K.B. 424 at 443	299
Fraser & Co. D. R. v. Minister of National Revenue	(1947) S.C.R. 157, 169; (1948) 4 D.L.R. 776, 781	338, 366

G

Name of Case	Where Reported	Page
Gagne v. Minister of Finance	(1925) Ex. C.R. 19	381
Garland v. Archer-Shee	(1930) 15 T.C. 693; (1931) A.C. 212	272
Gauthier v. The King	(1918) 56 S.C.R. 176	244
Germanic, The	(1904) 196 U.S. 589	299
Gogstad v. *SS. Camosun*	(1940) 56 B.C.R. 156	234
Gosse, Millerd Ltd. v. Canadian Government Merchant Marine	(1929) A.C. 223; (1928) 1 K.B. 717	296, 297
Graygarth, The	(1922) P. 80	234
Grey v. Pearson	(1857) 6 H.L. Cas. 61 at 106	331

H

Name of Case	Where Reported	Page
Hamilton v. Commissioners of Inland Revenue	(1931) 16 T.C. 213 at 228	337
Harlow, The	(1922) P. 175	234
Henry v. Great Northern Ry. Co	(1858) 27 L.J. Ch. 1	383
Hill v. Permanent Trustee Co. of New South Wales	(1930) A.C. 720	385
Holditch v. Canadian Northern Ontario Railway	(1916) A.C. 536	261
Holt v. Gas Light and Coke Co	(1872) 7 Q.B. 728	259
Horn v. Sunderland Corpn	(1941) 2 K.B. 26	57

I

Name of Case	Where Reported	Page
Income Tax Case No. 118	4 S.A.T.C. 71	313
Inland Revenue Commissioners v. Australian Mutual Provident Society	(1947) A.C. 605	89
Inland Revenue Commissioners v. Burrell	(1924) 2 K.B. 52	382
Inland Revenue Commissioners v. William Ranson & Son, Ltd	(1918) 2 K.B. 709	82

J

Name of Case	Where Reported	Page
Jacques Cartier Bank v. The Queen	(1895) 25 S.C.R. 84	390
Joannis Vatis, The (No. 2)	(1922) P. 213	234
Jokela v. The King	(1937) Ex. C.R. 132	245
Jones v. Leeming	(1930) A.C. 415; (1930) 1 K.B. 283	302

K

Name of Case	Where Reported	Page
Kennedy v. Minister of National Revenue	(1929) Ex. C.R. 36, 38	358, 390
King, The v. Acadia Sugar Refining Co.	(1947) Ex. C.R. 547	21
King, The v. Anthony. The King v. Thompson	(1946) S.C.R. 569	245
King, The v. Armstrong	(1908) 40 S.C.R. 229, 248	244, 346
King, The v. Desrosiers	(1908) 41 S.C.R. 71, 78	244
King, The v. Dubois	(1935) S.C.R. 278, 394, 398	249
King, The v. Edwards	(1946) Ex. C.R. 311	12, 39, 60
King, The v. Elgin Realty Co. Ltd	(1943) Ex. C.R. 49	12
King, The v. Irving Oil Co. Ltd.	(1946) S.C.R. 551	52
King, The v. Lawson & Sons Ltd., Thomas	(1948) Ex. C.R. 44	11, 39
King, The v. McCarthy	(1919) 18 Ex. C.R. 410	390
King, The v. Manuel	(1915) 15 Ex. C.R. 381	12, 39, 60
King, The v. Morris Realty Ltd., W. D.	(1943) Ex. C.R. 140	11, 54
King, The v. Northumberland Ferries	(1945) S.C.R. 458; (1944) Ex. C.R. 123	49
King, The v. Peat Fuels Ltd	(1930) Ex. C.R. 188	187
King, The v. Snell	(1947) S.C.R. 219, 222	346
King, The v. Vancouver Lumber Co.	(1914) 17 Ex. C.R. 329; (1920) D.L.R. 6	187, 390
King, The v. Woods Manufacturing Co. Ltd.	(1949) Ex. C.R. 9	259, 264
Knoxville, City of v. Knoxville Water Co.	(1909) 212 U.S. 1	29

L

Name of Case	Where Reported	Page
L'Abbe Warre v. Bertrand et Labelle	(1926) R.J.Q. 40 Br. 509	114, 115
Lapointe v. The King	(1913) 14 Ex. C.R. 219	244
Lazarus v. Charles	(1873) 42 L.J. Ch. 507	194
Leeming v. Jones	(1930) 1 K.B. 279 at 283	313
Lefaivre *es-qual.* v. Attorney General of the Province of Quebec	(1905) R.J.Q. 14 B.R. 115	187
Lefebvre v. The King	(1923) Ex. C.R. 115	187
Leonard's Perfect Skill Control Co. Ltd. v. John Henry Holloway *et al.*	(1929) 46 R.P.C. 353	161
Lieutenant-Governors, Salary of *In re*	(1931) Ex. C.R. 232	283
Longbottom v. Shaw	(1891) 8 R.P.C. 333	160
Lucas & Chesterfield Gas & Water Board, *In re*	(1909) 1 K.B. 16 at 29	41
Lumbers v. Minister of National Revenue	(1943) Ex. C.R. 202; (1944) S.C.R. 167	351, 353, 356, 388, 395
Lysaght v. Commissioners of Inland Revenue	(1928) 13 T.C. 511	101

Mc

Name of Case	Where Reported	Page
McArthur v. The King	(1943) Ex. C.R. 77	102
McDowell's Application	(1927) 44 R.P.C. 335, 341	407
McHugh v. The Queen	(1900) 6 Ex. C.R. 374	247

M

Name of Case	Where Reported	Page
Macleans, Ltd. v. Lightbown and Sons, Ltd.	(1937) 54 R.P.C. 230	205
Magnhild, Owners of S S. v. McIntyre Brothers & Co	(1920) 3 K.B. 321	222
Mahaffy v. Minister of National Revenue	(1946) Ex. C.R. 18; (1946) S.C.R. 450	283, 351

M—*Concluded*

Name of Case	Where Reported	Page
Marsh v. Commissioners of Inland Revenue	(1943) 1 All E.R. 199	394
Mayes v. The Queen	(1891) 2 Ex. C.R. 403	390
Miller's Agreement, *Re*, Uniacke v. Attorney General	(1947) A.E.R. vol. 2, 78	320, 342
Minister of National Revenue v. Dominion Natural Gas Co. Ltd	(1941) S.C.R. 19	88
Minnesota Rate Cases, The	(1913) 230 U.S. 352 at 456	30
Montreal Coke and Manufacturing Co. v. Minister of National Revenue	(1944) A.C. 126	283
Montreal Loan and Investment Co. v. Plourde	(1903) R.J.Q. 23 S.C. 399	225
Moore v. Gagnon	(1913) 15 R.P. 394	114
Morin v. La Corporation du Canton de Montminy	(1928) 34 R. de J. 128	177

N

Name of Case	Where Reported	Page
National Dock & Dredging Corpn. Ltd. v. The King	(1929) Ex. C.R. 40, 42	187, 390
Neild v. Commissioners of Inland Revenue	(1946) 2 All E.R. 405; (1947) 1 All E.R. 480; (1948) 2 All E. R. 1071	70, 78, 82, 396
Nettlefolds Ltd. v. Reynolds	(1892) 9 R.P.C. 270	166
Nichols Chemicals Co. v. Lefebvre	(1909) 42 S.C.R. 402	244
Non-Drip Measure Co. Ltd. v. Strangers Ltd. *et al.*	(1943) 60 R.P.C. 135	162
North American Life Insurance Co. v. Hudon	(1933) R.J.Q. 55 B.R. 273	176

O

Name of Case	Where Reported	Page
O'Connor v. Minister of National Revenue	(1943) Ex. C.R. 168	349, 351
Ollman, *Re*	(1925) 57 O.L.R. 340	386

P

Name of Case	Where Reported	Page
Palmolive Manufacturing Co. (Ontario) Limited v. The King; The King v. Colgate-Palmolive-Peet Co. Limited	(1933) S.C.R. 131	228
Parkes & Co. Ltd. Samuel v. Cocker Brothers Ltd.	(1929) 46 R.P.C. 241	162
Pastoral Finance Assn. Ltd. v. The Minister	(1914) A.C. 1083	44
Payton & Co., Ltd. v. Snelling, Lampard, & Co. Ltd.	(1900) 17 R.P.C. 48	213
Pearn v. Miller	(1927) 11 T.C. 610; (1930) 1 K.B. 279,	302
Pedrotti's Will, *Re*	(1859) 27 Beav. 583	344
Pioneer Laundry & Dry Cleaners Ltd. v. Minister of National Revenue	(1939) 4 D.L.R. 481	366, 370
Platt v. Routh	(1840) 151 E.R. 618; 55 R.R. 777	344
Powell v. The King	(1905) 9 Ex. C.R. 364	223
Price v. The King	(1906) 10 Ex. C.R 105	223
Procureur General, Le v. A. Fraser *et al.*	(1904) R.J.Q. 25 C.S. 104	187
Provincial Secretary-Treasurer v. Schofield	(1923) 2 D.L.R. 1144 at 1147	344
Pure Springs Co. Ltd. v. Minister of National Revenue	(1946) Ex. C.R. 471 at 498	335

Q

Name of Case	Where Reported	Page
Queen, The v. McCurdy *et al.*	(1891) 2 Ex. C.R. 311	223

R

Name of Case	Where Reported	Page
Reddaway, F. & Co. Ltd's Application	(1927) 44 R.P.C. 27, 35	407
Regent Taxi & Transport Co. Ltd. v La Congregation des Petits Freres de Marie	(1932) A.C. 295	175
Regina v. Edmundson	(1859) 28 L.J.M.C. 213	387
Rex v. Special Commissioners of Income Tax	(1922) Reports of Tax Cases 367, 373	387
Richards, *Re*, Uglow v. Richards	(1902) 1 Ch. 76	344
Rochon v. The King	(1932) Ex. C.R. 161	244
Roenisch v. Minister of National Revenue	(1931) Ex. C.R. 1, 4	388
Rogers Trade Mark, *re*	(1895) 12 R.P.C. 149	194
Rowson v. Atlantic Transport Co. Ltd	(1903) 2 K.B. 666	296
Rutledge v. Commissioners of Inland Revenue	(1929) 14 T.C. 490	303
Ryder, *Re*, Burton v. Kearsley	(1914) 1 Ch. 865	344

S

Name of Case		Where Reported	Page
Sabourin v. The King	(1911)	13 Ex. C.R. 341	244
Salmo Investments Ltd. v. The King	(1940)	S.C.R. 263, 272	249
Samson v. Minister of National Revenue	(1943)	Ex. C.R. 17 at 36	350
San Diego Land and Town Co. v. Jasper	(1903)	189 U.S. 439	29
Sandow Ltd's Application	(1914)	31 R.P.C. 196	130
Saville Perfumory Ltd. v. June Perfect Ltd. *et al*	(1941)	58 R.P.C. 147	133
Savoie v. Rouleau *et al*	(1926)	R.J.Q. 43 K.B. 79	225
Shaw v. Minister of National Revenue	(1939)	S.C.R. 338 at 346	350
Shuker's Estate, *Re*, Bromley v. Reed	(1937)	3 All. E.R. 25	344
Sidney v. North Eastern Ry	(1914)	3 K.B. 629 at 641	43
Silcock v. Roynon	(1843)	2 Y. & C. Ch. Cas. 376	347
Simmons v. Mathieson & Co. Ltd	(1911)	28 R.P.C. 486	202
Simpson v. Tate	(1925)	9 Rep. of Tax Cases 314	283
Siscoe Gold Mines Ltd. v. Minister of National Revenue	(1945)	Ex. C.R. 257	283
Sisters of Charity of Rockingham v. The King	(1922)	A.C. 315	13, 21, 259
Smith v. Anderson	(1880)	15 Ch. D. 247 at 258	393
Sonny Boy, The	(1945)	61 B.C. 309	235
Spaulding & Bros. A. G. v. A. W. Gamage Ltd.	(1915)	32 R.P.C. 273	211

T

Name of Case		Where Reported	Page
Thames & Mersey Marine Insurance Co. Ltd. v. Hamilton, Fraser & Co	(1887)	12 A.C. 484	387
Thiboutot v. The King	(1932)	Ex. C.R. 189	244
Thompson v. Goold & Co	(1910)	79 L.J.K.B. 905 at 911	331
Thomson v. Minister of National Revenue	(1945)	Ex. C.R. 17 at 24	101
Tillmanns & Co. v. S.S. Knutsford, Ltd	(1908)	2 K.B. 385	222
Toronto, Corporation of the City of v. Bell Telephone Co. of Canada	(1905)	A.C. 52	390
Tremblay v. The King	(1944)	Ex. C.R. 1	244
Trustees of Psalms & Hymns v. Whitwell	(1890)	Reports of Tax Cases 7, 11	387

V

Name of Case		Where Reported	Page
Valsesia, The	(1927)	P. 115	234
Versailles Sweets Ltd. v. Attorney General for Canada	(1924)	3 D.L.R. 884	388
Vickers v. Evans	(1910)	79 L.J.K.B. 954 at 955	331
Vyricherla Narayana Gajapateraju v. The Revenue Divisional Officer, Vizagapatam	(1939)	A.C. 302	45

W

Name of Case		Where Reported	Page
Wales v. Graham	(1941)	24 Rep. of Tax Cases 75	283
Waterous v. Minister of National Revenue	(1931)	Ex. C.R. 108	384
Webster v. Commissioners of Inland Revenue	(1942)	2 All. E.R. 517	65, 396
Western Dominion Coal Mines Ltd. v. The King	(1947)	S.C.R. 313	148
Western Vinegars Ltd. v. Minister of National Revenue	(1938)	Ex. C.R. 39, 41	390
Williams Co. J. B. v. H. Bronnley & Co. Ltd., J. B. Williams Co. v. J. H. Williams	(1909)	26 R.P.C. 765	212
Williamson, *Re*, Williamson *et al* v. Treasurer of Ontario	(1942)	3 D.L.R. 736	324
Worthington v. Walker	(1927)	30 R.P. 82	114
Wylie v. City of Montreal	(1885)	12 S.C.R. 384, 386	355, 388

Y

Name of Case		Where Reported	Page
Young v. C.N.R	(1931)	1 D.L.R. 645	283
Young v. Morris and Bastert	(1895)	12 R.P.C. 200	166
Ystradyfodwg & Pontypridd Sewerage Board v. Bensted	(1907)	Reports of Tax Cases 230, 241	387

Z

Name of Case		Where Reported	Page
Zakrewski v. The King	(1944)	Ex. C.R. 163	244

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

1947
Nov. 21
Dec. 13

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

AND

HARRY E. HUNT.......................DEFENDANT.

Crown—Action for return of money paid as subsidy—Commodity Prices Stabilization Corporation—P.C. 7475, August 26, 1942, s. 3(6)—No power in Court to set aside finding and decision.

The action is one to recover from defendant money paid by the Commodity Prices Stabilization Corporation Ltd. to defendant as a subsidy in connection with imported paper used by the defendant in the manufacture of tea bags.

Section 3(6) of P.C. 7475 dated August 26, 1942, provides:

(6) In any case where the Corporation finds, whether as a result of any such report or accounting or otherwise, that a person has received any sum of money by way of subsidy which the Corporation decides would not have been paid if all relevant facts and circumstances had been known at the time of application therefor, such person shall within thirty days from the date of demand in writing by the Corporation, pay to the Corporation such sum of money.

Held: That when the Corporation has made its finding under subsection 3(6) of P.C. 7475 and has made a demand for payment in writing, the amount of the demand is due and payable within thirty days from the date of the demand and the Court has no right to substitute its finding as to whether all relevant facts and circumstances were known to the Corporation for the finding of the Corporation itself, since the Corporation alone has the power to find the facts mentioned therein and the Court has no power to set aside that finding and decision.

INFORMATION exhibited by the Attorney General of Canada to recover from the defendant the sum of $1,073.25 paid to defendant as subsidy.

1948
THE KING
v.
HUNT
Cameron J.

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

A. J. P. Cameron, K.C., for plaintiff.

C. H. Howard, K.C., for defendant.

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

CAMERON J. now (December 13, 1947) delivered the following judgment:

In these proceedings, the plaintiff seeks to recover from the defendant the sum of $1,073.25, admittedly paid by the Commodity Prices Stabilization Corporation, Ltd. (hereinafter called the Corporation) to the defendant as a subsidy in connection with imported 10-lb. paper, used by the defendant in the manufacture of tea bags. The information exhibited by the Attorney General of Canada on behalf of the plaintiff states in paragraph 1 as follows:

Under and pursuant to Order in Council P.C. 7475 of the 26th day of August, 1942, particularly section 3, subsection (6) of the said Order, as amended, the Commodity Prices Stabilization Corporation, Limited, duly found, as recorded in formal minute of the Board of Directors of the said Corporation, passed on the 14th day of September, 1945, that Harry E. Hunt, carrying on business in the City of Toronto, in the County of York, as Harry E. Hunt & Company, had received the sum of $1,073 25 by way of subsidy, as defined in the said Order, and amendments thereto, and the said Corporation duly decided as recorded in the said minute, that the said subsidy would not have been paid to the said Harry E. Hunt & Company if all relevant facts had been known at the time of application therefor.

This is followed by an allegation that a demand in writing dated November 20, 1945, was duly made on the defendant by the said Corporation for repayment of the said sum pursuant to the said Order and amendments, and that the defendant had failed to pay the same. At the trial it was admitted by the defendant that such demand for repayment was received by him and that repayment had not been made. Uncontradicted evidence was given establishing the facts set out in paragraph 1 of the information (*supra*).

The defendant denies all liability, acknowledges receipt of the said subsidy, affirms that he was entitled to receive

the same and that he is entitled to retain it in as much as all relative facts were known to the Corporation at the time of application for, and payment of, the said subsidy.

The Corporation was established under the authority conferred upon the Minister of Finance by Order in Council P.C. 9870 of December 17, 1941. Order in Council P.C. 7475, of August 26, 1942, authorized certain regulations concerning the Corporation. By P.C. 5273, of July 26, 1945, a former section 3 (6) was deleted and the following substituted therefor:

(6) In any case where the Corporation finds, whether as a result of any such report or accounting or otherwise, that a person has received any sum of money by way of subsidy which the Corporation decides would not have been paid if all relevant facts and circumstances had been known at the time of application therefor, such person shall within thirty days from the date of demand in writing by the Corporation, pay to the Corporation such sum of money.

It is under the provisions of this subsection that the Corporation proceeded on September 14, 1945, as above set forth. Exhibit 3 is a certified copy of an extract from the minutes of the meeting of the Directors of the Corporation held on that date, certified by the Secretary.

By reason of section 5 (*i*) of P.C. 7475, the certified copy is conclusive evidence that the decision therein recorded was made or taken. In view, therefore, of the provisions of section 3 (6) of P.C. 7475, as amended (*supra*), proof of the finding of the Corporation having been established, and the defendant admitting that a demand for payment was made and not complied with within thirty days, the plaintiff, in my opinion, is entitled to succeed.

Counsel for the defendant raised no objections to the validity of section 3 (6) but argued that the Court had power to review the action of the Corporation and that if it were established that all the relevant facts and circumstances were, in fact, known at the time of the application, the Court should decline to direct the return of the subsidy. With that argument I cannot agree. It may be argued that section 3 (6) confers very arbitrary powers on the Corporation. But the subsection, in my view, is clear and unambiguous and it is the duty of the Court to give effect to its plain intent. In my opinion, once the Corporation has made its finding under subsection 3 (6), and has made a demand for payment in writing, the amount of such demand

1948
THE KING
v.
HUNT
Cameron J.

is due and payable within thirty days from the date of the demand. The Court has no right, in my view, to substitute its finding as to whether all the relevant facts and circumstances were known to the Corporation, for the finding of the Corporation itself. That is emphasized by the use of the words "in any case where the Corporation *finds*", and "which the Corporation *decides* would not have been paid". The situation would have been otherwise if the section had read, "in the case of any person who has received any sum of money by way of subsidy to which he was not entitled because of non-disclosure of all the relevant facts and circumstances in his application, the same may be recovered by the Corporation"—or words to that effect. But the language of the subsection itself makes it clear that the Corporation alone has the power to find the facts mentioned therein. In my view, the Court has no power to set aside that finding and decision.

But counsel for the plaintiff did not rely solely on the point which I have just discussed. In order to meet the allegations in the statement of defence, he led evidence to establish that had all the relevant facts and circumstances been known at the time of the applications for subsidy, the subsidies would not have been paid.

G. H. Glass, Vice-President and Chief Investigator for the Corporation, gave evidence for the plaintiff. Subsidies were first payable on entries at Customs on or after December 1, 1941, and the defendant's goods were not exempt from subsidy. In all, the defendant made thirteen applications for subsidy as shown in exhibit 4. A summary of these applications (and details of the manner in which they were respectively dealt with by the Corporation) is given in exhibit 5. At the outset, the Corporation had not completed its organization or formulated its policy for payment of subsidies and so it was deemed advisable to pay the subsidies as claimed, subject only to mathematical checking of the amounts claimed by the applicant, to proof that the goods had been entered under their proper customs entry, and that the goods were not exempt from subsidy. It was felt that it would be a hardship on smaller companies to delay subsidy payments unduly. The applicant's first claim for subsidy was made on April 18, 1942, and paid

in full on May 20, 1942. Claims 2 and 3 were made on June 30, 1942, and paid on July 28, 1942, with only minor mathematical adjustments.

In the meantime, the investigators of the Corporation were making their first investigation. It was limited to (i) ascertaining whether the laid-down costs of the goods as shown in the application form were correct and, (ii) establishing the laid-down cost of the applicant's tea bag paper in 1941 to be used as a basic cost. As a result of the first investigation, it was established that the laid-down cost of the paper in 1941 was $1.2068 per lb., and this was accepted by the defendant. However, in processing claim No. 1, it was found by the investigators that the actual laid-down cost of the importations in claim No. 1 somewhat exceeded the figures given by the defendant in his application; and as a result, on June 17, 1942, he was given a credit note of $4.52. Similar minor adjustments were made in respect of claims 2 to 7. In respect of claims 8 and 9 the full amount of the defendant's applications was granted, the last one being dated December 21, 1942.

Towards the end of 1942, and after about nine months' experience, the Corporation was able to give more mature consideration to all the factors involved. What then happened can best be indicated by reference to the evidence of Mr. Glass.

Then, having made that investigation—and this was all in 1942—by the end of 1942 we were formulating some principles under which we would subsidize importers who were bringing in merchandise to be further manufactured and sold in Canada. And as a result of our experience gained in 1942, early in 1943 we established an investigation procedure which we considered to be in line with the statement of import policy which Mr. Cameron has filed this morning. I might refer to the particular section which we had in mind—and that is 7(*b*)—where it says, to paraphrase it, that the maximum amount of subsidy payable in respect of any eligible goods is the amount by which the laid-down cost of the goods exceeds such other costs as may be appropriate, having regard to the maximum selling price of such goods or of goods made from or with them. So, early in 1943, we developed the procedure which, in our opinion, achieved what we were directed to do in section 7(*b*). We found out at that time in 1943 that in 1941 the applicant's selling price for these tea bags was $2 00 per M. We found out, or investigation in 1943 revealed, that the applicant's selling price of these tea bags during the period of February 1, 1941 to August 14, 1941 was $2 00 per M. On August 15th the selling price was increased to $2 10 per M and on October 1, 1941 the selling price was increased to $2.18 per M, an increase of 9 per cent over the price in effect during February through to August 14th . . . 9 per cent; 18 cents on $2 00. So that the procedure which we established

1948

THE KING
v.
HUNT

Cameron J.

at that time was that the basic cost appropriate to the $2.00 selling price was that old figure I gave you, $1.2068. The applicant's normal situation from February 1, 1941 to August 14, 1941 was that he had a cost of $1.2068, and he had a selling price of $2.00. On October 1, 1941, he had a selling price of $2.18, as a result of increasing his price, which was a perfectly legal thing for him to do prior to control. So, in order to leave him in what we considered to be his normal situation, we said, "the basic cost which you can stand is 9 per cent higher than $1.2068", and that figure is $1.3154. So in May, 1943, we then adjusted all these claims on the new basic cost of $1.3154.

In the result, claims 1 to 9 were re-assessed in May, 1943, on the basis of a basic laid-down cost in 1941 of $1.3154 and a maximum selling price of $2.18 per M, instead of $1.2068 per lb. on the basis of a selling price of $2.00 per M. On the new basis, only claims 1 and 2 were entitled to be paid subsidy as shown in exhibit 5. In all other cases no subsidy was payable, or where it amounted to less than $25.00, it was disallowed as no claims under $25.00 were paid. Repayment is now claimed of the difference between the amounts paid to the defendant and the amount of subsidy to which he was entitled on the basis of this re-assessment. No objection is taken to the amount that is so claimed.

Early in 1943 the Corporation established a new investigation procedure which appeared to be consistent with the statement of import policy by the Chairman of the Wartime Prices and Trade Board (exhibit 2), the relevant parts of which are as follows:

7(*b*) The maximum amount of subsidy payable in respect of any eligible goods is the amount by which the laid-down cost of the goods exceeds the laid-down cost of similar goods entered for consumption during the basic period, or at such other time or exceeds such other costs as may be appropriate having regard to the maximum selling price of such goods, or of goods made from or with them.

(*c*) A subsidy shall not be payable if, or shall be less than the aforesaid maximum to the extent that, the increased laid-down cost can reasonably be expected to be borne by the applicant or by subsequent purchasers other than consumers at the retail.

This involved consideration of a new factor not previously used, namely, the maximum selling price in the basic period, i.e. from September 15 to October 14, 1941. This second investigation showed that while the selling price of tea bags had been $2.00 per M (sales tax included) from February 1, 1941 to August 14, 1941, it was increased to $2.10 per M on August 15, 1941, and to $2.18 per M on October 1, 1941, in each case sales tax included. The sale price having

increased by 9 per cent, the Corporation felt that the basic laid-down cost of the paper should be increased by 9 per cent also, thus lessening the difference between the basic laid-down price and the actual laid-down cost of each item shown in the various applications. It is not at all clear as to whether the Corporation in 1942, when it made its first investigation, had knowledge of these changes in sales price in 1941, but it is evident that, even if they had, they were then considered as of no importance and were not taken into consideration. It was only because of the different system adopted early in 1943 that they were considered of importance.

That appears in a further statement of Mr. Glass as follows:

> Q. That clarifies it. What you are telling me now is that it was not due to any lack of facts but rather was due to an entirely different system that you adopted in 1943 that you came along and asked for this money back.
>
> A. That is correct.

Claims 1 to 9 were all made in 1942 and payments or adjustments thereof were made to the defendant on the basis of the first policy adopted by the Corporation. So far as the defendant was concerned, his sales prices in 1941, or any changes therein, were not considered by the Corporation to be of any relevancy in computing his subsidy. Under the policy then being followed by the Corporation, they were not then relevant facts and circumstances. If they had been required, the information was available to the investigators who had access to all the books and records of the defendant. Nothing was kept back by the defendant who acted in good faith throughout. He gave all the information that was requested and on the form of application supplied to him by the Corporation no information was asked for as to his sales prices in 1941. The investigators could have had this information and very possibly may have had it. Had the policy of the Corporation not changed early in 1943, the defendant would not have been re-assessed and would not have been asked for any refund.

Had the subsidies applied for been paid without investigation before any policy was determined, and on the understanding that necessary adjustments would be made when a policy was worked out, it would have been reasonable, I

1948
THE KING
v.
HUNT
Cameron J.

think, for one who had been paid a subsidy to rebate part or all of it, once the policy had been established. But here a policy was established in 1942 and on that policy further adjustments to, or settlements of, claims were made in 1942.

There can be no question, I think, that the Corporation had power to alter the basis of its policy for payment of subsidy insofar as it had to consider applications thereafter made. As pointed out in the statement of import policy (exhibit 2), payment of subsidies is discretionary and not obligatory and goods could at any time be excluded from subsidy. The amount of the subsidy might be adjusted which, I think, means "varied". Exhibit 2 clearly states that it is effective from February 11, 1943, and by that date all of claims 1 to 9 had been disposed of under the former policy.

How then can it be said that at the time the applications were made, or were considered by the Corporation, all the relevant facts and circumstances were not in the possession of the Corporation? Relevant facts and circumstances must mean all those facts and circumstances which were necessary to give proper and full consideration to the applications under the policy of the Corporation then existing. The evidence of Mr. Glass is clearly that the matter of selling prices in 1941 was not in 1942 a relevant fact or circumstance. It was not considered at all. I cannot find that, by a mere change in policy, that which under the old policy was undoubtedly irrelevant can become relevant to cases already disposed of. I have not been referred to any section of the Order in Council which gives such power to the Corporation. Had the Court power to determine the question as to whether all the relevant facts and circumstances had been known to the Corporation, I should undoubtedly have reached the conclusion that they were so known.

In view, however, of the provisions of section 3 (6) of P.C. 7475, to which I have previously referred, the plaintiff must succeed.

There will, therefore, be judgment declaring that the plaintiff is entitled to be paid by the defendant the sum of $1,073.25 and, if demanded, the taxed costs of the action.

Judgment accordingly.

1948
Oct. 25, 26, 28, 29, Nov. 1-3, 8-10, Dec. 23

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney General of Canada........................ PLAINTIFF;

AND

WOODS MANUFACTURING COMPANY LIMITED................ DEFENDANT.

Expropriation—Expropriation Act, R S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S C. 1927, c. 34, ss. 19(a), 19(b), 47—No right to compensation except as conferred by ss 19(a) and 19(b) of Exchequer Court Act—No right to compensation except for value of property—Evidence of municipal assessment inadmissible as proof of value—Right to compensation for loss by severance—Depreciation not prevented by maintenance—No intuitive power to estimate depreciation—Value of property to owner means realizable money value—Value of property in use not a test of value—Principle of reinstatement or replacement not applicable in determining amount of compensation—Unwillingness of owner to sell irrelevant—No right to compensation for loss by disturbance of business apart from value of property—Allowance for compulsory taking—No right to interest when owner left in undisturbed possession.

Plaintiff expropriated property in the City of Hull in two separate parcels on one of which there was a factory. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That sections 19(*a*) and 19(*b*) of the Exchequer Court Act not only confer jurisdiction upon the Court to hear and determine claims for compensation in respect of expropriated property but also establish rights to such compensation that would not otherwise exist, and the owner of expropriated property has only such rights as these sections confer.

2. That section 47 of the Exchequer Court Act permits compensation to the owner of expropriated property only to the extent of the value of the property as at the date of expropriation.

3 That evidence of municipal assessments is inadmissible as proof of the value of expropriated property, but may be helpful as a check against excessive valuations.

4. That when an owner's remaining property has suffered depreciation in value by reason of the severance from it of property formerly held with it the owner has a claim for loss by severance within the ambit of section 19(*b*) of the Exchequer Court Act.

5. That the assumption that a property can be so well maintained that it will remain as good as new indefinitely is erroneous. Depreciation goes on in spite of maintenance.

1948

THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.

Thorson P.

6. That it is fallacious to assume that a person can by intuition determine the amount of depreciation in a building merely by looking at it, without calling to his aid either his own experience or the general experience applicable to similar buildings.
7. That the method of ascertaining separately the amount of each element or factor that should be taken into account in estimating the value of expropriated property and adding such amounts together to arrive at the amount of compensation payable to the owner is erroneous.
8. That the value of the expropriated property to the owner means its realizable money value.
9. That it is not the value of the property in use, but its value in exchange with all its attributes including its adaptability for profitable use, that is the measure of the compensation payable to the owner for its loss.
10. That neither the unwillingness of the owner to sell his property nor the price at which he would be willing to sell it has any bearing on its value.
11. That an owner's loss by disturbance of his business as the result of the expropriation of his property can be taken into account by the Court only to the extent that it would be considered by a purchaser in deciding how much he would be willing to pay for the property or affect the price which the owner might reasonably expect to receive for it if he wished to sell it.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

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

F. B. Major K.C., and *Louis Farley* for plaintiff.

Glyn Osler K.C., *D. K. MacTavish K.C.* and *J. C. Osborne* for defendant.

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

THE PRESIDENT now (December 23, 1948) delivered the following judgment:

The Information exhibited herein shows that certain lands owned by the defendant were taken by His Majesty the King for the purpose of a public work of Canada under the Expropriation Act, R.S.C. 1927, chap. 64. The lands were taken in two expropriations, each completed by depositing a plan and description of the lands in the office

of the Registrar of Deeds for the registration division of Hull in Quebec pursuant to section 9 of the Act. The first plan and description was deposited on May 19, 1944. It covered the lands described in paragraph 5 of the Information, hereinafter referred to as the first expropriated property, as well as other lands owned by persons other than the defendant expropriated at the same time. The second plan and description, covering the lands described in paragraph 4 of the Information, hereinafter referred to as the second expropriated property, was deposited on May 7, 1946. Immediately on the deposit of these plans and descriptions the lands respectively covered thereby became vested in His Majesty and all the right, title and interest of the defendant thereto or therein ceased to exist. Thereafter, its claims in respect of the said lands were converted into claims to the compensation money pursuant to section 23 of the Expropriation Act whereby it was made to stand in the stead of the expropriated property.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are taken for an adjudication thereon. By the Information the plaintiff offered the sum of $329,-791.73, but the defendant by its amended statement of defence claimed $692,920.96. By a further amendment pursuant to leave granted at the trial it claimed an additional $33,341.62 in respect of the first expropriated property making the total of its claims come to $726,262.58.

The principles to be applied in determining the amount of compensation to be paid have been discussed in many cases, including *The King* v. *W. D. Morris Realty Limited* (1). There I referred to a number of English decisions and, at page 147, stated what I considered the two cardinal principles of expropriation law in relation to one another as follows:

> The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

And in *The King* v. *Thomas Lawson & Sons Limited* (2) I expressed the view that this is a correct statement of the

(1) (1943) Ex. C.R. 140. (2) (1948) Ex. C.R. 44 at 48.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

law, provided that the term "fair market value" is given the meaning defined in Nichols on Eminent Domain, 2nd Edition, page 658, as follows:

> By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

and that the Court, in estimating the value of the property, is guided by the rule as stated by Nichols, at page 664:

> The tribunal which determines the market value of real estate for the purpose of fixing compensation in eminent domain proceedings should take into consideration every element and indication of value which a prudent purchaser would consider, . . .

And it is also clear that while the owner has no right to receive by way of compensation for the loss of his property more than its fair market value he is entitled to have such market value based on the most advantageous use to which the property is adapted or could reasonably be applied: *The King* v. *Manuel* (1), affirmed by the Supreme Court of Canada. In *The King* v. *Edwards* (2) I said that the best statement of this principle, frequently enunciated in this Court, is contained in Nichols on Eminent Domain, 2nd Edition, page 665, where the author says:

> Market value is based on the most advantageous use of the property. In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate text.

This broad statement assumes the amount of money that a purchaser, having carefully considered the advantages and possible uses of the property, including what is sometimes called its potentialities, would be willing to pay for the property in order to obtain it. It must not be forgotten, however, that, while consideration should be given not only to the present use of the property but also to its prospective advantages, it is only the present value, as at the date of expropriation, of such prospective advantages that falls to be determined: *The King* v. *Elgin Realty Company Limited* (3).

(1) (1915) 15 Ex. C.R. 383.
(2) (1946) Ex. C.R. 311 at 315.
(3) (1943) S.C.R. 49.

It is also important to remember that the owner of expropriated property has no inherent right to compensation for the property lawfully taken from him. Nor has he any constitutional right, such as an owner has in the United States, to "just" or "reasonable" or "adequate" compensation. He has only such right as is conferred upon him by statute and no right at all apart therefrom. This basic principle was laid down by the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1). There Lord Parmoor, speaking for the Committee, said:

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian Statute.

The Canadian statute upon which the defendant must rely for his right to compensation for his expropriated properties is not the Expropriation Act, under which they were taken, but the Exchequer Court Act, R.S.C. 1927, chap. 34. In the *Thomas Lawson & Sons Limited* case (*supra*) I dealt at considerable length with the legislative origin and history of these two enactments and am satisfied that nowhere in the Expropriation Act can any provision be found conferring the right to compensation upon the owner of property expropriated under it. Undoubtedly, there are several sections in it that assume the existence of such a right but the actual statutory right to compensation for property taken under the Expropriation Act or damage to property injuriously affected thereby can be found only in sections 19(*a*) and 19(*b*) of the Exchequer Court Act which provide as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

A review of the legislative origin and history of these sections shows that they not only confer jurisdiction upon the Court to hear and determine claims for compensation in respect of expropriated property but also establish rights

(1) (1922) 2 A.C. 315 at 322.

1948

THE KING
v.
WOODS
MANUFACTURING
CO. LTD.

Thorson P.

to such compensation that would not otherwise exist. Furthermore, while sections 19(*a*) and 19(*b*) of the Exchequer Court Act establish the owner's rights to compensation, section 47 of that Act prescribes the standard by which the Court must measure the amount of compensation to which such owner is entitled. Its direction to the Court is as follows:

> 47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

In my judgment, this direction to use the standard set by the section is mandatory and the Court has no right to resort to any other standard, even although in a particular case it might consider that the application of the statutory standard would result in an amount which would fall short of full compensation to the owner for all the loss caused by the expropriation of his property. Where an owner makes a claim for property taken from him section 47 permits compensation to him only to the extent of the value of such property.

The expropriated properties are in the City of Hull in Quebec on the east side of Laurier Street, north of Verdun Street, and extend from Laurier Street to the Ottawa River. Their total frontage on Laurier Street is 456 feet and their total area 6·43 acres, of which Dalhousie Street, an unopened street, constitutes ·75 acres, leaving a net area of 5·68 acres. These are the measurements given by Mr. N. B. MacRostie and I accept them as correct. The first expropriated property, with a frontage of 343 feet on Laurier Street and a total area of 4 acres lies immediately south of the second expropriated property. It was vacant land, except as hereinafter set forth. Prior to its expropriation on May 19, 1944, it was held by the defendant with the second expropriated property as one property. On the second expropriated property the defendant had its buildings.

The defendant has its head office in Montreal where it has a factory at St. Lambert. It operates three industries, namely, a bag division with plants in St. Lambert, Toronto, Winnipeg and Calgary, a clothing and canvas division with

its main plant in Hull and a small one in Ogdensburg, New York, and a textile division with a cotton mill at Welland. The total magnitude of its business is from $12,000,000 to $15,000,000 per annum. At its Hull plant it makes heavy clothing for lumbermen and other workmen, sportsmen's uniforms and supplies, sporting goods, canvas tents and tarpaulins.

The defendant's statement of defence was framed as if there had been only one expropriation and counsel for the defendant began his proof of value of the land on such assumption and on the basis of its value as at May 7, 1946, the date of the second expropriation. I held that there were two expropriations, each completed by the deposit of a plan and description of the lands, and that the rights of the defendant to compensation in respect of the lands taken on May 19, 1944, must be determined as at that date. In my opinion, section 47 of the Exchequer Court Act, to which I have referred, makes this obligatory. Thereupon, the trial proceeded on the basis of there having been two expropriations, that of the 4 acres on May 19, 1944, and that of the remaining 1·68 acres with the buildings thereon on May 7, 1946.

When counsel for the defendant first sought to adduce evidence of loss through the severance of its property I ruled, on the objection of counsel for the plaintiff, that such evidence was not admissible on the pleadings as they stood. The following day counsel for the defendant applied for and obtained leave to make the amendment which appears as paragraph 4(*a*) of the last amended statement of defence. The defendant now makes a twofold claim in respect of the first expropriated property, namely, one for the property taken, a claim under section 19(*a*) of the Exchequer Court Act, and the other for damage to its remaining property as having been injuriously affected, a claim under section 19(*b*).

I find no difficulty in determining the amount of compensation to which the defendant is entitled in respect of the first expropriation. I shall deal first with the value of the 4 acres of land that was then taken. This was vacant land so far as the defendant was concerned except for a platform used by it for testing tents and a small bicycle shed for the use of its employees. Mr. W. J. McDougall,

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

the comptroller of the defendant's Hull plant, valued these buildings at $800. Apart from this use of the land the defendant leased a portion of it to a tennis club charging a proportion of the taxes amounting to $40 per year and a small amount of space near the river to the Gatineau Boom Company at $100 per year. Otherwise, it made no use of the land except that it was available to its employees for recreational purposes. But there is no doubt that it was valuable to the defendant for a number of reasons including the fact that it was available for extension of its plant and afforded a measure of control against undesirable neighbours immediately adjacent to it.

The experts referred to a variety of uses for which the land was adapted. Mr. N. B. MacRostie, for the defendant thought that it might conveniently have been subdivided. But Mr. W. H. Bosley, also for the defendant, rejected the possibility of its use for residential purposes. There were several factors making it undesirable for such purposes, such as the presence of the baseball park and the oil tanks of the Shell Oil Company and the Supertest Petroleum Company. In Mr. Bosley's opinion more could be got for the land for commercial or industrial use. He thought that it would have great advantage for a brewery or for a paper box factory or any other industry requiring a large supply of water and wanting the supply of labour that is available in Hull. Mr. E. S. Sherwood, also for the defendant, was of the same opinion and stressed in addition the central location of the site and its advertising advantages. For the plaintiff, Mr. T. Lanctot considered the frontage on Laurier Street as suitable for commercial or residential use and the balance as an industrial site, whereas Mr. S. E. Farley took a view similar to that of Mr. MacRostie and regarded the land as suitable for commercial and residential purposes. In my judgment, the opinions of Mr. Bosley and Mr. Sherwood as to the most advantageous use to which the property was adapted should be accepted.

Some sales of comparable property were referred to. The fullest particulars of such sales were given by Mr. Lanctot who said that he took the acreages involved in them from the registrar's office. There were three sales of property with frontages on Laurier Street. The first, registered April 8, 1929, was of 2·5 acres to the Supertest

Petroleum Company at $13,000, or $5,200 per acre; the second, registered September 3, 1931, was of 2·89 acres to the Shell Oil Company at $21,000, or $7,267 per acre; and the third, registered September 31, 1931, was of 2·4 acres to the Sisters of Charity at $12,000, or $5,000 per acre. The first two properties are south of the defendant's property and the third north of it. The average price paid for these properties works out at approximately $6,000 per acre, but I agree with Mr. Bosley that the price paid by the Supertest Company was low, so that I think it would be fair to take these sales as indicating an average somewhat higher than $6,000 per acre. In my opinion, these sales are of particular importance because they were all of large pieces of property fronting on Laurier Street and extending to the Ottawa River and, consequently, comparable with the defendant's property. The sales referred to serve to establish the market value of such properties at the time they were made. The Court is also fortunate in having reliable opinion evidence as to the rise in market values since that time. Mr. MacRostie said that if 1926 land values were taken as a base of 100 per cent, land values reached a low of 83 per cent about 1933 or 1934 and were not back to 100 per cent until 1940 or the beginning of 1941; they then rose steadily and had reached 113 per cent by 1944 and 133 per cent by 1946. Mr. Bosley put the increase up to 1944 at 10 per cent, as did Mr. Farley. Mr. Lanctot's evidence was similar to Mr. MacRostie's. He said that land prices from 1930 to 1940 or 1941 were at a low level, that they had gone down due to unpaid taxes, that in 1940 and 1941 the City of Hull had many vacant lots on its hands and that prices did not begin to increase until after 1940. He estimated that by 1944 there had been an increase of 15 per cent and by 1946 of 35 per cent.

I now come to the various valuations of the experts.

[The learned President here reviewed the various valuations.]

Evidence was also given of the municipal assessment of the land. In 1944 it was assessed at $14,550, which was said to be on the basis of two-thirds of its value. Subsequently, after a re-assessment of the City of Hull under the direction of Mr. Grandguillot, which was completed

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

in 1947, the assessment for the year ending April 30, 1948, was $91,725. The subject of municipal assessments has frequently been referred to in the judgments of this Court in expropriation cases. A municipal assessment is levied against land so that it may bear its share of taxation for municipal purposes. It is not made with any thought of the ascertainment of the value of the land for the purpose of determining the amount of compensation payable to its owner when it has been taken under the Expropriation Act and, as a matter of strict law, evidence of it is inadmissible in proceedings for such a purpose. That is the view expressed in Nichols on Eminent Domain, 2nd Edition, page 1207:

> It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value in eminent domain proceedings. The assessment is *res inter alios,* and is inadmissible upon the general principles of the law of evidence.

Notwithstanding this, it has been the practice in this Court to receive evidence of municipal assessments and there is perhaps no harm in this, provided that it is kept in mind that such evidence cannot be accepted as proof of value. There may be cases where it is helpful as a check against excessive valuations. In the present case, the evidence of the 1948 assessment was clearly inadmissible. It was made approximately 3 years after the land had been expropriated and became vested in His Majesty and no longer subject to tax. Since the Court must estimate the value of the land as at the date of its expropriation, it seems to me that it must attempt to put itself in the same position as if it had heard the defendant's claim immediately after the expropriation. If it had done so evidence of the 1948 assessment would not have been available. It cannot have any greater relevancy now. If any assessment is to be considered at all it can only be the assessment for 1944. Counsel for the defendant did not venture, except indirectly, to make use of the assessment for 1948 as evidence of the value of the land taken in 1944. Even if it had been admissible it could not have served any such purpose, being completely out of line with the evidence of well qualified real estate experts. The indirect use of the evidence was as follows. Mr. Brunet was called to give evidence as to the cost of the demolition

1948

THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.

Thorson P.

of certain buildings on the second expropriated property and the value of such buildings, to which further reference will be made later. He had been the contractor who demolished the said buildings and constructed the new tarpaulin and waterproofing building and the new garage. Mr. Brunet is also the mayor of the City of Hull and it was during his administration that the re-assessment of Hull under Mr. Grandguillot was undertaken, whereby the total assessment of the City was increased from $18,000,000 to $36,000,000. Mr. Brunet stated that the prices of property in Hull had more than doubled between 1930 and 1946. He admitted that he was not a real estate man and it is clear that when he made his statement he had in mind the increase in the municipal assessment figures. Yet counsel for the defendant ventured to urge that the assessment figures and Mr. Brunet's statement were persuasive of the fact that land values had increased since 1930 to a much greater extent than the opinions of the real estate experts indicated. Even if the defendant were permitted in this indirect way to contradict the evidence of its own real estate experts, Mr. MacRostie and Mr. Bosley, it would be unsound to accept Mr. Brunet's expansive generalization, based as it was upon municipal assessment increases, as against the considered opinions of the well qualified real estate experts who gave evidence as to the increase in real estate values, and I decline to do so. In my view, counsel's argument on this point was without merit and I reject it.

It is not often that the Court has such useful basic material on which to form its estimate of the value of an expropriated property as it has in the present case. I think it would be reasonable to assume from the three sales to which the experts referred that at the time thereof the fair market value of the defendant's 4 acres would have been approximately $6,500 per acre. The experts, all well qualified, differed only very slightly in their opinions as to the amount of the increase in land values since then and up to 1944, the lowest estimate being Mr. Bosley's at 10 per cent and the highest Mr. Lanctot's at 15 per cent. If the highest figure is taken a valuation of approximately $7,500 per acre is reached. The application of this rate to the 4 acres taken results in a total valuation of $30,000. In my view, this is the highest estimate of the value of the defendant's

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

4 acres as at the date of the expropriation that the Court should make. I consider it a fair estimate. To this amount there should be added $800 for the value of the buildings in accordance with the evidence of Mr. MacDougall. I therefore estimate the value of the first expropriated property as at the date of its expropriation at $30,800 and determine the amount of the defendant's claim to compensation for it accordingly.

The defendant's other claim in respect of the first expropriation is for damage and injurious affection of its remaining lands. Particulars of this are given in paragraph 4(*a*) of the last amended statement of defence, namely, $20,000 by the severance of the first expropriated property from the second whereby the latter was depreciated in value, $10,000 by the necessary demolition of certain buildings on the second expropriated property, and $3,341.62 as the cost of such demolition and other costs, making a total claim of $33,341.62.

I shall deal first with the claim for damage by severance. It is, I think, generally accepted that the total of the values of two parcels of land held separately may be less than the value of the two parcels held together as one property. Where that is so it is obvious that the owner suffers a loss when one of the parcels is severed from the other by its expropriation, over and above the value of such parcel. There is no specific mention of a loss by severance as a cause of action in either the Exchequer Court Act or the Expropriation Act, but if it exists it must be under section 19(*b*) of the former Act. The greater value of the two parcels held together over the total of the values of the parcels held separately is attributable to the property as a whole, and there is no loss of such additional value until after the severance has occurred. When it does take place by the expropriation of one of the parcels the owner suffers not only the loss of the value of the parcel taken but also the loss by the severance of it from his remaining property. His claim for value of the parcel taken is under section 19(*a*) and must be confined to its value as a separate parcel for it is taken as such. The only section under which he can claim for the loss by severance is, therefore, under section 19(*b*) on the ground that his remaining property has been injuriously affected. If it has suffered a deprecia-

tion in value by reason of the severance surely there can be no doubt that it has been injuriously affected. I had occasion recently to deal with the nature of the claim under section 19(*b*) in *The King* v. *Acadia Sugar Refining Company Limited* (1) and am satisfied that a claim for loss by severance, if substantiated, is within the ambit of the section. In the present case, I have no hesitation in finding that the defendant suffered a loss by the severance of its 4 acres from its remaining property and that such property was injuriously affected thereby. As laid down in *Sisters of Charity of Rockingham* v. *The King* (2) the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected. It is, therefore, only the quantum of the loss by severance that remains for consideration. Mr. Bosley thought that the depreciation in value of the defendant's remaining property was from $10,000 to $15,000 and later said that he would increase his figure of $30,800 for the 4 acres taken by one-third, or $10,000. There was some confusion in his evidence, for which I am afraid the Court was mainly responsible because of the questions put to him, as to whether he meant two amounts for loss by severance, one to be added to the value of the land taken and the other in respect of depreciation in value of the remaining land, or only one, but I am now satisfied that when Mr. Bosley added $10,000 to the value of the 4 acres he thought the land was worth that much more when joined with the land to the north and used in conjunction with the buildings there, and that he had in mind only one amount for the loss by severance, namely $10,000. If there was any doubt in the matter it was cleared by Mr. Sherwood. There was only one amount of loss by severance, namely, the depreciation in value of the defendant's remaining property. Mr. Sherwood thought that this came to from $10,000 to $15,000 and finally put it at $15,000. Both Mr. Lanctot and Mr. Farley agreed that there had been a loss by severance and put its amount at $10,000. Mr. Farley thought this would be the limit. On the argument Mr. Osborne, relying upon the evidence of Mr. Bosley and Mr. Sherwood, urged that the Court should accept the figure of $15,000 as the amount of the defendant's loss by

(1) (1947) Ex. C.R. 547. (2) (1922) 2 A.C. 315.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

severance. There were several reasons why the 4 acres had special value to the defendant when held with its remaining property on which it had its plant, namely, that it provided room for possible plant extension, that it was a recreational ground for its employees, that it gave a measure of insurance and protection against undesirable neighbours, that it was a safeguard against obstruction of light and that it could be used as a parking area. I agree with Mr. Osborne's argument on this and assess the amount of the defendant's loss by severance at $15,000.

The rest of the defendant's claim for damage resulting from the first expropriation is of a different nature. The facts on which it is based can be put briefly. At the date of the first expropriation there were several buildings on the defendant's remaining property in addition to its main building. These were described in a report by Irish and Maulson, Limited, a firm of insurance brokers, filed as exhibit P, in which the buildings were referred to by numbers. Building No. 2 on the north side of the main building was a factory extension building used for cutting, sewing and finishing truck top tarpaulins; building No. 3 near the north-east corner of the main building was really two buildings, a 3-car garage and a wax storage shed; building No. 5 near the south-east corner of the main building was a hose house and building No. 6 near it a bicycle shed. About the end of 1944 and the beginning of 1945 these four buildings were demolished to make way for two new buildings, namely, the tarpaulin and waterproofing building and the garage. Mr. R. B. Moffit, the defendant's vice-president and comptroller, explained that it had been intended to put the new tarpaulin and waterproofing building on the property to the south of the main building, but when this was expropriated a new location elsewhere had to be found for it and it was decided that the only space available was the area to the north of the main building. This made it necessary to tear down the old factory extension building and the garage and wax storage shed. If the space occupied by these buildings had not been required for the new tarpaulin and waterproofing building they would not have been demolished but could have been converted into additional garage accommodation. But their demolition made the con-

struction of the new garage necessary. Mr. Moffit estimated the value of the demolished buildings at $10,000 which he thought was approximately their reconstruction cost less depreciation. He then gave particulars of the cost of demolishing the four buildings referred to, of moving 60 tons of wax from the wax storage shed, of excavation due to the new waterproofing plant, of relocating a hydrant, and of filling and grading the approach to the new garage, amounting in all to the sum of $3,341.62. Mr. Moffit's opinion as to the value of the demolished buildings and his statement as to the cost of their demolition received confirmation from Mr. R. Brunet who had carried out the demolition of the old buildings and the construction of the new ones. Under these circumstances the defendant claimed $10,000 for the value of the demolished buildings and $3,341.62 for the costs referred to as damages resulting from the first expropriation. While it is, no doubt, true, as Mr. Moffit said, that the defendant would not have demolished the old buildings or incurred the costs referred to if it had kept the four acres taken from it, I am quite unable to see how the so-called damage can be charged to the Crown over and above the value of the four acres taken and the loss by severance. The real reason for the loss of the value of the old buildings and the incurring of the costs is to be found elsewhere. Mr. Moffit admitted that the defendant would not have demolished the plant extension building to the north of the main building if it had not had plans for erecting a new tarpaulin and waterproofing building, that if it had retained the four acres to the south it would have put such new building thereon and left the old buildings intact, but that since it had lost the four acres that land was not available to it and it could not proceed with the construction of the new building on the new site selected for it without first demolishing the old buildings thereon, and that to that extent their demolition was related to the defendant's expansion activities. A similar statement is applicable in the case of the new garage and the demolition and incurring of costs that led to its construction. The conclusion I draw from these facts is that it would not be fair or reasonable to hold the Crown responsible for the damage thus claimed by the defendant. It has no just cause for complaint that it could not put the new tarpaulin

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

and waterproofing building on the land to the south of the main building that was taken from it on the first expropriation, for the availability of such land to meet its requirements for expansion was one of the factors making for its value and loss by its severance and it will receive the money equivalent of such value in its place and compensation for such loss. If the expropriation had been the only thing that had occurred the alleged damage complained of by the defendant would not have happened. It was, therefore, not caused by the expropriation. If the defendant had not found it necessary for its own purposes to expand its plant by building the new tarpaulin and waterproofing building it would not have been necessary to demolish the old buildings or incur the costs referred to. The loss of the value of the old buildings and the incurring of the said costs were thus directly referable to the defendant's own actions, namely, its expansion activities. The alleged damage would not have happened otherwise. What the defendant is seeking to do is to hold the Crown responsible for a loss that would not have happened except for its own expansion activities. It has no right to make the Crown pay for what is in effect part of the price thereof. Moreover, there is another aspect of the matter. The construction of the new buildings on the defendant's remaining property resulted in an appreciation of its value which will have to be taken into account when its claim for the second expropriated property is being considered. Certainly, it cannot have both the amount of such appreciation and also compensation for a loss without which such appreciation could not have been realized. Under the circumstances, I have no hesitation in finding that this portion of the defendant's claim cannot be sustained.

The result is that the total amount of compensation money to which the defendant is entitled in respect of the first expropriation is the sum of $45,800.

The defendant has not made any use of the first expropriated property since its expropriation except that it continued to use the platform and bicycle shed above referred to until their demolition late in 1944. Apart from this it cannot, in my judgment, be said to have been in occupation or possession of the property after its expropriation. I do not think that this temporary use of the platform and

1948

THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.

Thorson P.

bicycle shed would warrant me in depriving it of any interest. Consequently, I award interest on the sum of $45,800 at the rate of 5 per cent per annum from May 19, 1944, to this date.

Now I come to the second expropriation of May 7, 1946. The defendant's claim in respect of the property thereby taken is exclusively under section 19(*a*) of the Exchequer Court Act; it cannot have any claim under section 19(*b*) for it had no remaining property that could have been injuriously affected. The whole of its property having been taken the measure of its entitlement to compensation is the estimate of its value which section 47 of the Exchequer Court Act requires the Court to make. The defendant's claim is put in paragraph 4 of the amended statement of defence as follows:

4. By reason of the expropriation, the Defendant has suffered loss to the extent of $692,920.96, which is the value of the said lands and buildings to the Defendant, and includes the replacement cost of the said buildings less depreciation; the value of the land including its possibilities for future development; and the inherent value to the Defendant of the said land and buildings which the Defendant would take into consideration in being willing to sell and move its business to a new location.

Particulars of the said claim were given as follows:

(*a*) Construction of new buildings, $480,000.

(*b*) Value of land, $80,000.

(*c*) Loss and damage occasioned by disturbance, demolition, removal, depreciation, reinstatement, reconstruction and readjustment of its plant, equipment and goods and of certain equipment necessarily incidental thereto, $76,920.96.

(*d*) $56,000 being 10 per cent by way of compensation for compulsory taking.

The claim of $80,000 for the value of the land is for the land taken by the first expropriation as well as the second so that the amount referable to the land of the second expropriated property must be reduced accordingly.

[The learned President here reviewed the various valuations.]

The municipal assessment for the land was $18,900 in 1944, 1945 and 1946, $26,600 in 1947 and $26,850 for the year ending April 30, 1948. I need not repeat what I said about the municipal assessment figures for the first expropriated property. It is equally applicable here.

If I were required to estimate the value of the land separately from the buildings, which is not the case, I think it would be fair to accept Mr. Lanctot's estimate of

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

the increase of land values in 1946 over 1944 and apply the figure of $9,000 per acre to the acreage of 1·68 and thus reach a valuation of $15,120. For reasons similar to those expressed with respect to the land taken by the first expropriation I think that this amount would be the highest estimate of the value of the land that the evidence could properly warrant.

The next item in the defendant's claim is for $480,000 for the construction of new buildings. This involves consideration of two sub-items, namely, the reconstruction cost of the buildings and the extent of their depreciation. The sub-item of reconstruction cost will be dealt with first.

[The learned President here reviewed the evidence as to reconstruction cost of the buildings, particularly that of Mr. A. B. Doran, secretary-treasurer of the Doran Construction Company, and that of J. Adam, consulting architect to Robert A. Rankin and Company, and continued.]

The closeness of the two total estimates to one another is striking, the difference between them being only $750. Part of this is due to the fact that both experts obtained their information as to prices of materials and labour costs from similar sources, such as the subcontractors listed by Mr. Doran and the members of the Canadian Construction Association mentioned by Mr. Adam, and the rest to the care and accuracy with which both Mr. Doran and Mr. Adam took off their quantities. I could with equal propriety adopt the estimate of either of them, but I take the higher one, namely, Mr. Adam's amended estimate of $478,032.

There was not the same agreement between the experts on the subject of depreciation. Indeed, there was a wide divergence as to the extent of the depreciation of the main building. Mr. Doran's total figure for depreciation for all the buildings, as shown by Exhibit O, was $87,631, which he increased by $7,000 in respect of the elevator, making a total of $94,631, leaving a net figure for reconstruction cost of the buildings less depreciation of $381,153.14. The defendant's claim under this item is $480,000. On the other hand, the estimate of Robert A. Rankin and Company for depreciation of all the buildings, for which Mr. J. A. Coote was mainly responsible, as shown by Exhibit 10, page 4, was $187,296 which will be increased to $190,296 if Mr.

Adam's figure of reconstruction cost is increased by $3,000 in respect of the elevator, leaving a net figure for reconstruction cost less depreciation, which the plaintiff's experts described as depreciated value, of $287,736. There was little difference of opinion as to the amount of depreciation of the buildings other than the main one and I think it desirable to clear this matter out of the way before dealing with the depreciation of the main building. Mr. Doran's estimate of the depreciation of the tarpaulin and waterproofing building, the new garage and the old auto shelter, whose total reconstruction cost he figured at $49,601.66 was $4,080, leaving a net figure of $45,521.66. Robert A. Rankin and Company's estimate for the same buildings, whose reconstruction cost Mr. Adam estimated at $52,830, was $2,218, leaving a net figure of $50,612. If necessary this could properly be accepted as the amount of the reconstruction cost of the buildings other than the main one less depreciation. This leaves the figures for the main building as follows: namely, Mr. Doran's estimate of $90,551 for depreciation against a reconstruction cost of $426,181.38, leaving a net figure of $335,630.38, as against Robert A. Rankin and Company's estimate of $188,078 for depreciation against a reconstruction cost of $425,202, leaving a net figure of $237,124. These latter figures include those for the pent house and underground piping and an increase of $3,000 over Mr. Adam's estimate of reconstruction cost as shown by Exhibit 10.

I shall now deal more fully with the evidence of the various witnesses as to the depreciation of the main building. Mr. Doran's evidence was brief.

[The learned President here reviewed the evidence as to depreciation of the main building of Mr. Doran for the defendant and of Messrs. J. A. Adam, J. L. Bieler, G. B. Bolton and J. A. Coote for the defendant and continued.]

I have dealt with the evidence on depreciation at length because of the wide difference between the parties as to its extent and the controversy that has arisen on it. Depreciation means diminution or loss of value. As I see it, all of the witnesses have dealt with it relatively to reconstruction cost on the assumption that if reconstruction cost is equivalent to value then depreciation is diminution or loss of such value.

1948
THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.
Thorson P.

On the evidence, I have no hesitation in rejecting Mr. Doran's estimate of $90,551 for the depreciation of the main building and its equipment. It is unfortunate that his evidence on the subject was so sketchy. No particulars of his estimate were given except that $7,000 was attributable to the elevator. Apart from this it is impossible to say how much of the remaining $83,551 is applicable to the other mechanical equipment in the building and how much to the building itself, so that it is not possible to compare his estimate with those of the witnesses for the plaintiff. Put in terms of percentage of reconstruction cost Mr. Doran's total estimate comes to just a little over 21 per cent for a building that was 39 years old and mechanical equipment of various ages. It is highly likely that the portion applicable to the building itself apart from the equipment in it would not exceed depreciation at the rate of ½ per cent per year. So far as I can recall, no expert in any expropriation case before me has ventured as low an estimate of depreciation as this. It is also interesting to note the wide difference in the defendant's attitude in the matter of depreciation according to the circumstances. In its income tax returns it has for many years claimed depreciation allowances on the basis of an implied depreciation of its building at the rate of 2½ per cent per annum, but when it claims compensation for its value on the basis of its reconstruction cost less depreciation it contends that the depreciation has been only at the rate of ½ per cent per annum or less. But, quite apart from these considerations, I think that Mr. Doran's estimate was erroneous and that if the defendant were to receive for the loss of its building the amount of its reconstruction cost less only the amount of depreciation estimated by him it would get far more than it is entitled to even on the highest basis of compensation that its counsel could suggest. There are several reasons for this conclusion.

The sketchiness of Mr. Doran's evidence and its lack of particulars is not the only reason for saying that his estimate of depreciation is not entitled to the same favourable comment as his estimate of reconstruction cost. It was based upon a number of fallacious assumptions. One of them was the statement that because of the high standard of maintenance the life of the building was indefinite.

The assumption that an asset can be so well maintained that it will remain as good as new indefinitely is both erroneous in fact and contrary to judicial opinion. Maintenance may affect the rate of incidence of the depreciation but cannot prevent it. The depreciation of which Mr. Adam spoke, not always readily evident on an inspection, goes on in spite of maintenance. Moreover, there was nothing exceptional in the maintenance of the defendant's building to take it out of the operation of the forces that normally result in depreciation. On this point I accept the evidence of Mr. Adam. The judicial opinion to which I refer is that of the Supreme Court of the United States, expressed in decisions on rate cases. As late as 1903 an assumption similar to that underlying Mr. Doran's statement found favour with that Court. In *San Diego Land and Town Co.* v. *Jasper* (1) it had to consider a bill in equity by a water company complaining that the rates fixed for the supply of water by it were so low as to amount to confiscation of its property. It was conceded that the company was entitled to a fair return upon the value of its property, but the contention that in estimating such value there should be an allowance for depreciation over and above the allowance for repairs was rejected. *Vide* also *Cedar Rapids Water Co.* v. *Cedar Rapids* (2). It was not until the decision in *City of Knoxville* v. *Knoxville Water Co.* (3) that the true character of depreciation was fully understood. This was also a case in which a water company complained that its water rates were fixed so low as to deny it a reasonable return upon its property. It was laid down by Mr. Justice Moody, who delivered the opinion of the Court, that in estimating the value of a plant for rate fixing purposes the cost of reproduction was not a fair measure of value, unless a substantial allowance was made for depreciation. It was also held that a sufficient amount should be allowed from the earnings of a public service corporation for making good depreciation of plant and replacing deteriorated portions thereof. The decision clearly recognizes that the depreciation of an industrial plant begins, notwithstanding repairs to it, from the moment of its first use. At page 13, Mr. Justice Moody said:

(1) (1903) 189 U.S. 439.
(2) (1902) 118 Iowa 234 at 263.
(3) (1909) 212 U.S. 1.

1948

THE KING v. WOODS MANUFACTURING CO. LTD.

Thorson P.

> A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning.

This opinion repudiates the assumption that a property can be kept in substantially as good as new condition indefinitely by means of maintenance. Its depreciation goes on continuously, notwithstanding the repairs made to it. The inevitability of depreciation in an old building and its equipment beyond that which has been overcome by repairs and replacements was also fully recognized by Mr. Justice Hughes in *The Minnesota Rate Cases* (1), in which *City of Knoxville* v. *Knoxville Water Company* (*supra*) was followed.

It is also fallacious to assume, as counsel for the defendant did, that a builder, even of Mr. Doran's ability, can by intuition determine the amount of depreciation in a building merely by looking at it, without calling to his aid either his own experience or the general experience applicable to similar buildings. The fact that depreciation is constantly going on although the signs of it may not be readily apparent makes resort to experience imperative. There is no such thing as an intuitive power to estimate the extent of the depreciation of a building like the defendant's merely by looking at it. Experts frequently express opinions as to the depreciation of a building but the value of their opinions depends largely upon their experience. From this point of view I do not consider Mr. Doran's estimate of depreciation as weighty as Mr. Adam's. Mr. Doran's qualifications as a builder are undoubtedly of a high order and his estimate of the reconstruction cost of the building was sound, but I do not think he was as well qualified as Mr. Adam, an architect of long experience, to estimate the extent of its depreciation. Certainly, his evidence on it was not as complete or as satisfactory as Mr. Adam's. The latter mentioned several indications of physical deterioration that were not referred to by Mr. Doran. Moreover, Mr. Adam

(1) (1913) 230 U.S. 352 at 456.

expressed the opinion that there was nothing exceptional about the maintenance of the building, and that while it was well maintained its maintenance was not beyond what might normally be expected. This was the evidence of a careful and experienced architect and I accept it. The view of the building taken by the Court confirms my opinion of its accuracy. As between Mr. Doran's estimate of depreciation and Mr. Adam's I have no hesitation in preferring Mr. Adam's. I was favourably impressed with the careful manner in which he gave his evidence and his reasons for his estimate.

Both Mr. Doran and Mr. Adam confined their estimates to physical depreciation. In addition, there is unquestionably obsolescence in the building, notwithstanding Mr. Moffit's evidence as to its suitability for the defendant's business. Not only is there Mr. Coote's clearly expressed opinion that there is such obsolescence but there is also Mr. Doran's statement that he would not suggest that type of building if he were building a new one. Moreover, there is Mr. Moffit's own admission that if the defendant were putting up a new building it is probable that it would be a more modern type of building than the present one. I do not think there can be any doubt that this would be so. Moreover, I do not believe that anyone who saw the building could fairly form any opinion other than that there is a good deal of obsolescence in it.

Mr. Osborne contended that there had been failure on the part of the plaintiff's witnesses to appreciate the nature of depreciation and that this nullified their evidence on it. I do not think so. On the contrary, as I have already indicated, it was the evidence of the defendant's witnesses on the subject that was faulty. Mr. Osborne referred particularly to Mr. Bieler's evidence as to the boilers and made much of the fact that he had put a scrap value on them, although they were in serviceable use, and seemed to urge that this error on his part was so fundamental as to destroy the evidence of the plaintiff's witnesses on depreciation. If there was any error of valuation on Mr. Bieler's part in respect of the boilers, which is by no means indisputable, counsel made far too much of it. The error, if any, is confined to the valuation of the boilers, and does not affect any of the other valuations; all that is involved is the

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

quantum of the valuation of the boilers. Their value may possibly be greater than scrap, but it cannot be very substantial. If Mr. Bieler, instead of basing his estimate solely on the age of the boilers, as it seems to me he did, had examined them carefully, as he should have done, and then estimated their likely life in the light of their actual condition and the fact that they mutually insured one another, and then placed a valuation on them little fault, if any, could have been found with his valuation. If he had followed a course similar to that taken by Mr. Coote with regard to the main building after a careful examination of it he would not have left himself as open to attack as he did. Too much emphasis must not, however, be put on the fact that the boilers are still in use, particularly since their pressure has had to be reduced and the length of the defendant's tenancy of the expropriated property is uncertain. Under the circumstances, it is natural that it should wish to keep them as long as possible, even although an element of risk is involved in so doing. Certainly if they have not already reached the end of their useful life, such end cannot be very many years away. A prospective purchaser would not pay much for them, if, indeed, he would pay anything at all. Unfortunately, we have no evidence from the defendant that would be helpful in enabling the Court to estimate what the depreciated value of the boilers was.

Mr. Osborne contended that Mr. Coote had no knowledge of real estate values and no special knowledge of the kind of business carried on by the defendant and that since he lacked these qualifications his opinion of the depreciated value of the building was worthless. I disagree. I considered Mr. Coote well qualified as an expert in the matters on which he expressed his opinions and was favourably impressed with his explanation of the considerations that led him to his conclusions. Indeed, I have not heard the difficult question of depreciation more fully discussed in this Court than it was by Mr. Coote in the present case. In my judgment, he was a competent and reliable witness. He dealt with the depreciated value of the building in relation to its reconstructed cost, so that if such cost represents value then the depreciation spoken of by him represents loss or diminution of such value. His opinion

as to depreciation on such a basis is, therefore, relevant on whatever basis of value the defendant's claim to compensation is put. If reconstruction cost less depreciation represents value to the owner then Mr. Coote's estimate of depreciated value is on precisely the same basis as that contended for by the defendant, and if it is only a factor of value to be taken into account then his estimate is also helpful. Mr. Coote need not be an expert in real estate values or know the defendant's business to give weight to his opinions.

Mr. Osborne also contended that Mr. Coote had made a statistical or accountant's approach to his estimate and that it was not proved to be an accurate representation of the depreciation of the building. I can best deal with this argument by referring to Mr. Coote's evidence on his cross-examination. I thought that instead of being shaken in any way he strengthened his opinions.

[The learned President here reviewed the evidence of Mr. Coote and continued.]

It may be that Mr. Coote's estimate does not exactly represent the actual depreciation that has taken place in the building. That would not be surprising since exact proof of that fact is impossible. The Court must act upon the best evidence that is available, realizing that the actual amount of depreciation can only be estimated and that the best estimate can only be an approximation.

On the evidence I have come to the conclusion that Mr. Coote's estimate of $159,780 for the depreciation of the main building is a conservative one and is the best evidence that is available. I see no reason why it should not be accepted. This would leave the depreciated value of the building at $200,898.

If the estimate of the depreciated value of the mechanical equipment in the main building were increased by $2,000, this would, in my opinion be ample allowance for any possible undervaluation by Mr. Bieler.

The estimates of the depreciation of the pent house and the underground piping, as shown on page 4 of Exhibit 10 come to $2,824, leaving a depreciated value of $4,576.

The total of the estimates of the depreciation of all the buildings and mechanical equipment thus comes to $188,296, as against a reconstruction cost of $478,032, leaving a depre-

1948

THE KING v. WOODS MANUFACTURING CO. LTD.

Thorson P.

ciated value of $289,736. If I were called upon to estimate the value of the defendant's building and mechanical equipment on the basis of reconstruction cost less depreciation this would be the highest figure at which, in my judgment, such estimate could reasonably be put.

The defendant also claimed compensation for certain fixtures not included in the mechanical equipment in the building. The valuation placed on these by Mr. G. Bilodeau, after allowance for depreciation, was $435.

The next item in the defendant's claim is for its prospective loss by disturbance of its business when it has to move from the premises. So far, of course, there has been no such loss. On the contrary, the defendant has been carrying on its business as if there had been no expropriation of its property and has been left in undisturbed occupation and possession of it free of rent. But Mr. Moffit explained that it had not been possible to make any arrangement with the Crown for any definite period of tenancy so that its right of occupancy is terminable at the Crown's pleasure. Mr. Moffit further stated that ever since the expropriation the defendant has been searching for another plant or a suitable site for a new one. In 1946 it examined the Hull Iron and Steel Company's plant in Hull. Later in the same year it bought a site in Overbrook but subsequently decided that it would not be suitable. In 1947 it discussed a possible location with Mayor Brunet. It has also considered the possibility of moving to its old Mullins Street plant in Montreal. It has still no plant or site in mind. If it cannot find a suitable building it will have to acquire a site and construct a new one.

No loss by disturbance having actually been incurred the evidence on this item had to be by way of estimate of the loss that will be likely when the defendant has to move. The particulars of the estimate prepared by the defendant appear in detail in Exhibit Q, which was carefully explained by Mr. Moffit. It was estimated that it would take approximately two months to measure up, template and layout machinery on the floor plan of another building and that this would cost $1,000. The cost of disconnecting, connecting and running in machines was put at $4,270. An estimate of $6,550 had been obtained from the firm of Mahoney and Rich for moving the machinery, stock and

other movables. It was considered that the physical move would take two weeks, that an additional week would be required for preparatory work before the move and that it would take another week after it before the new plant was operating. There would, therefore, be a shut down of four weeks due to the moving and there would be a loss of profit due to non-production as well as a continuing cost of fixed charges during this period. The loss of profit was estimated at $13,193.80 and the cost of the fixed charges at $20,571. It was also thought that about 20 per cent of the employees would leave when the defendant moved and that as a result there would be expense in training replacements, and loss of profit and loss on fixed charges due to low production during such training period, the total of the estimated loss under this head coming to $13,778.46. Finally, it was considered that there would be an average decline of 20 per cent over a period of 13 weeks in the efficiency of the employees remaining with the defendant and moving from one plant to another and the loss of profit and on fixed charges on this score was put at $17,557.70. The total of these various amounts comes to $76,920.96. To this must be added the sum of $2,550 as the depreciation in value of certain chattels, not fixtures, as a result of moving them from the old building into a new one. This was in accordance with the evidence of Mr. Bilodeau. That makes the total claim for loss by disturbance amount to $79,470.96. Mr. Moffit's estimates received general confirmation from Mr. C. L. Rousseau who considered most of them reasonable and some conservative. Nor was any substantial attack made on them by Mr. Coote. While he questioned the amount of the first item his only real challenge was in respect of the inclusion of certain items under the head of fixed charges, such as unemployment insurance, depreciation, light, heat and power, insurance and taxes, and special repairs. Some of these, like depreciation, he thought ought to be excluded altogether, and others reduced by reason of the plant not being in production during the move or dependent in amount upon when it was made.

While I thought that there was merit in some of Mr. Coote's criticisms it is impossible without further enquiry, which would serve no useful purpose now, to determine

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

to what extent, if any, the amount of the claim should be reduced by reason of them. But that is the least of the Court's difficulties. Even if it were conceded that the owner of expropriated property had a right to compensation for loss by disturbance of his business, how is the amount of the defendant's claim under this head to be determined, since no loss has as yet been incurred and the date at which it will occur, if it does occur, is not known and cannot be ascertained? These considerations led counsel for the plaintiff to point out several factors that might affect the quantum of this item of the defendant's claim. Some of the estimates of prospective loss depend on estimates of the time it will take to do certain things, which may prove too high, and others on the time of year in which the move is made and whether it is made in a period of full production or of holidays or shut down. Loss of prospective profits is claimed on the assumption that they will continue at the same rate as heretofore, whereas it may happen that at the time of the move the defendant will be operating at a loss as it did, for example, in 1938. Moreover, if the move is made to some nearby site in Hull the estimates of prospective loss through loss of employees and reduced efficiency of production as a result of moving may be too high. There are even more serious difficulties in the way. Even if the defendant were entitled to compensation for loss by disturbance of its business, it has no right to receive now the full amount of its claim for a loss that will happen only in the future, if it happens at all. It is surely not entitled to more than the present value of such prospective loss. Yet how is such present value to be ascertained? It is impossible to say now when the defendant will have to move. It may not be disturbed in its occupation of the premises for many years. Who is to say that its experience may not be similar to that of the persons who still carry on uninterrupted businesses on properties on the south side of Wellington Street in Ottawa although their properties were expropriated in 1938? Moreover, who can tell what the future may bring? Before the time when the defendant has to move it may decide against continuing in business in which case it will suffer no loss by disturbance, or business adversity may fall upon it which may affect its position. These considerations show the impossibility of determining

now the amount of compensation which ought to be paid to the defendant in respect of this item of its claim, if it has any right of action in respect of it, and I shall not attempt any assessment of it. All I can do at the moment is to say that the amount of its claim under this head, if all the assumptions on which it is based prove true, will be $79,470.96.

Subject to this, the maximum amounts which I would estimate for the various items of the defendant's claim, if I were required to do so, omitting for the moment the item of an allowance for compulsory taking, would be $15,120 for the land, $289,736 for the buildings and mechanical equipment, $435 for the fixtures, and $79,470.96 for the loss by disturbance of business, making a total of $384,-761.96.

Very important evidence touching the value of the expropriated property as a whole was given on behalf of the defendant by Mr. Bosley and Mr. Sherwood. Mr. Bosley said that its main building had been built for use as a factory and served its purpose well. It had a total floor area of approximately 80,000 square feet. In Toronto, buildings similar to it in construction and condition were being sold in 1946 at or about $3.00 per square foot. On this basis he put a valuation of $240,000 on the main building and the land. To this amount he added $40,000 as the cost of the new tarpaulin and waterproofing building and the new garage, making his total valuation come to $280,-000. This was his opinion of the market value of the property. He did not think that the owner could reasonably expect to get more than that in the market. If he wanted "to sell at the market" that was all he could get, unless he could find a purchaser who would pay a premium. He could not tell what a purchaser would be willing to pay, for that would depend on the urgency of his need. He thought that he could have sold the property for the amount of his valuation and that it would have been a judicious deal for the purchaser. He would have advised a client to pay $280,000 and go higher than that if he needed it urgently; 10 per cent more would not be an unreasonable premium to pay, but as a real estate broker he would not advise him to go higher than that. On the other hand, he would have advised the defendant not to

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

take $310,000 for the property, for it could not hope to reinstate itself at that figure. While Mr. Bosley thought he could help the Court by saying what he thought was the market value of the property, he could not put a price on its value in use. Mr. Sherwood's evidence was along similar lines. He thought that the defendant's building was ideally suited for the purpose for which it was being used. His valuation was on the basis of $3.50 per square foot of floor space, which came to $280,000 for the main building with the land, to which he added $35,000 for the other buildings, making his total valuation amount to $315,000. He felt reasonably sure that this amount or better might have been obtained for the property. He would have advised a prospective purchaser that if it suited him and he really wanted it and did not have to do too much altering of it to suit his requirement he could easily pay 10 per cent more for it. If, however, he had been asked to advise the defendant whether to accept an offer of such an amount he would have advised that if it was going to close up its business it was not a bad offer but that if it intended to continue in business it had better not accept it. The opinions of these two experts are entitled to considerable weight. In addition to their opinions as to the value of th property as a whole, further so-called over-all valuations were offered. Mr. Moffit expressed the view that he would not advise the defendant to sell unless the offer to buy was a very substantial one and that a minimum of $700,000 should be set as a selling price. The only comment that I need make on this evidence is that Mr. Moffit's figure of the amount at which the defendant would be prepared to sell is merely a restatement of the amount of the defendant's claim in a different form. Mr. C. L. Rousseau's so-called over-all valuation may also be dealt with briefly. He was asked to say how much he would advise a purchaser to pay for the defendant's property. In effect his final answer, after first saying that he would advise him to buy it as cheaply as possible, was that he would recommend the total of the value of the land and the buildings and the amount of the loss by business disturbance. On the assumption put to him by Mr. MacTavish that the proof of these amounts came to $621,000, he said that he would have advised a purchaser to pay that amount. Mr. Rousseau was a most obliging witness. He would have adopted as

the price he would have recommended to a purchaser whatever amount Mr. MacTavish had proved as the total of the various items in the defendant's claim. This was merely a statement that he would have recommended whatever amount the application of the principle of reinstatement would work out at. There was no independent judgment on his part.

It was contended for the defendant that the Court should find the amounts of the several items in its claim as given in the particulars, add them together and award the total as the amount of compensation to which the defendant is entitled. I am unable to accept this view. The danger of an excessive award resulting from such a method of ascertaining separately the amount of each element or factor that should be taken into account in estimating the value of an expropriated property and adding such amounts together has frequently been stressed in this Court. Moreover, I think that the method is an erroneous one. That was the view of Audette J. in *The King* v. *Manuel* (1) where he said:

the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation.

I followed this opinion in *The King* v. *Edwards* (2):

The Court is not directed to estimate the value of the component parts of the property separately, "although all these elements must be taken into consideration"—and it should not do so; it must estimate the value of the property as a whole, for it is the whole property, and not its component parts separately, that has been expropriated, and its value as such is indivisible.

And in *The King* v. *Thomas Lawson & Sons Limited* (3) I pointed out that there is a difference between taking elements of value into account in estimating the value of a property and merely adding the amounts of such elements together. The estimate of value which section 47 of the Exchequer Court Act requires the Court to make is a global one, not the addition of a number of separate estimates. The difference in a given case might prove to be of great importance.

In the course of an able argument, Mr. Osborne put forward what was basically the same contention in a

(1) (1915) 15 Ex. C.R. 381 at 386.
(2) (1946) Ex. C.R. 311 at 327.
(3) (1948) Ex. C.R. 44 at 104.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

number of forms. He realized, of course, that if the requirement of section 47 of the Exchequer Court Act was to be complied with he must relate the defendant's claim for compensation to the value of the expropriated property. This was essential. He, therefore, had to put his case, in whatever form it took, on the basis of a right to compensation according to the value of the property. I shall not attempt to set out his argument in detail. I think it will be sufficient, at this stage, if I merely outline his main contentions. He relied upon the established rule that the Court must estimate the value of expropriated property on the basis of its value to the owner, not its value to the expropriating party. This led him to what was perhaps his main contention, namely, that the expropriated property in the profitable use to which it was being put had a special value to the defendant and that it was entitled to compensation for its loss on the basis of its value to the defendant in such use. An alternative contention was that the defendant should be compensated for all loss resulting from the expropriation and that the word "value" in section 47 of the Exchequer Court Act must be interpreted accordingly. He would not concede that there could be any case where the estimate of value of an expropriated property could fall short of full compensation to the owner for all loss resulting from its expropriation. There was thus no difference between the concept of compensation on the basis of the value of the property and that of compensation on the basis of reinstatement or replacement. His alternative contention, therefore, was that the principle of reinstatement or replacement should be applied in the determination of the amount of the defendant's compensation or, put in other words, that it should be compensated for all loss resulting from the expropriation. In effect, this contention meant that compensation on the basis of "value of the expropriated property" meant the same thing as compensation for "all loss resulting from the expropriation of the property". It followed that in estimating the value of an expropriated property on which a business is conducted the Court must award compensation to the owner for any loss by disturbance of the business that results from the expropriation. Finally, counsel attempted to reconcile the market value test with the compensation one by urging that if the market value of the property was to be taken

as the measure of compensation regard should be had, not only to the price at which a purchaser would be willing to buy, but also that at which the owner would be willing to sell and that, since an owner would not be willing to sell at a price that would result in a loss to him, market value meant the same thing as compensation for all loss.

The outstanding statement that the owner of expropriated property should receive by way of compensation the money equivalent of his property is that of Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1) where he said:

> The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up the equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

With respect, I am unable to agree with the first sentence in this statement. Certainly, some of the principles referred to were not as well settled as Fletcher Moulton L.J. thought they were, for 30 years after his statement some of the views expressed by him were formally disapproved by Lord Romer, speaking for the Judicial Committee of the Privy Council, in the *Vyricherla* case (*infra*). And there is still controversy as to the extent of the owner's right to compensation for the loss sustained by him as a result of the expropriation of his property. Nevertheless, the statement remains a basic one. It seems clear that the equivalent of which the statement speaks is the money equivalent of the land. It is the loss of the value of the land that is to be replaced by its equivalent in money, so that the total value of the owner's property remains the same. It is only the form of the property that is changed; instead of the land, the owner has its money equivalent. It is also clear that the money equivalent referred to is the market value of the land, that is to say, the amount of

(1) (1909) 1 K.B. 16 at 29.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

money the owner could turn it into if he offered it for sale. Its worth to him in money is not what he thinks it is worth but what he could get for it. This statement is not affected by the requirement that the money equivalent of the land is estimated on its value to the owner and not on its value to the purchaser. This does not mean, as has been frequently contended, that the value of the land to its owner is something more or other than its market value. Certainly, Fletcher Moulton L.J. did not think so; he thought of the requirement as a restrictive one, namely, that the owner had no right to share in the value of the land to the expropriating party; what he meant was that the money equivalent of the land was to be determined without regard to what its value to the expropriating party might be. Finally, there is nothing in the statement to support the contention that the owner of expropriated property is entitled to compensation for all loss consequent upon its expropriation. Indeed, the statement is, in my opinion, by implication, if not expressly, contrary to any such view. It is only for the value of the land that the owner is to receive its equivalent in money.

The insistence upon the requirement that the Court must estimate the value of the expropriated property on the basis of its value to the owner, and not its value to the expropriating party, has given rise to much confusion. It has frequently been contended, as, in effect, it was in the present case, that if a property has a special adaptability for a particular purpose the owner is entitled to compensation in respect thereof in addition to the market value of the property. The contention is wholly erroneous. It has been held in numerous cases that the special adaptability of a property for a particular purpose is no more than one of the factors of value that a prospective prudent purchaser would take into account in deciding how much he would be willing to pay for it. Its special adaptability is, therefore, an element of value, but no more than that, which must be taken into account by the Court in its estimation of the value of the property, for it would affect the quantum of money into which the owner could turn the property if he were to offer it for sale. It is not the purpose of the requirement either to enhance or reduce the amount of compensation to which the owner is entitled.

1948

THE KING v. WOODS MANUFACTURING CO. LTD.

Thorson P.

Its effect is frequently restrictive as *In re Lucas and Chesterfield Gas and Water Board* (*supra*) and in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*infra*), where it was insisted upon in order to ensure that the owner of the expropriated property did not participate in the value of the scheme for which his property was taken. On the other hand, it may be a measure of fairness to the owner to protect him from having to bear any part of the loss in value that might result from the scheme for which his property was taken, as, for example, when property with valuable buildings on it is required for park or road purposes necessitating the demolition of the buildings. The real purpose of insisting upon the requirement is one of fairness, both to the owner and to the expropriating party, by ensuring that the value of the property is estimated without regard to its value to the expropriating party in the scheme for which it was taken, except to the extent referred to by Lord Romer in the *Vyricherla* case (*infra*). For further elaboration of the purpose of the requirement I refer to what I said on the subject in the *Thomas Lawson & Sons Limited* case (*supra*), at pages 78-79.

The next matter to consider is the construction that has been placed on the meaning of the term "value to the owner". By reference to what standard is its amount to be determined? I dealt with this matter at some length in the *Thomas Lawson & Sons Limited* case (*supra*), at pages 69 to 82, and incorporate what I said there in these reasons for judgment. I need, therefore, only summarize the effect of the decisions. In the case of *In re Lucas and Chesterfield Gas and Water Board* (*supra*), in which Fletcher Moulton stated that the money equivalent of the land was estimated on the value to the owner, and not on the value to the purchaser, it was clear that even although the land had special adaptability for a particular purpose its value to the owner was confined to its market value. That means that it cannot be more than it would fetch in the market. The view that the value of the land to the owner means what he could get for it in money was put very concisely by Shearman J. in *Sidney* v. *North Eastern Railway* (1) where, after stating that "special adaptability is nothing more than an element of market value" and that it is

(1) (1914) 3 K.B. 629 at 641.

1948
THE KING v. WOODS MANUFACTURING CO. LTD.
Thorson P.

"merely one kind of special value which is likely in the market to attract a class of purchasers who would come into competition", he said:

The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

There are three decisions of the Judicial Committee of the Privy Council which, in my opinion, settle the law on this matter. That the value of the land to the owner is the amount of money that he could get for it in a competitive field is to be deduced from the decision in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1). There Lord Dunedin made it plain that the amount of the value of the land to the owner is not the price which he places upon it but the amount that he could realize for it in money if he tried to sell it. At page 576, he said:

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking . . . the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give.

Thus the value of the land is the price that someone would give for it. Lord Dunedin then continued:

That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

And at page 579, he put the question thus:

The real question to be investigated was, for what would these subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

The second Privy Council decision to which I refer is *Pastoral Finance Association, Limited* v. *The Minister* (2). There Lord Moulton rejected the contention of the owners of the expropriated property that the capital amount of certain savings and additional profits which they would make in their business if it were transferred to the expropriated property should be added to its market value. At page 1088, he said of these savings and profits:

They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably

(1) (1914) A.C. 569. (2) (1914) A.C. 1083.

the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

It is clear, I think, that the words "a prudent man in their position" must mean "a prudent purchaser in a position similar to theirs". Otherwise, the phrase would not make sense. Later, Lord Moulton makes it clear that the special adaptability of the land in question, namely, the likelihood of savings and additional profits if the business were carried thereon, was not regarded as something apart from the land but rather as an element of value which a prudent purchaser would take into account and which "would guide him in arriving at the price which he would be willing to pay for the land." The third Privy Council decision is *Vyricherla Narayana Gajapateraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There Lord Romer said, at page 312:

The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser must alike be disregarded. Neither must be considered as acting under compulsion.

While I think that the tests of value in these three decisions, although put in somewhat different forms, are basically the same, I must say that, in my opinion, the form suggested by Lord Moulton in the *Pastoral Finance Association Limited* case (*supra*) is the least valuable of the three, because of the difficulty of applying it. In the present case, Mr. Bosley put his finger on this difficulty when he said that he could not say what a purchaser would be willing to pay for the defendant's property sooner than fail to obtain it, without knowing what was in the purchaser's mind and how urgent his need for the property was. The test put by Lord Romer in the *Vyricherla* case (*supra*) is, I think, a better one. It is simpler and capable of application with greater ease and certainty.

On the strength of the decisions I came to the conclusion in the *Thomas Lawson & Sons Limited* case (*supra*), at page 80, that the term "value to the owner", as applied to property expropriated under the Expropriation Act might be defined as follows:

It has no technical or special meaning. It does not mean the owner's own estimate or opinion of its value, or its sentimental or intrinsic value, but only its "worth to him in money". This assumes that a money

(1) (1939) A.C. 302.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

equivalent for the property can be obtained. Its value to the owner means, therefore, its realizable money value, as at the date of its expropriation. The amount of such money value is to be "tested by the imaginary market which would have ruled had the land been exposed for sale", as suggested by Lord Dunedin, and cannot exceed the amount which a prudent man in the position of the owner "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton put it, or "the price which a willing vendor might reasonably expect to obtain from a willing purchaser", as Lord Romer defined it.

I then expressed the opinion that this definition of "value to the owner" is essentially the same as that of "fair market value", as given in Nichols on Eminent Domain, 2nd Edition, at page 658, which I set out earlier in this judgment. I ought also to refer to a statement by the same author, at page 661:

> It has never been disputed that when property taken by eminent domain is of such a character that its market value can be estimated with reasonable accuracy, such value is the measure of compensation. The use of market value as a test in land damage cases preceded the publication of judicial decisions in this country, so that we find it looked upon as an established principle in the earliest reported cases.

In the present case, there is no reason for taking the defendant's property out of the ambit of realizable money value or fair market value as the measure of the defendant's right to compensation for it.

It follows from what I have said that Mr. Osborne's contention that the defendant's property had a special value to it because of its profitable use and that it was entitled to compensation for its loss on the basis of its value to the defendant in such use cannot be sustained. There are several reasons for this conclusion. There is a fundamental difference between the value of a property for a particular use and its value in such use. Its adaptability for profitable use is not the same thing as its profitable use. The former is an attribute of the property and consequently an element of its value, but the latter may depend largely, if not wholly, on factors extraneous to it. It is impossible to say how much of the profitable use made of a property is attributable to the property itself and how much to the industry, skill or good fortune of the owner. Yet the value of the property in use may be due to both. One of the objections to any attempt to determine compensation on the basis of the value of the property to the owner in use is the impossibility of estimating its money equivalent. No expert could assist the Court in the matter. Certainly

Mr. Bosley, with all his experience, said that he could not state any figure for the value of the defendant's property in use. Nor could any one else do so. But, even if the value in use could be estimated in terms of money, it would not be a proper basis for determining compensation in so far as it depends on factors extraneous to the property. While the owner is entitled to have the adaptability of his property to profitable use considered as an element of its value to him since that would influence a prudent person in deciding how much he would be willing to pay for it, he has no right to compensation for factors making for its profitable use that depend on his own qualities or are otherwise extraneous to the property, for they have not been expropriated. There is an illustration in Nichols on Eminent Domain, 2nd Edition, at page 662, of how absurd it would be to make the amount of compensation payable for a property dependent on the profit or lack of profit made by its owner in use:

> It might well be that two rival tradesmen held adjacent lots of land on the same street, similar in all respects, upon which they maintained their respective shops. One of them, by reason of shrewdness, foresight and good fortune might be deriving a large return from his business and would doubtless be unwilling to sell his land, and thus break up his established trade, for a sum considerably in excess of its market value, while the owner of the adjacent store, who found himself losing money from day to day, might be glad to dispose of his property at considerable sacrifice. If, however, the two stores are taken by eminent domain, the measure of compensation would be the same in each case.

What possible justification could there be in determining the compensation to be paid to each tradesman on the basis of the value of his property to him in use? Why should one get more for his property than the other? The adaptability of each property for profitable use is the same; the difference in the profit made in its use is due to factors wholly extraneous to it. Considerations of this sort led Nichols to say, at page 663:

> What is sometimes called the "value in use" is everywhere repudiated as the test.

With this opinion I entirely agree. It is not the value of the property in use, but its value in exchange, with all its attributes, including its adaptability for profitable use, that is the measure of the compensation payable to the owner for its loss.

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

Related to this contention is the submission that, if the market value of the property is taken as the measure of the compensation to be paid to its owner, regard should be had not only to the price at which a purchaser would be willing to buy but also to that at which the owner would be willing to sell. The objections to this argument are obvious. The price at which the owner would be willing to sell his property cannot be the criterion of his entitlement. To admit such a subjective test would be tantamount to making him the arbiter of the amount of his compensation. Nor can his unwillingness to part with his property be considered. An owner cannot increase the value of his property by being unwilling to sell it. The fact is that neither the unwillingness of the owner to sell his property nor the price at which he would be willing to sell it has any bearing on its value. The statement of Lord Romer in the *Vyricherla* case (*supra*) that the compensation must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser does not mean that the owner must be willing to sell at such price. It is the price which he might reasonably expect to receive from a willing purchaser if he were willing to sell. Lord Romer makes it clear that the disinclination of the owner to part with his property must be disregarded, and it is equally clear that the price at which he would be willing to sell it is not necessarily the same as that which he might reasonably expect to receive for it. A more definite and more objective standard than the one implied in the submission is necessary. It must be assumed, I think, that when Parliament directed the Court to measure the amount of compensation to be paid to the owner of expropriated property by the value of such property, meaning its value to the owner, it intended to supply the Court with a test by which the amount of compensation could be ascertained with reasonable certainty and without regard to the personality of the owner or any factors extraneous to the property. In the case of a commercial property such as the defendant's the test of realizable money value established by the cases referred to meets the requirements which Parliament must have had in mind.

The remaining contentions on behalf of the defendant may be dealt with together, namely, that the right to

compensation for expropriated property on the basis of its value to the owner means the same thing as the right to compensation for all loss resulting from the expropriation and that the defendant is consequently entitled to compensation for the loss it will suffer by the disturbance of its business when it is required to move. These contentions involve questions of difficulty that are still the subject of controversy. I dealt with similar contentions in the *Thomas Lawson & Sons Limited* case (*supra*) but their importance warrants further discussion of them. I am quite unable to accept the view that the right to compensation on the basis of the value of the expropriated property means the same thing as the right to compensation for all loss resulting from the expropriation. That would be tantamount to saying that although the Court, in determining the amount to be paid to the owner of expropriated property, must estimate the value of such property it should, nevertheless, apply the principle of reinstatement or replacement in determining the amount of his compensation. In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 83-90, I rejected such a view. There I expressed the opinion that the principle of reinstatement or replacement, being the cost of placing the owner of expropriated property in the same or as advantageous position as he occupied before the expropriation, is not applicable in determining the amount of compensation to which the owner is entitled. I put this opinion on the ground that the amount of his compensation is confined to the value of the property, with the result that if the cost of reinstatement or replacement should happen to exceed such value the owner would have no statutory right to the excess and the Court no lawful authority to award it. I found support for this conclusion in the judgment of the Supreme Court of Canada in *The King* v. *Northumberland Ferries Limited* (1) in which that Court, reversing the judgment of Angers J. in this Court (2), held unanimously that the principle of reinstatement or replacement was not applicable in determining the amount of compensation payable to the owner of two vessels appropriated by the Crown under the War Measures Act, R.S.C. 1927, chap. 206, when the measure of the compensation payable in respect of the acquisition of a vessel so appropriated was fixed by section 5(1) of

(1) (1945) S.C R. 458 (2) (1944) Ex C R 123

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

The Compensation (Defence Act, 1940), as "a sum equal to the value of the vessel, . . . no account being taken of any appreciation due to the war". It seems to me that similar reasoning must lead to the exclusion of the principle of reinstatement or replacement in determing the amount of an owner's claim for property expropriated under the Expropriation Act, once it is made clear, as was not done in the *Northumberland Ferries Limited* case (*supra*) either in this Court or in the Supreme Court of Canada, that the measure of the owner's right to compensation is fixed by section 47 of the Exchequer Court Act as the value of the property.

I have already referred to the statement of Lord Parmoor in *Sisters of Charity of Rockingham* v. *The King* (*supra*) that compensation claims are statutory and depend on statutory provisions and that "no owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right", and expressed the opinion that when property has been expropriated under the Expropriation Act the owner's rights to compensation in respect thereof are only those which he enjoys under sections 19(*a*) and 19(*b*) of the Exchequer Court Act. These are the sole sources of his statutory right to compensation. We are not here concerned with any claim under section 19(*b*), for the whole of the defendant's property was taken and it has no remaining property that could be injuriously affected. That leaves only the effect of section 19(*a*) to be considered. It is the only statutory authority for the owner's right to compensation when the whole of his property has been expropriated. He has only such rights as it vests in him and he is not entitled to any rights that are not within its ambit. Section 19(*a*) empowers the owner to make a claim against the Crown "for property taken for any public purpose". That gives him a right to compensation for the property. But his right is confined to compensation *for* the property. He is not given any right to claim for anything else. In this view, section 19(*a*) does not give him any right to compensation for loss apart from the property. Then section 47 of the Exchequer Court Act, which is under the heading "Rules for adjudicating upon claims," directs that the Court, in determining

the amount to be paid to any claimant for any land or property taken, shall estimate the value thereof at the time when it was taken. It seems to me that it is as plain as language can make it that the amount of compensation payable to the owner of expropriated property is thus limited to its value as at the date of its expropriation. Such value is the statutory measure of the owner's right to compensation and the Court must not use any other. There is no broad right "to be made economically whole". I am inclined to the view that the limitation of which I speak is inherent in the language of section 19(*a*) itself but, if that is not so, there can be no doubt that it is set by section 47.

In this view of the law, the contention that the owner of expropriated property has a statutory right to compensation for all loss resulting from the expropriation is untenable. A right to compensation on the basis of the value of the expropriated property is not the same thing as a right to compensation for all loss nor is it permissible to contend that it is inclusive of it. The concept of value cannot be stretched to include what is not value. It may well be that an owner may suffer loss in consequence of the expropriation of his property over and above the value of the property as defined by the cases I have referred to. If he does, I am unable to find any statutory right to compensation for such loss. If section 47 of the Exchequer Court Act does not have the purpose and effect of limiting the owner's right to compensation to the value of the property I am unable to see any reason for its enactment. To contend that the owner has a right to compensation for all loss resulting from the expropriation would be to regard the section as meaningless verbiage. If Parliament had intended such a wide right to compensation, what would be the sense of requiring the Court to estimate the value of the expropriated property since such value would be an element of the owner's loss without any such direction? To my mind, the conclusion is inescapable that Parliament intended to limit the owner's right of compensation to the value of the property and did not intend to give him any right to compensation for loss apart from such value. Certainly, no such right can be based on section 19(*a*) or section 47 of the Exchequer Court Act.

1948

THE KING
v.
WOODS
MANUFACTURING
CO. LTD.

Thorson P.

Nor, in my opinion, can any such statutory right be found anywhere else. I say this with due regard for the contrary opinion expressed by Rand J. in *The King* v. *Irving Oil Company Limited* (1) that there was authority for such a right in section 23 of the Expropriation Act. In that case, after stating that the provisions of the Expropriation Act dealing with compensation are in general language, and setting out the definition of "land" in that Act, Rand J. said, at page 560:

> The use of the word "damages" and the further language "and all other things done in pursuance of this Act", indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Then he referred to the opening statement in section 23 of the Act:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; . . .

And said of the section, at page 561:

> This language must be construed, within the limits mentioned, in the sense of compensation "by reason of" the acquisition or taking of land or property. The clause "shall stand in the stead of such land or property" can only mean that, with the compensation money in the hands of the owner, he is in the equivalent position of holding his land or property instead of the money. He is, therefore, under that section, in the sense indicated, to be made economically whole.

I must say that I find myself in disagreement with this interpretation of section 23 of the Expropriation Act and the conclusion that under it the owner of expropriated property is "to be made economically whole." In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 90-100, I outlined the legislative origin and history both of the definition of "land" and of section 23 of the Expropriation Act and my reasons for being unable to read the section as Rand J. did. Since then, I have considered the matter further but have not altered my opinion. In view of the full discussion of the matter in the case referred to I need do no more than merely enumerate my reasons for differing from the opinion referred to. In the first place, it must be kept in mind that the statutory scheme relating to the expropriation of property, originally enacted by the Public Works Act of 1867, Statutes of Canada, 1867, chap. 12, is not wholly embodied in the Expropriation Act. Part

(1) (1946) S C R 551.

of it is in the sections of the Exchequer Court Act to which I have referred. Failure to appreciate this fact contributed, I think, to the assumption that section 23 of the Expropriation Act is the statutory authority for the payment of compensation to the owner of property expropriated under that Act and the source of his statutory right to compensation for it. A study of the purpose for which the section was introduced and its place in the statutory scheme relating to the expropriation of property establishes beyond dispute that there is no basis for any such assumption. There was a right to compensation for expropriated property under certain sections of the Public Works Act of 1867, the forerunners of sections 19(*a*) and 19(*b*) of the Exchequer Court Act, several years before the predecessor of section 23 of the Expropriation Act was even thought of. There was thus never any need to look to it either as the source of the right to compensation or as the statutory measure of it. I also suggest that the place of the section in the statutory scheme cannot be ascertained by looking only at the first sentence in the section and concentrating on the statement that the compensation money "shall stand in the stead of such land or property", without looking at the rest of the section to see what the purpose of that statement is. The whole of section 23 reads as follows:

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or incumbrance upon such land or property shall, as respects His Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty

The predecessor of this section was first enacted as section 1 of an amendment of the Public Works Act of 1867, enacted in 1874, Statutes of Canada, 1874, chap. 13. Without repeating what I said about the history of the section in the *Thomas Lawson & Sons Limited* case (*supra*) I think I may fairly say that if the section is read in the light of the setting in which its predecessor first appeared it will be seen that the purpose of the provision that the compensation money "shall stand in the stead of the land or property" was to preserve the rights of those who had had claims to or incumbrances upon the expropriated property

1948
THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.
Thorson P.

by converting them into claims to the compensation money. Without some such provision there would have been nothing to which such claims or incumbrances, which became extinguished as against the property upon its expropriation, could attach. It was for this purpose that the compensation money, whether agreed upon or adjudged, was substituted for the expropriated property and made to stand in its stead. The section must not, therefore, be read as an assertion, even by implication, of any principle or standard for the determination or measurement of the amount of the compensation. It is not concerned with the right to compensation or its amount, but only with the status of the compensation money, after it has been agreed upon or adjudged, and its substitution for the property as a base to which former claims against the property may attach after its expropriation. This view of the section is wholly consistent with the rest of the legislative scheme. There is no suggestion that the word "compensation" is a dominating or controlling term. It is used only in the expression "compensation money" and is descriptive of the amount which has been agreed upon or adjudged. So far as it has been adjudged, the reference cannot be otherwise than to an adjudication pursuant to the direction given by section 47 of the Exchequer Court Act. Thus the "adjudged" compensation money referred to in section 23 of the Expropriation Act, which is to stand in the stead of the expropriated property, must mean the amount of compensation that has been "adjudged" by the Court pursuant to section 47 of the Exchequer Court Act, that is to say, the value of the expropriated property as estimated by the Court. Under the circumstances, the suggestion that, under section 23 of the Expropriation Act, the owner of expropriated property "is to be made economically whole" seems to me untenable.

A similar criticism is applicable in a degree to a statement of my own in *The King* v. *W. D. Morris Realty Limited* (1) in which, after stating that in expropriation proceedings the question of value of the expropriated property must be regarded from the point of view not of the expropriating party but of the owner, I said, at page 46:

This cardinal principle is clearly adopted in the Expropriation Act itself by its provisions in section 23 that the compensation shall stand

(1) (1943) Ex. C.R. 140.

in the stead of the expropriated property and generally by its description of the compensation money as the amount to which the defendant is entitled. Indeed, the principle is inherent in the term "compensation" itself.

My only comment on this statement is that, if I had then studied section 23 of the Expropriation Act and its purpose in the statutory scheme relating to the expropriation of property as carefully as I have done since, I would not have made it.

This brings me to the contention that the defendant is entitled to compensation for loss by disturbance of its business when it has to move, over and above the value of the land and buildings. The question whether the owner of expropriated property has any right to compensation for loss by disturbance of his business in consequence of the expropriation of his property has been the subject of controversy. If I were dealing with the matter *de novo,* in the light of the statutory enactments and without regard to the judicial decisions, I would have no hesitation in holding that the owner has no right to compensation for such loss. In my view, the law on this subject is the same in Canada as it is in the United States. There can be no dispute as to what the law is in that country. Nichols on Eminent Domain, 2nd Edition, lays it down clearly, at page 366:

it is well settled that when land occupied for business purposes is taken by eminent domain, the owner or occupant is not entitled to recover compensation for the destruction of his business or the injury thereto by its necessary removal from its established location.

And he says, at page 698:

There is one form of pecuniary injury, often of a crushing character, incident to the taking of real estate by eminent domain, which the most liberal constitution makers have not yet guarded against and which, except in a few cases of a very unusual character, is not regarded as a basis of a legal claim for damages in any state in the union—namely, the injury to the business conducted upon the land taken.

I am unable to find any more statutory authority for granting compensation for the destruction of the owner's business or injury to it in Canada than there is constitutional or statutory recognition of it in the United States. I put my reason for this opinion briefly. The disturbance of the owner's business is a different thing from the expropriation of his property, even although it follows as a consequence thereof, so that if his right to compensation is confined to the value of the property, as it plainly is, it cannot extend to such a different thing as loss by the dis-

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P

turbance of his business. That such loss is something other than the value of the property seems obvious. Let us assume that two properties of equal value have been expropriated. The owner of one intends to continue in business and will suffer loss by disturbance; the owner of the other does not intend to continue in business and will not suffer any loss. If the right to compensation is confined in each case to the value of the property by what authority can the first owner claim a larger amount of compensation than the second? He cannot impart any increase of value to his property by his intention to continue in business any more than he could do so by being unwilling to sell it. If he suffers loss by disturbance of his business such loss is in respect of a matter personal to himself and not part of the value of the property. Thus, while Parliament has given the owner the right to compensation for the loss of his property, and decreed that such compensation must be equal to its value, it has not given him any right to compensation for any personal loss such as loss by disturbance of his business.

But while that would be my view of the state of the law if I were free in the matter—and I do not say that I am not—I am also of the opinion that I ought not to disregard the fact that there are numerous decisions of this Court, as also of the Courts in England, wherein effect has been given in varying degrees to claims for loss bv business disturbance. The state of the case law on this subject cannot be described otherwise than as being chaotic. In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 55-68, I dealt with this deplorable condition and incorporate herein my remarks relating thereto. There I pointed out that the judgments of this Court in which claims for loss by disturbance were considered fell into two classes, namely, those of Burbidge J., who justified the allowance of compensation for loss by disturbance on the ground that it is an element of the value of the expropriated land and those of Cassels J. and other judges of this Court, who considered that the rights of the owner were not confined to the value of the land but extended to compensation for all damage resulting from the expropriation in addition to such value. The two views expressed in these classes

of cases are not, in my opinion, reconcileable with one another. After examing the authorities I came to the following conclusion, at page 68:

> Having regard, therefore, to what I consider the plain terms of section 47 of the Exchequer Court Act and the weight of judicial authority, I have no hesitation in holding that when property is expropriated under the Expropriation Act the owner's claim to compensation for it is confined by section 47 of the Exchequer Court Act to the value of the property as estimated by the Court, meaning thereby its value to the owner, and not to the expropriating party; that, if the owner has suffered any loss by disturbance or otherwise resulting from the expropriation, the Court, in estimating the value of the property, may take such loss into account only to the extent that it is an element in its value, but not otherwise; and that the owner has no independent cause of action for damages for such loss apart from such value.

I must confess that it was not without doubt that I went even as far as this, and I would not have done so except for some of the judicial decisions to which I referred.

An interesting explanation of how the claim for loss by disturbance came to be recognized at all in view of the absence of statutory authority for it was given by Scott L.J. in *Horn* v. *Sunderland Corporation* (1). After pointing out that in the Land Clauses Act of 1845 there is no express provision giving compensation for disturbance he said, at page 43:

> If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1.) for the value to him of the land, and (2.) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1.), that is, the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover.

This is, I think, the only possible justification for giving any effect to a claim for loss by business disturbance. I should, therefore, if I am to be guided by the authorities, avail myself of the judicial eyesight of which Scott L.J. spoke and thereby discern in section 47 of the Exchequer Court Act, although I am unable to do so with my own eyes, the right of the owner of expropriated property to have his loss by disturbance of his business taken into account by the Court as a factor or element of value in the estimate of the value of the property which the Court must make. It may be, for example, that in a particular case a purchaser would be influenced in the amount which he would be willing to pay for the property by the factor

(1) (1941) 2 K.B. 26.

1948
THE KING
v.
WOODS
MANU-
FACTURING
CO. LTD.
Thorson P.

of the disturbance in business of its owner. To the extent of such influence it would be a factor or element of value to be considered. Mr. Moffit suggested such a possibility in the present case and it was also envisaged in Mr. Bosley's evidence and perhaps also in Mr. Sherwood's. Whether a purchaser would be influenced by such a consideration to pay a higher price for the property than otherwise would depend, as Mr. Moffit said, on the urgency of his need for it. It is obvious, as Mr. Moffit admitted, that it would be difficult to determine how far a purchaser would go by reason of such a factor. It is also plain that the extent of its influence on the amount which a purchaser would be willing to pay for a property or a vendor might reasonably expect to receive for it is not capable of precise measurement; it might be substantial or, on the other hand, negligible or even non-existent. It might well be that in a given case the loss by business disturbance would be greater than the value of the property and be so high that it would be quite unreasonable to expect that anyone would be willing to pay it in order to obtain the property. In such a case it would be absurd to contend that it could be considered as a factor or element of its value. It is only to the extent that it would be considered by a purchaser in deciding how much he would be willing to pay for the property or affect the price which the owner might reasonably expect to receive for it if he wished to sell it that may be taken into account by the Court.

While I am prepared to go as far as this, notwithstanding the difficult speculative element involved therein, there is no justification in going farther and attempting to discern in section 47 something that is not there at all, namely, a right to compensation for loss by disturbance of business, over and above the value of the property. Section 47 of the Exchequer Court Act does not permit the Court, in estimating the value of the expropriated property, to take into account matters that are not factors or elements of its value. Certainly, it may not automatically add the amount of the claim for loss by disturbance of business to the amount which would otherwise fairly represent the value of the land. To do so would be to read the word "value" in section 47 as if it meant "value plus loss by disturbance". The judicial eyesight must not become so keen as to discern any such distortion of its meaning.

It is in this state of the law that the Court must consider the item in the defendant's claim relating to its prospective loss by disturbance of its business.

It follows from what I have said that there are circumstances under which the owner of expropriated property may suffer loss by reason of the expropriation of his property without any right to compensation for it. That is so in the case of his loss by disturbance of his business to the extent that it is not a factor or element of the value of the property. It seems to me that this state of the law is unsatisfactory and that Parliament might well consider appropriate measures for its correction. The simplest course, in my opinion, would be to confer upon the owner the right to compensation for loss by disturbance of his business as an independent cause of action quite apart from the value of the property. But if Parliament were to give favourable consideration to such a change in the law I venture the suggestion that it would be wise to confer the right only after the loss has occurred or its quantum can be determined with certainty. The difficulty there would be in determining the amount of compensation payable to the defendant in the present case in respect of its claim for prospective loss, by disturbance of its business, if it had an independent cause of action for it, is an excellent example of the wisdom of such a provision.

Under all the circumstances, I have come to the conclusion that if I were to award the defendant the sum of $350,000 for the second expropriated property this would adequately cover every factor or element of value, including that of loss by disturbance of business, that could properly be taken into account and, at the same time, meet the tests of value to which I have referred. I, therefore, estimate the value of the second expropriated property as at the date of its expropriation at the sum of $350,000, and determine the amount of compensation to which the defendant is entitled accordingly.

In addition to the items of the defendant's claim which I have discussed it also claimed an allowance of $56,000 for compulsory taking. I dealt briefly with the claim for an allowance for compulsory taking in the *Thomas Lawson & Sons Limited* case (*supra*), at page 106, and repeat my observations herein. Mr. MacTavish sought to make a

1948
THE KING
v.
WOODS
MANUFACTURING
CO. LTD.
Thorson P.

special case for the allowance in the present case but I find no justification for it. Where all the factors of value, including a claim for loss by disturbance, have been taken into account, and adequate compensation has been awarded, as I think has been done in the present case, I can see no justification for granting any additional allowance for compulsory taking and I have not done so. To grant the defendant in the present case an allowance of 10 per cent for compulsory taking would amount to giving it a bonus that would be wholly unwarranted. I repeat the suggestion that I have made previously that Parliament might well take steps to abolish any allowance for compulsory taking in Canada, as was done in England by the Acquisition of Land Act, 1919.

There remains only the question of interest. The defendant has been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent for it. Under these circumstances, in accordance with the established rule of this Court, it is not entitled to any allowance of interest: *The King* v. *Manuel* (1); *The King* v. *Edwards* (2).

There will, therefore, be judgment declaring that the property described in paragraph 5 of the Information is vested in His Majesty the King as from May 19, 1944, and that described in paragraph 4 as from May 7, 1946; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $45,800 for the first expropriated property, together with interest thereon at the rate of 5 per cent per annum from May 19, 1944 to this date, and the sum of $350,000 for the second expropriated property, without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

---

(1) (1915) 15 Ex C.R. 381. (2) (1946) Ex. C.R. 311.

BETWEEN:

FRANK C. BOWER......................APPELLANT;

AND

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

1946 Sept. 24

1949 Jan. 31

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 7(b)—Whether profits of optometrist exempt from liability to excess profits tax—Onus of proof of compliance with conditions of exemption prescribed by s. 7(b) on appellant—Meaning of "profession"—The Optometry Act, R.S.S. 1940, c. 221, ss. 2(1), 29(1)—Carrying on a profession a question of fact—Whether profits of a profession dependent on personal qualifications a question of fact.

The appellant is an optometrist at Humboldt, Saskatchewan, and claimed that his profits were exempt from liability to taxation under The Excess Profits Tax Act, 1940, by reason of section 7(*b*) thereof. He had attended the School of Optometry at Toronto, served an internship with a practising optometrist in Saskatchewan, passed an examination set by the University of Saskatchewan, obtained a professional certificate from the Saskatchewan Optometric Association, of which he was a member, and was licensed to practise as an optometrist or optician. His office consisted of a waiting room, a refracting room and a laboratory. There was a neon sign overhanging the entrance with a pair of eyes painted on it. He carried a professional card in seven local papers, put his name and description on cards, notes and blotters sent to former patients, but did no other advertising. The appellant kept a case history sheet for each person who consulted him complaining of visual defects, headaches or sore eyes. If there was any disease or pathological condition of the eyes he referred the patient to a medical doctor, but if there was no such condition he examined their eyes with a view to ascertaining the correction required to remedy any defect of visual acuity that might be disclosed. If glasses were required he wrote the prescription on the case history sheet. Then a suitable mounting or frame was selected and the necessary measurements for fitting the patient were taken. The appellant did not grind any lenses but otherwise assembled the frames and mountings. He then verified the lenses to make sure they answered the prescription and fitted them to the patient. The appellant charged an all inclusive fee for all the services rendered including the supplying of the glasses, without breaking it up in any way. The appellant did not sell goggles or binoculars or other similar articles, nor make up prescriptions for doctors or other optometrists. The Minister decided that the appellant's profits were not the profits of a profession within the meaning of section 7(*b*) of the Act. Being dissatisfied with the Minister's decision the appellant brought his appeal to this Court.

Held: That the onus of showing that the assessment appealed against is erroneous either in fact or in law lies on the appellant.

2. That since the appellant is claiming the benefit of exemption from liability by reason of the provisions of section 7(*b*) of the Act, he must show that every condition prescribed by it for the granting of the exemption has been complied with.

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

3. That the appellant must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, which are all questions of fact, is on the appellant.

4. That whether a man carried on a profession is in the last resort a question of fact.

5. That the appellant combined the professional services of an eye specialist with the business of a dispenser of glasses but that fact cannot constitute his combined activities the carrying on of a profession.

6. That even if the appellant's combined activities as optometrist and optician constituted the carrying on of a profession and the profits sought to be charged were the profits of such profession, the appellant would have to prove that the profits were wholly or mainly dependent upon his personal qualifications.

7. That the appellant's profits were not wholly or mainly dependent upon his personal qualifications.

APPEAL under the Excess Profits Tax Act, 1940.

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

A. H. Bence for appellant.

L. C. R. Batten K.C. and *E. S. MacLatchy* for respondent.

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

THE PRESIDENT now (January 31, 1949) delivered the following judgment:

This appeal raises the question whether the profits of an optometrist are exempt from liability to taxation under The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32. The appellant, an optometrist at Humboldt in Saskatchewan, was assessed for excess profits tax under the Act for the years 1940 and 1941. He appealed to the Minister who affirmed the assessments on the ground that his profits were not the profits of a profession within the meaning of section 7(*b*) of the Act. Being dissatisfied with the Minister's decision he brought his appeal to this Court.

The appellant contends that his profits in 1940 and 1941 were not liable to taxation under the Act by reason of section 7(*b*) thereof, which, so far as relevant, reads as follows:

7. The following profits shall not be liable to taxation under this Act:—

(*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed . . .

The onus of showing that the assessment appealed against is erroneous either in fact or in law lies on the appellant. To succeed in his appeal he must bring his case within the ambit of the express terms of the section and, since he is claiming the benefit of exemption from liability by reason of its provisions, he must show that every condition prescribed by it for the grant of the exemption has been complied with. It was agreed that little or no capital was employed, so that the Court need not concern itself with this condition of exemption. But compliance with the other conditions must be clearly proved. The appellant must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, which are all questions of fact, is on the appellant; if he fails in respect of any of them his appeal must be dismissed.

No assistance is available from any Canadian decision for this is the first time that the section has been before the Court, but there are several helpful decisions in the United Kingdom on a similar enactment there, namely, section 39(*c*) of the Finance (No. 2) Act, 1915, which provided, in part, as follows:

39. The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount . . .

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

and, in the amended form which may have been the source of the section under review, section 12(3) of the Finance (No. 2) Act, 1939, which reads, in part:

12. (3) The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications . . .

The first decision to which I refer is that of the Court of Appeal in *Commissioners of Inland Revenue* v. *Maxse* (1). There the respondent was the sole proprietor, editor and publisher of a monthly magazine. His earnings were derived from sales of the magazine, advertisements and reprints of articles mostly written by him. Before the war he wrote a large part of each number, and, though some of the matter was contributed by others, the sales were largely due to the popularity of his own writings. When war broke out he increased his personal contributions and did most of the writing. Having been assessed for excess profits duty he appealed to the General Income Tax Commissioners and contended that the profits were earned by reason of his personal qualifications, that the capital expenditure was small in comparison with the personal qualifications required to earn the profits, and that he was exempt from duty by virtue of section 39(*c*) of the Finance (No. 2) Act, 1915. The General Commissioners accepted this contention and discharged the assessment, but their decision was reversed by Sankey J., who held that the respondent was carrying on a commercial business and not a profession within section 39(*c*) and was therefore liable to duty. His decision was reversed by the Court of Appeal which held the respondent was carrying on the profession of a journalist, author or man of letters, and also the business of publishing his own periodical, that the proper course to be followed where such a course was possible, was to sever the profits of the profession and those of the business and assess only in respect of the latter, and that in the present case, the profits of the two businesses could be separated by debiting the profits of the publishing business with a proper sum for the respondent's professional activities as contributor and editor and assessing him only for the balance. Apart from this equitable disposition of the

(1) (1919) 1 K.B. 647.

matter, the decision is important for its statement as to what is meant by the word "profession". At page 657, Scrutton L.J. said:

The next question is what is a "profession"? I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a "profession" in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning.

In *Currie* v. *Commissioners of Inland Revenue* (1) the Court of Appeal held that the question whether a particular person carries on a profession within the exception of section 39(*c*) of the Finance (No. 2) Act, 1915, is one of fact to be determined by the Special Commissioners. At page 335, Lord Sterndale M.R. said:

Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question; it must depend upon the circumstances with which the Court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand there may be facts on which the direction would have to be given the other way. But between these two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact;

And Scrutton L.J.,, after agreeing that "whether a man carried on a profession is in the last resort a question of fact", made the following observation, at page 343:

I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organized professional body with a recognized standard of ability enforced before he can enter it and a recognized standard of conduct enforced while he is practising it. I do not for a moment say it settles the matter, but if I were deciding a question of profession I should attach some importance to that particular feature.

In several cases the facts were similar to those in the present case. In *Webster* v. *Commissioners of Inland Revenue* (2) they were as follows: the appellant was an

(1) (1921) 2 K.B. 332. (2) (1942) 2 All E.R. 517.

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

ophthalmic optician and a member of the Worshipful Company of Spectacle Makers, of the British Optical Association and of the Joint Council of Qualified Opticians; these bodies conducted examinations the passing of which required extensive knowledge of the human eye on the part of candidates and laid down a code of ethics with which the members had to comply; the appellant had waiting and consulting rooms with two shop windows for the exhibition of spectacles or spectacle frames; he had a small neon sign in front of the shop and advertised in the local papers in a form approved by the Council; his activities consisted of testing the eyesight of his customers, making out a prescription for the spectacles required, obtaining them from a spectacle maker, checking them with the prescription and fitting them to his customer; for these services he charged one amount without any separate fee for sight testing or prescribing, although he stated that he took into account a sum of 5s. for sight testing and, except in certain cases, a further sum of half a guinea for prescribing; if, after a sight test, the customer required another pair of spectacles the only charge made was for the second pair of spectacles. The appellant contended that he was carrying on a profession and that the profits of that profession were dependent wholly or mainly on his personal qualifications. The Commissioners for the General Purposes of Income Tax found that the appellant was carrying on the business of supplying and selling spectacles to which the eye-testing was ancillary and confirmed the assessments. MacNaghten J. agreed with this conclusion and dismissed the appeal from the Commissioners' decision. At page 518, he repeated the view expressed by Lord Sterndale M.R. in *Currie's* case (*supra*) in the following terms:

> The question whether an individual is carrying on a "profession" is a question of fact, and it has been pointed out that the facts of the case as found by the commissioners may be such that it would be impossible to hold that he was carrying on a "profession", or, on the other hand, that it would be unreasonable to deny that he was carrying on a "profession"; and as between those two extremes there may be intermediate cases in which it would be possible for one person to come to one conclusion, and for another person to come to the opposite conclusion but that, if there is evidence to support the conclusion at which the commissioners have arrived, then that conclusion cannot be set aside by the court.

MacNaghten J. then went on to say:

> On the facts as stated by the commissioners, I do not see how they could come to any other conclusion than that at which they did arrive.

It seems clear on the facts stated by the commissioners that the appellant was carrying on the trade of a vendor of spectacles, and that he was not exercising any profession at all.

With respect, I suggest that all that MacNaghten J. was called upon to determine was whether there was any evidence to support the Commissioners' conclusion and that when he had decided that there was such evidence, his own opinion as to whether the appellant was or was not carrying on a profession was irrelevant.

In *Carr* v. *Inland Revenue Commissioners* (1), a similar case came before the courts, except that the findings of fact by the Commissioners went the other way. There the facts were as follows: the appellant was a qualified optician; he had served an apprenticeship to his father for 5 years, had gained experience by working with and assisting oculists and opthalmic surgeons for over 17 years, including experience in the fitting of contact lenses, and became a member of the National Association of Opticians and the Joint Council of Qualified Opticians after furnishing evidence of his training and experience and recommendations of members of the medical profession; he had a waiting room and two consulting rooms at his premises, and on each side of the entrance had a small shop window front used for the display of types of optical frames without glasses and unpriced; his name appeared once upon the front of the premises without the addition of any advertising matter beyond his description and he did not advertise in any journal; his evidence was that his profits were wholly derived from fees paid for his advice to patients who consulted him as to appliances necessary to improve their eyesight and from his own assembly of such appliances to his own prescription and the subsequent supply thereof to his patients; the fee charged was an inclusive one to include the sight-testing and the appliance supplied (such item not being shown separately on the statements rendered by him to persons consulting him) except in cases where after examination no appliance was supplied when a fee for examination was charged; the proportion of such cases was very small; sometimes he obtained glasses from other opticians but this happened only very occasionally. On these facts the Commissioners found that the appellant's profits were dependent wholly or mainly on his personal

(1) (1944) 2 All E.R. 163.

1949
BOWER
v.
MINISTER OF
NATIONAL
REVENUE
Thorson P.

qualifications and that he was carrying on a profession within the meaning of the section. On an appeal from their decision MacNaghten J. took the view that, although they had found as a fact that the appellant was carrying on a profession, the right view of the case was that he was not carrying on a profession within the meaning of the section but was conducting the business of selling spectacles and reversed the decision of the Commissioners, but his judgment was unanimously reversed by the Court of Appeal which held that, if there was evidence upon which the Commissioners could find as they did, the trial judge was not entitled to take a different position, and that there was ample evidence for the Commissioners to find as they did. That is all that the Court of Appeal was called upon to decide. The case does, however, contain useful observations. In the first place, it is well to emphasize that it does not decide generally that opticians carry on a profession. Scott L.J. thought that the facts were adequate to justify the Commissioners' conclusion and that whether he personally would have come to the same conclusion or not was irrelevant. He also expressed the view that on the evidence before them the Commissioners could have decided the other way. Du Parcq L.J. put the matter even more clearly. At page 166, he said:

> I hope that nobody will think that we are deciding here that opticians as a class are all carrying on a profession. We are, of course, deciding nothing of the kind. We are simply saying that in this particular case it was open to the Commissioners to find on the facts that the appellant was carrying on a profession. Speaking for myself, if the Commissioners had found the other way, I should not have been in the least inclined to say that it was not open to them to do so. I think it would have been; and I will not say how I would have been likely to decide the case if I had been sitting in their place.

The case is also of importance for its observations as to the meaning of the word profession. Scott L.J. thought that the definition propounded by Scrutton L.J. in *Maxse's* case (*supra*) was too sweeping and preferred that of Lord Sterndale M.R. in *Currie's* case (*supra*). In addition, he set out several considerations that seemed to him to point to the fact that the appellant was carrying on a profession. At page 164, he said:

> On these findings of fact, it seems to me that the following six considerations point to his carrying on a profession: (i) There was no advertising, even outside the premises; (ii) he had the appropriate waiting room and two consulting rooms; (iii) no prices were mentioned in con-

nection with the seven or eight types of frame exhibited in his little windows for the observation of patients; (iv) he carried out the functions of examing and testing eyesight and prescribing the suitable glasses—in itself a process calling for much skill and experience—and assembling them in their frames, meaning, no doubt, that they were set in the frames, for example, at the appropriate angle, which, of course, is essential; (v) his net earnings, whatever they were called, were very substantial, particularly in relation to the expenditure on material, that is, on what would be called the stock-in-trade of a business; and finally, (vi) the proportion between those earnings and the item for stock-in-trade, so called in the account, was very large in relation to the stock-in-trade—far larger than it would normally be in any trading business.

The observations of Du Parcq L.J. on the subject are also very useful. His view was that it was dangerous to try to define the word "profession" but subject to that he said, at page 166:

I think that everybody would agreed that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anybody to be carrying on a profession.

Ultimately one has to answer this question: Would the ordinary man, the ordinary reasonable man—the man, if you like to refer to an old friend, on the Clapham omnibus—**say now, in the time in which we live,** of any particular occupation, that it is properly described as a profession? I do not believe one can escape from that very practical way of putting the question; in other words, I think it would be in a proper case a question for a jury, and I think in a case like this it is eminently one for the Commissioners. Times have changed. There are professions today which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations, I care not what word you use in relation to them, may in future years acquire the status of professions. It must be the intention of the legislature, when it refers to a profession, to indicate what the ordinary intelligent subject, taking down the volume of the statutes and reading the section, will think that "profession" means. I do not think that the lawyer as such can help him very much.

The two cases last cited are excellent illustrations of the fact that under the United Kingdom Act the Court's appellate jurisdiction is confined to questions of law. Findings of fact by the Commissioners are binding upon it if there was any evidence to support such findings and it has no jurisdiction to reverse them no matter what its own opinion of the facts might be. Thus, if the findings in the

1949
BOWER
v.
MINISTER OF
NATIONAL
REVENUE
Thorson P.

Webster case (*supra*) or the *Carr* case (*supra*) had been the reverse of what they were, as they might have been, the appeal therefrom in each case would have been dismissed. In Canada, of course, the situation is different, for the Court's appellate jurisdiction extends to questions of fact as well as to points of law. Consequently, the findings of fact by the Minister involved or implied in the assessment are not binding upon the Court and it may come to its own conclusions in respect of any of them.

I should also refer to *Neild* v. *Commissioners of Inland Revenue* (1). This is another illustration of the importance of findings of fact by the Commissioners and the limited scope of the Court's jurisdiction in respect thereof. There the facts were as follows. The taxpayer was a member of the British Optical Association, the Worshipful Company of Spectacle Makers and the Joint Council of Qualified Opticians. His premises included a waiting room and a consulting room. Optical frames without glasses and unpriced were exhibited in a show window at the entrance to his premises. He advertised in the local press, in magazines and on cinema screens and buses on lines approved by the British Optical Association. If a person troubled about his eyesight called on him, he would examine his eyes and ascertain whether there was any disease. If he found any, he would advise him to consult an oculist. If, on the other hand, he thought there was no disease, he would prescribe spectacles, which he and his mechanics would make in accordance with his prescription. He would then test such spectacles and fit them. He charged a fee of 10s. 6d. for examination of the eyes and supplying the prescription in cases where he did not himself make the spectacles and a fee of 5s. for examinations without a prescription. A fee of 5s. was included in his inclusive charge for examination and supplying of the spectacles. Occasionally he made up spectacles from prescriptions brought to him. He was assessed to excess profits tax on the sum of £1,402, this amount being arrived at by deducting his standard profit of £1,500 from his net profits of £2,902. The General Commissioners held that £750 out of his net

(1) (1946) 2 All E.R. 405;
(1947) 1 All E.R. 480;
(1948) 2 All E.R. 1071.

profits was professional and the remainder trading profit but did not say whether they affirmed or reduced the assessment.

On a further hearing they dismissed the taxpayer's appeal on the ground that his business was mainly of a commercial nature. MacNaghten J. read the Commissioners' decision as amounting to a finding that the taxpayer was really carrying on two businesses, one the profession of optician and the other the trade of spectacle maker, and that £750 of the net profits was due to the former, and, following *Maxse's* case (*supra*), held that the sum of £750 should be deducted from the total net profits and ordered that the assessment be reduced by £750. From this judgment the Crown appealed. When the matter came before the Court of Appeal, Lord Greene M.R. held that the Commissioners had not made findings on the issues of fact before them and directed the appeal to stand over and the Case to be remitted to them for answer and report on the following questions, namely, "(*a*) whether the profit of the taxpayer appealed from, or any, and, if so, what, part thereof, was derived from the carrying on of a profession. (*b*) If question (*a*) is answered in the affirmative, whether the profit so derived was dependent wholly or mainly on the personal qualifications of the taxpayer". The Commissioners then answered these questions as follows: "(1) That of the profit, the subject of the assessment appealed from, £750 was derived from the carrying on of a profession. (2) That the profit of £750, so derived, was dependent wholly or mainly on the personal qualifications of the appellant". They thus made specific findings of fact in line with what MacNaghten J. had assumed to be the meaning of their previous finding. When the matter came before the Court of Appeal the second time, Tucker L.J. held that there was no evidence on which the Commissioners could find that part of the profit of the taxpayer's business was derived from the carrying on of a profession, since there was no evidence that the carrying on of the professional part of the business was separate from the rest of it. The Court, therefore, allowed the appeal from MacNaghten J.'s judgment and restored the original assessment.

Counsel for the appellant relied mainly upon *Carr* v. *Commissioners of Inland Revenue* (*supra*). That case seemed

1949
BOWER
v.
MINISTER OF
NATIONAL
REVENUE
—
Thorson P.

to set the pattern which he followed in establishing the facts of his client's case. Evidence for the appellant was given not only by the appellant himself but also by Mr. Henry C. Arnold and Mr. Harold C. Arnold, president and registrar respectively of the Saskatchewan Optometric Association. Several contentions of an argumentative nature were made in the course of their testimony; I think that it would be desirable to set out the facts first and deal with the contentions later.

The appellant's evidence was as follows. He took a year's course at the School of Optometry at Toronto, passed the examinations conducted by the Board of Examiners in Optometry of the Province of Ontario under the regulations of the Optometry Act, 1919, of Ontario, and on July 21, 1924, became entitled to registration in Ontario as an Optometrist. He then served a year of internship with a practising optometrist in Saskatchewan, as required by the Saskatchewan Optometric Association, passed an examination set by the University of Saskatchewan and on July 30, 1925, obtained a professional certificate from the Saskatchewan Optometric Association whereby he became a duly registered member of the Association and entitled to be styled an optometrist or optician and to enjoy all the privileges set forth in The Optometry Act, 1924, of Saskatchewan. He has been a member of the Association ever since and, having paid the prescribed fee, held an annual license from it for the years 1940 and 1941. The Association holds annual summer refresher courses at the University of Saskatchewan in which lectures are given in various optometrical subjects and also in subjects relating to the eye and the appellant has attended at least ten of the fourteen courses thus held. The appellant's office is on the Main Street in Humboldt and consists of three rooms, the front one nearest the street being the waiting room, from which a door leads to the middle or refracting room, with a door leading from it to the back room which is used as a laboratory. The appellant's name is across the window of the front room with the word "Optometrist" underneath. There is also an overhanging neon sign, on which a pair of eyes is painted, to show the entrance to the office. This sort of sign is not now permitted by the Association under a by-law passed in 1945

and the appellant has asked electricians to remove it but they have been too busy to do so. The front window of the office has Venetian blinds, which are let down in the daytime, behind which there is a space of twenty-eight inches covered with a dark velvet cloth, on which fitting sets used to be displayed, but about the time when the Venetian blinds were put up in 1941 these sets were removed and nothing has been displayed there since. There is no indication of the cost of frames or mountings anywhere in the office. The appellant carries a professional card in seven local papers, two inches by one column wide. Up to about 1941 or 1942 his card carried the words "To see better see Bower". This kind of card was not then contrary to the regulations of the Association, but now the card permitted by it must be limited to the name and address of the optometrist and the word "optometrist". The appellant puts his name and address and the word "Optometrist" on the case which he supplies to his patient and on cards sent to former patients advising them of the time since he examined their eyes and telling them it is time for re-examination, and on notes advising them as to the care of their glasses and on blotters with tests for determining visual acuity. Apart from these means he does no advertising. Persons complaining of visual defects, headaches or sore eyes come to the appellant either of their own initiative or because they have been referred by a medical doctor, dentist or a previous patient. The appellant's activities in connection with a person's coming to his office were described by him in detail. He keeps a case history sheet (Exhibit 14) for each person who consults him on which he records his name, address, age, occupation, date of examination and name of person by whom he was referred. The patient's visual acuity is then taken without glasses and with present glasses. The first examination of the eyes by any instrument is by the opthalmoscope to ascertain whether there is any diseased or pathological condition of the eyes in which case the appellant refers the patient to a medical doctor and proceeds no further with his own examination. If there is no such condition the appellant proceeds with a number of tests involving the use of instruments, such as an opthalmometer, static and dynamic retinoscope, refractor head, cross cylinder and others, with

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

a view to ascertaining the correction required to remedy any defect of visual acuity that has been disclosed. When the necessary tests have been made the appellant decides upon his prescription. If glasses are required the prescription for the lenses required is written on the case history sheet. The patient is then seated at the fitting table where a suitable mounting or frame is selected. The bridge of the nose measurement, the temple width, the style and length of the temple and the fitting distance are all entered on the case history sheet and the patient is instructed to come back for a final fitting. The case history sheet is then taken to the appellant's laboratory where he does as much work as he has time for. He does not grind any lenses, but cuts them to size and shape, edges and feathers them off, drills any necessary holes in them, puts them in the frames and fits them in the mountings. The examination of the eyes and the prescription for the lenses is properly the function of an optometrist, and the work done in the laboratory of fashioning the lenses and assembling the glasses is called optician's work. After this work has been done the lenses are verified by a lensometer to make sure that they answer the prescription. When the patient calls for the final fitting the prescription is re-evaluated to determine whether the necessary correction has been effected. He is then advised to come back for servicing of his glasses such as tightening, straightening and adjustment as required and told to come back for a review of his eyes in one, two, or three years. The appellant charges an all-inclusive fee which is entered on the case history sheet. This is for all the services rendered including the supplying of the glasses. The fee is not broken up in any way. No scale of fees is set by the Saskatchewan Optometric Association. If the patient desires an additional pair of glasses the fee is not as large as in the first instance. The appellant does not sell goggles, or binoculars or other similar articles, nor does he make up prescriptions for doctors or other optometrists.

The evidence of Mr. Henry C. Arnold, president of the Saskatchewan Optometric Association, may be dealt with briefly. Almost all the optometrists in Saskatchewan are members of the Association and are governed by its by-laws as well as by The Optometry Act. The Association

has a code of ethics and discipline for its members. It was also instrumental in having a change made in the matter of collecting the provincial 2 per cent educational sales tax. Originally and during the years in dispute, optometrists were required to collect this tax from the persons whom they supplied with glasses, but since 1944 they have not been required to do so. Now they pay the tax on the materials that they themselves purchase. The association has been active in providing refresher courses and additional training for its members at the University of Saskatchewan and has recommended a five year degree course in Optometry there. It has also limited the advertising which optometrists may do and barred them from having their offices located in or with access from merchandising establishments.

Mr. Harold C. Arnold, the registrar of the Saskatchewan Optometric Association, gave evidence as to the requirements for the examinations for the license to practice optometry in Saskatchewan conducted by the Board of Examiners appointed by the University of Saskatchewan and the fees required for annual licenses. He compared the Saskatchewan Optometry Act with the Optometry Acts in the other provinces and said that in Saskatchewan the practice of optometry is considered a profession.

The practice of optometry is defined by section 2(1) of The Optometry Act, R.S.S. 1940, chap. 221, which is described as an Act to regulate the Practice of Optometry, as follows:

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

1. "Practice of optometry" means the employment of any means other than drugs, medicine or surgery for the measurement or aid of the powers of vision or the supplying of lenses or prisms for the aid thereof.

The statutory definition seems to be applicable either to the occupation of an "optometrist" or to that of an "optician", as these terms are ordinarily understood. There is no definition of them in the Act but I think that their meaning and the difference between them is clear. The word "optician" is defined in the New English Dictionary as "2. A maker of or dealer in optical instruments" and in Webster's New International Dictionary, Second Edition, as "2. One who makes, or who deals in, optical glasses and instruments". It is interesting to note that the word

1949
BOWER
v.
MINISTER OF
NATIONAL
REVENUE
Thorson P.

"optometrist" does not appear at all in the New English Dictionary, but its meaning is given in Webster's as "One who is skilled in and practices optometry" and "optometry" is defined as "1. Measurement of the range of vision; also, loosely, measurement of other visual powers. 2. Hence, scientific examination of the eyes for the purpose of prescribing glasses, etc., to correct defects, without the use of drugs." This definition of "optometry" is wider than that appearing in the New English Dictionary as "the measurement of the visual powers; the use and application of the optometer", the word "optometer" being given the meaning of "A name of instruments of various kinds, for measuring or testing vision, in respect of range, acuteness, perception of form or colour, etc.; *esp.* one for measuring the refractive power of the eye and thus testing long-or short-sightedness".

The Optometry Act governs the Saskatchewan Optometric Association and its members, empowers it to make by-laws for the government and dicipline of its members, vests in its council the power to make by-laws, rules and regulations governing a variety of matters including "the proper and better guidance, government and discipline of members of the association and the regulation of the practice and professional conduct of such members including the making of rules of professional ethics by which the said members shall be governed", and provides for a number of other matters such as examinations for candidates for professional certificates, the issue of certificates and licenses, the cancellation of licenses and revocation of certificates, the registration of members and students, the payment of fees and certain prohibitions and penalties. The Act does not describe the practice of optometry as a profession but uses the word "professional" in a number of contexts, such as "professional conduct", "professional ethics" and "professional services."

Counsel for the appellant contended that the appellant's practice of optometry was a profession and that the profits sought to be charged were the profits of such profession. I am unable to agree. I have no difficulty in finding that so far as he performed the functions of an optometrist, that is to say, the examination of the eyes and the prescription of the necessary correction for any visual defect thereby disclosed, he rendered services of a professional character, but I am unable to find that the work

which he himself described as optician's work, that is to say, the fashioning of the lenses and the assembly of the glasses and mountings was the carrying on of a profession. In my opinion, he combined the professional services of an optometrist with the commercial business of an optician. His services as an optometrist were of the same character as those that would be rendered by an oculist, meaning thereby an eye specialist, and could properly be described as professional. But the rest of his work was of a different nature and was not professional. In my view, an optician who fills a prescription for glasses brought to him from some one else conducts a business that is not a profession, even although he performs the ancillary functions of fitting the customer and subsequently servicing his glasses. I can see no difference between his position and that of a pharmacist who fills a doctor's prescription. Nor can I see how the character of the business can change by reason of the fact that it is conducted by a person who also renders services of a professional character. The fact is that the appellant combined what would have been the carrying on of a profession if it had been done separately with the conduct of a commercial business that was not a profession. The examination of the eyes and the prescription of the necessary glasses were activities of a professional nature, but the supplying of the glasses even with the services ancillary thereto were commercial business transactions. The person who consulted the appellant about his eyesight and was then supplied with glasses was both a patient and a customer. Nor can the fact that the appellant combined the professional services of an eye specialist with the business of a dispenser of glasses constitute his combined activities the carrying on of a profession, any more than a country medical doctor who also runs a drug store could make his drug store business part of his medical profession. While The Optometry Act uses the word professional in several contexts, as already mentioned, it seems to me that it clearly indicates that the supplying of glasses is a commercial transaction of purchase and sale, for section 29(1) provides:

> 29. (1) Every person practising optometry shall:
>
> (a) display his certificate and licence in a conspicuous place in the office or place where he practises and, when required, exhibit such certificate and license to the council or its authorized representatives;

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

(b) deliver to each *customer* or person fitted with glasses a *bill of purchase* which shall contain his full name, his post office address and the number of his certificate and license, together with a specification of the lenses and frames or mountings supplied and *the price charged therefore.*

The italics are mine. I think that the legislature has stressed the commercial character of the transaction of supplying glasses for the very purpose of preventing optometrists from hiding the price of the glasses supplied by them under the guise of an overall fee for professional services. The fact that optometrists in Saskatchewan do not comply with this section of the Act, as Mr. Henry C. Arnold stated, cannot turn the appellant's commercial activities into the carrying on of a profession or make them part thereof. Under the circumstances, I find that the business which the appellant carried on in 1940 and 1941 was not a profession, notwithstanding the fact that some services of a professional character were rendered. It follows as a matter of course from this finding that the profits sought to be charged were not the profits of a profession within the meaning of section 7(*b*) and that the appellant is not entitled to the exemption granted by it. On this ground alone, therefore, his appeal cannot be sustained.

Even if these findings were erroneous and the proper findings were that the appellant's combined activities as optometrist and optician constituted the carrying on of a profession and that the profits sought to be charged were the profits of such profession, that would not conclude the matter in the appellant's favour. It is not enough for him to show that he was carrying on a profession and that his profits were those of such profession. He must go further, for the profits of a profession are exempt only if they were dependent wholly or mainly upon personal qualifications, and not otherwise. The appellant must, therefore, prove not only that his profits were the profits of a profession, but also that they were wholly or mainly dependent upon his personal qualifications: *Neild* v. *Inland Revenue Commissioners* (1). Whether or not they were so dependent is a question of fact.

This brings me to the contentions of the appellant and his witnesses bearing on this issue. I have already referred

(1) (1947) 1 All E.R. 480.

to the appellant's evidence that he charged only one total fee for everything done for his patient including the supplying of glasses. He said that in fixing such fee he took into consideration the character of the service rendered to the patient, the amount of skill and knowledge required to render it and its value to the patient, and also the patient's ability to pay and the cost of the laboratory materials consumed. There was an indignant denial that he sold glasses at all. The contention was that he sold only his professional services, that in order to render such services he had to purchase opthalmic materials, such as lenses, frames, mountings, temples, pads and the like, that he did not sell any of these things but used or consumed them in the course of rendering his services to his patient, and that such opthalmic material had no use or value apart therefrom. Similar contentions were put forward by Mr. Harold C. Arnold, the registrar of the Saskatchewan Optometric Association. He said that optometrists in Saskatchewan followed a definite principle in setting their fees: the fee depended on the service rendered, namely, visual care; the services rendered consisted of examining, refracting and prescribing, verifying, fitting and re-evaluating, subsequent servicing and the consumption of the opthalmic materials; for these services the optometrist received a fee based upon "first, the type and character of the optometrist, second, the skill, knowledge and judgment required of the optometrist in each individual case, third, the value of the service to the patient and his ability to pay." The fact that Mr. Arnold used almost the same words as the appellant struck me and prompted me to ask whether they were set out in a manual, text or guide or code of ethics, and Mr. Arnold referred to a number of texts and brochures including one entitled "Economics in Visual Eye Care", published by the American Optical Company, in which the considerations put forward by the appellant and Mr. Arnold are stressed.

On the evidence and contentions put forward, and even if it were conceded that the appellant's practice of optometry was a profession and that his profits for 1940 and 1941 were the profits thereof, I have no hesitation in finding that they were not wholly or mainly dependent upon his personal qualifications. In the first place, I reject the contention that he did not sell glasses but consumed them

1949
Bower
v.
Minister of National Revenue
Thorson P.

himself in the course of rendering professional services to his patient. In my opinion, this contention is unsound. The appellant both rendered professional services for which he received a fee and sold glasses on which he made a substantial profit. The inclusion of the fee and the price of the glasses in one charge to his patient and customer without showing the price charged for the glasses looks like a device for hiding such price from his customer. Moreover, the contention that he did not sell glasses is inconsistent with his own records, such as his income tax returns and his case history sheets. I shall refer first to the former. In his income tax return for 1940 he reported $11,083.45 under the head of "merchandise sold (total cash and credit sales)", less a closing inventory of $3,295.53, leaving a gross trading profit of $7,787.92 from which he deducted business expenses, leaving a net income from business of $6,208.11 out of a total income of $6,531.48. The 1941 income tax return reported similar items, namely, $12,155.95 as merchandise sold (total cash and credit sales), less a closing inventory of $3,102.65, leaving a gross trading profit of $9,053.30, from which after deduction of expenses there was a net income from business of $7,455.65 out of a total income of $7,505.30. In neither return was there any report of any income from professional fees. The appellant sought to explain away his returns, including his certificate therein that all the statements and information contained in them were true in every respect, by saying that he was ignorant of the proper way to make them, that he had taken the matter to a lawyer in Humboldt, that he had not sold any merchandise, that the items of $11,083.45 for 1940 and $12,125.95 for 1941 under the heading "merchandise sold (total cash and credit sales)" were incorrectly included under such heading, that they represented his total fees charged, as set forth in his case history sheets, and should properly have been reported as fees for professional services. I am unable to accept the explanation that the items referred to should have been reported as fees for professional services. There were two other statements by the appellant which I also found unsatisfactory, namely, that he paid the provincial education sales tax on the amount of his fees for the services rendered by him, and that he could not tell how much of his over-all fee would be for his service

as an optometrist. I do not believe either of these statements. The Education Tax Act, R.S.S. 1940, chap. 55, required every consumer of tangible personal property purchased at a retail sale to pay a 2 per cent tax on the value of such property and required vendors to collect it from purchasers. It is not clear from the evidence whether the appellant collected this tax from his customers in addition to the amount of his total fee or whether he absorbed it himself and paid it out of such fee. It does not matter which course he followed, for the basis on which he computed the tax is clear. On the case history sheets which he kept for each person who consulted him he noted both the amount of his total fee and the amount of the education sales tax. This appears from the case history sheets which were put in by the appellant as Exhibit 15; one, dated 11-25-37, shows a total fee of $18 and an education sales tax of ·30 cents and the other, dated 3-4-40, a total fee of $14 and an education sales tax of ·22 cents. If these case history sheets are samples of the appellant's case history sheets generally, and I see no reason for assuming otherwise, they show conclusively that the appellant did not pay the 2 per cent education sales tax on the amount of his total fee, as he said he did, but on a lesser amount, namely, the total fee less a deduction of $3 in each case. The case history sheets do more than this; they refute the appellant's statement that he could not tell how much of his over-all fee would be for service as an optometrist. I do not think that there was ever any doubt in his mind as to what portion of it represented his fee for professional service and what portion the price at which he sold the glasses. I think that it would be fair to assume from the notations on the case history sheets, Exhibit 15, that in each case the fee for professional service was $3 and the balance represented the price charged for the glasses. Under the circumstances, I think that the items which the appellant included under the heading "merchandise sold (total cash and credit sales)" in his income tax returns, which were made up from the amounts of the total fees shown on his case history sheets, were properly included under such heading, except to the extent of the fee portion thereof. Moreover, the case history sheets have an important bearing on the issue whether the appellant's profits

1949
BOWER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

depended wholly or mainly upon his personal qualifications. It was only to the extent that they came from his professional services that it could be said that they depended upon his personal qualifications. The rest came from commercial business transactions that did not depend upon personal qualifications. Exhibit 15 shows in respect of two total fees of $18 and $14 that $15 and $11 respectively represented the price charged for the glasses and only $3 in each case the professional fee. I would be greatly surprised if the appellant's case history sheets generally did not show a similar picture. It would, therefore, appear that the bulk of the appellant's profits came from business transactions that did not depend upon personal qualifications. It is, of course, not necessary to go as far as this. It is not for the Crown to show that the appellant's profits were not wholly or mainly dependent upon his personal qualification. The onus is on the appellant to prove that they were. In my opinion, he has wholly failed to discharge such onus.

On the argument Mr. MacLatchy for the respondent suggested that it might be possible for the Court to find that the appellant was carrying on two businesses, one a profession and the other not, and that he was liable to taxation only in respect of the latter. I have given careful consideration to this suggestion but have come to the conclusion that such a disposition of the appeal ought not to be made. Where it is possible to separate two businesses and sever their respective profits there is nothing in law to prevent the course suggested: *Inland Revenue Commissioners* v. *William Ranson & Son, Limited* (1). And this course was followed in *Maxse's* case (*supra*). But the limited range of applicability of the principle in that case was clearly indicated by Tucker L.J. in *Neild* v. *Inland Revenue Commissioners* (2); there must be separate businesses and the profits thereof must be severable. These conditions do not exist in the present case. While I think it would be possible for the appellant by going through his case history sheets to sever his fees for his professional services from the rest of his receipts he could not determine what portion of his expenses would be properly chargeable to each of his activities. Moreover, the fact is that while

(1) (1918) 2 K.B. 709. (2) (1948) 2 All E.R. 1071.

some of his activities were of a professional nature he did not carry on two separate businesses. There was only one business.

The result is that since the appellant has not shown compliance with the conditions of exemption prescribed by section 7(*b*) of the Act his appeal must be dismissed with costs.

Judgment accordingly.

1948
Dec. 20
—
1949
Jan. 25

BETWEEN:

LUSCAR COALS LIMITED.............APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, ss. 2(m), 4(n), 6(1) (a) (b)—"Losses sustained in the process of earning income during the year last preceding the taxation year"—Dividends exempt from income tax received during the year losses incurred in earning the income are not applicable to reduce the amount of such losses—"Losses incurred" means those incurred in operating a business and not net losses—Earned income—Investment income—Appeal allowed.

Appellant in the years 1942 and 1943 was engaged in the business of coal mining in the Province of Alberta. In its income tax return for the taxation year 1943 appellant deducted, *inter alia*, an amount for losses incurred in carrying on its business for the preceding year. Appellant had received in such year a certain amount of money from other companies by way of dividends, such receipts being exempt from income tax in appellant's hands by virtue of s. 4(*n*) of the Income War Tax Act. Respondent deducted such amount of dividends received by appellant from the amount claimed by it for the losses claimed and assessed appellant for income tax accordingly. Appellant appealed to this Court.

Held: That the losses deductible are the losses sustained in the operation of or carrying on the business of the taxpayer and not the net losses of the taxpayer.

APPEAL under the Income War Tax Act.

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

J. R. Tolmie and *J. M. Coyne* for appellant.

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

1949

LUSCAR COALS LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

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

CAMERON J. now (January 25, 1949) delivered the following judgment:

This is an appeal from assessment for income tax and excess profits tax for the taxation year 1943, the fiscal year of the appellant ending on June 30, 1943. The appellant company, both in the year 1943 and the preceding year, was engaged in the business of coal mining in Alberta.

The appeal arises in connection with the interpretation to be placed on section 5 (*p*) of the Income War Tax Act and which for the year in question was as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*p*) losses sustained in the process of earning income during the year last preceding the taxation year by a person carrying on the same business in both of such years, if in the calculation of such losses, no account is taken of any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, or of any disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, except such amount for depreciation as the Minister may allow.

The appellant, under the provisions of this section, was entitled to a deduction from its 1943 income as it had suffered a loss in its previous fiscal year. The dispute arises because of a difference of opinion between the parties as to how such "losses" for 1942 are to be computed in ascertaining the proper deduction for the fiscal year 1943.

In its tax return for 1943 the appellant showed a taxable income of $73,190.79 after deducting from its income the sum of $21,299.57, which it claimed as the amount of its losses for 1942. The latter figure was arrived at by including as a disbursement the sum of $1,000 in donations made in 1942, and without including in its computation of losses the sum of $10,352.60 received by it in 1942 from other companies incorporated in Canada (the profits of which other companies had been taxed under the Act and which, therefore, under section 4 (*n*) were not subject to tax in 1942 in the hands of the appellant). In assessing the appellant for the year 1943 the respondent:

(a) Disallowed the item of $1,000, representing donations made by the appellant in 1942, as part of its losses in 1942 and the appellant does not appeal from that part of the assessment; and

(b) In computing the appellant's losses for 1942 which might be deducted in 1943, has included in the appellant's income for 1942 the sum of $10,352.60 received by it in dividends from other Canadian companies.

Instead, therefore, of allowing to the appellant losses for 1942 aggregating $20,299.57, as now claimed by the appellant, the respondent has allowed only $9,945.97. The sole question for determination, therefore, is whether in computing losses for 1942 under the provisions of section 5 (*p*) the tax-exempt dividends so received by the appellant in that year should be taken into account in ascertaining its taxable income for the year 1943.

Section 5 (*p*) was first introduced into the Act by section 5 (7), ch. 28, of the Statutes of Canada, 1942-3, and made applicable to the taxation year 1942 and subsequent years. The obvious purpose was to ease the tax burden on those who might make a profit in one year, but who had sustained a loss in the last preceding year, by recovery of that loss before tax as assessed in the succeeding profitable year.

Before considering particularly the provisions of clause 5 (*p*) I think it advisable to refer briefly to clause 4 (*n*) of the Act which, for the year in question, was as follows:

> 4. The following incomes shall not be liable to taxation hereunder:—
>
> (*n*) Dividends paid to an incorporated company by a company incorporated in Canada, the profits of which have been taxed under this Act, except as hereinafter provided by sections 19, 22A and 32A.

The purpose of that section was, I think, to prevent triple taxation of the same profits or gains. If there were no such provision, tax would be levied on the profits of the company in Canada which originally made the profits; a second tax would be applied to the incorporated company which received them from the original company; and finally, when the receiving company distributed profits to its shareholders, the latter would presumably again be subject to personal tax. The exceptions set out in section 4 (*n*) have admittedly here no application and the parties hereto are in

1949
LUSCAR COALS LTD. v. MINISTER OF NATIONAL REVENUE
Cameron J.

agreement that in 1942 the said dividends received by the appellant company were not subject to tax. As I have already pointed out the appellant paid no tax in 1942.

The effect of applying the provisions of section 4 (*n*) is, therefore, that in some cases it is possible for a company to show a profit in any given year under ordinary accounting practices and at the same time have no taxable profit or gain under the Income War Tax Act. That would be the case, for example, when the amount of dividends received (but which by the provisions of section 4 (*n*) were not subject to tax) exceeded the losses sustained in all other operations. The dividends so received are undoubtedly "income" of a taxpayer within the provisions of section 3 (1), but under the provisions of section 4 (*n*) are not liable to tax and may therefore be deducted from income in ascertaining the taxable profits or gains. The taxing authorities, therefore, in ascertaining the taxable income of such a company, do not take such dividends into account as they are not liable to taxation.

But, as in the instant case, when the deduction for business losses sustained in the last preceding year is to be considered under section 5 (*p*), the respondent submits that, in ascertaining the amount of losses so to be deducted, the amount of such dividends must be taken into account as part of the income of the appellant in the last preceding year. In effect, it is submitted that in ascertaining "losses," ordinary accounting practices must be followed.

The word "losses" is not defined in the Income War Tax Act, ch. 97, R.S.C. 1927, as amended, (or in the Excess Profits Tax Act) but it is apparent from the provisions of section 5 (*p*) itself that not all "losses" may be deducted, and to the extent that such "losses" are so limited it is possible to interpret the meaning of that word to some extent at least.

The deduction can only be claimed by a person carrying on the same business, both in the taxation year and in the last preceding year, and then only to the extent of such losses as were sustained in the last preceding year. Then certain further limitations are given as to the manner of computing such losses by excluding from the computation capital outlays or losses, and disbursements not wholly, exclusively and necessarily laid out for the purpose of

earning the income (these limitations following almost verbatim the wording of section 6(1) (*a*) and (*b*) relating to deductions from income which are not allowed). A deduction for such depreciation as the Minister may allow is permissible, and in the following year an amendment was made to provide for a similar allowance for depletion. The subsection, therefore, in general terms lays down what disbursements and outlays may or may not be taken into account in computing "losses", but gives no indication of what is or is not to be taken into account on the other side of the computation—namely, that of income. To ascertain whether there have been "losses" necessarily involves consideration of both sides of the balance sheet. The appellant's case rests in the main on its contention that the amount which it claims as losses in 1942 ($20,299.57) is, in fact, its "losses sustained in the process of earning income." That is the correct amount of such losses unless the dividend receipts be taken into account, in which case the loss is reduced to $9,946.97. The respondent, on the other hand, contends that the words "losses sustained in the process of earning income" mean the general overall loss and that investment income must therefore enter into the computation in ascertaining the amount of the losses.

I think it is clear that if the words "in the process of earning the income" did not appear in the subsection, the appellant would have no case. Since the words "losses sustained" are not defined in the Act, they would have to be given the ordinary meaning attributed to them in ordinary business accounting in which case the dividends received would of necessity be taken into account. The problem, therefore, narrows down to the determination of what is meant by the words "in the process of earning income," qualifying as they do the preceding words "losses sustained," it being clear that the taxpayer is entitled to deduct all "losses sustained in the process of earning the income" except as limited by the subsequent provisions of the subsection, which limitations do not here affect the appellant.

While the Act gives no definition of the words "in the process of earning the income," the meaning to be attributed

1949
LUSCAR COALS LTD. v. MINISTER OF NATIONAL REVENUE
Cameron J.

to them may be gathered from a consideration of certain other parts of the Act. By section 2 (*m*), "earned income" is defined as:

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

A clear distinction, therefore, is drawn between "earned income," as above defined, and "investment income" which, by section 2 (*n*), is defined as: "investment income includes any income not defined herein as 'earned income,' and also any amount deemed by this Act to be a dividend."

The distinction is in reality between that income which is obtained as a result of labour or effort and that income which is not so obtained. Clearly, the dividends received by the appellant fell within the category of "investment income" and are excluded from "earned income." The purpose of making such a distinction is illustrated by the additional rate of tax charged on investment income by section 9 (3) of the Income War Tax Act as it was in 1943. Further, the words "in the process" seem to indicate something in the nature of an active operation. The mere receipt of dividends involves no outlay of any effort or labour on the part of the recipient.

Judicial consideration has been given to the meaning of section 6 (1) (*a*) of the Act which then was as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended *for the purpose of earning the income.*

In the case of *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1), Duff, C.J. said at p. 22:

First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income."

I interpret that judgment to mean that the words "laid out or expended for the purpose of earning the income" are equivalent to "incurred in the process of earning the

(1) (1941) S.C.R. 19.

income," that is—working expenses. Since, therefore, the words "in the process of earning the income" as applied to expenses mean "working expenses," I see no reason why the almost identical words contained in section 5 (*p*), "in the process of earning income," as applied to losses, should not have a similar connotation. I think that they refer to losses sustained in the operation or carrying on the business of a taxpayer, that of the appellant herein being the business of coal mining.

Counsel for the respondent has referred me to the case of *Inland Revenue Commissioners* v. *Australian Mutual Provident Society* (1). That was a case arising under r. 3 of case III of sch. D. of the Income Tax Act, 1918, by which in the case of certain specified companies "the income of the company from investments of its life assurance fund (excluding the annuity fund, if any) wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this schedule and shall be charged under this case." This company was entitled under the Act to exemptions from United Kingdom tax in respect of interest and dividends from securities and investments forming part of its life assurance fund falling with certain rules. A question arose as to the method of computing tax and it was:

HELD, that r. 3 did not tax income from investments, whether exempted or not, but a conventional sum calculated as the rule directed; accordingly the sum to be taxed was not affected, by the fact that one of the factors in the calculation contained income from exempted investments, and there was no reduction of the society's liability on that ground.

Lord Wright said at p. 622:

It was on the contrary a charging provision intended to charge the assurance company on the basis of a fixed percentage of the total income. That was merely a convenient mode of imposing some charge on the assurance company in consideration of the privilege it enjoyed in trading in this country. The charge was a tax on the investment income only as a machinery to tax the general profits of the British business, and as a manner of measuring the charge by an arbitrary figure derived from a percentage of the investment income In this connection it was not material to distinguish between exempted and unexempted income. All that was needed was a yardstick.

I have considered that judgment and in my view it is not helpful in the case at bar. The decision was made under

(1) (1947) A.C. 605.

1949
LUSCAR COALS LTD. v. MINISTER OF NATIONAL REVENUE
Cameron J.

a special rule which did not tax income from investments whether exempted or not, but a conventional sum computed as the rule directed.

Counsel for the respondent also referred me to a passage in the dissenting judgment of Porter, L.J., in the case of *Absalom* v. *Talbot* (1), in which at p. 650 he said:

> In order to ascertain that balance one has to determine what sums are to be credited and what debited in the annual accounts. No directions are given in the Income Tax Acts as to how those profits are to be ascertained and in default of directing they must, I think, be arrived at on ordinary commercial principles, subject to such provisions of the Income Tax Acts as require a departure from such ordinary principles.

As I have stated above, if the words "in the process of earning the income" were not used in the subsection, then "losses", lacking any direction as to what losses are meant, would have to be given the meaning attributed to it in ordinary commercial practice, in which case I have no doubt that the losses would be reduced by the amount of investment income received. But I regard the use of these words in the subsection as a provision requiring a departure from the ordinary commercial principles, and conferring on the appellant a right to deduct, not the net losses incurred in the prior year, but its losses incurred in the operating of its business of coal mining, that being the only activity in which there was a process of earning income.

I have given careful consideration to the other cases which were cited but have reached the conclusion that they are not here helpful. It has also been brought to my attention that in the Income Tax Act, enacted June 30, 1948, and made applicable to the taxation year 1949, and subsequent years, the word "loss" is so defined as to exclude from the computation dividends of the type here in question. I am quite unable to draw any inference from that section in the new Act as to what was meant by the word "losses" under the Act in effect in 1943.

I was also referred to the provisions of section 5 (1) (*r*) which was enacted in 1943 and made applicable to the taxation year 1944 and subsequent years. That section permitted one whose chief occupation was farming to deduct his farm losses sustained in the process of earning income from the operation of any farm during the two years last preceding the taxation year, and it would appear

(1) (1944) 1 A.E.R. 642.

1949

LUSCAR COALS LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

that investment income in the years of loss would not be taken into account in computing the losses. The language of that subsection on this point is somewhat more clearly expressed than in section 5 (1) (*p*), and because of the difference in the wording and that it was enacted in the subsequent year, I am unable to see that it throws any light on section 5 (1) (*p*), although the tenor of each subsection is to permit the averaging out of income over years of profit and loss.

On the whole, I have reached the conclusion that the appellant has satisfied the onus cast on it, and the appeal will be allowed with costs. The matter will be referred back to the respondent to re-assess the appellant on the basis of my finding.

Judgment accordingly.

BETWEEN:

1948

Oct. 13 & 14

Dec. 2

ELPHINSTONE MATHER RUSSELL.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4 (t) (1), 9 (1) (a), 9 (1) (b)—Militia Act, R.S.C. 1927, c. 132, ss. 2 (e), 21, 69—Army Act, (British), s. 190 (4)—Orders in Council P.C. 16/1391 of April 10, 1940, P.C. 37/6070 of October 30, 1940, P.C. 1087 of February 21, 1944, P.C. 44/1555 of March 8, 1944, P.C. 3254 of March 2, 1944, P.C. 3228 of May 3, 1945—Pay and allowances—Auxiliary Service Supervisor with Armed Forces overseas not a member of the Military Forces of Canada—Exemption provided by s. 4 (t) (1) of the Income War Tax Act not applicable—Appellant residing or ordinarily resident in Canada—Member of the "personnel" or an "authorized field representative" of the Y.M.C.A. not a servant or employee of the Canadian Government—Appeal dismissed.

Appellant was assessed for the years 1943, 1944 and 1945 in respect to pay and allowances received while overseas. Assessments were made and affirmed on the basis that he was there and then an Auxiliary Service Supervisor of the Y.M.C.A. with the Armed Forces and therefore entitled only to the exemption granted by Order in Council P.C. 1087 as amended by P.C. 3254, which is that one-fifth of the pay, including dependents' allowances, is not subject to taxation, and from such assessments he appealed.

Held: That appellant was not during the years in question a member of the Military Forces of Canada and therefore not entitled to the exemption provided by section 4 (*t*) (1) of the Income War Tax Act.

1948
RUSSELL
v.
MINISTER OF NATIONAL REVENUE
O'Connor J.

2. That appellant was residing or ordinarily resident in Canada within section 9 (1) (a) of the Income War Tax Act during the period in question.

3. That appellant being at all times one of the "personnel" or an "authorized field representative" of the Y.M C A. was not a servant or employee of the Government of Canada within the meaning of section 9 (1) (*b*) of the Income War Tax Act.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Vancouver, B.C.

T. E. H. Ellis for appellant;

D. MacKenzie Brown for respondent.

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

O'CONNOR J. now (December 2, 1948) delivered the following judgment:

These are appeals under the Income War Tax Act, R.S.C., 1927, Chap. 97, from assessments for the years 1943, 1944 and 1945.

The issue in these appeals is whether the appellant is wholly exempt from taxation in respect to pay and allowances received while overseas. The assessment was made in respect to such pay and allowances on the basis that the appellant was an Auxiliary Service Supervisor of the Y.M.C.A. and therefore entitled only to the exemption granted by Order in Council P.C. 1087 as amended by P.C. 3254, which is that one-fifth of the pay, including dependents' allowances, is not subject to taxation.

The appellant gave Notice of Appeal on the following grounds:—

1. That he was during the period in question a member of the Canadian Military Forces while in the Canadian Active Service Forces and overseas in the strength of an overseas unit outside of the Western Hemisphere, and therefore not liable to taxation in respect of service pay and allowances by reason of section 4 (*t*) (i).

2. That he did not reside, or was not ordinarily resident, in Canada at any time during the period in question and was not within section 9 (1) (*a*) of the Act.

The Minister affirmed the assessments on the grounds that the appellant had been allowed all proper exemptions as an Auxiliary Service Officer and that he, during the period of service outside the Western Hemisphere, was ordinarily resident in Canada. The appellant gave Notice of Dissatisfaction and the reply of the Minister affirmed the assessment. The appeals were heard together. On the hearing of the appeals, the appellant applied for leave to raise a third ground:—

3. In the alternative that if the appellant was not a member of the Forces while overseas, he was a servant of the Government of Canada within the meaning of section 9 (1) (*f*) and was not liable for taxation in respect to pay and allowances which were income received by way of salary from the said Government. The facts here are not in dispute and the question is whether on these facts the appellant comes within this subsection. In the circumstances, the amendment will be allowed.

The facts are set out in the evidence of the appellant who stated that:—

He resided at 4014 West 34th Street in the City of Vancouver, in the Province of British Columbia, and that during his absence overseas his wife and children continued to reside there, and on his return to Canada he lived at that address.

Until the 4th June, 1943, he was employed by the Y.M.C A. in War Service work in Canada. He was selected as an Auxiliary Service Officer after a medical examination by the Army Medical Corps, and after passing certain tests required of Army personnel and an interview with the General Officer Commanding the Military District. He did not take the Militiamen's Oath set out in section 21 of the Militia Act, R.S.C., 1927, chap. 132. He was issued an officer type battle dress without the officer's insignia of rank. There was issued to him an officer's Record of Service which shows the unit to which he was attached and other information as to his service. He embarked for overseas on the 25th June, 1943, with Army personnel. He was posted to a number of units in England and then to the 5th Canadian Anti-tank Corps and he was with that unit both in England and on the continent until he was returned to Canada. He was the Welfare Officer responsible for the sports and entertainment of the men in the unit. He received his instructions from the Officer Commanding through the Adjutant. He received leave from time to time from the Officer Commanding in the same way as the others in the unit. On occasions he was posted for relief as Orderly Officer. He was billeted with the officers and a member of their Mess. He was assisted in his work by men chosen by the Adjutant from the ranks of the unit. It is admitted

1948

RUSSELL v. MINISTER OF NATIONAL REVENUE

O'Connor J.

that throughout the whole period the appellant was under military discipline. He was paid in the same manner as the officers of the unit by the Department of National Defence. His wife received his assigned pay in the same manner as the wives of the officers of the unit. He was wounded and it was admitted that he served with distinction.

He had to have the required number of points on the same basis as the other Army personnel in order to return to Canada. On his return to Canada he received a War Service gratuity at the same rate as a Captain. He is entitled to wear War Service Badge, General Service class, the Defence Medal and the France Medal. He received a letter from the Officer Commanding, 11th Military District, stating that he had served on Active Service from 10th June, 1943, to 21st February, 1946, and was struck off strength on 21st February, 1946. He also received a certificate from Field Marshall Montgomery that he had performed outstanding good service and shown great devotion to duty.

The relevant Orders in Council are as follows:—

Order in Council, P.C. 16/1391 (Exhibit A), 10th April, 1940, sets out the report and recommendation of the Minister of National Defence as follows:—

> That in order to provide certain facilities and comforts for the Active Militia on Active Service the Department of National Defence has created a Directorate of Auxiliary Services, whose duties are to co-ordinate the efforts of the National Organizations in Canada and to insure that the efforts of these Organizations are put to the best possible use.
>
> That in order to enable them to provide a maximum of facilities for the personnel of the Canadian Active Service Force Overseas, these Organizations have requested the Department of National Defence to pay a limited number of the personnel of such Organizations who are employed outside of Canada.
>
> That in the opinion of the undersigned, while it is not necessary that such personnel be appointed to the Active Militia, nevertheless the exigencies of the Service require that they wear some distinctive uniform and be deemed to be persons accompanying a Force on active service under the provisions of subsection (8) of Section 175 of the Army Act.

Accordingly, the undersigned has the honour to recommend that pay and allowances, transportation, rations, accommodation, medical treatment and hospitalization be provided by the Department of National Defence for personnel of the four major Organizations working in conjunction with the Department in such numbers as the Minister of National Defence may from time to time determine, namely:—

Canadian Legion War Services, Inc.
Young Men's Christian Association
Salvation Army
Knights of Columbus;

at the same rates as are prescribed for a Captain in Financial Regulations and Instructions for the Canadian Active Service Force Overseas, save and except, Dependents' Allowance and Outfit Allowance.

The undersigned has the honour further to recommend that the personnel aforesaid shall not be deemed to be members of the Naval, Military or Air Forces of Canada on active service, and that, in conse-

quence, the provisions of the Pension Act, to the extent that they are made applicable to said members of the Naval, Military or Air Forces of Canada, shall not apply to the personnel in question.

The undersigned has the honour further to recommend that the provisions of this Order apply to each of said personnel as of and from the date he embarks for service outside of Canada.

The report and recommendation was approved by His Excellency, the Administrator in Council.

Routine Order 215 of the Canadian Active Service Force, (Overseas) (Exhibit 5) set out the provisions of P.C. 16/1391 (Exhibit A).

Routine Order 3660, part of Exhibit 5, authorized the appellant to receive the pay and allowances and transportation set out in Overseas Routine Order 215.

P.C. 37/6070 (Exhibit G), dated 30th October, 1940, provided that:—

The Board recommend that Order in Council of April 10, 1940, P.C. 16/1391 be amended to include authorization for payment or rail transportation by the Department of National Defence from station to point of embarkation for personnel of Canadian Legion War Services Inc., Young Men's Christian Association, Salvation Army and Knights of Columbus, who have already proceeded abroad or who may be detailed by the Minister of National Defence to proceed abroad for duty in conjunction with the Department of National Defence.

P.C. 1087 (Exhibit B), dated 21st February, 1944, is in part as follows:

WHEREAS the Minister of Finance reports that the Auxiliary Service Supervisors of the Department of National Defence, Adjutant General's Branch, are persons engaged in such like organizations as the Y.M.C.A., the Red Cross, the Salvation Army, the Knights of Columbus, and other organizations;

That in all there are something over three hundred such persons engaged in the Auxiliary Service serving in non-combatant capacities, with the Canadian Active Service Forces outside the Western Hemisphere;

That the members of the said Auxiliary Service are subject to Canadian Income Tax in respect of their pay and allowances, throughout the period of their service overseas;

That having regard to the character of their activities in conjunction with the Army, Navy and Air Forces aboard, it is deemed fair and expedient that they should not be required to pay income tax on the same basis as civilians, that is, be liable to tax on their total income from all sources, but rather that they should be dealt with in a manner more approximate to the exemption granted to members of the Armed Forces overseas, but, inasmuch as they are not members of the Canadian Armed Forces, that they should not receive complete exemption in respect of their pay for such services;

THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of Finance and under and by virtue of the War Measures Act, Chapter 206, Revised Statutes of Canada, 1927,

1948
RUSSELL v. MINISTER OF NATIONAL REVENUE
O'Connor J.

is pleased to order and doth hereby order that the following exemptions be provided under the Income War Tax Act, to be effective as and from the first day of January 1943;

1. One-fifth of the pay of such Auxiliary Service Supervisors be deemed not subject to taxation under the Income War Tax Act;

2. All subsistence allowances received by such Auxiliary Service Supervisors relative to their duties overseas shall not be subject to taxation under the said Act;

3. The Portion of the "taxes otherwise payable" as referred to in Section 7A of the Income War Tax Act, sometimes referred to as the Refundable Portion, shall not be payable in the case of such Supervisors.

P.C. 3254, 2nd May, 1944, (Exhibit 6), amended, P.C. 1087 (Exhibit B), is:

A. The first paragraph of the preamble is amended to read as follows:

"Whereas the Minister of Finance reports that the Auxiliary Service Supervisors are personnel of such organizations as Canadian Legion War Services, Inc., the National Council of the Y.M.C.A., Knights of Columbus Canadian Army Huts, Salvation Army Canadian War Services, who have been selected by the Royal Canadian Navy, the Army and Royal Canadian Air Force for service with the said forces;"

B. Paragraph numbered 1 is amended to read as follows:—

"1. One-fifth of the pay, including dependents' allowances, of such Auxiliary Service Supervisors be deemed not subject to taxation under the Income War Tax Act."

P.C. 44/1555, dated 8th March, 1944 (Exhibit D), cancelled prior Orders In Council and authorized an Order effective January 1, 1944, which provided in part:—

1. (*b*) "Supervisor" means an authorized field representative of
Canadian Legion War Services, Inc.,
The National Council of the Y.M.C.A.,
Knights of Columbus Canadian Army Huts,
Salvation Army Canadian War Services,
who directly provides services and recreational equipment to the forces and who is appointed as hereinafter provided.

2. The provisions of the Income War Tax Act, Revised Statutes of Canada, 1927, Chapter 97, as from time to time amended, and the schedules appended thereto, shall apply to Auxiliary Service personnel in such manner and to such extent as may be from time to time determined by the Governor-in-Council.

PART I

4. Supervisors attached to the Royal Canadian Navy shall be selected and approved by the Chief of Naval Personnel. Supervisors attached to the active units and formations of the Canadian Army shall be selected and approved by the Adjutant-General. Supervisors attached to the Royal Canadian Air Force shall be selected and approved by the Air Member for Personnel.

6. Supervisors serving with active units and formations of the Canadian Army shall be deemed to be members of the military forces of Canada on Active Service for all purposes except engaging in combat with the enemy and be subject to the military law in all respects as though they were officers holding the rank of Captain, and shall be

entitled to the pay and allowances, pensions and all other benefits (except income tax benefits) applicable or pertaining to such rank as and from the date they embark for service outside of Canada, until their services are terminated by the Adjutant-General.

9. Supervisors will wear an officer type uniform with the insignia of their organization, of such pattern as may be designated from time to time by the appropriate Minister, but will not wear badges of rank.

P.C. 3228, dated 3rd May, 1945 (Exhibit L), set out:—

Whereas the Minister of Veterans Affairs reports that Auxiliary Services Supervisors serving with the Armed Forces overseas undertake to serve for the duration of the war and, although non-combatant, are required, in the performance of their duty, to accompany the Forces wherever they may go in active theatres of war and are subject to Military, Naval or Air Force Law as the case may be;

That such Supervisors are paid, while serving, pay and allowances and granted certain other benefits applicable or pertaining to officers holding the rank of Lieutenant in the Navy, or of Captain in the Army, or of Flight-Lieutenant, non-flying list, in the Air Force with respect to the period of their service overseas;

That such Supervisors are now entitled to rehabilitation grant, civilian clothing allowance and transportation home on ceasing to serve and are eligible for pension, in respect of disability or death, on the same terms as a member of the Forces, and hospitalization and treatment for a pensionable disability; and

That, while it is considered that no group or class of persons serving as civilians could, in fairness to the members of the Armed Forces, be granted benefits on the scale provided such members of the Armed Forces, it is believed justifiable and advisable, in view of the conditions of service, terms of engagement and basis of remuneration of Auxiliary Services Supervisors, which are in many respects similar to those of members of the Armed Forces, to make available to them certain additional benefits on termination of their services.

And ordered (inter alia):—

1. This Order may be cited as the "Auxiliary Services Supervisors War Service Order."

2. In this Order unless the context otherwise requires—

(a) "discharge," with reference to a Supervisor, means ceasing to serve as a Supervisor and "discharged" shall have a corresponding meaning.

(b) "Supervisor" means an authorized field representative of—
Canadian Legion War Services Inc.,
The National Council of the Y.M.C.A.
Knights of Columbus Canadian Army Huts, or
Salvation Army Canadian War Services

who has been appointed to serve and has served pursuant to the provisions of Part I of Order in Council, P.C. 44/1555, of the 8th day of March, 1944.

And the Order then provided that every Supervisor shall upon discharge be entitled to gratuities and to benefits under the Veterans' Insurance Act, the Civil Employment Act, 1942, the Veterans' Land Act, 1942, and under the Post Discharge Re-Establishment Order.

1948

RUSSELL v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The first contention of the appellant is that during the period in question he was a member of the Forces and therefore not liable to taxation in respect of service pay and allowances by reason of section 4 (*t*) (i) on the following grounds:—

(*a*) That having been attached to a unit and having served with that unit in the circumstances and to the extent disclosed by his evidence that he was in fact a member of the Forces.

It is clear from the evidence of the appellant and P.C. 16/1391, and Routine Orders 215 and 3660, that the appellant was one of the "personnel" of the Y.M.C.A. mentioned in P.C. 16/1391.

The Y.M.C.A. requested the Department of National Defence to pay and furnish transportation for the appellant. It could not be otherwise. He was with the Y.M.C.A. in Canada. Then Routine Order 3660, based on P.C. 16/1391 as amended, and Routine Order 215 authorized his pay and allowances and transportation from Vancouver to the point of embarkation and from there to England, as one of the "personnel" described in P.C. 16/1391. The medical examination and tests were made by the Army for the purpose of ensuring that he could do the work required, i.e., to provide certain facilities and comforts for the personnel of the Forces overseas. Then, by P.C. 44/1555, a Supervisor was defined to mean "an authorized field representative of the Y.M.C.A." or the other organizations. If he had not been one of the "personnel" or "an authorized field representative" of the Y.M.C.A., he would not have been sent overseas. It was in that capacity that he was attached to and served with a unit of the Forces. He wore a uniform and was under military discipline because the exigencies of the Service required this. His Service as stated in his evidence did not, in my opinion, make him a member of the Forces. P.C. 16/1391 provided that such personnel shall not be deemed to be members of the Military Forces of Canada. In addition, he did not take the oath required by section 21 of the Militia Act, R.S.C., 1927, chap. 132.

21. The following oath shall be taken and subscribed before one of such commissioned officers of the Militia as are authorized for that purpose by any general order or by regulation, or before a justice of the peace, by every person upon engaging to serve in the Active Militia:—

"I, A. B., do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty."

2. Such oath shall have the effect of a written engagement with the King, binding the person subscribing it to serve in the Militia until he is legally discharged, dismissed or removed, or until his resignation is accepted.

And by section 2 (*e*) "Militia" is defined:—

2 (*e*) "Militia" means all the military forces of Canada.

There was, therefore, no written engagement with the King, binding him to serve in the Military Forces of Canada and he was not, therefore, in my opinion, a member of the Military Forces of Canada.

(*b*) That he was "in pay as an officer" within the definition of officer set out in section 190(4) of the Army Act, in force in Canada by virtue of section 69 of the Militia Act, R.S.C., 1927, chap. 132:—

190 (4). The expression "officer" means an officer commissioned or in pay as an officer in His Majesty's forces, or any arm, branch, or part thereof . . .

Nor was the appellant an officer within the meaning of section 190(4) of the Army Act. He was not "in pay as an officer." He was "in pay" as one of the personnel or as an authorized field representative of the Y.M.C.A. at the "same rates as are prescribed for a Captain . . ." under P.C. 16/1391, or "entitled to the pay and allowances . . . applicable or pertaining to such (Captain) rank . . ." under P.C. 44/1555.

(*c*) That by section 6 of P.C. 44/1555 (Exhibit D):—

6. Supervisors serving with active units and formations of the Canadian Army shall be deemed to be members of the military forces of Canada on Active Service for all purposes except engaging in combat with the enemy and be subject to the military law in all respects as though they were officers holding the rank of Captain, and shall be entitled to the pay and allowances, pensions and all other benefits (except income tax benefits) applicable or pertaining to such rank as and from the date they embark for service outside of Canada, until their services are terminated by the Adjutant-General.

he was deemed to be a member of the Military Forces of Canada on Active Service for all purposes except engaging in conflict with the enemy and is, therefore, entitled to the exemption from taxation as to pay and allowances provided for such members by section 4 (*t*) of the Act. And that the subsequent exception "without income tax benefits" in the provision for "pay and allowances, pensions and all

1948
RUSSELL
v.
MINISTER OF NATIONAL REVENUE
O'Connor J.

other benefits" is an attempt to impose taxation by removing an exemption to which all members were entitled. And that to the extent the Order in Council purports to do so, it is ultra vires.

Counsel for the respondent informed the Court that the respondent was not contending that there was power to impose taxation by Orders in Council under the War Measures Act, or to do so by the removal of an exemption to which such members of the Forces were entitled.

The question, then, is this. Does section 6 deem him a member for all purposes which would include a member within section 4 (*t*) of the Act and would exempt his pay and allowances for taxation and then, by the subsequent exception, "without income tax benefits," remove that exemption; or is the effect of the whole section to deem him to be a member without income tax benefits. That the intention was to deem them members without income tax benefits is clear from an examination of the Orders P.C. 1087 (Exhibit B) and P.C. 3228 (Exhibit L).

P.C. 1087 sets out in the preamble that having regard to the character of the activities of the supervisors, it is deemed fair and expedient that they should not pay income tax on the same basis as civilians, but should be dealt with in a manner more approximate to the exemptions granted to members of the Armed Forces overseas; but, inasmuch as they are not members, they should not receive complete exemption in respect of their pay for such services. It then provides that one-fifth of the pay be deemed not subject to taxation. P.C. 1087 was made on the 21st February, 1944, and approximately only two weeks after the Order in question, P.C. 44/1555, was made (8th March, 1944) with the provisions already quoted, "except income tax benefits." In addition, P.C. 1087 was amended on 2nd May, 1944, approximately two months after P.C. 44/1555 by P.C. 3254 (Exhibit C), to increase the exemption for supervisors so that one-fifth of the pay, including dependents' allowances, be not subject to taxation. Then P.C. 3228, made on 3rd May, 1945 (Exhibit L), sets out in the preamble, "That, while it is considered that no group or class of persons serving as civilians could, in fairness to the members of the Armed Forces, be granted benefits on the scale provided such members of the Armed Forces . . .," and then, after

defining "Supervisors" as meaning an authorized field representative of the Y.M.C.A. and other like organizations, orders they then be entitled to certain gratuities and benefits.

The intention, however, must be ascertained from the language used in the section. The section should not be divided into two parts, but its meaning should be ascertained by reading it in its entirety. When so read the intention, in my opinion, is to deem the supervisors members of the Armed Forces without income tax benefits. For these reasons, I am of the opinion that the appellant is not entitled to the exemption provided by section 4 (*t*) (i).

The next question to be determined is whether the appellant was a person residing or ordinarily resident within section 9 (1) (*a*):—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(*a*) residing or ordinarily resident in Canada at any time in such year.

There is no definition of these terms in the Act. The Concise Oxford Dictionary gives the meanings of "reside" as:—

Reside—(Of persons) have one's home, dwell permanently, *at, in, abroad,* etc.; (of officials) be in residence; (of power, rights etc.,) rest or be vested *in* person etc.; (of qualities) be present or inherent *in.*

The question is a question of fact and not a question of law. (*Lysaght* v. *The Commissioners of Inland Revenue* (1)). The cases, therefore, are, as Thorson, P. said in *Thomson* v. *The Minister of National Revenue* (2) but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country. No cases were cited which had been decided on facts that were in any way comparable to the facts here.

In this case the appellant established a home where he resided with his family. He describes it in his Officer's Service Record (Exhibit 1) as his "permanent home address." While he was never in Canada during the period in question, yet his wife and children remained in this home during his absence and on his return to Canada he returned there. While he was in England and in the countries on

(1) (1928) 13 T.C. 511. (2) (1945) Ex C.R. 17 at 24.

1948
RUSSELL v. MINISTER OF NATIONAL REVENUE
O'Connor J.

the continent he was not residing or ordinarily resident in those countries. His residence there was casual. Or, if he resided in any of them, then he had two residences.

On the facts here I am of the opinion that the appellant was residing or ordinarily resident in Canada during the period in question.

The last contention of the appellant is that in the alternative, if the appellant was not a member of the Forces while overseas, he was in the circumstances a servant or employee of the Government of Canada within the meaning of section 9 (1) (*f*):—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(*f*) who, before his appointment was a resident of Canada and is now or hereafter becomes a Minister, High Commissioner, officer, servant or employee of the Government of Canada, or an agent general for any of the provinces of Canada, or any officer, servant or employee thereof, resident outside of Canada, except upon income received by way of salary from the said government.

The contention is based on the facts already set out that the appellant was paid by the Department of National Defence and sent overseas at the request of the Y.M.C.A. as set out in the preamble in P.C. 16/1391. That he was attached to the Forces to carry out the duties of a supervisor, i.e., look after the welfare and recreational activities of the members of the Forces. He wore a uniform, was under military discipline, and he took his orders from the Officer commanding the unit. But all that did not alter the fact that he was at all times one of the "personnel" or an "authorized field representative" of the Y.M.C.A.

In my opinion, the appellant in these circumstances was not a servant or employee of the Government of Canada within the meaning of section 9 (1) (*f*).

Counsel for the appellant did not contend, in view of the decision in *McArthur v. The King* (1), that a member of the Forces was a servant within section 9 (1) (*f*).

For the reasons given the appeal will be dismissed, but in the circumstances without costs.

Judgment accordingly.

---

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

1948 Dec. 28 — 1949 Jan. 5

BETWEEN:

PORTER BROTHERS LIMITED........SUPPLIANT;

AND

HIS MAJESTY THE KING............RESPONDENT.

Practice—Motion to set aside judgment dismissing action for want of prosecution—Application for dismissal of action for want of prosecution made and granted without notice to other party—Exchequer Court Rule 127 covers any default—Exchequer Court Rules 127, 128, 250, 251 and 252.

Motion under rule 127 of the General Rules and Orders of the Exchequer Court to set aside a judgment dismissing an action for want of prosecution.

Held: That under rule 128 of the General Rules and Orders of the Exchequer Court an application to dismiss an action for want of prosecution may be made and granted without notice being given to the other party. Rule 128 is an exception to Rules 251 and 252 of the same General Rules and Orders.

2. That rule 127 of the General Rules and Orders of the Exchequer Court covers any default. The text "may be relieved against *any default* under any of these rules" is unrestricted.

MOTION to set aside judgment.

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

Jacques Bonneau for the motion.

Charles Stein, K.C. contra.

ANGERS J. now (January 5, 1949) delivered the following judgment:

Il s'agit d'une motion par la pétitionnaire pour faire rétracter le jugement du 4 novembre 1948, rejetant sa pétition de droit, avec dépens.

Par sa pétition de droit la pétitionnaire réclamait de l'intimé la somme de $59,137.17 de dommages provenant de la perte de chalands avec appareillage fournis à l'intimé pour le dragage d'une base navale dans le port de Saint-Jean (Terre-Neuve), en août 1941.

La pétition a été produite le 16 avril, la défense de l'intimé le 11 juillet et la réponse le 14 novembre 1947.

1949
PORTER BROTHERS LTD.
v.
THE KING
Angers J.

Le 4 novembre 1948, soit près d'un an après que la contestation eût été liée, l'un des procureurs de l'intimé a fait devant moi motion verbalement pour rejet de la pétition en vertu de la règle 128, qui est ainsi conçue:

> If the plaintiff does not within three months after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, then the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or make such other order and on such terms, as to the Court or Judge may seem just.

J'ai demandé si l'on avait signifié aux avocats de la pétitionnaire un avis de la présentation de cette motion; l'on m'a dit que non et que tel avis n'était pas requis par la règle 128. L'on m'a laissé entendre qu'il y avait eu échange de correspondance entre les procureurs de l'intimé et de la pétitionnaire, les premiers demandant que la pétitionnaire procédât sans plus de délai, à défaut de quoi l'intimé se verrait obligé de demander le rejet de la pétition.

J'ai adopté la prétention du procureur de l'intimé que la règle 128 n'exige point d'avis à la partie adverse et j'ai, à regret, accordé la motion verbale de rejet, songeant incidemment que, si la règle en question ne requiert pas l'avis, la courtoisie d'autrefois entre confrères était plus exigeante. Autre temps, autres mœurs.

La pétitionnaire, par sa motion, demande que le jugement du 4 novembre rejetant la pétition de droit pour défaut de procéder soit *écarté* (rétracté) et qu'un lieu et une date soient fixés pour enquête et audition.

Au soutien de cette motion il y a trois affidavits: un de chacun des procureurs de la pétitionnaire, Me Maurice-H. Fortier et Me Marcel Gaboury, et un de Me Jacques Bonneau, agent à Ottawa des procureurs de la pétitionnaire.

Les affidavits de Mes Fortier et Gaboury contiennent, entre autres, les allégations suivantes:

> 4. Ladite motion fut ainsi présentée hors ma connaissance et sans qu'aucune signification ou avis au préalable soient signifiés tant à moi personnellement qu'à nos représentants attitrés à Ottawa, Mtres Parisien, Chartrand & Bonneau, qui sont inscrits dans le dossier de cette cause, et hors la connaissance du procureur de Sa Majesté à Montréal, Me Jacques Vadeboncœur;

5. Le retard occasionné a été causé par des pourparlers et discussions entre le soussigné et Me Jacques Vadeboncœur, procureur de Sa Majesté à Montréal, dans le but d'en arriver à une entente ou à un règlement, et subséquemment, il fut convenu qu'une date devait être fixée afin d'interroger M. E. P. Murphy, sous-ministre des travaux publics qui, dans le temps, agissait pour le département de la défense nationale;

6. C'est le désir de la requérante de persister dans sa demande et de continuer les procédures.

L'affidavit de Me Bonneau contient, entre autres, l'allégation suivante:

3. Cette motion a été présentée hors de ma connaissance, sans qu'aucun avis de motion ou autre avis ne soit signifié au préalable tant à moi-même personnellement qu'aux autres membres de l'étude Parisien, Chartrand & Bonneau.

L'intimé a contesté cette motion pour les motifs que le jugement du 4 novembre a été rendu conformément aux dispositions de la règle 128 et est conséquemment régulier et valide et parce que ni la loi de la Cour de l'Échiquier ni ses règles ne pourvoient à la rétractation d'un jugement et que le seul recours, si recours il y a, est l'appel.

A l'appui de sa contestation l'intimé a produit un affidavit de Me Henriette Bourque qui déclare, entre autres, ce qui suit:

3. Le 1er mai 1948, Me Jacques Vadeboncœur, correspondant du ministre de la Justice, était avisé par lettre du sous-ministre adjoint de la Justice de mettre en demeure ses adversaires de poursuivre leur action;

4 Le procureur de la pétitionnaire, Me Marcel Gaboury, C.R., dans une lettre du 7 mai allégua diverses raisons relatives à son défaut de procéder dans cette affaire et fit une offre de règlement;

5 Cette offre de règlement fut refusée par l'intimé, tel qu'il appert dans une lettre en date du 18 mai du sous-ministre adjoint de la Justice à Me Jacques Vadeboncœur;

6. Du 18 mai au 4 novembre 1948, le procureur de la pétitionnaire ne fit aucune motion, soit pour inscrire la présente cause, soit pour interroger monsieur E. P. Murphy;

La loi de la Cour de l'Échiquier et les règles de pratique s'y référant ne sont pas aussi compréhensives qu'elles pourraient l'être et il faut les interpréter le mieux possible, ayant toujours en vue la justice et l'équité.

Le procureur de la pétitionnaire a invoqué la règle 250 qui décrète que toute motion doit être faite sur avis, à moins que la Cour ou un juge croit dans l'intérêt de la justice de dispenser de l'avis. Selon lui, au surplus, la règle 128 doit être interprétée suivant l'esprit des règles 124 et 125, lesquelles exigent un avis.

1949
PORTER BROTHERS LTD.
v.
THE KING
Angers J.

Le procureur de l'intimé, de son côté, a signalé que, si les règles 251 et 252 exigent un avis à défaut de dispense, l'absence d'avis a été prise en considération par la Cour lors de la demande de jugement en vertu de la règle 128, ce qui est exact. J'ai cru, à tort ou à raison, que la règle 128 faisait exception aux règles 251 et 252 et permettait au défendeur (ou à l'intimé, suivant le cas, bien qu'il ne soit pas mentionné) de présenter, sans avis à la partie adverse, une demande de rejet de l'action pour défaut de procéder. Je dois dire que sur ce point je n'ai pas changé d'opinion.

La question qui se présente est de savoir si la Cour peut rétracter son propre jugement, nonobstant l'absence de disposition précise et catégorique sur le sujet. Le procureur de la pétitionnaire s'est appuyé sur la règle 127 qui est ainsi conçue:

> Any party may be relieved against any default under any of these Rules, by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

La règle 127 (autrefois 132) paraît avoir été inspirée par la règle 15 de l'ordonnance 27 des "Rules of the Supreme Court, 1883" (Angleterre), qui se lit comme suit:

> Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit, and where an action has been set down on motion for judgment under Rule 11 of this Order, such setting down may be dealt with by the Court or a judge in the same way as if judgment by default had been signed when the case was set down.

La règle 33 de l'ordonnance 36, concernant la rétractation d'un jugement obtenu alors que l'une des parties n'a pas comparu au procès, ordonne ce qui suit:

> Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.

Notre règle 127, moins précise dans ses termes, couvre, à mon sens, tous les cas de défaut possibles. Le texte "May be relieved against *any default* under any of these rules" ne pose aucune limite.

La règle 259, ayant trait à la rétractation d'un jugement rendu en chambre, n'est pas pertinente.

Le paragraphe 2 de l'article 1177 du Code de Procédure Civile, dans le chapitre relatif à la requête civile, invoqué par la pétitionnaire, qui décrète qu'un jugement non susceptible d'appel ou d'opposition peut être rétracté sur requête présentée au même tribunal par ceux qui ont été parties ou assignés, "si la procédure prescrite n'a pas été suivie et que la nullité qui en résulte n'ait pas été couverte par les parties", ne peut l'aider, vu que la procédure prescrite par la règle 128 pour recouvrer le jugement du 4 novembre a été suivie.

La portée de la règle 127 ne paraît pas avoir été interprétée, si l'on en juge par l'absence de décisions rapportées.

Dans une cause d'*Albert C. Rogers* v. *His Majesty the King,* n° 1586, non rapportée, jugement a été rendu par Sir Walter Cassells, alors président de la Cour, le 3 février 1909, annulant le jugement prononcé par Sir Thomas Taylor pour la raison qu'aucun avis du procès n'avait été signifié.

Je crois opportun de citer le jugement:

I think the judgment pronounced by Chief Justice Sir Thomas Taylor must be set aside.

No notice of trial was properly served.

The statement of defence is signed by

E. L. Newcombe,
Solicitor for the Attorney General of
Canada, Ottawa.

It is endorsed in the same manner. The notice of trial produced has the following endorsement:

Service accepted this 11th day of June, 1908,
Jacques Bureau,
(per Gus. T. Priv. Secty.)
Solicitor for the Attorney General of Canada.

Jacques Bureau was not the solicitor for the Attorney General of Canada.

Gustave Turcotte swears to the best of his knowledge and belief "no notice of trial in this case was ever left with me".

It is not stated in the affidavit of Mr. McDougal that a copy was left.

In any event Turcotte was not a clerk of the solicitor.

The suppliant must pay the costs of the application.

Ce jugement, dont il n'y a pas eu appel et qui, à ma connaissance, est le seul traitant de la question dont il s'agit, a consacré le principe qu'une partie peut faire rétracter un jugement rendu par défaut à son insu. Cette pratique me paraît juste et équitable.

1949
PORTER BROTHERS LTD.
v.
THE KING
Angers J.

Le jugement rejetant la pétition de droit rendu le 4 novembre 1948, est rétracté et annulé et les parties remises dans l'état où elles étaient avant le prononcé d'icelui.

Les parties devront faire motion sans délai pour faire fixer un lieu et une date pour enquête et audition.

Les frais de la présente motion suivront le sort de la cause.

Judgment accordingly.

1948
Dec. 23
1949
Jan. 17

RENE DE JACZYNSKI ET AL. . . . . PLAINTIFFS;

AND

LOUIS JOSEPH LEMIEUX. . . . . DEFENDANT.

Practice—Motion to examine plaintiffs residing in a foreign country and unable to come to Canada to give evidence before the Court—Evidence by affidavit or interrogatories or before a Commissioner—Exchequer Court Rules 2, 164 and 169—Arts. 380 and 381, Code of Civil Procedure of the Province of Quebec—Delay on part of plaintiffs—Allegations of affidavit in support of motion insufficient.

Motion of the plaintiffs under rules 164 and 169 of the General Rules and Orders of the Exchequer Court to examine two of the plaintiffs who reside in France by affidavit or subsidiarily *viva voce* by interrogatories or before a Commissioner. In support of the motion an affidavit of the plaintiffs' solicitor in Canada states that the two plaintiffs "are unable to come to Canada to give evidence before this Court".

Held: That the plaintiffs' motion is tardy.

2. That the said statement in the affidavit is insufficient; no reasons are alleged therein to support it.

MOTION to examine in France two of the plaintiffs by affidavit or interrogatories or before a Commissioner.

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

Henri-Gérin Lajoie, K.C. for the motion.

Auguste Lemieux, K.C. contra.

ANGERS J. now (January 17, 1949) delivered the following judgment:

Il s'agit d'une motion des demandeurs pour permission de faire la preuve des allégations contenues dans les paragraphes 1 à 13 de l'exposé de réclamation au moyen d'affi-

davits à être fournis en France par le demandeur René de Jaczynski, demeurant à Saint-Denis-Hors, département de l'Indre-et-Loire, et par le demandeur Maurice Py, demeurant à Puteaux, département de la Seine, ou, subsidiairement, de faire la preuve desdites allégations par interrogatoire *viva voce* des dits demandeurs au moyen d'interrogatoires devant un commissaire à Paris ou ailleurs en France et, subsidiairement, de faire la preuve desdites allégations par interrogatoire *viva voce* des demandeurs au moyen d'une commission rogatoire devant un commissaire à Paris ou ailleurs en France.

Un affidavit du procureur des demandeurs, Henri Gérin-Lajoie, a été produit au soutien de ladite motion, dans laquelle il est déclaré, entre autres, ceci:

2. Pour les fins de l'enquête et audition au mérite en la présente cause les demandeurs désirent faire la preuve des allégations contenues aux paragraphes 1 à 13 inclusivement de l'Exposé de Réclamation amendé sur lesquels repose la présente action;

3. Les demandeurs, pour les fins de cette preuve, ont besoin d'offrir le témoignage par voie d'affidavits ou autrement, du demandeur René de Jaczynski demeurant à Saint-Denis-Hors, Département Indre et Loire, en France, et du demandeur Maurice Py, pharmacien, demeurant à Puteaux, Département de Seine, en France;

4. Je viens d'être avisé par lettre de mes principaux à Paris, avec qui je corresponds en la présente cause, datée du 9 décembre courant et reçue le 14 décembre courant, que les dits René de Jaczynski et Maurice Py ne peuvent pas se rendre au Canada pour témoigner devant cette Cour pour les fins de l'enquête et audition en la présente cause;

5. Dans les circonstances, il est nécessaire d'obtenir le témoignage des dits témoins en France par voie d'affidavits ou subsidiairement par l'examen *viva voce* des dits témoins par voie d'interrogatoire à leur être soumis, en France, devant un Commissaire, ou subsidiairement par le témoignage *viva voce* des dits témoins au moyen d'une Commission Rogatoire adressée à un Commissaire à Paris, ou ailleurs en France;

Les allégations 1 à 13 de l'exposé de réclamation mentionnées dans la motion se lisent ainsi:

1. Les demandeurs ci-dessus désignés, moins le demandeur Maurice Py, constituent une Société Civile, dont ils sont les seuls membres, sous le nom de "Solution Schoum & Neutadrol" et ils sont, comme tels, propriétaires de la marque de commerce consistant dans le mot "Schoum", utilisée par eux et par leur prédécesseur en titre depuis un grand nombre d'années à travers le monde, et en particulier au Canada.

2. La dite marque "Schoum" fut adoptée par le prédécesseur en titre des dits demandeurs, savoir, feu Marcel de Lannoïse, en son vivant docteur en médecine, résidant à Paris, France, depuis l'année 1898, en rapport avec une solution connue sous le nom de "Solution Schoum", contre les coliques hépathiques, néphritiques, menstruelles et dans les maladies du

1949
DE JACZYNSKI ET AL v. L. J. LEMIEUX
Angers J.

foie, des reins et de la vessie et fut l'objet d'un enregistrement au nom de ce dernier au Bureau International de Berne, en date du 28 mai 1930, sous le n° 69,585.

3. Le demandeur Maurice Py est bénéficiaire d'une licence exclusive d'exploitation du dit produit pharmaceutique portant la dite marque de commerce "Schoum" pour la France, ses colonies et tous les pays sans exception et fabrique la dite "Solution Schoum" à ses laboratoires à Bécon-les-Bruyères, France, d'après une certaine formule.

4. La dite marque de commerce "Schoum" fut déposée en France, au nom du dit Marcel de Lannoise, en date du 15 juin 1925, sous le n° 82,984, et dans un grand nombre de pays;

5. Depuis l'année 1913, la dite "Solution Schoum" fut vendue et répandue au Canada par l'entremise d'agents ou représentants commerciaux agissant pour les demandeurs ou leur dit prédécesseur en titre.

6. La marque de commerce "Schoum", ainsi que la "Solution Schoum", à laquelle la dite marque est appliquée, grâce à la haute qualité du produit et à une publicité considérable faite à grands frais, sont devenus bien connus à travers le monde et jouissent d'une haute renommée depuis un grand nombre d'années et spécialement au Canada depuis au moins l'année 1913.

7. Dans le cours de l'année 1938 le défendeur entra en correspondance avec le demandeur Maurice Py qui, en date du 1er février 1939, lui concéda la représentation exclusive au Canada pour la vente de la dite "Solution Schoum" dans les termes suivants: Comme suite à nos diverses correspondances je vous confirme par la présente que vous êtes seul chargé de la vente au Canada de la Solution Schoum à titre de représentant de cette spécialité.

8. Le défendeur a agi en conséquence depuis cette date comme agent et représentant des demandeurs pour la vente du dit produit au Canada, mais toutes communications furent interrompues entre la France et le Canada, par suite de la guerre, dans le cours de l'année 1940.

9 Lorsque les hostilités prirent fin et que les relations entre les deux pays furent rétablies en 1945, les demandeurs apprirent que dans le cours de 1941 le défendeur, hors la connaissance et sans le consentement des demandeurs, avait déposé la dite marque "Schoum", en son propre nom au Bureau des Marques de Commerce à Ottawa, en date du 6 mai 1941, sous le n° N.S. 14,996, du Registre 56, en rapport avec le produit suivant: Produit pharmaceutique, sous forme de solution contre les coliques menstruelles, et dans certaines maladies du foie, des reins et de la vessie, et que le défendeur vendait au Canada sous le nom de "Solution Schoum", tel que ci-après relaté, un autre produit que celui fabriqué par le demandeur Maurice Py.

10. Le demandeur Maurice Py écrivit aussitôt au défendeur, en date du 20 (devrait être 24) septembre 1945, protestant contre ces agissements et mettant ce dernier en demeure de cesser la fabrication et la vente du dit produit.

11. Le défendeur communiqua avec le dit demandeur par cable, en date du 8 octobre 1945, assurant celui-ci de ses intentions honorables et se déclarant prêt à lui transférer l'enregistrement de la dite marque, reconnaissant ainsi l'illégalité de son acte.

12. Le défendeur, bien que depuis dûment requis à maintes reprises, a refusé et refuse de renoncer à son dit enregistrement de marque et il a continué et il continue d'en faire usage par l'entremise d'une compagnie

1949

DE JACZYNSKI ET AL v. L. J. LEMIEUX

Angers J.

dont il est le président et le principal intéressé, savoir: La Cie de Produits Biologiques Europa Ltée, dont le siège social est dans la Cité de Montréal et par l'entremise de laquelle il vend une solution appelée "Solution Schoum", autre que celle des demandeurs, mais destinée aux mêmes fins médicales, et dont l'étiquette, au-dessus du nom comporte les mots "Formule Schoum".

13. De fait, le produit du défendeur, vendu par l'entremise de la dite "La Cie de Produits Biologiques Europa Ltée" n'est pas le véritable produit "Schoum", ni fabriqué suivant la formule Schoum et les demandeurs se réservent tous leurs droits et recours contre le défendeur et contre toutes autres personnes légalement responsables envers eux par suite des agissements ci-dessus constituant une concurrence déloyale et contrefaçon de marque de commerce.

Je crois bon de noter que le procureur du défendeur a, le 25 novembre 1948, fait recevoir copie (pour valoir signification), par les agents à Ottawa du procureur des demandeurs, d'une motion présentable le 30 du même mois, aux fins de faire fixer le lieu et la date de l'enquête et audition au mérite. A l'appui de cette motion le procureur du défendeur a produit son propre affidavit, dans lequel il est dit, entre autres, qu'après examen du plumitif il a constaté que l'exposé de réclamation avait été produit au greffe le 29 avril 1947, que le plaidoyer du défendeur l'avait été le 13 mars 1948 et que la contestation est liée et la cause mûre pour enquête et audition au mérite.

Le 2 avril 1948, le procureur du défendeur a fait recevoir copie (pour valoir signification), par les agents à Ottawa du procureur des demandeurs, d'un avis aux demandeurs et à leur procureur les requérant de révéler par voie de déclarations assermentées, dans un délai de dix jours de la signification dudit avis, quels documents sont ou ont été en leur possession ou sous leur contrôle se rapportant à aucune des matières en question en cette cause et de produire telles déclarations assermentées au greffe de cette Cour pour les fins usuelles.

Le 15 avril 1948, le procureur des demandeurs a fait recevoir copie (pour valoir signification), par le procureur du défendeur, d'un avis au défendeur et à son procureur les requérant de révéler par voie de déclarations assermentées, dans un délai de dix jours de la signification dudit avis, quels documents sont ou ont été en leur possession ou sous leur contrôle se rapportant à aucune des matières en question en cette cause et de produire telles déclarations assermentées au greffe de cette cour pour les fins usuelles.

1949
DE JACZYNSKI ET AL v. L. J. LEMIEUX
Angers J.

Le 11 septembre 1948, ont été produits au greffe de cette cour deux affidavits, l'un du demandeur René de Jaczynski, paraissant avoir été assermenté le 31 juillet 1948, et l'autre du demandeur Maurice Py, paraissant avoir été assermenté le 17 août 1948.

Ces deux affidavits sont identiques et énumèrent les mêmes documents en la possession et sous le contrôle des demandeurs.

Un affidavit du défendeur, paraissant avoir été assermenté le 5 août 1948, a été produit au greffe de cette cour le 22 décembre de la même année. Dans cet affidavit le défendeur donne une liste de documents, comprenant un certificat de marque de commerce émise au défendeur, des lettres et copies de lettres et un câblogramme et copies de deux câblogrammes, que le défendeur déclare n'avoir pas d'objection à produire, et une liste de documents, consistant en correspondance confidentielle échangée entre le défendeur et son avocat et des officiers du Ministère de la Santé nationale et du bien-être social et du Bureau des marques de commerce, que le défendeur déclare avoir objection à produire.

Lors de la présentation des deux motions susdites, l'on m'a donné communication d'une lettre adressée par le procureur des demandeurs à celui du défendeur le 12 novembre 1948, qui contient, entre autres, les déclarations suivantes:

Relativement à l'inscription de la cause pour preuve et audition au mérite, nous sommes nous-mêmes anxieux de pouvoir le faire le plus tôt possible. Il nous faut, cependant, décider auparavant de la procédure que nous aurons à suivre relativement à la preuve requise. Je ne sais pas encore si nous devrons faire émettre une Commission Rogatoire pour examiner en particulier M. René de Jaczynski et M. Maurice Py en France, ou si ces derniers sont disposés à venir témoigner au Canada pour les fins du procès. Je leur ai fait observer que dans ce dernier cas les frais de voyage, qui nécessairement représenteraient un montant substantiel, feraient partie des frais de la cause.

J'ai soulevé cette question en faisant rapport à mes clients ces jours derniers, à la suite des affidavits produits de part et d'autre sous la règle 139 de la Cour de l'Échiquier, et à la suite de l'examen que nous venons de faire ensemble de tous ces documents. Je devrais donc être en état de vous aviser davantage à ce sujet assez prochainement

Vous remarquerez que la plupart des allégations de l'Exposé de Réclamation sont niées par le défendeur dans sa Défense, ce qui nous obligera de faire la preuve d'un grand nombre de points, plutôt accessoires dans la cause, tels que la constitution de la Société "Solution Schoum et Neu-

tadrol", le droit de propriété de cette dernière à la marque de commerce "Schoum" (par. 1), l'adoption de la marque "Schoum" par feu Marcel de Lannoïse, de Paris, France, et l'enregistrement de cette marque au Bureau International de Berne le 28 mai 1930 (par. 2), le contrat d'exploitation en faveur du demandeur Maurice Py (par. 3), le dépôt de la marque "Schoum" en France au nom de Marcel de Lannoïse le 15 juin 1925 et dans un grand nombre de pays (par. 4), la vente de la "Solution Schoum" au Canada depuis l'année 1913 par l'entremise d'agents ou représentants commerciaux (par. 5), la haute réputation acquise par ladite marque et par la "Solution Schoum" (par. 6), etc.

Si le défendeur est disposé à admettre ces allégations et d'autres dont nous pourrions convenir, ou si nous pouvions nous entendre pour limiter le débat à certains points de droit, en nous entendant sur les faits (je crois me rappeler que vous m'avez déclaré qu'il s'agissait en somme dans cette cause d'une simple question de droit), nous pourrions évidemment simplifier la cause et éviter peut-être la nécessité d'une Commission Rogatoire en France, ou d'avoir à faire venir des témoins de là-bas.

Évidemment, les avocats n'ont pu s'entendre et les motions ont été faites de part et d'autre.

La règle 169 des règles et ordonnances générales de la Cour régit le cas de la commission rogatoire; elle se lit en partie comme suit:

The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

Le texte de cette règle est très large, mais peu précis: "the examination... at *any place*, of *any witness or person*". Les mots "any witness or person" comprennent-ils la partie pour son compte personnel ou dans son propre intérêt? A première vue je suis porté à le croire. Vu l'imprécision de la règle 169, il y a lieu de se reporter à la pratique suivie dans la province où la cause d'action a pris naissance, en l'espèce celle de Québec. Ceci me paraît autorisé par la règle 2, qui contient, entre autres, les dispositions suivantes:

In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:

(*a*) . . .

(*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Superior Court for the Province of Quebec; and

1949
DE JACZYNSKI ET AL v. L. J. LEMIEUX
Angers J.

if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Supreme Court of Judicature in England.

L'article 380 du code de procédure civile détermine les cas où il y a lieu à l'émission d'une commission; avant sa modification par le chapitre 71 du statut 17 George V, entré en vigueur le 1er avril 1927, cet article se lisait ainsi:

Lorsque quelqu'un des témoins ou quelqu'une des parties à interroger réside hors de la province, ou même dans la province à plus de cent milles du lieu des séances du tribunal, la partie qui a besoin de les examiner peut obtenir une commission nommant une ou plusieurs personnes pour recevoir les réponses de ceux dont le témoignage est ainsi requis.

Ce texte pouvait prêter à équivoque. Les mots "quelqu'une des parties" s'appliquaient-ils à l'égard de la partie qui désirait offrir son propre témoignage aussi bien qu'à la partie adverse? L'expression "quelqu'une des parties" semblerait, à prime abord, favoriser cette interprétation. Quelques jugements cependant ont adopté l'opinion contraire: *Deslandes* v. *Saint-Jacques* (1); *Moore* v. *Gagnon* (2); *L'Abbé Warré* v. *Bertrand et Labelle* (3); *Worthington* v. *Walker* (4).

Par l'article 1 du chapitre 71 du statut 17 George V, le paragraphe suivant a été ajouté à l'article 380:

Lorsque l'une des parties réside hors de la province, elle peut également obtenir une commission pour recevoir son témoignage.

L'article ainsi modifié est clair et précis.

Il reste à déterminer le délai dans lequel la motion pour commission rogatoire doit être présentée et ce que doit démontrer l'affidavit au soutien d'icelle.

La règle 169 ne mentionne pas de délai; relativement à la nécessité de la commission, elle dit simplement: "Where it shall appear necessary for the purposes of justice".

L'article 381 du Code de Procédure civile, plus clair et plus précis, décrète ce qui suit:

Cette demande doit être faite dans les quatre jours après la contestation liée, à moins de circonstances particulières laissées à l'arbitrage du juge, et elle est accordée si la nécessité de cette commission lui est démontrée par affidavit.

La motion des demandeurs est tardive; elle me semble avoir été inspirée par celle du défendeur, demandant l'inscription de la cause pour enquête et audition. J'aurais peut-

(1) (1908) 9 R.P. 215 et 14 R. de J. 257
(2) (1913) 15 R.P. 394.
(3) (1926) R.J.Q. 40 B.R. 509.
(4) (1927) 30 R.P. 82.

1949
DE JACZYNSKI ET AL v. L. J. LEMIEUX
Angers J.

être hésité à la rejeter pour cette seule raison, vu la discrétion accordée à la Cour par l'article 381. L'affidavit à l'appui de la motion ne me paraît pas suffisant. La seule allégation concernant la nécessité, contenue dans le paragraphe 4, se limite à l'assertion que les demandeurs "ne peuvent pas se rendre au Canada pour témoigner devant cette Cour"; aucune raison n'est soumise pour établir cette impossibilité: voir *L'Abbé Warré* v. *Bertrand et Labelle* (1). Dans les circonstances, je n'ai pas d'autre alternative que de rejeter la motion des demandeurs, avec dépens.

Statuant maintenant sur la motion du défendeur, la cause est inscrite pour enquête et audition en l'édifice de la Cour Suprême et de la Cour de l'Échiquier, à Ottawa, le 30 mai 1949 à 10 h. 30 du matin. Les frais de cette motion suivront le sort de la cause.

Judgment accordingly.

IN RE W. O. BEYER'S APPLICATION

1949
Jan. 13
Jan. 25

Patents—Practice—Filing of Petition for a patent does not in itself constitute a request for an extension under s. 28A of the Patent Act 1935—Appeal from Commissioner of Patents dismissed.

Held: That s. 28A of the Patent Act 1935 contemplates something of a definite nature which would draw to the attention of the Commissioner of Patents the fact that the provisions of that section were being invoked so that he could then consider whether the necessary requirements of subsections (*b*) and (*c*) of s. 28A had been complied with as a preliminary to granting extension to November 15, 1947; the mere filing of the petition for a patent does not constitute a request for extension.

APPEAL from the decision of the Commissioner of Patents.

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

Cuthbert Scott and *W. R. Meredith,* instructed by the attorneys for the applicant, for the appellant.

No one for the Commissioner of Patents.

(1) (1926) R.J.Q. 40 B.R. 509, à la page 514.

1949

IN RE W.O. BEYER'S APPLICATION

Cameron J.

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

CAMERON J. now (January 25, 1949) delivered the following judgment:

This is a motion by the above named applicant for Letters Patent, by way of an appeal from the rejection of the application by the Commissioner of Patents, dated December 2, 1948, on the ground that the Commissioner erred in finally rejecting said application under the provisions of sections 26(2) (*a*) and (*b*) of the Patent Act of 1935, and for an order declaring that the said applicant has complied with the provisions of section 28A of the Patent Act, and directing the Commissioner to grant an extension of time for the filing of the said application for patent in accordance with the provisions of section 28A.

The Commissioner, although notified of the Notice of Motion, did not appear on the hearing.

The facts are not in dispute. The application for patent was first applied for in the United States on December 8, 1938, and issued on October 21, 1941. The Canadian application was filed on July 18, 1947, and therefore could not be granted because of the provisions of section 26(2) (b) unless the applicant complied with the provisions of section 28A. That section, in part, is as follows:—

28A. (1) Subject as hereinafter provided, the Commissioner shall extend to the fifteenth day of November 1947, in favour of a patentee or applicant, such of the time limits fixed by this Act for the filing or prosecution of applications for patents, for appeals from the Commissioner or for the payment of fees, as expired after the second day of September, 1939: Provided

(*a*) a request for such extension is made by or on behalf of such patentee not later than the fifteenth day of November 1947, or by or on behalf of such applicant for patent before the fifteenth day of May, 1948; and

(*b*) such request specifies the date of the first application in any country for a patent for the same invention by such applicant or patentee or any one through whom he claims; and

(*c*) such patentee or applicant is a Canadian citizen or a national of a country which gives substantially reciprocal privileges to Canadian citizens.

Section 28A was added to the Act by s. 7, c. 23, of the Statutes of Canada, 1947, and following that amendment the Commissioner of Patents under date June 30, 1947, issued a notice which appeared in The Canadian Patent

Office Record of July 1, 1947, regarding the procedure to be followed on applications for patents for inventions filed by United States nationals pursuant to the above section and which so far as new applications were concerned was as follows:—

For New Applications.

(*a*) A separate written request that the application be filed under the provisions of the section and specifying in the request the extensions desired.

(*b*) A statement, preferably in the petition, giving the date on which and the country in which the first application was filed.

As I have pointed out the application here in question was filed subsequent to the publication of that notice.

I do not think that in this case it is necessary to consider whether the terms of that notice by the Commissioner have to be complied with in every detail. It is sufficient, I think, to consider the provisions of section 28A in reaching a conclusion on this motion.

For the appellant it is submitted that the petition for patent which was filed on July 18, 1947, is a sufficient compliance with the requirements of section 28A. It is submitted that paragraph 3 of the petition fulfils all the requirements of section 28A, that clause being as follows:—

3. Your petition requests that this application shall be treated as entitled to priority as follows, having regard to the following applications for patent heretofore made in other countries: United States, filed December 8, 1938—Serial No. 244,602 now patent No. 2,259,453, October 21, 1941.

It is submitted that while this may not be considered a direct request for extension under the provisions of section 28A, that such request may be inferred from the fact that particulars of the prior United States application and grant are supplied, and that inasmuch as the application for patent was out of time because of the provisions of section 26(2) (*b*) (in that it was not filed in Canada within twelve months after the filing of the application in the United States) that it must have been obvious to the Commissioner that the application was made under section 28A and that he should have treated it accordingly as a request for extension.

Following the filing of the application there was certain correspondence between the attorney for the applicant and the Commissioner's office. On September 8, 1947, the attorneys for the applicant were advised of the filing of

1949

IN RE W. O. BEYER'S APPLICATION

Cameron J.

the application for patent and there appears at the bottom of that letter the words, "Convention date—too late." Certain other matters in regard to the application were drawn to the attention of the applicant's attorneys which were corrected, and on June 23, 1948, notice was given that the application was refused in view of section 26(2) (*a*) and (*b*). It was not until June 29, 1948, that the attorneys for the applicant made any reference to the provisions of section 28A, at which time they submitted that the applicant had complied with the provisions of that section in that all the necessary information required by section 28A had been supplied and that it was obvious that a request that the application be treated as an application entitled to priority under section 27 was in effect a request for an extension of time for taking advantage of the Convention rights on the present application.

At that time—June 29, 1948—it was too late to make application for the extension for, at the latest, such application, under the provisions of section 28A(1) (*a*), must have been made by May 15, 1948.

After giving the matter careful consideration, I have reached the conclusion that the appeal must be dismissed. I am quite unable to find that there has been compliance with the provisions of section 28A(1) (*a*). I must find that no request for such extension was made by the applicant prior to May 15, 1948.

There was nothing in the petition or any of the correspondence prior to May 15, 1948, which in my opinion could be construed as a request for extension of the time. No specific request was made and there was nothing to draw to the attention of the Commissioner the fact that any extension of time was requested. I do not think it is possible to accede to the suggestion of counsel for the appellant that, as the application was undoubtedly barred by the provisions of section 26(2) (*a*) and (*b*) long before the application in Canada was made, the Commissioner should therefore have reached the conclusion, by inference, that the mere filing of the petition in itself constituted a request for extension. I think that section 28A contemplated something of a definite nature which would draw to the attention of the Commissioner the fact that the provisions of that section were being invoked so that he could then consider whether

the necessary requirements of subsections (*b*) and (*c*) had been complied with as a preliminary to granting extension to November 15, 1947. In enacting section 28A it was no doubt the intention of Parliament to give certain relief to the applicants for patents, etc., from the strict time limitations provided in the Act, and because of disturbances created in one way or another by the war; but such additional privileges were granted only upon the conditions laid down in the section itself, one of which was that a request for such extension should be made within the time limits therein mentioned. No such request having been made in this case I must confirm the finding of the Commissioner and the appeal from his finding will be dismissed, but under the circumstances without costs.

1949 — IN RE W. O. BEYER'S APPLICATION — Cameron J.

Judgment accordingly.

BETWEEN:

THE COCA-COLA COMPANY OF CANADA, LIMITED, ... PLAINTIFF;

AND

BERNARD BEVERAGES LIMITED .... DEFENDANT.

1945 — Feb. 12-16 21-23 — 1948 — Dec. 31

Trade Mark—"Coca-Cola"—"Cleco"—"Cleco Cola"—Infringement—Unfair competition—Passing off—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 3(c), 6, 11(b)—Use of mark as a trade mark and similarity of mark essential conditions of infringement—Definition of infringement—Test of first impression in determination of similarity of trade marks—Importance of evidence of actual confusion—Infringement of design mark by word mark—Statutory action for unfair competition substitute for former action for passing off—Reasonable apprehension of likelihood of confusion a question of fact for the Court.

The plaintiff complained that the defendant had infringed its trade mark "Coca-Cola" by using the words "Cleco Cola" as a trade mark in association with one of its beverages and that the defendant had directed public attention to its wares in such a way that it might be reasonably apprehended that its course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff.

1948

COCA-COLA COMPANY
v.
BERNARD BEVERAGES LIMITED

Thorson P.

Held: That the use of words or a mark cannot constitute infringement of a registered trade mark unless there has been a trade mark use of the said words or mark. Only use as a trade mark can infringe.

2. That if a person has used words or a mark in the way in which a trade mark is ordinarily used it is not a defence in an infringement action brought against him to say that he did not intend the use of the words or mark as a trade mark.

3. That the words "Cleco Cola" were used by the defendant as a trade mark to distinguish the beverage to which they were applied as its product.

4. That it is not permissible to break up trade marks into so-called distinctive and so-called common parts with a view to emphasizing the difference in the distinctive ones and thus demonstrating that the marks are not similar. A trade mark must be looked at in its totality, rather than with reference to its component parts. *The British Drug Houses Ltd.* v. *Battle Pharmaceuticals* (1944) Ex. C.R. 239, (1946) S.C R. 56 followed.

5. That the answer to the question whether trade marks are similar must nearly always depend on first impression. *Aristoc Ltd.* v. *Rysta Ld.* (1945) A C. 68 at 86 followed.

6. That while evidence of actual confusion may not be necessary to the determination of the likelihood of confusion through the use of similar marks, and is not conclusive of such likelihood, it is clearly helpful to such determination.

7. That where a design mark consists of words written in a particular form it can be infringed by the use of a word mark containing a word or words similar to the words in the design mark.

8. That the cause of action under section 11 of The Unfair Competition Act, 1932, is the statutory substitute for the former cause of action for passing off. Everything that would amount to a passing off in England would fall within the prohibitions of the section. It may even be wider in scope.

9. That it is for the Court to decide whether there is reasonable apprehension that the defendant's course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff. The question is really a jury question.

ACTION for infringement of the plaintiff's trade mark "Coca-Cola" and unfair competition.

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

O. M. Biggar K.C., G. M. Huycke K.C. and *C. Robinson* for plaintiff.

Hon. W. D. Herridge K.C. and *H. M. Lehrer K.C.* for defendant.

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

1948

COCA-COLA COMPANY *v.* BERNARD BEVERAGES LIMITED

Thorson P.

THE PRESIDENT now (December 31, 1948) delivered the following judgment:

The parties to this action are both corporations and each has its head office and principal place of business in Toronto. The plaintiff manufactures and sells a non-alcoholic beverage known as "Coca-Cola" and also a syrup for such beverage. The defendant manufactures and sells non-alcoholic beverages of various flavours one of which is called "Cleco Cola". The plaintiff alleges two causes of action against the defendant: one, that the defendant has infringed its trade mark "Coca-Cola" by using the words "Cleco Cola" as a trade mark in association with the beverage above referred to; and the other, that the defendant has directed public attention to its wares in such a way that it might be reasonably apprehended that its course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff. Both complaints are of breaches of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, the infringement coming under section 3(*c*) and the unfair competition under section 11(*b*).

The plaintiff is the registered owner of two "Coca-Cola" trade marks. The first was registered, on the application of the Coca-Cola Company of Georgia, on November 11, 1905, under the Trade Mark and Design Act, R.S.C. 1886, chap. 63, in Trade Mark Register No. 43, Folio 10433, as a specific trade mark consisting of the compound word "Coca-Cola" according to a specified pattern, to be applied to the sale of beverages and syrup for the manufacture of such beverages. The Coca-Cola Company of Georgia assigned this trade mark to the Coca-Cola Company of Delaware by an assignment, dated January 10, 1922, and registered January 31, 1922, and the plaintiff became the registered owner of it under an assignment from the Coca-Cola Company of Delaware, dated February 5, 1930, and registered March 7, 1930. The second "Coca-Cola" trade mark was registered, on the application of the plaintiff, on September 29, 1932, under the Trade Mark and Design Act in Trade Mark Register No. 257, Folio 55268, as a specific trade mark consisting of the compound word "Coca-Cola" in any and every form or kind or representation, to be applied to the sale of beverages and syrups for the manufacture of such beverages.

1948
COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED
Thorson P.

"Coca-Cola" has become a very popular soft drink. Prior to the incorporation of the plaintiff in 1923 its predecessors in title distributed the beverage widely in Canada as well as in the United States. The sales grew from an original 25 wine gallons of syrup in 1886, each enough for 115 glasses or bottles of beverage, to 18,000,000 gallons in 1920. After the plaintiff acquired the Canadian assets of its parent, the Coca-Cola Company of Delaware, as from January 1, 1924, the Canadian sales grew from 39,000,000 glasses or bottles in 1924 to a peak of 625,000,000 in 1941. About 10 per cent of the "Coca-Cola" sales are by the glass at soda fountains, where the operator merely adds carbonated water to syrup supplied by the plaintiff. The remaining sales are by the bottle, singly or by cartons or by the case. The bottled beverage is sold in many kinds of stores and shops, restaurants, snack bars, clubs, theatres, factories, public buildings and numerous other kinds of establishments throughout Canada. There are about 3,400 soda fountain operators and 62,000 other dealers, about 6,000 in Toronto alone, who handle the plaintiff's product and its sales amount to about 40 per cent of all sales of soft drinks in Canada. The plaintiff advertises its product extensively in every part of Canada and much of the advertising done by the parent company in the United States flows into Canada. The "Coca-Cola" trade mark in script form is used in a variety of ways, such as being blown into the bottles in which the beverage is sold or printed on the crowns or caps of such bottles, or being printed or stamped on the cartons and wooden cases in which the bottles are carried, or painted on the plaintiff's delivery trucks and countless signs across the country. The "Coca-Cola" trade mark is also used in block letters in newspaper and magazine advertising. The word "Coca-Cola" is also spoken in radio advertising. It may fairly be said that "Coca-Cola" has become a household term meaning the plaintiff's beverage.

Some of the evidence has no bearing on the issue of infringement but I think that it is desirable to set out the plaintiff's complaints against the defendant's course of conduct without attempting, for the time being, to separate what is relevant to the issue of infringement from what is not, but before that is done a brief general statement of the defendant's business and registered trade marks is in order.

The defendant commenced business in 1928 and for about 10 years confined itself to manufacturing or bottling a sweet ginger ale, known as "Vernor's Ginger Ale", but in 1938 it decided to go into the bottling of other soft drinks as well. On August 19, 1938, it applied for the registration of the word "Cleco" as a word mark in connection with the sale of non-alcoholic beverages, syrups, extracts, essences, tonics, and flavours used in production, and the said word mark "Cleco" was registered on September 3, 1938, as Trade Mark No. N.S. 9968, Register 36, for use in association with the said wares. The word "Cleco" was said to have been coined from the words "Clear Water Company" which had been thought of at one time as the name for the defendant. Then on August 2, 1939, the defendant applied for the registration of a design mark to be applied to the manufacture and sale of the same wares. This was registered on September 26, 1939, as Trade Mark No. N.S. 13027, Register 49. The design mark was described as follows: "Label, the central figure of which comprises an ellipse in which appears reading matter in large conspicuous letters, the ellipse being mounted on a shaded backing formed with curved top and bottom edges and bearing reading matter, the whole being mounted on a ground formed in a fanciful convergent shape and surrounded by a border." In the centre of the ellipse the word "Cleco" appears in large capital letters slanting to the right. In October, 1938, the defendant commenced bottling aerated beverages of various flavours, "orange" being the first and "kola" the next. By November, 1940, it had put out the following beverages, namely, Cleco Orange, Cleco Kola, Cleco Grapefruit, Cleco Lime Rickey, Cleco Verdun Dry, Cleco Dr. Pep, Cleco Root Beer and Cleco Grape, and it still bottles all of these except the last named one. All the beverages were sold in the same kind of bottle with the word "Cleco", in the slanting form of the label, blown on both sides of the shoulder and appearing also on the label. It was also printed on the crown of the bottle. On January 13, 1943, the defendant applied for the registration of the words "Cleco Cola" as a word mark in connection with the manufacture and sale of non-alcoholic beverages, syrups, extracts, essences, tonics and flavours used in production and the said word mark "Cleco Cola" was registered on

January 27, 1943, on Folio N.S. 17129 of Trade Mark Register No. 65, for use in association with the said wares. On March 10, 1943, the defendant also filed an application for the registration of "Cleco Cola" as a trade mark in the United States Patent Office but registration of it there was refused. After the commencement of this action, the registration of the word mark "Cleco Cola" was cancelled, at the defendant's request, on April 14, 1944, under section 48 of the Act.

The plaintiff's complaints may now be enumerated. Its major complaint is of the defendant's use of the words "Cleco Cola" in association with the beverage manufactured by the defendant and sold under that name. Special objection is taken to the use of the words "Cleco Cola" on the crown or cap of the bottle in which it is sold. There were several changes in the form of this crown. The first order for crowns was placed on September 24, 1938, and a crown in the form of Exhibit 4-A was supplied. The top of this crown was divided into two segments: on the upper and much the larger one the word "Cleco" appeared in large capital letters, in the slanting form of the label, with the word "wholesome" above it in small type and in a curved line conforming with the upper curve of the segment; on the lower segment the word "Kola" appeared in small capital letters with the words "a pure" on the left and "blend" on the right in still smaller letters in line with it and below it the word "refreshing" also in small type in a curved line conforming with the lower curve. This crown was used for over a year. On November 23, 1939, Mr. J. B. Wolfe, the defendant's general manager, instructed a number of changes in it and a new crown in the form of Exhibit 4-B was made. In this one the upper segment of the top was made much larger than the lower one. In the upper segment the word "wholesome" was eliminated and only the word "Cleco" appeared, but in smaller letters than previously; in the lower segment the words "a pure blend" and "refreshing" disappeared, the size of the letters in "Kola" was greatly increased and the words "bottled by Vernor's of Toronto" were put in a very small print just inside the lower curve of the segment. This crown was used until after May, 1942, when Mr. Wolfe gave instructions for a further change and thereafter a crown in the form of

Exhibit 4-C was used. In this one the word "Cola" replaced the word "Kola", but otherwise the crown was the same except for a slight difference of colour in the background of the lower segment and the letters of the upper one. The crown in the form of Exhibit 4-C is still in use.

In addition to using the words "Cleco Cola" on the crowns of the bottles in which the beverage was sold the defendant also used them in the form "Drink Cleco Cola" painted prominently on the backs of its delivery trucks and on its display advertising signs.

There is also evidence that from early in February, 1943, until early in February, 1944, the defendant sponsored a half-hour weekly radio program on station CFRB in Toronto, in which it featured the qualities of "Cleco Cola" as a drink.

The plaintiff also complains that the defendant used the name "Cleco Kola Co. of Canada" as a trade mark. Proof was given that this name appeared in the City of Toronto Directories of the Bell Telephone Company both in the alphabetical and in the classified listings in the issues of April, 1942, December, 1942, July, 1943, and April, 1944, under the same address and telephone number as the defendant's, that the defendant had applied for these listings and that it had been billed for them. There was also the evidence of Mr. R. S. J. Davies in which he said that in one of the radio broadcasts the Cleco Cola Company of Canada was referred to as the manufacturer of "Cleco Cola".

I shall deal first with the plaintiff's claim that the defendant has infringed its trade mark "Coca-Cola" by the use of the words "Cleco Cola" in association with the beverage designated by that name. Infringement of a trade mark has been defined in Kerley on Trade Marks, 6th Edition, at page 445, as follows:

> Infringement is the use by the defendant, for trading purposes upon or in connection with goods of the kind for which the plaintiff's right to exclusive use exists (*i.e.*, goods in respect of which his mark is registered) not being the goods of the plaintiff, of a mark identical with the plaintiff's mark, or comprising some of its essential features, or colourably resembling it, so as to be calculated to cause goods to be taken by ordinary purchasers for the goods of the plaintiff.

This definition was approved by Romer L.J. in *Bale & Church Ltd.* v. *Sutton, Parsons & Sutton* (1) and has been

(1) (1934) 51 R P C 129 at 141.

1948
COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED
Thorson P.

generally accepted as a correct statement of the test to be applied in considering whether one trade mark does or does not infringe another registered trade mark. In Canada the prohibition against the infringement of a trade mark is put by section 3 of the Unfair Competition Act, 1932, as follows:

> 3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which
> (a) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares;
> (b) is already in use by any other person in any country of the Union other than Canada as a trade mark or distinguishing guise for the same or similar wares, and is known in Canada in association with such wares by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in and/or users of such wares in Canada; or
> (c) is similar to any trade mark or distinguishing guise in use or in use and known as aforesaid.

I think it may fairly be said that there is no difference so far as the present case is concerned between Kerley's definition of infringement and that contained by implication in section 3 of the Act. We are concerned only with section 3(*c*). There is no doubt that the plaintiff's "Coca-Cola" and the defendant's "Cleco Cola" beverages are similar wares, so that we are concerned only with the question whether "Cleco Cola" is a trade mark which the defendant has knowingly adopted for use in connection with its beverage, and, if so, whether it is similar to the plaintiff's trade mark "Coca-Cola", within the meaning of section 2(*k*) of the Act.

On the first question, counsel for the defendant contended that the words "Cleco Cola" had never been used by the defendant as a trade mark; its trade mark was "Cleco", which it applied to all the beverages manufactured by it, and "Cola" was simply a word describing one of the flavours in the "Cleco" series. It was also urged that the words "Cleco" and "Cola" were not used together in one line or integrated to convey one meaning but were two different words distinctly separated from one another in two lines and were not used in that kind of juxtaposition or interrelationship which is a basic essential of a trade mark. It was also suggested that the use of a registered trade mark such as "Cleco" in juxtaposition or propinquity to a de-

scriptive word like "Cola" could not make the registered trade mark and the descriptive word a trade mark. Finally, it was submitted that the defendant had a right to decide what its trade mark should be and that it had never intended the use of "Cleco Cola" as a trade mark.

In my opinion, there are several reasons why the contentions of counsel on this point should not be accepted. It is plain that the use of words or a mark cannot constitute infringement of a registered trade mark unless there has been a trade mark use of the said words or mark. Only use as a trade mark can infringe. What constitutes "use" of a trade mark is set out in section 6 of the Act as follows:

> 6. For the purposes of this Act a trade mark shall be deemed to have been or to be used in association with wares if, by its being marked on the wares themselves or on the packages in which they are distributed, or by its being in any other manner so associated with the wares at the time of the transfer of the property therein, or of the possession thereof, in the ordinary course of trade and commerce, notice of the association is then given to the persons to whom the property or possession is transferred.

In my view, the use of the words "Cleco Cola" on the crowns of the bottles comes within the ambit of this section, so that it is not necessary to determine whether their use on the backs of the delivery trucks or on the display signs or in the radio broadcasts was use in association with the wares within the meaning of the section. As I see it, the words "Cleco Cola" served the purpose of a trade mark, namely, to distinguish the beverage in association with which they were used as the defendant's product. If that is so, how can it be said that this was not a trade mark use of the words? It cannot help the defendant to say that the word "Cola" was used in relation to the word "Cleco" in the same way as other words descriptive of other flavours. How the defendant distinguishes or identifies its other beverages can have no bearing on whether the words "Cleco Cola" were used as a trade mark. Nor does it matter that the two words appear on the crowns in two lines instead of one. The eye would see the two words together and that would be all that would be seen if the bottles were immersed in one of the coolers which the plaintiff supplies to the trade. Moreover, when the two words are spoken by a customer asking for a bottle of the beverage by the name of "Cleco Cola" there is no dividing line in the customer's mind. In that case, the words are integrated to convey

1948
COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED
Thorson P.

one idea. Nor can I see how the fact that "Cleco" is itself a registered trade mark and "Cola" is said to be merely descriptive of a flavour can prevent the two words when used together from being a trade mark. The plaintiff in an infringement action need not show that the alleged infringing trade mark has been registered. It need not be. All that need be shown is that it has been used as a trade mark and is confusingly similar to the plaintiff's registered trade mark. The fact that "Cola" is a descriptive word has nothing to do with the matter for words of that sort are frequently used as part of a trade mark; it is the trade mark as a whole, not its separate parts, that must be looked at. It would be possible to cite a great many cases in which words of which "Cola" was one have been held to be trade marks that infringed the plaintiff's "Coca-Cola" trade mark and their use restrained. But no useful purpose would be served by so doing, for each case must stand on its own feet. Nor can the question whether the words "Cleco Cola" were used as a trade mark be determined negatively by Mr. Wolfe's statement that they were never used by the defendant as its trade mark. The issue is whether the words were used as a trade mark, not whether any one said that they were or were not so used. Allegations of non use or use cannot affect the fact of use. It follows that the intent of the user has no bearing on the fact of use. Thus, if a person has used words or a mark in the way in which a trade mark is ordinarily used it is not a defence in an infringement action brought against him to say that he did not intend the use of the words or mark as a trade mark. In this connection, I should refer briefly to the defendant's application to register "Cleco Cola" as a word mark in Canada and its attempt to register the words as a trade mark in the United States. In its application for the Canadian registration the defendant stated that it had adopted and continuously used the word mark "Cleco Cola" since September 1, 1942, and that the said word mark was imprinted or otherwise applied to the wares or packages or containers within which the wares were marketed to indicate the wares were manufactured and/or sold by the defendant. This statement was by the defendant's attorney who had been empowered by the defendant to make the application. A similar statement was made in the defendant's application for registration of "Cleco Cola" in the United States, but in

this case it was signed by Mr. H. M. Samuel, the defendant's president, who also swore an affidavit that the statement was true, and that the specimens submitted with the application "show the Trade Mark as actually used upon the goods". Just as I have held that Mr. Wolfe's statement that the defendant has never used the words "Cleco Cola" as a trade mark cannot negative the fact of their use as a trade mark, if they were so used, so also the defendant's statements in its application to register "Cleco Cola" in Canada and the United States that the words have been used as a trade mark are not conclusive of the fact of such use, although it seems to me that they are corroborative of it. I need not determine whether these statements are binding upon the defendant as an admission and thus prevent it from being able to allege that the words were not used as a trade mark, for I need not rely upon any such admission. There is plenty of evidence of trade mark use without it. In my opinion, it is clear that the words "Cleco Cola" were used by the defendant as a trade mark to distinguish the beverage to which they were applied as its product. The beverage was identified and known by these words. Customers asked for a bottle of "Cleco Cola". The defendant's advertisements on the back of its delivery trucks and on its display signs exhorted the public to drink "Cleco Cola" and the radio broadcasts extolled the qualities of "Cleco Cola". Even if these last mentioned uses were not in themselves trade mark uses within the meaning of section 6 they serve to confirm the fact of their use as a trade mark. Under the circumstances, I have no hesitation in holding that the defendant did use the words "Cleco Cola" as a trade mark.

The next question to be considered is whether the said trade mark "Cleco Cola" is similar to the plaintiff's trade mark "Coca-Cola". Similarity in relation to trade marks is defined by section 2(*k*) of The Unfair Competition Act, 1932, as follows:

2. (*k*) "Similar" in relation to trade marks, . . . describes marks . . . so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, . . .

In the present case the question is whether, if "Cleco Cola" and "Coca-Cola" were both used at the same time

1948
COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED
Thorson P.

and in the same place, there would be likelihood of confusion in the minds of dealers in and/or users of the beverages as to whose products they were.

Counsel for the defendant argued that if "Cleco Cola" was a trade mark its use could not infringe "Coca-Cola". His contention was that since the word "Cola", a descriptive word, is common to both marks the Court should, in determining whether the two marks are "similar", shift the emphasis to the uncommon and distinctive parts of the two marks, namely "Cleco" in the one case and "Coca" in the other. While it is possible to find some judicial support for comparing trade marks in this way I think that the weight of judicial authority indicates that it is not permissible to break up trade marks into so-called distinctive and so-called common parts with a view to emphasizing the difference in the distinctive ones and thus demonstrating that the marks are not similar. In my view, a trade mark must be looked at in its totality, rather than with reference to its component parts. It is a unitary concept and the question whether two trade marks are similar must be approached from that point of view.

This Court has dealt with similarity of trade marks in a number of cases, including *The British Drug Houses, Ltd.* v. *Battle Pharmaceuticals* (1). While the issue in that case related to expungement of the respondent's word mark "Multivims" on the ground that it was confusingly similar to the petitioner's word mark "Multivito", the tests of similarity there applied are equally applicable in an action for infringement. In that case I held, at page 248, following *Sandow Ld's Application* (2):

> In determining whether the registration of a trade mark should be expunged on the ground of its similarity to a mark already registered for use in connection with similar wares it is not a correct approach to solution of the problem to lay the two marks side by side and make a careful comparison of them with a view to observing the differences between them. They should not be subjected to careful analysis; the Court should rather seek to put itself in the position of a person who has only a general and not a precise recollection of the earlier mark and then sees the later mark by itself; if such a person would be likely to think that the goods on which the later mark appears are put out by the same people as the goods sold under the mark of which he has only such a recollection, the Court may properly conclude that the marks are similar.

(1) (1944) Ex. C.R. 239. (2) (1914) 31 R.P.C. 196.

And, at page 251, following *Re Christiansen's Trade Mark* (1), I said

It is, I think, firmly established that, when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.

The judgment of this Court was approved by the Supreme Court of Canada (2). There Kerwin J., who delivered the judgment of the Court, followed the judgment of the House of Lords in *Aristoc Ld. v. Rysta Ld.* (3), which adopted a passage in the dissenting judgment of Luxmore L.J. in the Court of Appeal as a fair statement of how the Court should approach the question of similarity of trade marks. The passage appears in the speech of Viscount Maugham, at page 86:

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of s. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

I think it may fairly be said that this is now the leading statement of the test to be applied in determining whether words in trade marks are similar. While the passage refers to trade marks consisting of single words I see no reason why it should not be equally applicable to trade marks consisting of more than one word, such as those in question in the present case.

Having regard to the tests to be applied, and quite apart from the evidence of actual confusion, I have come to the conclusion that the trade marks "Cleco Cola" and "Coca-Cola" are confusingly similar in sound.

(1) (1886) 3 R.P C. 54.
(2) (1946) S C R. 50.
(3) (1945) A C. 68.

1948

COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED

Thorson P.

I am strengthened in my opinion that the two trade marks are confusingly similar by the fact that there has been actual confusion through their contemporaneous use. While evidence of actual confusion may not be necessary to the determination of likelihood of confusion through the use of similar marks, it is clearly helpful to that end. It is not conclusive, but it seems to me that if there has been actual confusion it would be difficult to find that there is no likelihood of confusion. Evidence relating to the presence or absence of confusion was given both for the plaintiff and for the defendant. Three dealers in soft drinks gave evidence that, so far as their experience went, there had been no confusion and I have no hesitation in believing their evidence. On the other hand, several witnesses for the plaintiff gave evidence on the subject. Mr. C. Duncan said that he had to listen attentively to "Cleco Cola" and "Coca-Cola" or he would be likely to become confused. Specific evidence of actual confusion was given by Mr. J. H. Ledger. He said that he and Mr. D. S. Macdonald, who was in service overseas at the time of the trial, had on May 19 and May 20, 1943, called on 80 retail dealers in the Toronto area. At each place of call either he or Mr. Macdonald asked for a bottle of "Cleco Cola". On the first request a bottle of "Cleco Cola" was served in 10 cases, a bottle of "Coca-Cola" in 14 cases, and in 24 other cases the dealer said that he was out of "Cleco Cola". In the other 32 cases the order was repeated after a discussion; in 8 of these a bottle of "Cleco Cola" was served, in 4 a bottle of "Coca-Cola", and there was no sale in the remaining 20. Mr. R. S. J. Davies, the head of the plaintiff's legal department, also gave evidence that he had been served with "Coca-Cola" when he had asked for "Cleco Cola" on 14 or 15 occasions out of 40 to 50 calls. While the Court should scrutinize "trap" orders with great care, I must say that I was very favourably impressed with the manner in which these witnesses gave their evidence and I believe their statements. I cannot accept the suggestion of counsel for the defendant that this was not evidence of confusion but of substitution. It is more likely, as counsel for the plaintiff suggested, that the dealers were confused as to what was being asked for, but I need not decide this. Nor does it matter whether one party stood

to gain or lose by the confusion. The question is whether there was confusion. In my opinion that fact is well established.

On the question of infringement, counsel for the defendant contended that the plaintiff could not successfully bring an action for infringement of its trade mark "Coca-Cola" where the trade mark complained of was a word mark and the alleged infringement was by similarity of sound. His argument, as I understood it, ran as follows: the plaintiff had never used the words "Coca-Cola" in association with its wares except in script form so that its trade mark, since The Unfair Competition Act, 1932, was exclusively a design mark, within the meaning of section 3(*c*) of the Act; that the non use of the words in association with its wares, apart from their use in script form, constituted an abandonment of their status as a word mark since they were not used as a trade mark, within the meaning of section 2(*m*); that the plaintiff had never used the "Coca-Cola" trade mark registered in 1932 in association with its wares so that it could not rely upon it as a word mark since it had never been used as a trade mark; that this left the plaintiff with only a design mark and no word mark; that since a design mark, under section 2(*c*), depends for its distinctiveness "upon its form and colour, or upon the form, arrangement or colour of its several parts" it could not be infringed by a word mark since it depends for its distinctiveness "upon the idea or sound suggested by the words"; that a design could be seen but not heard; and that, therefore, there could be infringement of a design mark by a design mark, since the similarity between the two designs could be seen, but not by a word mark, since no similarity could be heard so far as the design was concerned. From this line of reasoning the conclusion was drawn that since the plaintiff had no word mark it could not succeed in an action for infringement by a word mark where the alleged similarity was similarity of sound. The argument is a novel and interesting one. It is met, although perhaps not wholly, by the decision in *Saville Perfumory Ld.* v. *June Perfect Ld. et al* (1) in which a trade mark in a design form was held to be infringed by the use of a word in it in conjunction with other words. Moreover, I am not able to see how the

(1) (1941) 58 R.P.C. 147.

1948
COCA-COLA COMPANY v. BERNARD BEVERAGES LIMITED
Thorson P.

plaintiff's right to protection against infringement, which prior to the 1932 Act would have extended to infringement by the use of words, can have been restricted under the Act or by the fact that there has been no change in the manner of the plaintiff's use of its trade mark and that it has continued to use the words "Coca-Cola" in their script form. Nor do I think it must be conceded that the plaintiff's "Coca-Cola" trade mark is exclusively a design mark and has no status as a word mark. But even if it is exclusively a design mark I do not see how the argument can be applied in the case of such a design mark as "Coca-Cola" where the design consists of words written in a particular form and it would not be possible to see the distinctiveness of the design without seeing the words.

Under all the circumstances, I have come to the conclusion that the plaintiff has made out a case of infringement of its trade mark by the defendant.

Even if there were doubt as to whether the defendant was guilty of infringement of the plaintiff's trade mark, it would not be free from responsibility if its conduct brought it within the prohibitions of section 11 of the Act. This brings me to the second part of the plaintiff's case, namely, its claim for unfair competition under that section, which reads as follows:

11. No person shall, in the course of his business,

(*a*) make any false statement tending to discredit the wares of a competitor;

(*b*) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;

(*c*) adopt any other business practice contrary to honest industrial and commercial usage.

We are concerned only with section 11(*b*). The cause of action under section 11 is wider than for infringement in that infringement is only one of the forms of unfair competition against which the section is directed. There may be other breaches of it that do not involve infringement of trade mark at all. Consequently, even if the plaintiff were to fail on the infringement issue it might

1948
COCA-COLA COMPANY
v.
BERNARD BEVERAGES LIMITED
Thorson P.

succeed in its claim under section 11. Conversely, the fact that the defendant was guilty of infringement does not *ipso facto* make it liable under section 11, for it might be able to show that its conduct, notwithstanding the infringement, had been such as not to fall within the prohibition of the section. The cause of action under section 11 is the statutory substitute for the former cause of action for passing off. Everything that would amount to a passing off in England would fall within the prohibitions of the section. It may even be wider in scope. Intent is not a necessary ingredient of the cause of action, nor can absence of intent beget freedom from responsibility. In the present case counsel for the defendant argued that it was not permissible to make a mosaic of the various acts of which the plaintiff complained. I need not discuss that question if there is any act on the part of the defendant that amounts to a breach of the section. The question is whether the acts which the defendant is proved to have done were acts from which there might be reasonable apprehension of the likelihood of confusion. It is for the Court to decide whether there is such reasonable apprehension. The question is really a jury question. After consideration of the evidence and the arguments of counsel I think that there is ample evidence to warrant the conclusion that there is reasonable apprehension that the defendant's course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff. I, therefore, find that the plaintiff has established its claim of unfair competition by the defendant.

There will, therefore, be judgment in favour of the plaintiff for the injunctions and other relief sought by it and costs, except that the damages will be such as the Registrar of this Court may award on a reference to him, if the plaintiff elects such reference.

Judgment accordingly.

1948
Apr. 5, 6, 7, 15, 16, 23, 24
—
Nov. 26

BETWEEN:

JOY OIL COMPANY LIMITED and JOY OIL LIMITED .... } SUPPLIANTS;

AND

HIS MAJESTY THE KING .... RESPONDENT.

Crown—Petition of Right—Claim for subsidies on sale of gasoline—"Place" —P.C. 1195, February 19, 1941—Order 010A of the Oil Controller— "Place" means geographical locality and not place of business—Suppliants not entitled to subsidy.

Suppliants seek to recover from respondent certain subsidies on gasoline imported into Canada by suppliants, one of which carried on business as a retailer of gasoline and lubricating oils through the operation of a main terminal in Toronto, Ontario, and sixteen service stations in the Toronto area; the other suppliant operates a main terminal and twelve stations in Montreal, Quebec.

P.C. 1195, February 19, 1941, empowered the Oil Controller "subject to the approval of the Minister to fix or regulate the price or fix the maximum price or the minimum price at which oil may be sold in any place, area or zone by or to any person . . ." and pursuant to such power the Order of the Oil Controller 010A provided that "the price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941 . . ."

Held: That the word "place" as used in P.C. 1195 and Order 010A means a geographical locality and not a "place of business", and establishes a ceiling price in each geographical locality and not on an outlet basis.

2. That the price at which suppliants could sell gasoline was not the price at which they had been selling at each of their stations, but the maximum price at which it had been sold during the basic period in Toronto and Montreal.

PETITION OF RIGHT to recover from the Crown money claimed by suppliants as subsidies on the sale of gasoline and lubricating oils by suppliants.

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

R. M. Willes Chitty, K.C. for suppliants.

Hugh E. O'Donnell, K.C. for respondent.

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

O'CONNOR J. now (November 26, 1948) delivered the following judgment:

The suppliants claim by Petition of Right to be entitled to recover from the Crown subsidies on gasoline imported by the suppliants. The suppliants were incorporated in the year 1934, and carried on business as retailers in gasoline and lubricating oils. The Joy Oil Company Limited operates a marine terminal in Toronto, and sixteen service stations in the Toronto district. The Joy Oil Limited operates a marine terminal and twelve gasoline stations in Montreal. The suppliants had always imported gasoline from Trinidad into Canada, and had sold their gasoline to consumers at prices lower than the prices of their competitors in Toronto and Montreal.

Pursuant to the powers conferred by Section 6 of the War Measures Act, 1914, by an Order in Council P.C. 2516, dated September 3, 1939 (Exhibit 5) the Wartime Prices and Trade Board, hereinafter called the Board, was created with the powers necessary to provide safeguards under war conditions against undue enhancement in the prices of food, fuel and other necessaries of life, and to ensure an adequate supply and equitable distribution thereof.

P.C. 6834, dated August 28, 1941 (Exhibit 9) reorganized the Board, and gave the Board power to fix maximum or minimum prices or markups at which any goods or services may be sold. And under Section 7(*d*) to recommend any additional measures it may deem necessary for the protection of the public with respect to goods or services.

By P.C. 2715, dated June 24, 1940 (Exhibit 6) Wartime Industries Control Board was created, consisting of the controllers from time to time appointed by the Governor-General in Council. This was amended by P.C. 6835, dated August 29, 1941 (Exhibit 10) Section 8(1) (*d*) of which provided:—

> 8(1) Notwithstanding the provisions of any other Order in Council, every Controller shall have power, exercisable from time to time subject to the approval of the Chairman, to fix specific or maximum or minimum prices and/or markups at or for which any articles, commodities, substances, goods, services or things over, or in respect to, which such Controller is given authority, jurisdiction or power, may be sold or offered for sale or supplied generally or in any place, area or zone . . .

P.C. 2818, dated June 28, 1940 (Exhibit 7) appointed an Oil Controller and made Regulations respecting oil, includ-

ing, *inter alia*, the power, subject to the approval of the Minister, to fix maximum prices or maximum markups at which oil may be sold or offered for sale. The Regulations were amended by P.C. 1195, dated February 19, 1941 (Exhibit 15), and provided *inter alia*:—

(*d*) Subject to the approval of the Minister, to fix or regulate the price or fix the maximum price or the minimum price at which oil may be sold or offered for sale in any place, area or zone by or to any person or class of persons and for such purpose to designate any such person or class of persons or any such place, area or zone.

The Oil Controller issued Order 010, dated October 21, 1941 (Exhibit 8), which confirmed a price increase and provided for regulations governing prices for petroleum products, including

(*a*) The price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, plus any applicable price increase confirmed, authorized or required by this Order and having regard to the quantity purchased.

Order 010 was amended by Order of the Oil Controller, numbered 010A, dated January 28, 1942 (Exhibit 13A), to provide:—

8. From and after the date of this Order, the price to be paid for petroleum products, or any of them, by any purchaser thereof in any Province of Canada shall be regulated as follows:—

(1) The price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, having regard to the quantity purchased, plus

(*a*) any applicable price increase confirmed and/or authorized by this Order, and

(*b*) any price increase actually imposed in any place as authorized by paragraph 7 of Order numbered 010 and dated the 21st day of October, 1941; provided that such price increase was imposed on or after the date of the said Order and on or before the 13th day of December, 1941, when the said paragraph of the said Order was suspended by the Oil Controller.

Orders 010 and 010A were concurred in by the Board and approved by the Wartime Industries Control Board.

P.C. 8527, dated November 1, 1941 (Exhibit 12), fixed the "Maximum Prices for Goods":—

3. (1) No person shall, on or after November 17, 1941, (amended by P.C. 8818 dated December 1, 1941) sell or supply or offer to sell or supply any goods or services at a price that is higher than the maximum price for such goods or services as provided in these regulations, unless otherwise permitted under the provisions of these regulations.

Section 4 provided that:—

4. The provisions of Section 3 of these regulations shall not apply with respect to:—

(g) any price fixed by the Board, or fixed or approved by any other federal, provincial, or other authority with the written concurrence of the Board.

The Board issued a pamphlet dated November 21, 1941, entitled "Preliminary Statement of Policy" (Exhibit 1). They announced that on December 1, 1941, there would come into force in Canada a complete control of all prices and that higher prices would not be permitted than those at which goods were actually sold during the four weeks, September 15th to October 11th. Section X stated that the whole question of imports in relation to price ceiling was being studied by the Board and a statement of policy might be expected in the near future.

By a second pamphlet dated December 2, 1941, the Board announced the "Import Policy" (Exhibit 2).

On January 1, 1942, a "Statement of Import Policy" (Exhibit 3) was published by the Board in *The Canada Gazette,* No. 124, Vol. LXXV.

P.C. 9870, dated December 17, 1941 (Exhibit 13), authorized the Minister of Finance to cause the incorporation of a private company wholly owned by the Crown, and to be known as Commodity Prices Stabilization Corporation Limited, hereinafter called the Corporation, with the intent and purpose of facilitating, under the Board, the control of prices of goods in Canada, with such powers, in addition to those conferred by the Companies Act, as may be set forth in the Letters Patent, and further authorized the Minister to execute an agreement with the Corporation in terms of the draft attached thereto. And to advance $10,000,000 to the Corporation for the purpose, *inter alia,* of paying subsidies. And under Section 2 the Board was authorized from time to time to delegate to the said Company such of the powers of the Board as the Board may deem advisable. Under the Agreement the Corporation was authorized in discharge of such duties as may be delegated to it, to pay subventions, subsidies, as may be deemed advisable, in accordance with the principles formulated from time to time by the Board and approved by the Minister.

1948
JOY OIL CO. LTD. v. THE KING
O'Connor J.

P.C. 9870 (Exhibit 13) and the draft Agreement were amended by P.C. 5863, dated July 7, 1942 (Exhibit 14). Section A(1) gave the Company the powers, in addition to those contained in the Letters Patent, the Companies Act, and the Order in Council, to do all things as may be deemed necessary for the purpose of carrying out the object of the Company and of the agreement referred to in Section 3.

P.C. 5863 authorized the Company (*inter alia*) to:—

A—(2) (*a*) Subject to the terms of the Agreement between His Majesty and the said Company referred to in Section 3 hereof, to pay such sum or sums by way of subvention, subsidy, bonus or otherwise to any person, firm or corporation as may be deemed advisable; provided, however, that the said Company shall not enter into any agreement binding itself to pay any such sum or sums to any person, firm or corporation except with the approval of the Minister of Finance.

Section A(5) provided for additional funds for the Company as an accountable advance or advances, and under Section B the Agreement under P.C. 9870 was rescinded and a new draft Agreement approved which provided *inter alia*:—

1. The payment by the Company of any financial assistance to or for the benefit of any person, firm or corporation by way of subvention, subsidy, bonus or otherwise shall be in accordance with Principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister.

Section C provided that P.C. 9870 shall be read and construed as if it included all the provisions of the substituted agreement and all amendments thereto.

Under Letters Patent of the Corporation (Exhibit C), the Corporation was given the power:—

(*a*) 2. To pay such sum or sums, by way of subvention, subsidy, bonus or otherwise to any person, firm or corporation as the company may deem fit and proper.

Owing to the shortage in shipping space the suppliants were unable to bring gasoline in from Trinidad so they purchased it in the United States at a cost that was higher than that which they had paid for the gasoline from Trinidad. They then made applications for payment of the subsidies (Exhibits 16 and 17) in respect to importations during the period December 1, 1941 and July 1, 1942.

The suppliants contended that "place" in Oil Orders 010 and 010A (Exhibits 8 and 13A) meant "place of business" and that their retail price ceiling was the price at which gasoline had been sold on September 30, 1941, at each of their service stations.

The applications for subsidy were refused by the Corporation on the ground that there were similar goods available in Canada at reasonable prices. The suppliants denied that there were similar goods available in Canada and that if there were they were not at reasonable prices having regard to their contention that the price ceiling was on an individual outlet basis. The Corporation contended that the price ceiling was not on an individual basis but on a geographical basis, i.e., Montreal and Toronto in this case, and that the suppliants could have increased their price to that of their competitors. A lengthy correspondence ensued. The contention of the suppliants and the reply of the Corporation are well set out in the letter from the President of the Corporation to the suppliants, dated October 16, 1942 (Exhibit 27):—

The brief contains several submissions upon which we deem it proper to comment:

The statement in the Import Policy that "No subsidies will be paid if similar goods are available in Canada at reasonable prices" applies to this case, the Oil Controller having advised us that your clients could have obtained and can obtain similar goods in Canada at reasonable prices. The further statement quoted by you, "Diversion of purchases from domestic to foreign sources of supply if not justified by a shortage of supply in Canada . . ." was included in the Policy announcement by way of special warning and does not detract from the generality of the statement first quoted.

The statement quoted on p. 3 of your submission from Item 3 of the Statement of Import Policy of December 2, 1941, depends entirely upon the meaning of "retail ceiling prices." As indicated below, ceiling prices in this case were such that your clients could have continued importing in the normal manner, so far as the relationship between their import costs and their selling prices was concerned, without requiring any subsidy payment.

Your submission stresses the point that the Wartime Prices and Trade Board's Preliminary Statement of Policy stated that each seller was bound by his own individual selling prices as established during the basic period. This referred, of course, only to goods which were governed by an individual ceiling. It did not refer to goods which were subject to a uniform ceiling under a pre-existing law or under a subsequent order of the Board. The provisions of the Maximum Prices Regulations as originally enacted expressly preserved existing maximum price orders of the Board and other authorities, including the Oil Controller's Order 010. The Oil Controller's Order 010A, amending Order 010 in some particulars, received the concurrence of the Board. In both these orders maximum prices were set for gasoline on a geographical basis and not on an individual basis. The Wartime Prices and Trade Board did not and does not require your clients to sell at these maximum prices but the fact remains that it was open to your clients to adjust their retail selling prices by an amount sufficient to cover the increased costs of their imports.

1948
JOY OIL CO. LTD.
v.
THE KING
O'Connor J.

The Oil Controller declares to us that your clients did not approach him in connection with this matter; further, the major Canadian gasoline refining companies have declared to the Oil Controller that they were not approached by your clients.

Having considered fully the submissions contained in your brief, we find no reason to change our position, and I must therefore confirm that no subsidies are payable in respect of the applications submitted.

On November 9, 1942, the Corporation by letters (Exhibits 29 and 30) advised the suppliants that the applications had been refused:—

With reference to your applications for Subsidy No. 1, 2, 3, 4, amended, 5, 6, 7, amended, 8, amended, and 9, the Oil Controller has advised us that similar products of Canadian production are available in Canada at reasonable prices in relation to the official Retail Ceiling for Gasoline.

In accordance with Sections 9, 4(*c*), and 9, of the Import Policies of the Wartime Prices and Trade Board of December 2, 1941, January 1, 1942, and August 1, 1942, respectively, we have no alternative, but to refuse payment on these applications.

The Minutes of the Meeting of the Corporation (Exhibit F) show that the applications were considered and refused at a number of meetings and the final resolution, dated October 21, 1942, is as follows:—

With further reference to the request from the solicitors for Joy Oil Company Limited and Joy Oil Ltd., that their applications for import subsidy on gasoline be reconsidered (page 1037), the Chairman reported that we had now replied pointing out, *inter alia,* that similar goods were and are available in Canada at reasonable prices; that the Maximum Prices Regulations had maintained pre-existing law such as the Oil Controller's Orders 010 and 010A so that these companies could have adjusted their retail selling prices by an amount sufficient to cover the increased costs of their imports; and concluding by confirming that no subsidies are payable in respect of the applications submitted.

A further submission was then made by the solicitors to the Minister of Finance reiterating the contentions of the suppliants and renewing the applications (Exhibit 31). In reply, dated March 11, 1943, (Exhibit 32), the Minister of Finance quoted from the Oil Controller's Order 010 (Exhibit 8), Section 9(*a*), (*b*) and (*c*), and stated that the maximum price of petroleum products having been fixed by the Oil Controller's Order 010, it followed that such products were not subject to the provisions of the General Order Maximum Prices Regulations (Exhibit 12), but were governed by the Special Order 010 (Exhibit 8) and that:—

The question as to whether the Joy Companies are entitled to receive payment of a subsidy would appear to depend upon the interpretation of the word "place" as contained in the Orders above referred to. If, as you contend, this word means "place of business," your clients are entitled

to payment of a subsidy. If, on the other hand, it means a geographical area, i.e., a municipality or adjacent district, they are not, since my advice is that no subsidy would have been required to enable your clients to sell gasoline at the maximum price permitted in the Montreal and Toronto areas.

The word "place" taken by itself is a word of rather wide meaning and is, of course, capable of either interpretation. In this connection I quote two definitions of the word taken from the Oxford Dictionary.

(1) "A portion of space in which people dwell together; a general designation for a city, town, village, hamlet, etc."

(2) "A building, apartment, or spot devoted to a specified purpose, (Usually with specification as *place of amusement, of* resort, bathing place, etc.)"

The question as to the interpretation to be placed on this word as used in the Orders above referred to, was submitted to the Solicitor of the Wartime Prices and Trade Board for his opinion. He has advised that in his opinion the word "place" as used in the Oil Controller's Orders does not mean "place of business" but means a geographical locality as indicated in the first of the two definitions which I have quoted above.

I suggest that the interpretation to be placed on the word as contained in the Order is affected by the use of the preceding word "in." Had the Order read "at a place," it could be more strongly urged that the phrase referred to a specific establishment and not to a geographical area.

In view of the opinion which has been given by the Solicitor of the Wartime Prices and Trade Board, I regret to have to advise you that I do not feel that I can interfere with the decision of the Commodity Prices Stabilization Corporation that your clients are not entitled to payment of the subsidy claimed.

The claim is not put on the basis of a contract arrived at by mutual agreement. There were no negotiations between the parties prior to the applications for subsidy.

Nor is the claim put on the basis of compliance with conditions of regulations having the force of law. P.C. 5863, which authorized the Corporation to pay subsidies, does not set out conditions and its language is permissive and not imperative. In addition, payment of subsidies was to be made as "may be deemed advisable." The claim is put first, on the basis that the statements of policy issued by the Board (Exhibits 1, 2 and 3) constituted an offer to pay subsidies, which was accepted by the suppliants by performance of the conditions of the offer. That is, that the Board, as an agent or servant of the Crown, in these statements made an offer that if the suppliants and other Canadian importers would continue to import and sell at the retail ceiling price that appropriate subsidies would be paid to them by the Corporation so that imported goods would cost the importer no more than was appropriate in

1948
JOY OIL CO. LTD. v. THE KING
O'Connor J.

relation to the retail ceiling price. And that the suppliants accepted this offer by continuing to import and sell at the retail selling price and that the imported goods cost them more than was appropriate in relation to the retail ceiling price. And that this offer and its acceptance created a contract under which there is a contractual liability on the respondent to pay them subsidies and a right in the suppliants to recover the subsidy enforceable by petition of right.

And the claim is put next on the basis of the letter to the suppliants from the Minister of Finance (Exhibit 32).

Counsel agreed that the Court should first determine whether there was a right to the subsidy, and then, if so, a reference would be made to ascertain the amount. P.C. 6834, August 28, 1941, (Exhibit 9) rescinded the prior Wartime Prices and Trade Board regulations. The Board was not empowered by P.C. 6834 to agree on behalf of the Crown to pay subsidies. The only provision in respect of it was (Section 7) that "It shall be the duty of the Board (*d*) to recommend any additional measures it may deem necessary for the protection of the public with respect to goods and services . . ." And it will be noted that in the Preliminary Statement of Policy, dated November 21, 1941 (Exhibit 1), it was stated that if the total burden was too great the Board . . . will recommend that the Government . . . should share the burden by way of subsidy . . .

But the Board in "Import Policy", December 2, 1941 (Exhibit 2), stated that "importers may therefore continue importing in the normal manner, with the assurance that appropriate subsidies will be provided with respect to goods imported on or after December 1, 1941, on the basis outlined below." And that the Commodity Prices Stabilization Corporation may act by paying subsidies or by buying and selling goods.

The respondent then (December 17, 1941) authorized the incorporation of the Commodity Prices Stabilization Corporation with power to pay subsidies in accordance with the principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister. And subsidies were paid on goods other than motor gasoline.

It is clear from this that the respondent subsequently ratified and confirmed the action of the Board.

It is quite clear from P.C. 6834 that the Board was not an independent body but a servant or agent of the respondent.

It is equally clear from P.C. 9870 (Exhibit 13) and P.C. 5863 (Exhibit 14) that the Corporation was not an independent body, but the servant or agent of the respondent. It was incorporated to provide the machinery to pass on and pay the subsidies.

If the statements in Exhibit 1, 2 and 3 contain an offer capable of acceptance by performance, as the suppliants contend, then in the circumstances, on acceptance, a liability would be created on the respondent.

What remains to be considered here, then, is first whether the statements of policy (Exhibits 1, 2 and 3) constitute an offer capable of acceptance by performance.

The Preliminary Statement (Exhibit 1) was superseded by the "Import Policy" (Exhibit 2) dated December 2, 1941. The suppliants rely on the following paragraphs of Exhibit 2:—

3. The general principle is that imported goods will, in general, cost the importer no more than is appropriate in relation to retail ceiling prices. Importers may, therefore, continue importing in the normal manner, with the assurance that appropriate subsidies will be provided, with respect to goods imported on and after December 1st, 1941, on the basis outlined below. The methods will in the first instance consist of direct subsidies to importers, with the possibility that from time to time duties and taxes on imported goods may be reduced in such a way as to make subsidies unnecessary.

Part of 5. Subject to the variations mentioned, the subsidies will be paid on all eligible goods imported through normal trade channels for eventual sale to domestic consumers. This will apply to goods for which import entry is passed on and after December 1st, 1941.

Part of 6(*a*) The Board will endeavour to measure the amount of the subsidy in such a way that the retailer will receive his goods at a cost which is reasonable in relation to his retail ceiling price. It follows that those who maintained low retail prices during the basic period will be able to continue to sell at those prices without undue hardship. Each retailer who imports direct should prepare a list of his ceiling prices for imported goods.

9. At the present time, however, the important thing is for import trade to be continued in accordance with past practice, even if present import prices involve an actual loss to the importers concerned, for subsidy adjustments will be made retroactive to December 1st. Importers should, therefore, adjust their own selling prices so as to enable retailers to carry on under the retail ceiling.

1948
JOY OIL CO. LTD.
v.
THE KING
O'Connor J.

And from "Statement of Import Policy" (Exhibit 3), January 1, 1942:—

2(1) The Board's objective is to ensure a continued flow of necessary imported goods for sale in Canada under the retail price ceiling. If import prices of such goods rise to a degree which cannot be absorbed by trade and industry, subsidies will be paid through the Commodity Prices Stabilization Corporation. Duties and taxes on imported goods may, however, be reduced from time to time in such a way as to reduce the need for subsidies.

The suppliants contend that these are not general exhortations but specific statements—"Keep on importing on the assurance that you will be paid a subsidy"; "Subsidy will be paid on all eligible goods imported"; "The Board will endeavour to measure the amount of the subsidy in such a way that the retailer will receive his goods at a cost which is reasonable in relation to his retail ceiling price. It follows that those who maintain low retail prices during the basic period will be able to continue to sell at those prices without undue hardship."

And that having kept on importing in accordance with these specific statements and having maintained low prices, and the cost of imported goods having been more than was appropriate to their low retail ceiling price that they are entitled to subsidy "measured in such a way that they would receive their goods at a cost which is reasonable in relation to their retail ceiling price."

If the sections quoted above stood alone, the contention of the suppliants might well prevail. But they were not alone, and in my view when read with the remainder of the statements do not constitute an offer capable of acceptance by performance so as to create a liability on the respondent.

The Board set out quite clearly that they were enunciating "general principles," "general statements" and "general import policy," as will be seen from the following excerpts:

Ex. 2 (9) The above represents the most comprehensive general statement that can be made.

Ex. 2 (3) The general principle is that imported goods will, in general, cost the importer no more than is appropriate in relation to retail ceiling.

Ex. 3 (2(1)) The general import policy provides for the payment of subsidies . . .

Ex. 3 (1) If import prices of such goods rise to a degree which cannot be absorbed by trade and industry, subsidies will be paid through the Commodity Prices Stabilization Corporation.

The Board was urging importers to continue to import, but that was a general exhortation. The statement, Exhibit 2(9):—

Importers are urged to have confidence that the Board and the Commodity Prices Stabilization Corporation will deal with individual problems fairly and reasonably.

clearly indicated that each application would be passed on by the Board and that in turn obviously involved refusal or acceptance.

Then the Board in both Exhibit 2(3) and Exhibit 3(1) expressly reserved the right to exclude any goods from import duty.

And the Board would determine whether the increased cost could be absorbed by the importer without undue hardship, or whether it was "greater than the amount which can reasonably be expected to be absorbed."

Exhibit 2(3):—

It must also be emphasized that the Board cannot be expected to approve subsidies where the increase in import prices is not of significant proportions for those concerned. Any increase which the importer or his trade customers can absorb without undue hardship should not even be made the subject of an application to the Board. If the increased cost is greater than the amount which can reasonably be expected to be absorbed, the Board, acting wherever possible on the advice of its Administrators, will set the subsidy at a reasonable level.

In order to determine the increase in cost the Board, with the assistance of its Administrators, would determine the appropriate basic costs. Exhibit 2(7):—

Each industry should consult with its Administrator with a view to establishing the appropriate basic cost of materials. The time at which materials were bought for making goods sold by retailers in September and October will, of course, vary as between industries, and as between different kinds of goods produced by each industry. The Board, with the assistance of its Administrators, will determine the appropriate basic costs, so that higher import prices, if not reasonably capable of being absorbed by the industry, may be offset by appropriate subsidies.

The import cost would be ascertained by the Board *after examination* on:—

(*a*) The cost to the applicant, or
(*b*) By special procedure, or
(*c*) By the average or standard cost.

Exhibit 3(5):—

Where an individual firm has a large volume of imports, (whether finished goods or otherwise), the Board *after examination* may find it more practicable to adopt special procedures for the purpose of establishing import costs, *the extent to which rises in such costs may be absorbed,*

1948

JOY OIL CO. LTD. v. THE KING

O'Connor J.

and the extent to which subsidies may properly be provided. On the other hand, there will be many cases where average or standard cost and selling prices will be used as the basis of calculating the appropriate amount of subsidy, particularly with reference to imports of semi-finished goods.

While the statements do lay down some general rules and some specific rules, it was clearly stated in Exhibit 3(5) that:—

No definite rules can be laid down for raw materials including fuel.

And in Exhibit 2(8) Petroleum and its Products listed under the heading of "Imported Fuel":—

Imported Fuel—Coal, coke, petroleum and its products, will be dealt with on much the same basis as raw materials if circumstances so require.

An importer could not tell whether or not his goods would or would not be excluded. Nor the method that the board would use in determining the increased cost. Nor whether the increased cost would be absorbed by him or not. And importers were clearly advised that no definite "rules" could be laid down for imported fuel which included "petroleum and its products."

While the Board laid down as a general principle that subsidies would be paid to importers, they made no specific statement that could be construed as an offer by every importer. The whole of the statements clearly indicate that the Board would decide after examination of all the facts, whether or not a subsidy would be paid, and if so, in what amount.

It was contended in the *Western Dominion Coal Mines Ltd.* v. *The King* (1) (excluding contract and estoppel) that there had been an acceptance of an offer by compliance with the terms of regulations having the force of law. Here, of course, it is contended that the offer was contained in the Statements of Policy of the Board. Except for that difference, what was said in the *Western Dominion* case (*supra*) by Rand, J., page 335, can be applied here. That the conditions in the statement of policy clearly involved the discretion of the Board which could only be exercised after the increase in cost became known and on an appreciation of all circumstances; a discretion which became exercised only when the subsidy was in fact paid. What the suppliants contend is that by importing gasoline and selling at the retail price ceiling, that would *ipso facto*

(1) (1947) S.C.R. 313.

guarantee any company importing at an increase in cost over past costs, a subsidy. But that is wholly inconsistent with what the Board laid down. These applications were refused and the discretionary nature of the reserved powers permitted that to be done.

If I am not correct in that conclusion, and if the statements of the Board do constitute an offer which was accepted by performance, and if there was no reserved power of a discretionary nature, I would still be of the opinion that the suppliants are not entitled to the relief claimed for the following reasons:—

Exhibit 2(9) stated:—

As already indicated, it is fundamental that imported goods will not be eligible for subsidy if such goods can be obtained in Canada in sufficient volume and at reasonable prices. Any tendency towards a large increase in the volume of imports of any particular kind of goods will be presumptive evidence that the subsidy is excessive, and any importer who deliberately diverts his business from a domestic supplier to a foreign supplier may be excluded from assistance under the subsidy system.

And Exhibit 3(4) stated:—

(*c*) Diversion of purchases from domestic to foreign sources of supply, if not justified by a shortage of supplies in Canada, may result in the reduction or elimination of the subsidy with respect to such imports or in the exclusion of the importer concerned from the benefits of the subsidy. No subsidies will be paid if similar goods are available in Canada at reasonable prices.

It is clear from this that subsidies would not be paid if similar goods were available in Canada at reasonable prices.

The suppliants contend first that the last sentence in Exhibit 3(4) (*c*) above only applies where the first sentence applies because the first sentence overrides the second. And that the expression "as already indicated" in Exhibit 2(9) above refers back to Section 3 of Exhibit 2 (5th par.):—

Importers will also realize that the Board, in carrying out its import policy, must have regard for the position of domestic producers, and diversion from domestic to foreign sources of supply, if not occasioned by a shortage of supplies in Canada, may require reduction or elimination of the subsidy with respect to such imports or exclusion of the importer concerned from the benefits of the subsidy system.

And that this paragraph likewise overrides the paragraph Exhibit 2(9), commencing "As already indicated."

And that as the suppliants never purchased gasoline in Canada, they did not divert from domestic to foreign sources of supply and therefore the statements that no subsidies will be paid if similar goods are available in Canada at reasonable prices, do not apply to them.

1948
JOY OIL CO. LTD. v. THE KING
O'Connor J.

I do not agree with that contention. The statements that no subsidies will be paid if similar goods are available in Canada at reasonable prices, are clearly severable from the preceding statements and apply equally to those who had always purchased from foreign sources of supply as well as to those importers who diverted from domestic to foreign.

The evidence establishes that similar goods were available in Canada at the prices quoted by Mr. Hall, and I so find.

Whether these goods were at reasonable prices depends, of course, on the retail ceiling price at which the suppliants could sell gasoline, and that in turn depends on the interpretation of the word "place" in the Orders 010 and 010A of the Oil Controller (*supra*).

The suppliants' contention is that "place" means "place of business" and that they were, therefore, restricted to the price at which they sold on September 30, 1941, at each of their service stations.

The contention of the Oil Controller, the Corporation and the Minister of Finance has already been set out in the correspondence and was that "place" means a "geographical locality," i.e., Montreal and Toronto.

The word "place" has the two definitions quoted by the Minister and as stated in the Oxford Concise Dictionary, when it means a spot devoted to a specified purpose, it is "usually with specification as place of amusement or resort, bathing place." And therefore, conversely, without such specification it is usually a general designation of a city, town, village, hamlet, etc.

P.C. 1195 (Exhibit 15) empowered the Oil Controller:—"Subject to the approval of the Minister, to fix or regulate the price or fix the maximum price or the minimum price at which oil may be sold *in any place, area or zone* by or to any person . . ." Then, pursuant to that power, the Order of the Oil Controller 010A (Exhibit 13A) provided that—"(1) The price to be paid *in any place* shall not exceed the maximum price at which such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, having regard to the quantity purchased . . ."

The words "of business" are not in the order and, giving the words of the section their natural and ordinary mean-

ing, the word "place" means, in my opinion, a geographical locality and not a "place of business." I see no justification for reading into the section the words "of business." And, on the contrary, in view of the power to fix the price in "any place, area or zone," this should not be done.

This interpretation on the word "place" establishes a ceiling price in each geographical locality, whereas under the statements of the Board a ceiling was established for retail merchants for each retail store, or branch of chain store, and every department of a departmental store.

It is also correct that putting the ceiling on a "place" basis and not on an outlet basis was out of line with the policy announced in Exhibit 2, that payment of a subsidy would permit those who maintained low prices during the basic period to continue to sell at those prices without undue hardship.

But the power to fix maximum prices for gasoline had been given to the Oil Controller nearly nine months before these statements were issued. And the Oil Controller had issued Order 010 on October 21, 1941. P.C. 8527 (Exhibit 12), fixing the Maximum Prices for Goods, was made on November 1, 1941. And the first statement (Exhibit 1) was issued on November 25, 1941. Order 010 was before the Board when they issued these statements because they concurred in the Order. And the statements, so far as fixing prices was concerned, had nothing to do with gasoline because that had already been done. It was the Board which put retail merchants on a different basis from that already existing for retailers of gasoline and changed the policy of a uniform price for each locality to that for each outlet. But there was no change in their policy as to retailers of gasoline. It was in respect to retail merchants that they laid down a different policy.

It is correct that the Oil Controller did not define the various places, areas or zones, but these must have been well known to the industry because Mr. Cottle said that the Order was administered throughout on a place basis and not on an outlet basis.

I therefore reach the conclusion that the price at which the suppliants could sell gasoline was not the price at which they had been selling at each of their stations, but

1948
JOY OIL CO. LTD. v. THE KING
O'Connor J.

the maximum price at which it had been sold during the basic period in Toronto and Montreal, which was established in evidence as 32½ cents and 31½ cents, respectively.

The prices quoted by Mr. Hall would be "reasonable prices" having regard to these retail selling prices.

There were, therefore, (assuming the correctness of my holding that "place" in Order 010 and 010A means a geographical locality and not a place of business) "similar goods available in Canada at reasonable prices" during the period in question, December 1, 1941, to July 1, 1942.

Having regard to the Board statement that no subsidies would be paid in those circumstances, the suppliants are not, in my opinion, entitled to the relief claimed.

The alternative basis put forward by the suppliants is the statement in the letter from the Minister of Finance to the solicitor for the suppliants (Exhibit 32) (*supra*), that:—

> The question as to whether the Joy Companies are entitled to receive payment of a subsidy would appear to depend upon the interpretation of the word "place" as contained in the Orders above referred to. If, as you contend, this word means "place of business," your clients are entitled to payment of a subsidy.

The suppliants contend that the Minister's letter concludes or carries them beyond the issue of offer and acceptance because he said that they were entitled to payment of the subsidy if "place" meant "place of business." So that if "place" means "place of business" then they are entitled to the relief claimed.

The Corporation was authorized to enter into the Agreement with the Minister and he was authorized to advance funds and could approve or refuse to approve any agreement the Corporation made to pay subsidies. His statement, in my opinion, does not conclude the issue of offer and acceptance nor does it create or add to the liability of the Crown.

For the reasons given, I find that the suppliants are not entitled to the relief claimed in the Petition of Right.

The respondent is entitled to costs.

Judgment accordingly.

1947 Sept. 9, 10, & 11
—
1948 Nov. 19

BETWEEN:

INTERNATIONAL VEHICULAR PARKING LIMITED............ } PLAINTIFF;

AND

MI-CO METER (CANADA) LTD., THE MUNICIPAL CORPORATION OF THE CITY OF GUELPH } DEFENDANTS.

Patent—Infringement—Patent for improvements in parking meters—Lack of invention—Subject matter—Prior art—Utility—Improved method of attaining old object is not invention.

The action is one for infringement by defendants of plaintiff's patent. The invention claimed by plaintiff relates to improvements in or relating to parking meters. The main object of the invention was to overcome the tendency in some meters for the violation signal to indicate a violation before the paid-for predetermined time had in fact elapsed. The defendants denied infringement and questioned the validity of plaintiff's patent.

The Court found that the alleged invention disclosed in plaintiff's patent is merely an improved mode of attaining an old object, it being a mere mechanical device which solved no engineering problem and required no exercise of the inventive faculty to achieve its object which was accomplished by merely a skilled application of tools and well understood processes in the art. Plaintiff's patent was therefore invalid as lacking subject matter and there could be no infringement.

Held: That a mere workshop improvement does not constitute invention.

2. That since plaintiff's alleged invention is merely a different method of achieving a result already known in the art defendants could infringe plaintiff's patent only by making use of the particular method described or by means substantially the same.

ACTION by plaintiff to have it declared that Canadian Patent No. 395,164 owned by it is valid and has been infringed by defendants.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

S. S. McInnes, K.C. and *G. E. Maybee* for plaintiff.

E. G. Gowling, K.C. and *Andre Forget* for defendants.

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

1948

INTERNATIONAL VEHICULAR PARKING LIMITED *v.* MI-CO METER (CANADA) LIMITED ET AL.

Cameron J.

CAMERON J. now (November 19, 1948) delivered the following judgment:

This is an action for infringement. The plaintiff is a company incorporated under the laws of the State of Delaware. The first-named defendant is a company incorporated under the laws of the Dominion of Canada with its head office in Montreal. The other defendant is a municipal corporation in Ontario.

The plaintiff is the owner of Canadian Patent No. 395,164 and alleges that its patent has been infringed: (*a*) by Mi-Co Meter (Canada) Limited, by making, using and vending to others to be used, and licensing or leasing to others to be used, apparatus embodying the invention claimed in the said patent; and (*b*) by the other defendant by using apparatus made by and purchased from its co-defendant and embodying the invention claimed in said patent.

Both defendants admit the issue of the patent to the plaintiff but deny infringement, allege that the patent is invalid for reasons that will later be referred to, and ask that the patent be declared invalid. Notice of Infringement, dated September 30, 1946, is admitted by the first defendant.

Application for the plaintiff's patent is dated June 2, 1937, and was made by William Noll Woodruff, Charles Alfred Toce and William Foy Herschede. It was filed on June 17, 1937, together with an assignment to Vehicular Parking Limited. The patent issued to the plaintiff on March 11, 1941, an assignment to it from Vehicular Parking Limited, having been filed prior to the grant. In the application priority was claimed as of November 24, 1936, the date of filing the application in the United States Patent Office; but in these proceedings the plaintiff gave notice that it proposed to rely on November 1, 1935, as the date of invention, and the defendants do not challenge the claim of the plaintiff to rely on that date. For the sake of brevity the plaintiff's patent will hereafter be called the "Woodruff" patent.

Exhibit (1) is the plaintiff's patent. Exhibit (3) is a sample of the parking meter admittedly manufactured and sold by the first defendant in Canada, and leased and used by the second defendant and other municipalities.

It will be convenient to consider first the attack made by the defendants on the validity of the plaintiff's patent. If that patent be found invalid the action for infringement must fail.

Woodruff and his associates were not the first inventors of parking meters. In the specification the Woodruff invention is called "improvements in or relating to parking meters." The following are the opening clauses of the specification which show that parking meters were known and in use prior to Woodruff and also indicate the objects of the improvements later set out.

This application relates in general to time measuring apparatus, and more particularly to that type of apparatus designed for measuring the time which a vehicle remains parked in a given location.

Great difficulty has been encountered from time to time in regulating the parking on the city streets, and in other locations, and various means have been devised for regulating this practice in such a manner that the public would derive the greatest benefit from the parking space available, and would not unduly hamper traffic. *One means of controlling the parking of vehicles has been to provide a meter or time keeper which will indicate to a passer-by upon a mere casual inspection the length of time which has elapsed since a vehicle was parked in the space controlled by said device.*

It is an object of this invention to provide a device of this general character which will eliminate the difficulties encountered by and inherent in previous means for this purpose.

It is a more specific object of this invention to provide a device which will indicate at a glance whether or not a given period which has been paid for has expired, and which will show on inspection within certain limits the length of time which has expired beyond the period within which parking is allowed.

It is a further object to provide a device of the character set forth in which when the device is to be reset before the initial period has expired, a signal will be operated to indicate that the time period has expired, and this signal will not be rendered inoperative until the resetting operation is complete.

It is a further object of this invention to provide a device of the character set forth with a signal adapted to indicate that the allowable parking period has expired, and to eliminate the necessity in such a device for a latch or catch mechanism to hold such signal in inoperative position until the time has expired.

One other object of this invention is to provide a device of the character described which will give a readily perceptible visual indication of whether or not the time has expired, and will give this indication at night as well as in daylight.

Another object is to provide a device which will give an accurate indication of the passage of time after the allowed parking period has expired, as well as prior thereto.

1948

INTERNATIONAL VEHICULAR PARKING LIMITED v. MI-CO METER (CANADA) LIMITED ET AL.

Cameron J.

Another object is to provide a separate scale upon which overtime parking is indicated, and to provide for the automatic replacement of the regular time scale by such separate scale upon the expiration of the allowed parking period.

Other objects and advantages of this invention will become apparent from the following description taken in connection with the accompanying drawings, it being understood that the embodiment set forth in said description and drawings is by way of illustration and example only, and not by way of limitation. This invention is to be limited only by the prior art and by the terms of the appended claims.

The recital by the plaintiff in its specifications that parking meters were actually in use is, of course, binding on the plaintiff (Terrell on Patents, 8th ed., p. 138). In further proof that Woodruff and his associates were not the first inventors of parking meters, the defendants produced the August 1935 issue of "The American City." (Exhibit E). On page 61 thereof there are photographs establishing that parking meters having a dial and timing mechanism were known prior to the date of the plaintiff's invention.

The plaintiff relies only on Claims 5, 6, 7 and 8, as follows:

5. In a timing apparatus, means for indicating the passage of time, a mechanism for setting said indicating means at a predetermined starting point, signalling means for signalling the expiration of a predetermined period of time following said setting operations, means constantly urging said signalling means away from signalling position, and means controlled by said indicating means for overpowering said last-mentioned means to move said signalling means to signalling position when said predetermined time has expired.

6. In a timing apparatus, means for indicating the passage of time, a mechanism for setting said indicating means at a predetermined starting point, signalling means for signalling the expiration of a predetermined period of time following said setting operation, means for normally urging said signalling means away from signalling position, and means controlled by said first means for overpowering said last-mentioned means to move said signalling means toward signalling position when said predetermined time has expired.

7. In a timing apparatus, means for indicating the passage of time, a mechanism for setting said indicating means at a predetermined starting point, signalling means movable to signal the expiration of a predetermined period of time following said setting operation, and means controlled by said first means for moving said signalling means toward signalling position when said predetermined time has expired.

8. In a timing apparatus, means for counting the passage of time, means for causing said counting means to start the counting of a predetermined period of time, signalling means movable to signal the expiration of said predetermined period of time, and means controlled by said first means for moving said signalling means toward signalling position when said predetermined time has expired.

The elements in these claims may be enumerated as follows: (1) a timing apparatus; (2) means for indicating the passage of time; (3) a mechanism for setting said indicating means at a predetermined starting point; (4) signalling means for signalling the expiration of a predetermined period of time following said setting operation: (5) means constantly (or normally) urging the said signalling means away from a signalling position and means controlled by said first means for overpowering said last-mentioned means to move said signalling means towards signalling position when said predetermined time has expired; (6) a signalling means movable to signalling the expiration of a predetermined period of time following said setting operation; (7) means for counting the passage of time.

J. H. Joynt—a Patent Attorney practising in Washington, U.S.A., and a witness for the plaintiff—alleges that the defendant's meter incorporates each of the said seven elements.

The defendants, however, allege that in Woodruff's patent there was no invention having regard to the common knowledge in the art and because of the prior knowledge of the applicants named in the patents referred to, and that the specification and claims in the latter completely anticipated all the claims in the plaintiff's patent, and, alternatively, that if there is any subject-matter in the plaintiff's patent, they have not infringed it.

The defendants refer first to Exhibit B, a patent issued to Carl C. Magee by the United States Patent Office on May 5, 1936, as No. 2,039,544, and which was filed December 21, 1932, for a "parking meter". An examination of this patent discloses that it includes the elements of a timing apparatus, a means for indicating the passage of time, a lever for setting the meter at a predetermined starting point, signalling means for signalling the expiration of a predetermined period of time following said setting operation, signalling means movable to signal the expiration of a predetermined period of time following said setting operation, and means for counting the passage of time.

The one remaining element in which the plaintiff's claims differ somewhat from those in the Magee patent is in regard to the violation signal. In the Magee patent above referred

1948
INTERNATIONAL VEHICULAR PARKING LIMITED
v.
MI-CO METER (CANADA) LIMITED ET AL.
Cameron J.

to there is a flag or violation signal to indicate when the predetermined time has expired. Magee contemplated that his violation signal would always be urged into signalling position. His method is described as follows:

> In order that an officer may tell at a glance if a car is parked overtime, a flag or arm 56 is located exteriorly of the housing adjacent the top of the end 7 thereof. The arm 56 is rigidly keyed to the protruding end of a shaft 57 which is mounted for rotation in the housing ends 7 and 8. The shaft 57 is urged by a spring 58 to normally hold said arm 56 in an upright position so that it may be seen above the housing from all directions. The following described mechanism is provided for the purpose of holding the arm 56 in a horizontal position below the top of the housing until the predetermined parking time limit has been reached and for then automatically releasing the arm to the action of said spring 58. At a point in alignment with the previously described small sheave 43 the shaft 57 is equipped with a similar sheave 59 which is keyed or otherwise firmly attached thereto. A cable 60 is connected firmly between the two sheaves 43 and 59 so that when the shaft 36 is partially rotated by use of the lever arm 30, the shaft 57 is likewise partially rotated. This partial rotation brings the free end of a rod 61 which is rigidly attached at its other end to said shaft 57, into engagement with a latch or retaining mechanism carried by the upper surface of the side 17 of said frame 15. This latch mechanism is best illustrated in Fig. 5, and consists substantially of bell-crank 62 pivotally mounted upon a pin 63 and urged to rotate through substantially one-fourth of a complete circle by a spring, not shown, but which is similar in action to said spring 58 on said shaft 57. A pivotally mounted latch 64 is provided for engaging one arm of the bell-crank 62 when the rod 61 forces it past the latch. When the latch engages the bell-crank, the rod 61 is held against movement by the other arm of the bell-crank. A pin 65 carried by the adjacent face of the sheave 38 is adapted to contact the free end of the latch 64, and release the bell-crank 62 when the sheave reaches the end of its partial rotation. When the bell-crank is released, the rod 61 is consequently released, and the spring 68 is then free to partially rotate said shaft 57, and thus return the flag 56 to its upright position. *Other desired mechanism may be provided for giving the visual signal.*

When this Magee meter was in operation the violation signal was in a horizontal position, but at the expiry of the predetermined time it was automatically brought to a vertical position above the housing by the action of a spring. The violation signal was constantly being urged *into* signalling position by a spring, the action of which was restrained by a latch or catch until it was released to action upon the expiry of the predetermined period of time in the manner above mentioned.

It was stated by Mr. Joynt that this type of violation signal was defective in that when the meter was jarred there was a tendency for the latch to release the spring to action with the result that the violation signal would spring into

view and indicate that the predetermined time had expired, although such was not the case. As stated in Woodruff's specification, therefore, one of the objects of his invention was to eliminate the necessity for a latch or catch mechanism to hold such signal in inoperative position until the time had expired.

In the Woodruff meter the scale is vertical and at the left side of the meter. Until the coin is placed in the slot and the starting level fully rotated and released, the violation signal completely covers the scale and is itself in view through the window in the meter. When the starting operation has been completed and the starting handle fully released, the violation signal is carried by a spring away from the scale and into an obscured position at the top of the housing. It is constantly and normally held there by a spring until the expiry of the predetermined period of time, when, by the operation of the indicating means, it is released to the action of another spring and drops into view over the scale. Mr. Joynt described these two operations as follows:

Now, the handle is released to act under the force of its spring 20. Notice that as it comes back it is fairly easy to move. Now, the ratchet arrangement is no longer in contact because the coin has fallen out and it permits this brass plate, that includes studs 33, 32 and 72 to fall back out of alignment with these various pieces that they contacted before. On the continued return, stud 32 now comes in contact to release the latch which has been holding this signal 52 down. It releases latch 56 to permit the signal to fly up under the pull of its spring 54. Now, the meter is placed into operation. Signal 52 is withdrawn from view. The indicator 42 is exposed and it starts its timing operation . . . the red violation signal is obscured and it is constantly being held in this obscured position. If you shake it, it will go right back up again. There is a spring force, the force of spring 54 keeps that in an obscured position.

That control or lease is had when the indicating means 42 as driven by the clock mechanism and this shaft 38 which is integral with the clock mechanism and the indicating means, reaches the point 60, for example, on the timing dial 9 in fig. 1, and in Exhibit 4 it is the ten-minute count. When the indicating means reaches that particular point, it is the back end, 41, as seen in fig. 7, for example, it is the back end, 41, which contacts the cam surface 66 and releases the catch 62 as shown in figs. 8 and 9, for example, which had been holding arm 60 against the action of the spring 61. When your time indicating means trips that latch then the arm 60 acting under the force of spring 61 is rotated in a counter clockwise direction as seen in the drawings and pulls the signal into view. This pulling serving to stretch or extend the spring 54 which is connected to the signal means and which normally holds the signalling means up.

1948

INTERNATIONAL VEHICULAR PARKING LIMITED v. MI-CO METER (CANADA) LIMITED ET AL.

Cameron J.

In so far, therefore, as claims 5, 6, 7 and 8 are concerned, Woodruff's improvement over the first Magee patent consisted in changing the means by which the violation signal was controlled. Instead of using a spring which normally and constantly urged the violation signal into the signalling position (the action of which was restrained by a latch or catch until the predetermined time had elapsed) as set forth in Magee, he made use of a spring which operated in the reverse direction and which constantly or normally urged the violation signal *out* of signalling position until the expiration of the predetermined period of time, thus eliminating the necessity of a latch or catch to keep the violation signal out of signalling position.

For the defendant it is contended that this is nothing more than a workshop or mechanical improvement. The plaintiff, while frankly admitting that there would be no serious engineering problem involved in making the change, contends it was the conception of the idea of the improvement that was important, and that that, and the method provided for carrying it into effect, constituted invention. The question for consideration, therefore, is whether that which Woodruff did in so reversing Magee constitutes a patentable invention. Is there sufficient subject matter to support the plaintiff's patent? Or, on the other hand, having regard to what was known or used prior to the date of the patent, was the invention obvious and one that did not involve any inventive step?

It is clear, I think, that the improvement so made was a simple one. The evidence is that to actually make the change required no skill beyond that of a mechanic. Mere simplicity, however, will not prevent there being invention. As stated in Terrell on Patents, 8th Edition, p. 67:—

> A mere scintilla of invention is sufficient, especially where the appreciation of a desideratum is one of the important features of the invention, and there may be invention in what is merely simplification. But matters of ordinary skilled designing or mere workshop improvements cannot be considered as requiring the exercise of invention.

Reference may usefully be made to *Longbottom* v. *Shaw*, (1) where, in giving judgment in the House of Lords, Lord Herschell stated at p. 336:—

> If it were shown that the defects which this apparatus is designed to remedy, or does remedy, were defects which had been felt, and the knowledge of which had come to the public so that there was a demand for a

(1) (1891) 8 R.P.C. 333.

new apparatus which did not possess those defects, and if it were shown that that demand had lasted for a considerable time, so that men's minds were likely to have been engaged upon a mode of remedying those defects, and they were not remedied until the apparatus was devised for which the patent is taken out, no doubt that would have afforded considerable evidence that the adaptation or arrangement of the patentee was not obvious, inasmuch as you would then have a demand for some considerable time not met although known, and the fact that it was not met for a considerable time though known would indicate that the mode by which it was ultimately met could not have been so obvious as otherwise might have been supposed. Therefore, in that way, the demand for an improved article might become a very material circumstance. But it appears to me that the elements which would make it very material are altogether wanting in the present case. We have here no evidence that the defects, though they existed, seriously pressed upon those who used this apparatus, and that they had indicated a desire for a machine which was free from those defects. There is no evidence that men's minds had been applied to the removal of these defects, which in some cases has been thought a very material circumstance . . . But nothing of that sort appears here. We have no history of the manner in which this invention came about.

And, at p. 337:—

But when we are coming to enquire into the question whether there really is an invention in any case, or whether it is merely such an adaptation as would be obvious to anyone whose mind addressed itself to the subject, then the absence of any such evidence as I have indicated of either experiment or investigation or thought on the part of the patentee, or evidence that the mind of anybody else had been addressed to the subject, or that there had been attempts to remedy the defects by other methods—I say the absence of such evidence appears to me to justify one in resting upon the opinion which one has formed that there is in this case no invention at all. I quite agree that it is always easy to say a thing is obvious when it has been pointed out. I fully feel the force of that argument and the danger of hastily arriving at such a conclusion; and, as I have said, if I saw that although the minds of mechanicians had been directed to meeting a certain want, and various methods of doing so had been devised, those mechanicians had not arrived at the simple and the efficient one at which the patentee had arrived, I should be disposed to put aside my own view of the obviousness of the so-called invention and to come to the conclusion, notwithstanding my own impression on the subject, that those facts indicated that it was not so obvious as I myself should have thought. But in this case nothing of that sort is really to be found in the evidence, and therefore it appears to me that no more is shown than an adaptation of the well-known idea of utilizing a row of hooks attached to or forming part of a band of metal by applying them as they are required, the adaptation in the particular case being in a well-known manner, for a well-known purpose, and not involving, as it appears to me, any invention which can support a patent.

Reference may be made also to *Leonard's Perfect Skill Control Co. Ltd.* v. *John Henry Holloway et al* (1), and to *Deutche Nahmaschinen Fabrik vorm Wertheim* v. *Pfaff* (2).

(1) (1929) 46 R.P.C. 353. (2) (1890) 7 R.P.C. 251.

1948
INTERNATIONAL VEHICULAR PARKING LIMITED
v.
MI-CO METER (CANADA) LIMITED ET AL.
Cameron J.

In the case of *Non-Drip Measure Co. Ltd.* v. *Strangers Ld. and others* (1), Lord Russell of Killowen, at p. 143, referred with approval to the case of *Samuel Parkes & Co. Ltd.* v. *Cocker Brothers Ld.* (2), in which Tomlin J. at p. 248 said:—

> Nobody, however, has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality, the presence of which distinguishes invention from a workshop improvement . . . the truth is that, when once it has been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent.

Now what are the circumstances here? The art of parking meters was quite new, having commenced, as Mr. Joynt stated, in 1935, just a few months prior to the date of the Woodruff invention. There is no evidence that knowledge of the defect in the Magee type of meter—if, in fact it be a defect—had lasted for any considerable length of time or that men's minds had been engaged upon a mode of remedying that defect. There is no evidence that the defect, although it may have existed, seriously pressed upon those who used the apparatus or that they indicated a desire for a meter which was free of those defects. Further, there is no evidence that the Magee meter was commercially unsuccessful, or that the Woodruff meter, with the improvement, was a commercial success over the Magee meter. No new result was obtained by the Woodruff meter over Magee so far as the violation signal was concerned, although the "invention" was possibly a better way of securing the same result. Magee and others had previously conceived the idea of using a violation signal.

In my opinion, as soon as it became known to those skilled in the art of parking meters that jarring of the Magee meter could at times cause the signal to indicate a violation before the expiry of the predetermined time, it was quite obvious that such a defect was caused by the spring urging the signal *into* view. The remedy also was obvious, namely, to use a spring which would normally and constantly urge the violation signal out of view. Springs, and the use of springs, to raise or lower objects, to urge

(1) (1943) 60 R.P.C. 135. (2) (1929) 46 R.P.C. 241.

them in any direction, were well-known. In my view, therefore, having regard to what was known and used prior to the date of this patent, no exercise of the inventive faculty was required to reverse Magee, and to conceive the idea of using a spring which would constantly and normally hold the violation signal *out* of view. And, as I have pointed out, the witness for the plaintiff states very frankly that there was no engineering problem involved in providing the mechanical means for carrying the idea into effect. The answer to the problem would at once jump to the mind of a mechanic. It was not merely obvious that the improvement could be done, but it was also obvious to do it.

In my opinion, there was here no invention but merely a skilled application of tools and well understood processes. I do not think it required any study or thought to arrive at the plaintiff's method of controlling the violation signal. Any ordinary skilled workman setting his mind to accomplish that object could have come to the same result. What was done by Woodruff did not, I think, involve that degree of ingenuity which must have been the result of thought and experiment. I find that there was here no invention, or at least insufficient invention to support the plaintiff's patent. It lacks subject-matter and therefore I must find that the plaintiff's patent is invalid.

The defendants also refer to a second Magee patent No. 2118318, filed in the United States Patent Office on May 13, 1935, and which issued on May 24, 1938. It was filed prior to the date of the Woodruff invention but issued after the Woodruff application was filed. The corresponding Magee patent was applied for in Canada on January 16, 1936, and issued as No. 390,658 on August 13, 1940. As previously stated the Woodruff patent was applied for in Canada on June 17, 1937, and issued on March 11, 1941.

I do not need to say much about this second Magee patent. It was filed in the United States Patent Office prior to the date of the Woodruff invention and contained all the elements in the first Magee patent which I have outlined above. The main difference, I think, is in the flag or violation signal. It has no separate violation signal, but the scale itself is the signal. It disappears from view

1948

INTERNATIONAL VEHICULAR PARKING LIMITED v. MI-CO METER (CANADA) LIMITED ET AL.

Cameron J.

when the predetermined time is up, thus indicating that the paid-for time has elapsed. It discloses all the essential elements claimed by the plaintiff which are here in issue and is, therefore, again a complete anticipation of the patent in suit.

Counsel for the defendant also attacked the validity of the plaintiff's patent on the ground of a certain disclaimer filed in the United States Patent Office. The application by Woodruff and his associates for the United States patent corresponding to the Canadian patent in suit was filed on November 24, 1936, and issued to patent on June 13, 1939, as No. 2162191, Exhibit A being a certified copy thereof, which contains also a copy of the disclaimer filed by Woodruff, Toce and Herschede and also by their assignee, Vehicular Parking Limited, to Claim 1 of the patent as issued to them. The disclaimer is dated September 27, 1940, and was filed October 4, 1940. It is admitted that Claim 3 of the Canadian patent corresponds to the original Claim 1 of the United States patent which is as follows:—

In a timing apparatus, means for indicating the passage of time comprising a dial and a hand moveable over said dial, means for setting said hand at a predetermined starting point with respect to said dial, and a signalling means connected to said first means and operable upon the expiration of a predetermined period of time following said setting operation, said signalling means including a shield adapted to move to a position between said hand and said dial.

Mr. Joynt stated that he was responsible for the preparation and filing of the disclaimer and that it resulted from certain interference proceedings which culminated in a concession of priority by both sides; he also admitted that the reason for filing such disclaimer was that the applicants for the patent were not the inventors of the subject-matter referred to in Claim 1. No similar disclaimer was filed in Canada.

I agree, however, with counsel for the plaintiff that such disclaimer is of no importance so far as the present litigation is concerned. The disclaimer, as mentioned above, was made by the inventors and Vehicular Parking Limited. The plaintiff was not a party to the disclaimer. And before the date of the disclaimer, namely on August 29, 1939, Vehicular Parking Limited, then the owners of the application for the Canadian patent which had been assigned to

them by Woodruff and his associates, had further assigned all its rights in that application to the plaintiff company. A disclaimer is effective only as to the persons filing it. Notwithstanding the statement by Mr. Joynt that the reason for filing the disclaimer was that Woodruff was not the inventor of the claims in Claim 1 of the United States patent, I do not believe that he is a competent witness on that point in these proceedings. In any event, the present plaintiff, not being a party to the disclaimer, is not here bound by it inasmuch as a grantor cannot derogate from his grant.

Having found that the plaintiff's patent is invalid, it follows that there can be no infringement by the defendants. I think it advisable, however, to consider briefly the question of infringement in order that all the issues may be determined.

I do not think it is necessary to examine in great detail each element of the plaintiff's claims. The essence of the "invention" is, I think, in the method of controlling the violation signal by providing that it is normally and constantly urged out of signalling position rather than into signalling position. In the specification the invention is referred to as "improvements in or relating to parking meters". The evidence indicates that the main difficulty encountered in previous meters was a tendency for the violation signal to spring into view and indicate a violation before the paid-for predetermined time had in fact elapsed, and it was the main object to Woodruff's invention to overcome this difficulty. Taking into consideration the evidence as to the prior art, it must be found that if there were any subject-matter in the plaintiff's patent it could be only the means for controlling the violation signal.

This is not the kind of invention which consists in the discovery of a method of application of a new principle. If it were, the Court would regard jealously any other method embodying that principle because the inventor was not bound to describe every method by which his invention could be carried into effect. Here no new result was obtained, but merely a different and possibly better method of achieving the same result as had been previously obtained. It is merely an improved mode of attaining an

1948
INTERNATIONAL VEHICULAR PARKING LIMITED
v.
MI-CO METER (CANADA) LIMITED ET AL.
Cameron J.

old object and the monopoly is for that particular improvement, and the defendants would only be held to have infringed if they had made use of that particular method. (Terrell—p. 153).

Reference may be made to *Young* v. *Morris and Bastert* (1). In the Court of Appeal Rigby, L.J. gave a dissenting judgment in which it was held that, assuming, but without deciding, that the application of the old appliance to hoists was good subject-matter, that there was no infringement, as the plaintiff's invention was not a pioneer invention but only a new combination producing an old result, and the plaintiffs must therefore be confined to their particular method.

At p. 213 Rigby, L.J. said:

In my judgment, it cannot be denied that the plaintiffs' machine, when properly understood, is essentially different from the Defendants'. If the Plaintiffs had been the first who, by the application of the inventive faculty, had produced machinery calculated to operate by way of raising, and also by graduated and safe lowering, they might have had a better case. They were not the first, and can only claim for what is substantially set out and described in their Specification.

The judgment of Rigby, L.J. was upheld in the House of Lords, 12 R.P.C. 455.

Reference may also be made to *Nettlefolds Ld.* v. *Reynolds* (2). In that case the Court of Appeal held, affirming the judgment at the trial, that the plaintiff's claim was confined to circular dies and even if it had not been so confined, the defendants' die differed more from the plaintiff's die than that did from earlier dies, and that there was therefore no infringement.

In that case Kay L.J. stated at p. 299:

The case in my opinion comes within the decision in Curtis *v.* Platt, 3 Ch. D. page 135. I quote from the judgment in that case the following passage which applies closely to the facts which I have been considering, "Where the thing is wholly novel, and one that has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object to see whether or not they are merely colourable contrivances for evading that which has been before done. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before, has a right to extend very largely the interpretation of these means which he has adopted for carrying it into effect.

(1) (1895) 12 R.P.C. 200. (2) (1892) 9 R.P.C. 270.

Because, otherwise that would be to say that the whole world is to be precluded from achieving some desirable and well known object which everybody has had in view for years. In such a case, it may be said that the means taken are simply mechanical equivalents for the means previously adopted for arriving at the same object. One looks more jealously at the claims of inventors, seeking to limit the rights of the public at large, for effecting that which has been commonly known to all the world long ago. Of course, no patent can be taken out for effecting this as a new object, but only effecting it by a new means."

I have previously described the means used by Woodruff for controlling the violation signal. The signal is carried away from a scale into an obscured position by means of a spring. There it is constantly and normally held by the action of the spring until the expiry of the predetermined time when by the operation of the indicating means it is released to the action of another and stronger spring and drops into view over the scale. The signal is held in view until the setting operation is completed and the starting handle fully released and returned to its original position. It is held out of view until the paid-for predetermined time has elapsed when it drops into view.

The defendants' means of operating the violation signal are quite different. The signal starts to disappear when the re-setting operation is commenced and completely disappears when it is set back a few minutes, and therefore it does not remain visible during the entire setting operation as does the plaintiff's. Springs are not used in controlling the signal. The means for constantly urging the signal out of view are the weight of the violation signal itself and the weight of two parallel levers or arms pivoted to an extension of the frame plate and attached at the extreme left ends to the violation signal by means of pivots. The means used for over-powering the weight of these members and to bring the signal into view is the indicating means or pointer. A downward extension or hook forming part of the indicating means, shortly before the expiry of the predetermined time, engages a pin or projection attached to the extremity of the parallel bars supporting the violation signal, and as the indicating means approaches zero on the dial it forces the violation signal gradually into view, and it is fully in view when the indicating means has reached the zero point on the dial. While, therefore, it must be

1948

INTERNATIONAL VEHICULAR PARKING LIMITED v. MI-CO METER (CANADA) LIMITED ET AL.

Cameron J.

found that the defendant's meter has means for constantly and normally urging the violation signal out of view and means controlled by said indicating means for overpowering the said last-mentioned means to move said signalling means to said signalling position (as set forth in the plaintiff's claim), the mechanism used by the defendants is essentially different from the mechanism which is particularly illustrated and described in Woodruff's specification. That this is so was frankly admitted by Joynt. In Woodruff's specification there is no suggestion whatever about the use of counter balances and weights to control the violation signal. If the plaintiff's patent were valid, its monopoly would in this case be limited to the particular mode described. The defendants would infringe the plaintiff's monopoly only by making use of the particular mode described or by means substantially the same. I find that they have not done so, and the claim for infringement therefore fails and is dismissed.

In the result, therefore, the plaintiff's action for infringement will be dismissed and there will be a declaration that the plaintiff's patent No. 395,164, dated March 11, 1941, is invalid.

The defendants normally would be entitled to their full costs. However, at the trial the defendants asked leave to amend their particulars of objections by adding thereto a reference to United States patent No. 2,118,318 and the corresponding Canadian Patent No. 390,658, as well as the publication entitled "The American City," of August 1935, all of which had been omitted therefrom in error. Counsel for the plaintiff consented, it being agreed, however, that if counsel for the plaintiff were thereby taken by surprise and that if I felt that the addition of these matters were important to the case, the defendants would be penalized in costs to such extent as I felt proper. Under all the circumstances, therefore, I award the defendants one-half of their taxed costs.

Judgment accordingly.

1948
June 8
—
1949
Mar. 4

BETWEEN:

JULIETTE CARROLL *et al*.......... SUPPLIANTS;

AND

HIS MAJESTY THE KING.......... RESPONDENT.

Crown—Petition of Right—Action by the heirs of a retired judge to recover his retiring annuities withheld while holding the office of Lieutenant-Governor—Prescription of claim raised by defence—Res judicata—Applicability of laws of the province of Quebec relating to prescription and limitation of actions—Office of Lieutenant-Governor a mandate, not a lease of manual, professional or intellectual work—Applicability of prescription by thirty years—Prescription by five years not applicable—Renunciation to prescription—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 32—Arts. 1241, 1602, 1666, 2185, 2186, 2188, 2242, 2250, 2260(6), 2267 cc.

In an action by which suppliants seek to recover from the respondent a sum of $30,500 the issue of prescription of the claim was raised by the defence.

Held: That there is no *res judicata* insofar as the issue of prescription of the claim is concerned. The sole question to be determined on the question of law set down for hearing before trial was whether the office of Lieutenant-Governor of a province is or is not "a public office under His Majesty *in respect of his Government of Canada.*" It was adjudged it is not. *Carroll* v. *The King* (1947) Ex. C.R. 410; (1948) S.C.R. 126.

2. That the laws of the province of Quebec relating to prescription and the limitation of actions do apply since the cause of action arose and the debt was payable in that province.

3. That the office of Lieutenant-Governor of a province is a mandate, not a lease of manual, professional or intellectual work.

4. That the prescription by thirty years is the only one applicable, the action being neither for arrears of rents, of interest, of house-rent or land-rent, of fruits natural or civil, nor for hire of labour, nor the price of manual, professional or intellectual work, which are all prescribed by five years as enacted by Arts. 2250, 2260(6) cc.

5. That if the prescription by five years was applicable there was a renunciation to prescription on the part of the respondent.

PETITION OF RIGHT by the heirs of a retired judge to recover his retiring annuities which were withheld while he held the office of Lieutenant-Governor.

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

Fernand Choquette, K.C. for suppliants.

Charles Stein, K.C. for respondent.

1949
CARROLL ET AL v. THE KING
Angers J.

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

ANGERS J. now (March 4, 1949) delivered the following judgment:

Par leur pétition de droit amendée les pétitionnaires, en leur qualité d'héritières légales de feu dame Amazélie Boulanger, veuve de l'honorable juge H.-G. Carroll, dont elle était héritière, décédée intestat à Québec le 4 janvier 1943, réclament de Sa Majesté le Roi la somme de $30,500 comme pension ou partie de salaire due audit H.-G. Carroll lors de son décès, avec intérêt sur $6,000 depuis 1930, sur $6,000 depuis 1931, sur $6,000 depuis 1932, sur $6,000 depuis 1933 et sur $6,000 depuis 1934 et les dépens.

Dans leur pétition les pétitionaires allèguent en substance:

elles sont les filles et les seules héritières légales de dame Amazélie Boulanger, veuve de l'honorable juge H.-G. Carroll, décédée à Québec sans testament le 4 janvier 1943;

ladite Amazélie Boulanger était légataire universelle dudit H.-G. Carroll, ancien lieutenant-gouverneur de la province de Québec, en vertu d'un testament olographe en date du 5 septembre 1936;

ledit H.-G. Carroll est décédé le 20 août 1939;

ladite Amazélie Boulanger avait accepté la succession de son mari et payé les droits de succession exigibles en vertu de la loi;

les pétitionnaires ont accepté la succession de leur mère et payé les droits de succession exigibles;

le 2 avril 1929 ledit H.-G. Carroll a été nommé lieutenant-gouverneur pour la province de Québec;

lors de sa nomination comme lieutenant-gouverneur, ledit H.-G. Carroll avait droit de toucher et touchait une pension du gouvernement de Sa Majesté pour le Canada en sa qualité d'ancien juge de la Cour du Banc du Roi de la province de Québec;

ledit H.-G. Carroll a occupé la fonction de lieutenant-gouverneur du 2 avril 1929 au 3 mai 1934;

durant cette période de cinq ans et un mois le gouvernement de Sa Majesté pour le Canada aurait dû verser audit H.-G. Carroll sadite pension de $6,000 par année, soit un total de $30,500;

le gouvernement de Sa Majesté pour le Canada, s'appuyant sur l'article 27 du chapitre 105 des Statuts Revisés du Canada de 1927, a, durant le terme d'office dudit H.-G. Carroll comme lieutenant-gouverneur, retenu à celui-ci la somme de $30,500, soit à même la pension susdite soit à même son salaire, à raison de ladite pension;

la disposition légale susmentionée ne pouvait justifier la retenue par le gouvernement de Sa Majesté pour le Canada de ladite pension ou partie de salaire au total de $30,500 parce que le lieutenant-gouverneur d'une province n'exerce pas "une charge publique sous Sa Majesté pour son gouvernement du Canada", mais une charge publique sous Sa Majesté pour son gouvernement de la province, en l'espèce la province de Québec;

au surplus, aucune restriction ne pouvait justifier la retenue de cette pension ou partie de salaire dans l'arrêté ministériel nommant ledit H.-G. Carroll à la charge de lieutenant-gouverneur;

ledit H.-G. Carroll avait soumis de son vivant une réclamation au ministère de la Justice pour le paiement de ladite pension ou partie de salaire, à laquelle il n'a jamais renoncé;

les pétitionnaires, en leur qualité d'héritières légales de leur mère, ladite Amazélie Boulanger, elle-même légataire universelle dudit H.-G. Carroll, sont justifiables de réclamer ladite somme de $30,500 avec intérêt depuis 1930 sur $6,000, depuis 1931 sur $6,000, depuis 1932 sur $6,000, depuis 1933 sur $6,000 et depuis 1934 sur $6,000.

Dans sa défense amendée l'intimé plaide ce qui suit:

il admet que l'honorable H.-G. Carroll est décédé le 20 août 1939;

il admet que ledit H.-G. Carroll a été nommé lieutenant-gouverneur de la province de Québec le 2 avril 1929, selon un arrêté en conseil et que cette nomination a été faite par lettres patentes en date du 2 avril 1929;

par lettres patentes sous le grand sceau du Canada datées le 29 janvier 1904, ledit H.-G. Carroll a été nommé juge puîné de la Cour Supérieure de la province de Québec;

ledit H.-G. Carroll a continué à exercer cette fonction jusqu'à ce que, par lettres patentes sous le grand sceau du Canada datées le 24 décembre 1908, il ait été nommé juge puîné de la Cour du Banc du Roi de ladite province;

ledit H.-G. Carroll a résigné sa fonction de juge puîné de la Cour du Banc du Roi le 18 février 1921;

par lettres patentes sous le grand sceau du Canada datées le 18 février 1921, Sa Majesté a accordé audit H.-G. Carroll une pension de $6,000 par année et proportionnellement pour toute période de moins d'une année, commençant à la date susdite;

il admet que ledit H.-G. Carroll a occupé la charge de lieutenant-gouverneur de la province de Québec du 2 avril 1929 au 3 mai 1934;

il dit ne pas admettre ou nie les autres allégations de la pétition de droit;

il déclare que le paiement de ladite pension et du salaire autorisé par la loi à être payé audit H.-G. Carroll comme lieutenant-gouverneur lui a été fait durant la période où il a occupé cette position;

dans l'alternative, si le paiement de ladite pension a été retenu, des surpayes sur son salaire comme lieutenant-gouverneur de la province de Québec au montant de $6,000 par année ont été faites audit H.-G. Carroll durant toute la période de prétendu non-paiement de ladite pension, le montant total de ces paiements étant égal à la réclamation des pétitionnaires pour pension et ledit H.-G. Carroll était endetté envers Sa Majesté en rapport avec ces surpayes de salaire; Sa Majesté a droit d'opposer le montant desdites surpayes contre le montant de la réclamation des pétitionnaires et celle-ci est compensée par un montant égal réclamé par Sa Majesté des pétitionnaires pour les raisons susdites;

si les pétitionnaires ou la succession de feu l'honorable H.-G. Carroll ou celle de sa veuve, dame Amazélie Boulanger, ou ledit H.-G. Carroll lui-même ont en aucun temps eu une réclamation valide contre Sa Majesté pour non-paiement de la pension ou du salaire en question, ce qui est nié, telle réclamation est périmée et éteinte en vertu des dispositoins de la loi relative à la prescription, savoir l'article 32 de la Loi de la Cour de l'Échiquier, S.R.C. 1927, chap. 34, et des articles 2250, 2260 (6) et 2267 du Code Civil de la province de Québec.

Pour réponse à la défense amendée les pétitionnaires, après avoir demandé acte des admissions y contenues, déclaré que les documents y mentionnés font foi de leur contenu, lié contestation quant aux allégations négatives y incluses et nié les autres allégations, déclarent ce qui suit:

les dispositions des articles 2250, 2260 (6) et 2267 du Code Civil n'ont aucune application à la présente cause;

l'intimé a renoncé à toute prescription par le consentement qu'il a donné à soumettre le litige sur la question de droit jugée le 4 juillet 1947 par cette Cour, dont le jugement a été confirmé par la Cour Suprême du Canada;

cette renonciation appert plus spécialement par la lettre du sous-ministre de la Justice au procureur des pétitionnaires en date du 2 mai 1944 et par la réponse de ce dernier en date du 4 mai;

les deux jugements rendus par cette Cour et par la Cour Suprême constituent chose jugée sur la question de droit et l'intimé n'est plus admis à invoquer la prescription, moyen qu'il n'a soulevé que par avis d'amendement en date du 11 mai 1948.

La défense est mal fondée en fait et en droit.

Des admissions et déclarations des parties ont été produites de consentement pour tenir lieu de preuve. Je les résumerai le plus brièvement possible.

L'intimé admet que les pétitionnaires sont les filles et seules héritières légales de feu dame Amazélie Boulanger, veuve de feu le juge H.-G. Carroll, décédée à Québec sans testament le 4 janvier 1943; que ladite Amazélie Boulanger était la légataire universelle de feu le juge H.-G. Carroll, ancien lieutenant-gouverneur de la province de Québec, en vertu d'un testament olographe en date du 5 septembre 1936; que ladite Amazélie Boulanger avait accepté la succession de son mari et payé les droits de succession exigibles en vertu de la loi; que les pétitionnaires ont elles-mêmes accepté la succession de leur mère, dame Amazélie Boulanger, et payé les droits de succession; que, le 18 février 1921, l'intimé, pour le compte du Canada, accorda audit H.-G. Carroll une pension ou annuité de $6,000 par année en vertu de la Loi des juges (S.R.C. 1906, chap. 138); que ledit H.-G. Carroll avait droit au paiement de cette pension ou annuité pour la période allant du 2 avril 1929 au 3 mai 1934; que durant cette période ledit H.-G. Carroll occupait la charge de lieutenant-gouverneur de la province de Québec et que cette charge comportait un salaire de $10,000 par année; que durant cette période ledit H.-G. Carroll fut payé par Sa Majesté, à même le fonds consolidé du revenu du Canada, $10,000 par année, à l'égard de ladite pension ou

1949
CARROLL ET AL v. THE KING
Angers J.

annuité et dudit salaire; que ledit H.-G. Carroll n'a pas signé de renonciation à la réclamation que font valoir les pétitionnaires.

Les pétitionnaires, de leur côté, se déclarent satisfaites de ces admissions et en conséquence elles n'ont pas de preuve à offrir à l'appui de la pétition de droit, sauf la production de deux lettres invoquées au paragraphe 7 de leur réponse à la défense amendée.

Les deux lettres en question sont une lettre du sous-ministre de la Justice au procureur des pétitionnaires datée le 2 mai 1944 et une réponse de ce dernier au sous-ministre de la Justice datée le 4 mai 1944. La première se lit ainsi:

In view of your amendments to the petition of right, it will be necessary for me to make consequential amendments in the defence. I propose to amend paragraphs 10 and 15 of the defence to read as in the form annexed hereto.

There seems to be merely a question of law involved in the case, namely, as to the meaning of section 27 of the Judges Act. I would like to suggest to you that we might set this question down as a point of law to be disposed of before trial pursuant to Rule 149 of the Exchequer Court Rules. We could have the case set down for hearing on this point of law by the President during the last week in May at Ottawa or during the last week in June, whichever you prefer.

You might let me hear from you at your convenience.

La seconde est ainsi conçue:

J'ai l'honneur d'accuser réception de votre lettre du 2 mai, contenant un projet d'amendement des paragraphes 10 et 15 de votre défense. Je vous adresserai ma réponse ces jours-ci.

Tel que vous le suggérez, nous pourrions soumettre le litige comme point de droit à la décision du tribunal.

Quant à la date de l'audition, j'écris immédiatement à mon conseil, Me Aimé Geoffrion, C.R., pour lui demander laquelle des deux dates suggérées lui conviendrait le mieux. Dès que j'aurai sa réponse, je vous écrirai de nouveau.

Dans l'intervalle, auriez-vous l'obligeance de me soumettre un projet de consentement que les deux parties pourraient signer sur le point de droit à décider.

La question de droit soumise à la Cour se lisait ainsi:

Assuming that the Honourable H. G. Carroll became entitled on February 18th, 1921, to a pension under the "Judges Act" at a rate of $6,000 per annum and was entitled to receive the same during and in respect of the period from April 2nd, 1929, to May 3rd, 1934, and that during the said period he occupied the office of Lieutenant Governor of Quebec to which office there was attached the salary of $10,000.00 per annum and assuming that he received payment out of the Consolidated Revenue Fund of Canada in respect of the said pension and of salary as Lieutenant Governor during the said period at the rate of $10,000.00 per annum, are the suppliants entitled to the relief sought by the petition of right?

Par jugement rendu le 4 juillet 1947 il a été répondu à cette question dans l'affirmative. Ce jugement a été confirmé à l'unanimité par la Cour Suprême le 22 mars 1948.

Le procureur de l'intimé a plaidé qu'il ne peut y avoir chose jugée en l'espèce, nonobstant le fait que la question soumise à la Cour se terminait par les mots "Are the suppliants entitled to the relief sought by the petition of right?", parce que la question de prescription n'a pas été soulevée ni par les avocats, ni par le jugement de cette Cour, ni par celui de la Cour Suprême, et que tout ce qui a été décidé c'est le sens et la portée de l'article 27 de la Loi des juges et, plus précisément, la question de savoir si la charge de lieutenant-gouverneur est fédérale ou provinciale, ou, en d'autres mots, si elle est une charge publique sous Sa Majesté pour son gouvernement du Canada ou pour son gouvernement de la province. L'avocat a soutenu que tout ce que les jugements ont décidé c'est que, prenant pour acquis que, le 18 février 1921, le juge Carroll est devenu qualifié pour recevoir une pension de $6,000 par année en vertu de la Loi des Juges, qu'il y a eu droit pour la période du 2 avril 1929 au 3 mai 1934, que durant cette période il a occupé la charge de lieutenant-gouverneur de Québec, comportant un salaire de $10,000 par année, et reçu paiement, à même le fonds consolidé du revenu du Canada, de la somme de $10,000 pour salaire ou pour pension et partie de salaire, les pétitionnaires ont une créance contre Sa Majesté. Il a ajouté que ceci n'affecte en rien la question de savoir si le droit d'action existait lorsque la pétition de droit a été remise au Secrétaire d'État.

Relativement à la distinction qu'il y a lieu de faire entre la créance et le droit d'action, le procureur de l'intimé s'est appuyé sur certains jugements, qu'il me semble convenable d'analyser brièvement.

Il y a d'abord l'arrêt du comité judiciaire du Conseil Privé dans la cause de *Regent Taxi & Transport Co. Limited et La Congrégation des Petits Frères de Marie* (1). A la page 301, l'on trouve les observations suivantes de Lord Russell of Killowen:

Nor do their Lordships feel any doubt in regard to the question whether the cause of action (if any) vested in the community under art. 1053 had become barred. This point arises for consideration upon the

(1) (1932) A.C. 295

1949
CARROLL ET AL v. THE KING
Angers J.

assumption that the community have under art. 1053 a right to recover by action the damage caused to them by the fault of the appellants' driver, i.e. by the driver's tortious act in wrongfully inflicting bodily injuries upon Brother Henri-Gabriel.

Et plus loin (p. 303):

For these reasons their Lordships are of opinion that the community's action should in any event have been dismissed as being "prescribed by one year" under art. 2262 (2).

Their Lordships having come to this clear opinion upon this part of the case, feel grave doubts as to the advisability or propriety of expressing any opinion upon the remaining question. The importance of that question admits of no doubt, and its difficulty is apparent in the division of judicial opinion; but, unfortunately, any view which their Lordships have formed (and whether clearly or otherwise) would involve no decision upon the point, for the case is determined in any event by the date on which the proceedings were commenced.

In these circumstances would it be advisable or proper that a view, unnecessary to the decision of the case, should be expressed upon so vexed a question? Their Lordships think not. They are of opinion that no opinion should be expressed by their Lordships upon the question until it comes before them upon an appeal in which they can deal with it as the sole factor for consideration, unhampered by any other competing question which would be decisive of the case.

Après avoir lu le sommaire du jugement et fait allusion aux commentaires ci-dessus, le procureur de l'intimé a suggéré que la Cour aurait pu soulever d'office le sujet de la prescription et répondre dans la négative à la question soumise, parce que la réclamation était prescrite. Il a ajouté que l'intimé aurait pu en appeler au Conseil Privé et soulever là la question de prescription ou que le Conseil Privé, si la question ne lui était pas soumise, aurait pu la soulever lui-même et rejeter l'action. Il a conclu de là qu'à l'enquête et audition au mérite il a le droit de soulever la question de prescription. Au soutien de cette opinion, il a cité la décision de la Cour du Banc du Roi dans la cause de *North American Life Insurance Co.* v. *Hudon* (1). Il a signalé particulièrement les remarques de l'honorable juge Galipeault (p. 275):

Notre Code civil à l'article 2267 édicte que dans les cas mentionnés aux articles qu'il énumère et qui traitent de courtes prescriptions, la créance est absolument éteinte et nulle action ne peut être reçue après l'expiration du temps fixé pour la prescription.

De son côté, l'article 2188 C.C. décrète que les tribunaux ne peuvent pas suppléer d'office le moyen résultant de la prescription, sauf dans les cas où la loi dénie l'action.

Il n'est pas contesté que l'article 2267 C.C. couvre également les prescriptions spéciales, les prescriptions statutaires.

(1) (1933) R.J.Q. 55 B.R. 273.

Le texte du par. 3 de l'art 216, ch. 243, S.R.Q. 1925, ne saurait, à mon avis, prêter à ambiguité, non plus à double interprétation; il dénie bien l'action, et ce, en termes formels.

Il nous incombe donc de l'appliquer, bien que le moyen n'ait pas été soulevé dans les plaidoiries. Il s'est écoulé entre l'arrivée du fait qui constituait le risque de l'assurance, à savoir l'incapacité totale du demandeur survenue en décembre 1930, et l'institution de l'action le 4 janvier 1933, plus de deux années, alors que la loi déniait toute action après l'expiration d'une année, délai pouvant s'étendre jusqu'à 18 mois, avec permission d'un juge de la Cour supérieure et sur requête à cet effet.

Lors de l'institution de ses procédures, le demandeur n'avait plus d'action.

Après avoir fait allusion à une admission ajoutée aux notes sténographiques et conclu qu'elle ne modifie pas la position juridique des parties, le savant juge continue (p. 276):

La défense ne soulève en aucune façon le moyen né de la prescription et le défendeur n'était pas tenu de le mettre de l'avant. On ne saurait décréter qu'une partie a renoncé par la bouche de son procureur à une prescription acquise, sans qu'on se soit au moins clairement exprimé. Le procureur était-il autorisé à faire pareille renonciation, sans mandat spécial, sans aucune admission dans ses procédures, je suis porté à croire que non.

Le procureur de la défenderesse aurait dit au cours de la plaidoirie: "Si les moyens soulevés par la défense ne sont pas victorieux, le demandeur est en droit d'obtenir la somme de $220 réclamée par ses conclusions", que les tribunaux ne se seraient pas cru autorisés à voir dans cette déclaration, une renonciation à la prescription acquise, et, à mon avis, l'admission de Me Deguise ne va pas plus loin que la déclaration ci-dessus.

Il y a lieu de consulter aussi les notes de l'honorable juge Rivard (pp. 277 et 278).

Le procureur de l'intimé a ensuite invoqué le jugement de l'honorable juge Stein dans la cause de *Morin* v. *La Corporation du Canton de Montminy* (1). A la page 150 l'on trouve les commentaires suivants:

Ce jugement sur l'exception à la forme ne dispose donc pas de la question de savoir si le demandeur avait, ou non, le droit de soumettre à ce tribunal son grief contre le règlement; et je conçois qu'il était alors impossible au juge, à cet étage de la procédure, sans avoir entendu la preuve, d'en venir à une décision sur cette importante question, qui est discutée dans chaque cause de ce genre, et dont la solution présente de graves difficultés,—du moins pour ce qui me concerne.

Il est vrai que le jugement ne dit pas que cette partie de la motion du demandeur est remise au mérite pour adjudication ultérieure; mais il est évident que ce jugement ne se prononce pas sur ce point. Alors, peut-on dire qu'il y a là chose jugée? Je ne le crois pas, car l'art. 1241 C.C. dit que l'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui fait l'objet du jugement.

Or, il est évident, ici, que cette question ne fait pas du tout l'objet du jugement interlocutoire du 22 juin. Il me paraît clair que la Cour,

(1) (1928) 34 R. de J. 128.

1949
CARROLL ET AL v. THE KING
Angers J.

accordant alors l'amendement, s'est contentée de disposer de l'exception à la forme en obligeant le demandeur d'en payer les frais, et en lui permettant, comme compensation, de réparer son erreur. Mais cela démontre que le juge n'avait alors en vue que cette partie de la motion de la défenderesse attaquant l'illégalité de la désignation que le demandeur lui donnait au bref. Ce jugement ne dispose pas de l'autre moyen soulevé par cette motion (*voir* Evans *vs* Wilson, 1 R.P., 186, 1898, C.B.R.).

L'article 1241 du Code Civil, mentionné dans le jugement, se lit ainsi:

> L'autorité de la chose jugée est une présomption juris et de jure; elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, et lorsque la demande est fondée sur la même cause, est entre les mêmes parties agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée.

Le procureur de l'intimé a suggéré, comme moyen additionnel à l'encontre de la théorie de la chose jugée, que la décision sur la question de droit soumise à la Cour a porté sur les plaidoiries telles qu'elles se lisaient au moment de l'audition, alors que la défense ne plaidait pas la prescription, et que la situation est autre aujourd'hui, depuis l'addition faite à la défense.

Le procureur des pétitionnaires, de son côté, a soutenu qu'il y a chose jugée, vu que l'amendement fait à la défense n'ajoute aucune allégation de fait mais uniquement une allégation de droit. D'après lui celle-ci est couverte par le jugement de cette Cour et celui de la Cour Suprême. Il a fait valoir que la question telle que formulée couvrait toutes les objections de droit qui pouvaient être invoquées contre la pétition, y comprises les courtes prescriptions, qui éteignent la créance et dénient l'action, qu'il n'est pas nécessaire de plaider et que les tribunaux doivent appliquer d'office, si elles existent.

Il a insisté sur le fait que la question soumise à la Cour n'était aucunement limitée à un motif de droit particulier, ajoutant que, si les avocats, dans leurs plaidoiries, se sont contentés de plaider sur un point unique, la question telle que posée permettait la soumission de n'importe quelle objection de droit couverte par la contestation liée ou autorisée par la loi.

A la question de savoir si, à l'audition sur la question de droit, la Cour pouvait appliquer la courte prescription invoquée dans l'amendement à la défense, même si elle n'était pas plaidée, le procureur des pétitionnaires a soutenu que

non seulement la Cour pouvait le faire mais qu'elle le devait; à l'appui de son opinion il a cité l'article 2188 C.C. et Mignault, Droit civil canadien, tome 9, p. 351.

L'article 2188 C.C. est ainsi conçu:

> Les tribunaux ne peuvent pas suppléer d'office le moyen résultant de la prescription, sauf dans les cas où la loi dénie l'action.

Mignault déclare ceci:

> Je crois qu'il est maintenant hors de doute que non seulement le tribunal peut suppléer d'office le moyen résultant de la prescription, dans les cas où la loi dénie l'action, mais qu'il doit le faire, la seule question discutable étant de savoir si le texte qu'il s'agit d'appliquer dénie réellement l'action. Il est certain que dans les cas mentionnés par l'article 2267, il y a déni d'action.

Le procureur des pétitionnaires a suggéré ensuite que cette Cour et la Cour Suprême n'ont pas appliqué ces courtes prescriptions parce qu'elles ont jugé qu'elles ne s'appliquaient pas. Il a émis l'opinion que, s'il y a eu erreur dans le jugement de cette Cour, confirmé par la Cour Suprême, en n'appliquant pas la courte prescription quand elle devait l'être, le seul remède était un appel au Conseil Privé. Il a insisté que le remède n'est pas devant cette Cour, parce qu'il y a chose jugée, ajoutant qu'une partie ne peut revenir devant le tribunal qui a rendu jugement et lui demander de le modifier, sauf dans les cas prévus par la loi.

Il a signalé que la question telle que posée indiquait la date à laquelle remontait la créance des pétitionnaires et que la Cour a jugé que cette créance, ainsi située quant au temps, justifiait les pétitionnaires dans leur réclamation en octobre 1943.

Il soumet que l'amendement à la défense n'ajoute rien à la question de droit et que celle-ci contenait déjà la nouvelle allégation de la défense, savoir que la créance était échue depuis 1934.

Après avoir lu attentivement les plaidoyers soigneux et complets des avocats, examiné les plaidoiries et les admissions, étudié la loi et la jurisprudence, j'en suis venu à la conclusion qu'il n'y a pas chose jugée dans le cas qui nous occupe. Tout ce qui a été déterminé c'est la signification ou la portée de l'article 27 de la Loi des juges ou, plus exactement, ce qu'il entend par les mots "une charge publique sous Sa Majesté pour son gouvernement du Ca-

1949
CARROLL ET AL v. THE KING
Angers J.

nada"; tout ce qui a été discuté devant la Cour c'est l'interprétation de cet article 27 et son application. Il s'agissait de faire décider si les mots "pour son gouvernement du Canada" comprenaient "son gouvernement pour une province". C'est là-dessus qu'a porté la discussion exclusivement. Le jugement de cette Cour et celui de la Cour Suprême ont reconnu le droit des pétitionnaires de faire valoir leur réclamation devant les tribunaux; ils ne se sont pas prononcés sur la validité ou l'invalidité de cette réclamation, particulièrement son extinction par prescription. Lors de l'audition en droit, le défendeur n'avait pas fait sa motion pour ajouter à sa défense le paragraphe 15*a* plaidant la prescription; les Cours n'avaient pas le matériel nécessaire pour décider cette question, laquelle est une question mixte, de fait et de droit. Cette modification de la défense n'a été faite que le 27 mai 1948, selon jugement rendu ce jour-là.

J'examinerai maintenant la question de prescription.

L'intimé, dans le paragraphe 15*a* de sa défense amendée, prétend que la réclamation est prescrite en vertu de l'article 32 de la Loi de la Cour de l'Échiquier et des articles 2250, 2260 (6) et 2267 du Code Civil.

L'article 32 décrète ce qui suit:

> Les lois relatives à la prescription et à la limitation des actions, en vigueur dans toute province entre particuliers, s'appliquent, subordonnément aux dispositions de toute loi du Parlement du Canada, aux procédures instituées contre la Couronne à l'égard de toute cause d'action qui prend naissance dans cette province.

Il me semble à propos de déclarer ici que, contrairement à la prétention du procureur des pétitionnaires, je crois que les dispositions du Code Civil relatives à la prescription s'appliquent en l'espèce parce que la cause d'action a pris naissance dans la province et que la dette y était payable.

L'article 2242 du Code Civil, relatif à la prescription trentenaire, se lit ainsi:

> Toutes choses, droits et actions dont la prescription n'est pas autrement réglée par la loi, se prescrivent par trente ans, sans que celui qui prescrit soit obligé de rapporter titre et sans qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

Cet article pose la règle générale: les plus courtes prescriptions sont exceptionnelles et ne s'appliquent qu'aux cas spécifiques prévus dans les articles y ayant trait.

L'article 2250 du Code Civil contient, entre autres, les dispositions suivantes:

A l'exception de ce qui est dû à Sa Majesté, et de l'intérêt sur les jugements, les arrérages de rentes, même viagères, ceux de l'intérêt, ceux des loyers et fermages, et en général tous arrérages de fruits naturels ou civils se prescrivent par cinq ans.

Je ne crois pas que cet article s'applique. Il ne s'agit pas en l'espèce d'arrérages de rentes, d'intérêt, de loyers ou fermages ou, en général, de fruits naturels ou civils. Il n'y a rien dans l'article 2250 concernant le salaire ou la pension.

Mignault, dans "Le Droit civil canadien", tome 9, à la page 486 (in fine), exprime l'opinion suivante:

Ajoutons que sauf les deux exceptions que j'ai mentionnées, la règle de l'article 2250 s'applique à tous les arrérages et intérêts quelconques, à tous loyers ou fermages, et à toutes prestations périodiques, y comprise la rente emphytéotique.

Comme l'a signalé le procureur des pétitionnaires, cette opinion de Mignault semble inspirée de la jurisprudence interprétant l'article 2277 du Code Napoléon, qui est ainsi conçu:

Les arrérages de rentes perpétuelles et viagères;
Ceux des pensions alimentaires;
Les loyers des maisons, et le prix de ferme des biens ruraux;
Les intérêts des sommes prêtées, et généralement tout ce qui est payable par année, ou à des termes périodiques plus courts, se prescrivent par cinq ans.

Plus loin, Mignault ajoute (p. 487):

L'article 2250, à la différence de l'article 2277 du code Napoléon, ne mentionne pas les pensions alimentaires. Si cette pension constitue une rente viagère, elle se trouve comprise dans l'énumération de l'article 2250. Et même s'il n'était pas possible de dire que cette pension est une rente viagère, la raison de la loi, qui est d'empêcher l'accumulation des arrérages, me semble couvrir le cas de la pension alimentaire, comme des arrérages de rente viagère.

J'avouerai que cette opinion ne me paraît pas justifiée par le texte de l'article 2250. Cet article ne contient pas les mots "Ceux (les arrérages) des pensions alimentaires" ni les mots "généralement tout ce qui est payable par année, ou à des termes périodiques plus courts", que l'on trouve dans l'article 2277 C.N.

L'on a attiré l'attention de la Cour sur un autre passage du même traité relatif à l'article 2250, qui se lit ainsi (p. 487):

Il n'est pas nécessaire de se demander si le salaire ou traitement payé à des fonctionnaires publics tombe sous la prescription établie par l'article

1949
CARROLL ET AL v. THE KING
Angers J.

2250. De quelque manière qu'on envisage le contrat en vertu duquel ce salaire est payé, il est certain que le terme de la prescription ne peut dépasser cinq ans et peut même être plus court.

Ce passage se rapportant au salaire ou traitement payé à des fonctionnaires publics se trouve sous l'article 2250, dans lequel il n'en est nullement question. C'est le paragraphe (6) de l'article 2260 qui a trait au louage d'ouvrage et au prix du travail. Il y a là une erreur qui paraît provenir de la comparaison de l'article 2250 du Code Civil avec l'article 2277 du Code Napoléon. Il s'agit dans ce dernier, comme nous l'avons vu, de prestations périodiques et l'on s'appuie sur ces mots pour appliquer la prescription au salaire et au traitement. Au surplus, il me semble que, dans ce dernier commentaire, l'auteur entre dans le domaine du législateur.

La partie pertinente de l'article 2260 se lit ainsi:

L'action se prescrit par cinq ans dans les cas suivants:

6. Pour louage d'ouvrage et prix de travail, soit manuel, professionnel ou intellectuel, et matériaux fournis; sauf les exceptions contenues aux articles qui suivent;

La question qui se présente est de savoir si les services que comporte la fonction de lieutenant-gouverneur d'une province, qui est le représentant direct de Sa Majesté le Roi, peuvent être assimilés à ceux prévus par la clause 6 de l'article 2260. S'agit-il, dans le cas d'un lieutenant-gouverneur, de louage d'ouvrage ou de prix de travail, manuel, professionnel ou intellectuel Il me semble qu'il ne peut s'agir de louage de service ou d'ouvrage; les officiers publics me paraissent être des mandataires et non des locateurs d'ouvrage.

Relativement à la fonction d'un mandataire, il y a lieu de consulter Mignault, op. cit., tome 8, pp. 4 et 6. A la page 4, Mignault exprime cette opinion:

J'ai dit que l'idée de la représentation domine dans le mandat. Bien que le rôle du mandataire paraisse actif et celui du mandant passif, juridiquement parlant, c'est tout l'inverse qui a lieu. Le mandataire, en effet, n'agit et ne parle qu'au nom du mandant, et c'est celui-ci qui acquiert des droits et contracte des obligations à l'égard des tiers, et non pas le mandataire. Cela est si vrai, que ce n'est que lorsque le mandataire excède les bornes de son mandat, où qu'il agit en son nom propre,—et alors il répudie pratiquement le mandat,—qu'il s'oblige envers les tiers avec qui il traite. C'est encore pour la même raison, comme nous le verrons, que l'incapacité même absolue du mandataire n'empêche pas que le mandant ne s'oblige par son entremise.

Ce trait essentiel du mandat permet de distinguer ce contrat du louage d'ouvrage, car celui qui loue son travail ou ses services ne représente pas celui qui accepte ce louage, tandis qu'il n'y a pas de mandat sans représentation.

Traitant du contrat de louage dans le tome 7 de son ouvrage, Mignault expose la différence entre le louage d'ouvrage et le mandat. Avant d'examiner ses commentaires, il est peut-être avantageux de citer les articles 1602 et 1666 C.C., ce dernier sous la rubrique "Dispositions générales", qui est le premier du chapitre 3 intitulé "Du louage d'ouvrage":

1602. Le louage d'ouvrage est un contrat par lequel l'une des parties, appelée locateur, s'engage à faire quelque chose pour l'autre, qui est appelée locataire, moyennant un prix que cette dernière s'oblige de payer.

1666. Les principales espèces d'ouvrages qui peuvent être louées, sont:

1. Le service personnel des ouvriers, domestiques et autres;
2. Le service des voituriers, tant par terre que par eau, lorsqu'ils se chargent du transport des personnes et des choses;
3. Celui des constructeurs et autres entrepreneurs de travaux suivant devis et marché.

Après avoir référé aux observations des codificateurs au sujet de la distinction entre le contrat de louage d'ouvrage et le mandat, Mignault, à la page 239 de son tome 7, déclare, entre autres, ceci:

La question de savoir quel est au juste le caractère distinctif du louage d'ouvrage et du mandat, surtout lorsque ce dernier est salarié, est assez difficile à résoudre, et aucun système ne peut nous donner sur ce point une satisfaction complète. Ainsi, c'est une question qui peut être controversée que celle de savoir quelle est la nature du contrat qui unit le commis au patron qui l'emploie; on se demande s'il constitue un mandat, un louage de services, ou un contrat mixte participant de l'un et de l'autre. La majorité des auteurs, en France, se prononce pour cette dernière opinion, et aucun des systèmes qu'on y a tour à tour soutenus et attaqués, et que je vais maintenant mentionner, n'est suffisant en principe pour placer le contrat en question, c'est-à-dire celui qui unit le commis au patron, sous la seule dénomination soit du mandat, soit du louage de services. Il peut en être ainsi dans beaucoup d'autres cas.

Mignault expose ensuite que dans un système on prétend que le louage d'ouvrage se différencie du mandat par la condition qu'un prix est toujours attaché au travail dans le premier contrat, tandis que le second est gratuit de sa nature et que la rémunération qui peut l'accompagner n'a que le caractère d'honoraire ou de récompense. Il ajoute que dans ce système il n'y a louage d'ouvrage que lorsque l'acte accompli est purement manuel et matériel et qu'au

contraire il y a mandat si l'acte est plutôt intellectuel. Il signale que ce système est soutenu par de grands jurisconsultes, mais il ne croit pas qu'il y ait lieu de l'accepter dans notre droit. L'auteur poursuit ainsi son exposé (p. 240):

> Dans un autre système, qui me paraît plus exact, pour déterminer si un contrat renferme un louage d'ouvrage ou un mandat, on doit se demander si celui qui travaille ou agit pour autrui accomplit ou non un acte juridique, tel qu'une vente, un achat, un emprunt ou une affaire quelconque. Il y aura louage d'ouvrage toutes les fois que l'acte accompli n'offrira pas ce caractère juridique, et mandat dans les autres cas. Ainsi le médecin, le professeur ou l'artiste que j'emploie ne sont point mes mandataires, car l'acte accompli par eux pour moi n'est pas un acte juridique. La convention intervenue entre eux et moi est un véritable louage d'ouvrage.

Mignault dit ensuite qu'en faveur de ce système l'on peut faire remarquer: 1° que, selon la loi, le mandataire est celui qui s'est chargé de la gestion d'une affaire pour une autre personne et que par ces mots "la gestion d'une affaire" on entend l'accomplissement d'un acte juridique capable de produire des obligations ou transférer des droits, ou d'en opérer l'extinction, et non pas l'exécution d'un simple ouvrage, quelque intellectuel qu'il puisse être; 2° que la loi reconnaît le mandat salarié, sans distinguer si le salaire convenu est ou non modique comparativement au service à rendre; 3° que, dans le système opposé, la loi eût été obligée de donner une classification des ouvrages appelés libéraux et que, ne l'ayant pas donnée, elle a par là montré qu'elle n'entendait point établir de différence entre le travail libéral et celui qui ne l'est pas.

L'auteur conclut ses commentaires ainsi (p. 241):

> J'admets toutefois qu'en certains cas il sera assez difficile de faire entrer le contrat qui sera intervenu entre les parties sous la seule dénomination de louage ou de mandat. Ces deux contrats se rapprochent par tant de points, qu'il arrivera souvent qu'ils seront liés ensemble de manière à former un seul contrat, participant à la fois du louage de services et du mandat. C'est ainsi qu'on peut dire que le contrat qui unit le commis au patron est un contrat mixte. On devra alors appliquer les règles du louage ou les règles du mandat suivant les circonstances, et suivant la nature de l'acte dont il s'agit.

Devant pareille indécision il est quelque peu difficile d'opter. J'ai, par acquit de conscience, consulté le Cours de droit civil de Langelier; il ne m'a été d'aucune assistance. J'ai cherché dans les codes annotés et les répertoires de jurisprudence pour vérifier s'il y avait eu des décisions sur le sujet, malheureusement sans succès.

Après avoir pesé avec soin les arguments présentés de part et d'autre, j'en suis venu à la conclusion que nous sommes en face d'un mandat et non d'un contrat de louage d'ouvrage. La prescription quinquennale ne s'applique donc point; c'est la prescription trentenaire qui régit le cas. Si les mots "louage d'ouvrage" ne s'appliquent point, comme je le crois, mais que les mots "prix de travail" se rapportent à un prix déterminé pour un travail convenu, peut-il être question d'évaluer en argent le "travail" d'un lieutenant-gouverneur qui exécute les devoirs de sa charge? Si l'on considère que le lieutenant-gouverneur fait partie de la législature de la province, il me semble qu'il ne peut être question de prix pour ce genre de service. L'article 71 de l'Acte de l'Amérique Britannique du Nord décrète ceci:

Il y aura pour Québec une législature composée du lieutenant-gouverneur et de deux Chambres appelées le Conseil Législatif de Québec et l'Assemblée Législative de Québec.

En vertu de cette disposition le lieutenant-gouverneur participe de l'autorité du souverain; il administre les affaires de la province en vertu d'une commission qui lui est accordée par le gouverneur général en conseil. La loi accorde un traitement au lieutenant-gouverneur, non pas tant pour payer son travail que pour l'indemniser des pertes que lui cause l'exécution de sa fonction. Je crois raisonnable et logique de conclure qu'il ne s'agit pas de prix de travail mais d'un traitement ou d'une indemnité. Ceci me confirme dans l'opinion que le paragraphe 6 de l'article 2260 C.C. n'a aucune relation avec le cas d'un lieutenant-gouverneur. J'ajouterai que les mots "et matériaux fournis" dans le paragraphe 6 de l'article 2260 me semblent appuyer cette façon de voir.

Il faut être prudent relativement à la doctrine et la jurisprudence en France, vu la différence entre l'article 2260 C.C. et l'article 2277 C.N. Le procureur des pétitionnaires a cité un extrait de Baudry-Lacantinerie, tome 28, De la prescription, N° 776, où l'auteur, traitant de la prescription du traitement des fonctionnaires publics, fait les commentaires suivants:

D'après Laurent, les traitements des fonctionnaires publics doivent être assimilés à des pensions alimentaires. Au fond, dit cet auteur, ces traitements sont calculés de manière que les fonctionnaires comptent parmi les pauvres dans une société riche; on peut donc hardiment les assimiler à des aliments (Laurent, n. 441).

1949
CARROLL ET AL v. THE KING
Angers J.

Laurent assimile donc le traitement du fonctionnaire public à une pension alimentaire et le croit prescriptible par cinq ans, étant donné que l'article 2277 C.N. mentionne les pensions alimentaires.

Baudry-Lacantinerie continue:

Il n'est pas besoin de cette assimilation, qui manquerait d'ailleurs de justesse à plus d'un point de vue, pour déclarer applicable ici la prescription quinquennale; on peut faire rentrer sans le moindre effort les traitements dont il s'agit dans la règle formulée par l'article 2277, alinéa 4: "et généralement tout ce qui est payable par année ou à des termes périodiques plus courts".

On constate ainsi qu'en France on applique au traitement des fonctionnaires publics la prescription quinquennale, soit qu'on l'assimile à une pension alimentaire ou qu'on l'inclut dans la formule "tout ce qui est payable par année ou à des termes périodiques plus courts". Ces deux stipulations de l'article 2277 C.N. ne se trouvent pas dans l'article 2260 C.C. Il n'est pas question dans celui-ci de pension alimentaire ni de sommes payables par année ou à des termes périodiques plus courts. Par ces motifs, sur lesquels il me semble inutile d'insister, la défense de prescription ne peut être accueillie.

Le procureur des pétitionnaires a plaidé, subsidiairement, que, si la prescription de cinq ans était applicable, il y a eu renonciation à la prescription.

L'article 2185 du Code civil décrète ce qui suit:

La renonciation à la prescription est expresse ou tacite; la renonciation tacite résulte d'un fait qui suppose l'abandon du droit acquis.

Le procureur de l'intimé, invoquant l'article 2186 C.C., qui déclare que "Celui qui ne peut aliéner ne peut renoncer à la prescription acquise", a plaidé qu'on ne peut engager la Couronne sans certaines formalités et que même le sous-ministre de la Justice ne pouvait faire don de $30,000 aux pétitionnaires sans autorisation du Parlement ou, au moins du gouverneur général en conseil. Le procureur de l'intimé a représenté que la lettre du sous-ministre de la Justice au procureur des pétitionnaires, en date du 2 mai 1944, ne comporte pas de renonciation de la part de la Couronne à la prescription acquise. Il a ajouté que, par cette lettre et la réponse du procureur des pétitionnaires, tout ce dont on convenait c'était de demander une audition en droit pour faire interpréter l'article 27 de la Loi des juges. Il est de

jurisprudence constante qu'un ministre ne peut, de son propre chef, engager la Couronne; à plus forte raison un sous-ministre ne peut-il le faire. Je crois inutile d'insister sur ce point; je me contenterai de citer les jugements suivants: *Algoma Central Railway Company* v. *The King* (1), ce jugement a été infirmé par la Cour Suprême sur un point étranger à la question qui nous occupe (2); *Black et al.* v. *The Queen* (3); *Boone* v. *The King* (4); *British American Fish Corporation Ltd.* v. *The King* (5); *DeGalindez et al.* v. *The King* (6); *La Banque Jacques-Cartier* v. *La Reine* (7); *Lefebvre* v. *The King* (8); *Le Procureur Général* v. *A. Fraser et al.* (9), ce jugement a été infirmé par la Cour du Banc du Roi sur un autre point, sub nom. *Lefaivre ès-qual.* v. *Attorney General of the Province of Quebec* (10), et restauré par la Cour Suprême sub nom. *Attorney General of the Province of Quebec and Kenneth Gordon Fraser et al.* (11); *National Dock and Dredging Corporation Limited* v. *The King* (12); *The King* v. *Peat Fuels Limited* (13); *The King* v. *Vancouver Lumber Co.* (14).

Mais en l'espèce il y a plus que la lettre du sous-ministre; il y a le fait que l'intimé a jugé à propos de soumettre à la Cour une question de droit et l'a fait plaider par l'un de ses procureurs, qui n'était autre que le sous-ministre de la Justice. Si, comme le prétend l'intimé, l'action était prescrite, il était inutile de faire décider cette question de droit. Ceci me paraît disposer de la prétention de l'intimé qu'il ne peut y avoir eu renonciation à la prescription.

Par ces motifs j'en suis venu à la conclusion que la pétition de droit est bien fondée, jusqu'à concurrence de $30,500. Il y aura donc jugement contre l'intimé pour cette somme, avec dépens.

Judgment accordingly.

---

(1) (1901) 7 Ex. C.R. 239, 267;
(2) (1902) 32 S.C.R. 277.
(3) (1899) 29 S.C.R. 693.
(4) (1933) Ex. C.R. 33.
(5) (1918) 18 Ex. C.R. 230; (1919) 59 S.C.R. 651.
(6) (1906) R.J.Q. 15 B.R. 320; (1907) 39 S.C.R. 682.
(7) (1895) 25 S.C.R. 84.
(8) (1923) Ex. C.R. 115.
(9) (1904) R.J.Q. 25 C.S. 104.
(10) (1905) R.J.Q. 14 B.R. 115.
(11) (1906) 37 S.C.R. 577.
(12) (1929) Ex. S.C.R. 40.
(13) (1930) Ex. C.R. 188.
(14) (1914) 17 Ex. C.R. 329; (1920) D.L.R. 6.

1947
June 24, 25, 26, 27, 28, 30
July 1
—
1949
Jan. 5

BETWEEN:

RENWAL MANUFACTURING COMPANY, INC. .... PLAINTIFF;

AND

RELIABLE TOY COMPANY, LIMITED and RELIABLE PLASTICS COMPANY, LIMITED...... DEFENDANTS.

Trade Mark—Industrial designs—Trade Mark and Design Act, R.S.C. 1927, c. 71, ss. 31, 34, 35 and 39—Infringement—Passing-off—Article of manufacture may not be the subject of a registered design—Novelty and originality required to render valid registration of a design—Introduction of trade variations into old design cannot make it new or original—No passing-off unless a person with reasonable apprehension and proper eyesight would be deceived.

The action is one for infringement by defendant Reliable Plastics Company Limited, of plaintiff's registered industrial designs covering children's toys and kitchen utility houseware. Plaintiff alleges that defendant has manufactured and sold in Canada toys for which plaintiff holds registered industrial designs and has passed off these goods as the goods of the plaintiff. Denying infringement and passing-off the defendant also attacks the validity of plaintiff's industrial designs and asks that they be expunged from the register.

The Court found that each of the registrations and applications therefor was for the article of manufacture itself and not for the ornamenting of such articles; and that the designs in question lacked novelty in that they were not new or original. The Court also found that in shape, form or get-up, the various articles of the defendant are not imitations of the plaintiff's toys, nor do they closely resemble them.

Held: That an industrial design under the Trade Mark and Design Act was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself.

2. That since the registered designs of plaintiff lacked novelty they were not registrable.

3. That the introduction of trade variations into an old design cannot make it new or original.

4. That in a passing-off action it is necessary for the plaintiff to establish that he has selected a novel design as a distinguishing feature of his goods and that such goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that the defendants' articles are like his and in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived.

ACTION for infringement of plaintiff's registered industrial designs and the passing-off by defendant of its goods for those of plaintiff. The action proceeded against Reliable Plastics Company, Limited, only.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Cuthbert Scott for plaintiff.

Gordon F. Henderson for defendants.

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

CAMERON J. now (January 5, 1949) delivered the following judgment:

This is an action for an injunction, damages and consequential relief in which the plaintiff claims that the defendants have infringed plaintiff's registered industrial designs and have passed off their miniature plastic toys for those of the plaintiff. At the commencement of the trial, counsel for the plaintiff asked leave to discontinue the action as against Reliable Toy Company, Limited, the first named defendant. With the consent of counsel for the defendants, I therefore made an order discontinuing the action as against that company, reserving, however, the question of costs. Inasmuch as both defendants were represented by the same counsel throughout and did not file separate pleadings, and, taking into consideration all the circumstances of the case, I think that I should fix the costs of that defendant rather than direct that they should be taxed. I fix those costs at the sum of $75, payable by the plaintiff to the defendant, Reliable Toy Company Limited.

Wherever reference is made hereafter to the defendant the reference will be only to the second defendant—Reliable Plastics Company, Limited.

The plaintiff is a New York corporation. Since 1939 it has been engaged in the manufacture and sale of children's toys and kitchen utility houseware. Its goods are manufactured in the United States and sold there, as well as in Canada and other countries. Irving Rosenbloom, president of the plaintiff company, registered in Canada certain

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

industrial designs under the Trade Mark and Design Act, R.S.C., 1927, c. 71, in his own name as proprietor. These registered designs and particulars of the date of registration and registration numbers are as follows:

Title	*Registered No.*	*Date of Registration*
BATHROOM SET		
Plastic toy bathtub	14893/84	28th Sept., 1946
Plastic toy washstand	14897/84	" "
Plastic toy water closet	14898/84	" "
Plastic toy hamper	14899/84	" "
KITCHEN SET		
Toy oblong tub	195014/86	29th Nov., 1946
Toy stove	15009/86	" "
Toy refrigerator	15013/86	" "
Toy sink	15015/86	" "

All of the said registered designs were subsequently assigned to the plaintiff herein on November 19, 1946.

The defendant company was organized in 1941 with its head office at Toronto, Ontario, and its chief officers are Solomon Frank Samuels, Ben Samuels and Alec Samuels. These three brothers, or some of them, however, have been in the business of manufacturing and selling toys since 1920 and since then have continuously used the word "Reliable" in the name under which the business was from time to time operated. The company is a large and substantial one and sells its products to jobbers and departmental and general stores. It entered the field of plastic toys in 1941. Since 1946 it has manufactured and sold in Canada substantial quantities of plastic toys for doll house furniture, simulating household furniture, including bath, hamper, wash basin and toilet, and kitchen table, stove, refrigerator and sink, these being the toys for which the plaintiff holds registered industrial designs, as above mentioned. The plaintiff alleges that these articles of the defendant infringe its registered designs and also that the defendant by its conduct has passed off these goods and a kitchen chair (for which the plaintiff has no registered design in Canada) as the goods of the plaintiff.

The defendant denies infringement and passing off on grounds later to be referred to. It also attacks the validity of the plaintiff's registered industrial designs on several grounds and asks that they be expunged from the register. I shall consider first the question of the validity of the

plaintiff's registered industrial designs, for if it be found that these registrations are invalid there can be no infringement thereof by the defendant.

The defendant alleges that Irving Rosenbloom, the registrant of each of the eight industrial designs, was at no time the author or proprietor thereof and therefore could not validly register them in his own name. It is provided by section 30 of the Trade Mark and Design Act that the certificates of registration of the designs (all of which were filed as exhibits), in the absence of proof to the contrary, shall be sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act. The burden of proof on this point, therefore, is on the defendant.

Rosenbloom has been the president of the plaintiff company since its incorporation in 1939. As president of the plaintiff company it was one of his duties to create and style new ideas and inventions for his company to bring out. His first experience with plastic toys was about 1943 when his company made airplanes of that type. These toys proved to be successful. In the same year Rosenbloom conceived the idea of making plastic doll house furniture—to design and style such toys for five rooms, including the bathroom and kitchen pieces above enumerated. He then discussed the idea with an associate and also with the buyers of several large firms. Their reaction was favourable. His plan was to make the four pieces for the bathroom set (bath, toilet, hamper and sink) and for the kitchen set (one table, four chairs, stove, sink and refrigerator), as well as for the other three rooms. He says he proceeded with some sketches in a very crude way and then called in a free-lance artist—one Mermer—who proceeded to finish the sketches, with Rosenbloom, however, making suggestions from time to time as to proposed changes in the artist's sketches. These sketches were not made to any set scale. Rosenbloom decided that the toys should be made of plastic as there was nothing then in that market made in plastic except four pieces of the dining-room set sold by a competitor. He also decided that it was of paramount importance that the parts should

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

be moulded in such a way as to require a minimum of assembly as that would result in a considerable saving of expense. He also considered that ivory would be the best colour for the toys. He further instructed the artist to place certain ribs in the back of the sink, refrigerator and stove, into which could be inserted a cardboard or plastic back,—cardboard eventually being chosen as it was cheaper. Finally these drawings, or sketches, when completed by the artist were taken to a model maker in early 1943 so that hand-made models could be produced as a necessary preliminary to the preparation of the dies to be used in manufacturing.

In cross-examination of Mr. Rosenbloom it was admitted that it was by his efforts, and those of the artist and model makers, that the ultimate designs were finally produced. Rosenbloom very rarely, if ever, made the entire sketch himself but merely put on paper the size of the units desired and the artist followed that. It is apparent from his own verbal admissions and the sketches which he was asked to draw, both on his examination for discovery and at the trial, that he was by no means capable of producing anything like a satisfactory sketch of the designs which were contemplated. I think the only satisfactory conclusion from his evidence is that he did nothing more than indicate in a very vague manner the size of each of the specific articles, and then left it entirely to the artist to actually make the designs which from time to time were checked and altered by him. That he had relatively little to do with the designing is apparent from his own admission that when he asked his patent attorney to apply for registration in the United States and Canada, he merely produced to him the various articles and told him nothing as to the features for which protection was desired, or for which he claimed novelty. After admitting at the trial that he had read the various applications prepared by his attorney prior to signing them, he could not give the descriptions of the designs as they appeared in his own applications, or indicate what was stated as novel in any of them.

In further cross-examination Rosenbloom admitted that he had no written contract with the plaintiff outlining his duties, that he was on salary, and that in preparing the sketches and in all his activities relating to the production

of the designs and articles in question, he was acting within the scope of his employment as president of the company; that everything he did was done on behalf of the company, in company time and with company materials. It is also established that the plaintiff company paid all expenses, including the charges of the artist and model makers and that the artist participated in the working out of the designs.

The Trade Mark and Design Act provides for registration of designs only by the proprietor thereof.

Section 35 is as follows:

> The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

Section 31 is as follows:

> If the author of any design shall, for a good and valuable consideration, have executed the same for some other person, such other person shall *alone* be entitled to register.

The statute contains no definition of the word "author." While I am of the opinion that Rosenbloom did little more than communicate to the artist, Mermer, the nature or kind of designs that were wanted by him, and that the artist was the creator or inventor of the designs for all substantial purposes, I do not think it necessary to reach a definite conclusion on that point.

Assuming, therefore—but without deciding—that Rosenbloom was in fact the author of the designs, I still have to consider whether his registrations were valid. As I have stated above, only the proprietor of a design is entitled to register his design. By the provisions of section 35 (*supra*) the author shall be considered the proprietor unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor. Then, by section 31 it is provided that if the author shall for good and valuable consideration have executed the design for some other person, such other person shall *alone* be entitled to register. It follows from the provisions of these two sections that if an author has executed the design for good and valuable considerations for another person, that the author cannot register the design in his own name, that right being reserved for "such other person."

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

It is clear to me that under the circumstances previously referred to, the designs in question (and whether prepared by Rosenbloom alone or in concert with the artist) were executed for good and valuable consideration for the plaintiff company. I shall not repeat all the circumstances, it is sufficient to state that everything that Rosenbloom did in this connection was done for the plaintiff in the course of his duties for it, in the employer's time and at its expense, that the company paid out large sums of money to the artist and model makers, and that Rosenbloom incurred no expense whatever in connection therewith. The good and valuable consideration is found in the salary paid by the plaintiff to Rosenbloom, part of the duties which were paid for by his salary being the designing and styling of new articles.

Reference may be made to *Lazarus* v. *Charles* (1) in which Malins, V.C., said:

> I take it that where a person is engaged in any ornamental business, and has a workman in his employ under him who makes a design which is new and original, that design would become the property of his master by virtue of the relation that exists between them.

The only Canadian case to which I have been referred on this point is *Equator Manufacturing Co., ex parte, Pendlebury* (2). In that case the application was made by the trustee of a bankrupt company for a declaration that he was entitled to the benefit of certain designs registered by the respondent in his own name, the latter having previously been in the employ of the bankrupt company. In that case Fisher, J., found: (*a*) that the designs in question were brought about by the work and skill of Pendlebury in the course of his employment, for the company, and that they were to his knowledge and consent adopted and used by the company without any claim whatever made by him for extra remuneration; (*b*) that all the expense in connection with the making of these designs was paid by or charged to the company, and the time of the company's employees was used in the completion of them.

Judgment in that case was given in favour of the trustee.

In the last-mentioned case reference was made to *re Rogers Trade Mark* (3). In this case, which concerned a

(1) (1873) 42, L.J. Ch. 507.
(2) (1926) 1 D.L.R. 1101.
(3) (1895) 12 R.P.C. 149 at 156.

trade mark, North, J., held that the mark in question belonged to the company. In dealing with the principles involved he said:

> Supposing that the whole label had been designed by him, in the shape in which it is, for his masters who were employing him, and had been adopted by them, printed by them, and at their expense, and always used by them, that would not give him, their servant, any right whatever to use that mark as against the Company . . . he thinks that, having introduced it to the Company, it gives him some claim upon it now . . .

It follows, I think, that Rosenbloom was not the proprietor of the designs at the time of his application and that his statement in each of the applications, "of which I am sole proprietor," was a false statement. The registrations were therefore invalid, *ab initio.* I have not overlooked the fact that in the cases which I have cited the disputes arose between employer and employee, but my finding as to invalidity on this ground is based on the sections of the Act which I have quoted and my finding thereunder that Rosenbloom was never the proprietor of the designs in question, and that only a proprietor could register the designs.

In view, however, of the fact that the designs in question were all assigned by Rosenbloom to the plaintiff company, I do not desire to rest my opinion on the question of validity solely on the somewhat technical finding which I have made.

Counsel for the defendant submits also that as the registered designs here in question are for the articles themselves—rather than for ornamentation of an article—they are invalid in that the Trade Mark and Design Act does not permit design registration of an article of manufacture itself, but merely "for the ornamentation of any article of manufacture." In my view each of the applications and registrations was for the article itself. For the kitchen furniture the applications read, "hereby request you to register in the name of Irving Rosenbloom an industrial design of a toy sink (or toy table, toy refrigerator, or toy stove, etc.) of which I am the sole proprietor," and the certificates of registration show that registrations were made for industrial designs of a toy stove, toy refrigerator, etc. In the case of the applications for bathroom pieces and the certificates thereof, the wording is the same except that in each case the word "plastic" precedes the name of

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

each article. In all of the applications a description of the article is given and the wording is followed in the certificates of registration. After the words describing the article in each application there appear the words "a drawing of the said industrial design is hereunto annexed," and the drawings represent in each case the whole of the article. In each certificate appears the words "as per the annexed pattern and application."

There is considerable uncertainty as to whether a design for shape or configuration which can only be applied to a thing by making it in that shape comes within the Canadian Act. According to the statute the design must, it would seem, be something capable of application to any article of manufacture or other article "for the ornamentation thereof." The matter was discussed by the late President of this Court in *Clatworthy & Son* v. *Dale Display Fixtures Ltd.* (1), where Maclean, J., considered also the wording of the English Act in which "design" is defined so as to include pattern, shape or configuration, or for the ornament thereof. His judgment was affirmed in the Supreme Court of Canada, (1929) S.C.R. 429, but that point was not directly considered, the matter being decided on the question of anticipation.

The matter was also considered by Maclean, J., in *Canadian Wm. A. Rogers Ltd.* v. *International Silver Co. of Canada Ltd.* (2). In that case he said at p. 65:

> I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd.* v. *Miner Rubber Co. Ltd.* (1926) Ex. C.R. 26, I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture" were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned.

As I have said, the Canadian Act does not provide a definition of the word "design." A perusal of sections 34

(1) (1928) Ex. C.R. 159. (2) (1932) Ex. C.R. 63.

and 39 would seem to support the contention of the defendants' counsel that a registrable design must be something which can be attached or applied as an ornamentation to an article of manufacture rather than the manufactured article itself. These sections are as follows:

34. During the existence of such exclusive right, whether of the entire or partial use of such design, no person shall without the license in writing of the registered proprietor, or, if assigned, of his assignee, apply for the purposes of sale such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached, or publish, sell or expose for sale or use, any such article as aforesaid to which such design or fraudulent imitation thereof has been applied.

39. Every person who, in violation of the provisions of this Part, during the existence of the exclusive right acquired for any industrial design by the registration of the same under this Part, whether of the entire or partial use of such design, without the license in writing of the registered proprietor, or, if assigned, of his assignee.

(a) for the purposes of sale, applies or attaches such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached; or

(b) publishes, sells or exposes for sale or for use, any article of manufacture or other article to which an industrial design may be applied or attached and to which such design or fraudulent imitation thereof has been applied or attached;

shall forfeit a sum not exceeding one hundred and twenty dollars and not less than twenty dollars to the proprietor of the design so applied or attached.

2. Such sum shall be recoverable with costs on summary conviction under the Criminal Code by the registered proprietor or assignee. R.S., c. 71, s. 36.

I have been unable to find in the Act anything which would indicate that the shape or configuration of an article of manufacture may itself be the subject of a registered design. As I have stated above, all the registered designs here in question are for the articles of manufacture themselves. It will be sufficient, I think, to pick as an example the certificate of registration of one of the eight articles, the others being substantially in the same form, the descriptions of the individual articles varying, of course, as required. The certificate of the toy sink is as follows:

THIS IS TO CERTIFY that this Industrial Design of a

TOY SINK

consisting of a toy representation of a sink and cabinet consisting of a base portion and a cabinet, the front of one side of which is a section consisting of a two door compartment above which is a section containing louvers as air vents for the sink which is represented by a depressed portion in the top directly above same, the other side of the front of the

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

cabinet being a three drawer section with drawers of varying depths, the top of the cabinet over same being corrugated inside a frame section to represent a drain board, along the back of the cabinet is a narrow back board, from the base of which over the sink section is the representation of a single tap spigot with two valves; in the center of each drawer and the top central portions of the doors of the compartment are elongated curved portions representing handles, as per the annexed pattern and application,

has been registered in THE REGISTER OF INDUSTRIAL DESIGN No. 86, FOLIO 15015, in accordance with "THE TRADE MARK AND DESIGN ACT" by

IRVING ROSENBLOOM,

of the City of New York, State of New York, United States of America,

ON THE 29th DAY OF NOVEMBER, A.D. 1946.

IN TESTIMONY WHEREOF

I have hereunto set my hand, and caused the Seal of the Patent and Copyright Office to be hereunto affixed at the City of Ottawa, in the Dominion of Canada, this twenty-ninth day of November, in the year of Our Lord one thousand nine hundred and forty-six.

S E A L
MRW

(sgd) J. T. Mitchell
Commissioner of Patents.

I think there can be no question whatever that the certificate in question was for "a toy sink," which is an article of manufacture, and not for any design for the ornamenting of a toy sink. The description of the toy sink contained in the certificate is a description of every part of the toy sink itself, and that description indicates the very shape or configuration of an article of manufacture. There is no suggestion of any particular ornamentation, decoration, pattern, engraving, or anything of that nature to be applied or attached "to the ornamenting of any article of manufacture."

I am in accord with the views expressed by Maclean, J., in the *Canadian Wm. A. Rogers* case, (*supra*), in which it was held:

that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself.

I have, therefore, reached the conclusion that none of the eight designs of the plaintiff should have been registered.

To be entitled to registration the "design" must be original and in order to be original there must be the exercise of intellectual activity so as to originate, that is to say suggest for the first time, something which had not occurred to anyone before (*Clatworthy* v. *Dale, supra*). It is submitted by the defendant that in the case of the designs here in question no intellectual activity was displayed, that the "designs" were not original, all being miniatures or small replicas of the current well-known articles of household furniture which they simulated in the form of a toy for children. It is said that they are mere reductions of familiar adult items and that, therefore, they lacked originality.

It has been established to my complete satisfaction that for a great many years the basis of the toy industry has been to produce miniature articles which represent as faithfully as possible the full size items which they simulate. A. E. Sullivan, a witness for the defence, and who has been engaged in the sale and production of toys in a very large way for thirty-eight years and with some of the largest selling organizations in the United States, and is now assistant to the president of the Ideal Novelty & Toy Company, stated at p. 680 of the evidence:

A. Well, the very backbone of the very life blood of the industry is its ability to simulate, create or mimic, if I may use the word, the type of item that the youngster sees day in and day out in his everyday life.

Q. Why is that the basis? Have you any explanation as to why that constitutes the basis?

A. Well, a child wants to do what his daddy does, a girl wants to do what the mother may be doing. If I may elaborate for a moment, if daddy goes fishing the youngster wants a small miniature fishing pole, or his size of golf club if his daddy is a golfer; if mother is baking a pie the youngster likes a bit of dough on her size of pie plate, her size of rolling pin, so that she can do what mother is doing. It is that close association between parent and child.

Q. You said that you developed and created new ideas. What do you look to, you personally look to, when you develop and create new ideas—what would you do?

A. Well, if we want an idea to be successful, which we all do, we strive with every ounce of effort within our being to have a duplicate or to be as similar to the large items that we are trying to follow.

Q. How long has that been the practice in the toy art?

A. Long before my time.

Q. What would you say as to the practice during your time?

A. All during the thirty-five years that I have been in the toy business.

That evidence has not been challenged in any way.

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

It is also established that the nature of the toys sold from time to time varies with changes made in the senior or adult articles which the toys simulate. On that point the witness Sullivan said at p. 681 of the evidence:

> When we had the small miniature items that came into this—I refer to "this country," Canada and the United States—from Germany, from France, from England and from other parts of the world and these manufacturers had copied the items that were used in those nations during that time; an old-fashioned German stove would have the brick appearance of the brick oven, the wash bowl and the pitcher would be the same as would be found in the homes of the day. The English would copy their type of architecture into the toy.

And on the same page, referring to certain German toys produced by Nerlich & Company in 1914 and 1915, he said:

> They are styled in the particular era, the architecture, a type of architecture that was probably found in Germany during that period.

The evidence also indicates that for many years toy doll house furniture has been sold in individual pieces and in sets in cardboard boxes in the United States and Canada. Originally they were made of pewter, cardboard, steel, wood, pulp, etc., and in the main such toys were crude and less attractive than those now made of plastic by the injection moulding process. Except in the case of the more expensive toys they lacked the finish and detail which is now supplied by that process.

Rosenbloom endeavoured to establish that the designs here in question were not mere reproductions in miniature of well-known articles of household furniture. He stated that if the original articles were reduced to approximately the size of his toy articles, the result would not be his toys but that the proportions would be quite different. In no instance, however, could he state the dimensions of any of the standard or adult articles and he finally admitted that in making the statement that his toys were not made to the scale of the adult items, he was only guessing. I am fully satisfied that the general scheme was to simulate the adult articles to the greatest possible extent, consistent with the requirements of the moulding process. Rosenbloom finally admitted in cross-examination that it was probably correct to say that it is general practice in the toy trade to reduce an adult item into a toy item, that that is the backbone of the industry and that it has been the

practice for centuries for toy manufacturers to look for senior or adult items which a child would like to have in toy size.

There seems no question whatever that Rosenbloom endeavoured to follow what he finally admitted was standard practice. Exhibit p. 1 is the catalogue put out by the plaintiff company in 1946 after the actual articles went on sale. It is to be kept in mind that this catalogue was issued with the view of interesting the trade in the articles which his company was then producing, and, from the nature of the advertising, it is very evident that the objective was to simulate the senior article to the greatest possible extent. In connection with the kitchen set and kitchen pieces the catalogue says:

> Here is sensational realism in plastic miniature furniture. Stove, refrigerator, sink, table and chair, each a child's dream.

In connection with the bathroom articles, all four of which are displayed in the catalogue, the following words are used:

> Here are four ultra-realistic miniature bathroom pieces in glittering plastic with footings in contrasting colour.

Some of the articles, but not those in question in this action, are described as "Tru-scale."

Further evidence corroborating that of Sullivan as to the practice of toy manufacturers to follow faithfully the designs of adult articles may be found in the evidence of certain witnesses examined on behalf of the plaintiff on commission. B. H. Lambert is a buyer for the McCrory Stores Corporation and has had lengthy experience in the toy trade. He agreed with the suggestion of counsel for the defendants that, in the trade, if you make a small article you are anxious to make that small article as close to the real thing as possible; that is, if you want to make a small refrigerator you want to make it as much like a big refrigerator as you can.

Arthur C. McIntyre is a buyer for Kress & Company, operating 240 stores. Referring to the bathroom and kitchen sets made by the plaintiff, which his firm bought in very large quantities, he said that the most attractive feature of them was their imitation of real furniture items.

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

He further said that in the toy trade the practice was to imitate the larger item and to put on detail which would closely imitate the larger item.

William Butler is the vice-president and buyer of M. H. Lamston Inc., a general store organization with nine outlets. He stated in regard to the plaintiff's toys that they were outstanding as to detail, and by that he meant that the articles were close counter-parts of the original pieces and that these articles were reductions in size of the larger items and that that made them more attractive.

O. B. Jillson has been a toy buyer for twenty-six years, now with the S. S. Kresge Company having over 600 retail stores in the United States and Canada. His firm made very substantial purchases from the plaintiff company of the articles in question. He said that these were of beautiful design and colour and that by that statement he meant that they looked like the larger items which they simulate —they were miniatures of the larger items reduced in size.

Similar evidence was given by witnesses for the defendant. One of the plaintiff's witnesses, Lambert, a buyer for McCrory Stores Corporation, suggested to Rosenbloom the making of doll house furniture in plastic because the advantage of plastic is that one can get on more detail on the item, and by "more detail" I take it that he meant a more complete reproduction of the senior item than would be possible with other substances such as wood.

On the whole of the evidence I am satisfied that in the case of all of the "designs" here in question the objective was to reproduce in miniature the very appearance and shape of each of the senior articles, limited only by the requirements of the injection moulding technique and the desirability of producing a toy in as few parts as possible so as to minimize the cost of assembling the parts.

And it must be found that the objective of Mr. Rosenbloom was achieved in the results that he obtained. Each of the eight designs which he registered is in form and outline a reproduction in miniature of senior articles in everyday use, with, in some cases, very minor and immaterial alterations.

The requirements as to novelty and originality were considered in *Simmons* v. *Mathieson & Co. Ld.* (1). In that case the plaintiff had registered a design for the shape

(1) (1911) 28 R.P.C. 486.

and pattern of the body of a children's carriage. The defendant denied infringement and pleaded anticipation. Among the prior publications cited was a landau, marked A.P. At p. 491 Buckley, L.J. said in the Court of Appeal:

In order to render valid the registration of a Design under the Patents and Designs Act, 1907, there must be novelty and originality, it must be a new or original Design. To my mind, that means that there must be a mental conception expressed in a physical form which has not existed before, but has originated in the constructive brain of its proprietor, and that must not be in a trivial or infinitesimal degree, but in some substantial degree. The intention of the Act is to protect a person who has conceived and expressed in a physical form, the idea of something which is new or original as a Design. I am quite satisfied that Mr. Simmons has done nothing of the sort. It appears to me that the mental conception expressed in this physical form is one which has existed for many years, and has been used over and over again.

And Fletcher Moulton, L.J., stated at p. 489:

The registration of a Design cannot give any rights unless that Design is new or original. It was never intended that persons in their trade, in which they are not only justified in using but bound to use the skill, which they have acquired during years of practice, in making variations of the shape of the articles they produce, should be harassed by persons claiming a monopoly in Designs if those are really matters that are open to the public. You must have something new before the law will allow you to get any monopoly at all. In this case we are dealing with perambulators in which there is a foot-well, which is intended in certain circumstances to act as a foot-well for two children sitting at opposite ends of the perambulator. It therefore is a carriage which has, in a small way, to fulfil exactly the same functions as double-seated carriages, such as landaus, have to do on a much bigger scale, and I unhesitatingly say that there is nothing new or original in taking that which has been done in landaus and proposing to do it on the smaller scale suitable to perambulators. That is a matter of law, but I am confirmed in my view by some of the evidence given in the course of the case, which showed to the learned Judge's satisfaction that the Defendants' designer took this Design from the memory he had of a landau that he had made, or that he had seen some time before, thus showing that the similarity of usage is patent to people engaged in the trade, and that they recognize that there is a close analogy between the use of a particular shape for the body of a landau and the use of that particular shape for the body of a double perambulator . . .

That being so, I look at the registered Design and I ask myself what is new or original in it, and I confess I cannot find anything. The panels are different to a certain extent from what I see in "A.P." I should gather that there were similar panels in the carriage which the Plaintiff had in his mind when he drew that picture, but, for the reasons I have given, I do not think that that is of any importance. The rest seem to me to be substantially the reproduction of "A.P." on a smaller scale. I am therefore of opinion that the Design was not new or original, and that the registration is invalid. But now I will suppose, in order to give the Plaintiff's case every chance, that the differences though small may be held to constitute something which is new or original. Then if very small

1949
RENWAL MANUFACTURING CO. INC.
v.
RELIABLE TOY CO. LTD. ET AL
Cameron J.

differences are to make a thing new or original, very small differences must take you out of the ambit of the registration, because if you were to give a broad ambit to the registration, it would certainly include such a body as is shown in "A.P.", that is, it would include something that was old, and that would make the registration bad. The only possible way in which this registration could be good would be to magnify the importance of minute details so as to give it novelty or originality, and then, if you magnify the importance of small details for that purpose, you must also keep them on that scale for the purpose of deciding whether there is an infringement.

I have reached the conclusion that the eight designs in question lacked novelty in that each was merely a miniature reproduction of a design which had been in common use in ordinary household articles long before Rosenbloom conceived them as designs for plastic toys. There is nothing new or original in taking that which had been done in the larger article and applying it on a smaller scale in the construction of a toy article.

There is still another reason why the designs of the plaintiff lack that novelty which is required to make them registrable. The undisputed evidence is that doll house furniture has been in use for many years and is reproduced in miniature from the senior articles then in common use to the fullest extent then possible. Some articles of plastic doll house furniture, namely those of the New York Merchandise Company and Wolverine Toys, anticipated those of the plaintiff. All that Rosenbloom did was to make his designs to represent the articles of household furniture of the day, in plastic. That was merely a trade variation of what had long been the practice; and the introduction of trade variations into an old design cannot make it new or original (*Clatworthy* v. *Dale* (1)).

My conclusion, therefore, is that the eight registered designs of the plaintiff company lacked registrability in that they lacked novelty and that they were for articles of manufacture rather than ornamental designs to be applied to an article of manufacture. As prayed for by the defendants these registrations will, therefore, be expunged from the register. Inasmuch as the registrations are found to be invalid the plaintiff fails on the claim of infringement, which will be dismissed.

The plaintiff also alleges that by copying and appropriating the design and shapes and individual and collective

(1) (1928) Ex. C.R. 164.

appearance of plaintiff's toys the defendants have attempted to pass off, and have passed off, their toys for those of the plaintiff, and they have adopted business practices contrary to honest industrial and commercial usage. It is alleged that by such acts of the defendant the plaintiff's business and goodwill have been damaged.

A statement of the principle to be followed in passing off cases is found in *Macleans, Ld.* v. *Lightbown and Sons, Ld.* (1).

> No trader can complain of honest competition, but no trader is entitled to steal the property of his rival by endeavouring to attract to his goods members of the public by inducing them to believe that the goods that are being offered for sale are the goods of a rival firm.

The plaintiff alleges that the defendant had prior knowledge of the plaintiff's doll house toys prior to the time when the defendant commenced the manufacture of its toys. It should be noted that in its claim of passing off the plaintiff company refers not only to the eight toys for which it had registered designs, but also to a kitchen table, the design for which, apparently through inadvertence, was not registered.

Rosenbloom first turned his attention to the making of plastic doll house furniture early in 1943. After he and the artist had completed the drawings of the designs, handmade models were ordered for each of the toys and the evidence establishes that these were all delivered to the company prior to September 13, 1943. Due to war conditions there was some delay in procuring the dies or moulds to be used in the injection moulding processes. All the dies, however, were completed and delivered in 1944 and 1945. The bathroom toys were first assembled in December 1945, or January 1946, and the kitchen toys in December 1945. It had been decided not to make any sales of these toys until all of the pieces for five rooms were complete. Samples were shown to buyers in December 1945 or January 1946, and the first orders were taken in February 1946. The response was very favourable and large orders were taken. The first shipment was made in March 1946. Substantial advertising was done by way of catalogues and in trade journals and throw-away circulars. Catalogues were sent to chain and department stores in Canada. The room sets were also on display in chain and

(1) (1937) 54 R.P.C. 230 at 239.

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

departmental store windows in New York and elsewhere. They were also on display at the New York Toy Show in March 1946.

It is established that S. F. Samuels, an officer of the defendant company, had full knowledge of the bathroom and kitchen sets made by the plaintiff company. He stated that it was common practice for his company to purchase and examine articles made by other toy manufacturers for purposes of comparison. In March 1946 he was in New York City and purchased each of the plaintiff's articles here in question (as well as toys made by other companies), took them to Toronto, examined them and took them apart. In answer to a question as to what he did with them on his return he said: "Just used it for comparative purposes to see our stuff doesn't look like theirs. There is no point in using the same thing. We have to have a different design and made sure we had that."

The plaintiff endeavoured to establish that the defendant first conceived the idea of making these toys after seeing and examining those of the plaintiff and then copied them. I think he has failed to establish that as a fact. The defendant has been manufacturing toys for a great many years. The idea of making plastic doll house furniture first arose about 1941 or 1942, following a discussion with the witness Sullivan. In 1943 hand-made models of a radio, piano and bench and lamp were made. Progress was slow due to war conditions. Some of these articles were made and sold in 1945. Hand-made models of all the toys in question (that is, the kitchen and bathroom pieces) were made late in 1944 and were shown to Mr. Sullivan about January 1945. Mr. Sullivan confirmed the fact that he had been shown these models by one of the Samuels brothers at the defendant's plant in January 1945. Five of such hand-made models were produced and filed as Exhibit R58, although it was not clearly established that these were the original models. The evidence of Mr. H. O. Marshall, a buyer and manager of the Toy Department of Robert Simpson Company Ltd., of Toronto (Mail Order Division), and who has been associated with that firm for twenty-three years, has completely satisfied me that the development by the defendant company of the manufacture of plastic doll house furniture was practically concurrent with

that of the plaintiff company. Mr. Marshall is a completely disinterested witness and I accept his evidence throughout without question. About 1941 he also suggested to the Samuels, shortly after they entered the plastic business, that they make the kitchen and bathroom articles for doll house furniture in plastic. From time to time the discussions were continued, as it was the practice of department stores to suggest to manufacturers lines which would meet a public demand. He stated that in February 1945, before he had ever heard of the similar Renwal products, he had seen hand-made samples of the kitchen and bathroom pieces made by the defendant company at its office in Toronto, similar to the ones in issue. He remembers specifically seeing many of the articles but was not certain that he had seen all of them. His evidence was not in any way shaken on cross-examination on this point.

After the hand-made models of the defendant were completed, orders were given to the engineering department in October 1945 to procure the necessary moulds. Some were made in the defendant's plant and others by an outside firm. The date when the orders were given is not established but the invoices indicate that all were delivered in 1946.

Evidence was given by the plaintiff to indicate that a scrutiny of the defendant's toys would show that the processes used by the plaintiff company in manufacturing its toys had been closely followed by the defendant company, and it was urged that this indicated a close imitation of the plaintiff's goods. On the other hand, evidence was given by the defendant that its processes were standard in the art and common to the trade. I do not think I need be concerned with this matter. The question here involved is not that of processes of manufacturing, but whether, in the result, the finished articles of the defendant and the manner in which they were disposed of constituted unfair practice.

I have carefully examined each of the individual articles here in question. It is apparent at once that to a certain extent there is a large degree of similarity between the individual pieces made by the plaintiff and the similar articles made by the defendant—in some cases more than in others. But that similarity arises because of the fact

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

that in each case the manufacturer is endeavouring to imitate as closely as possible the senior article in everyday use. The similarity is functional, the plaintiff's bath, for example, being intended to simulate a full-size bath, as does also the defendant's. The major portion of each article is in white plastic. But in every article where a different colour is used in the trimming, the plaintiff has used black plastic and the defendant blue plastic, e.g., on the spigots, taps, handles, doors and drawer handles, chair seats and stove plates. The word "Reliable" appears prominently in blue lettering on the top of the defendant's bath, on the door of its refrigerator and on the front of the stove; and in plain lettering on the front of the sink. The words, "A Reliable Product—Made in Canada," are stamped on the toilet, wash basin, table and chairs. The only article on which the word "Reliable" does not appear is the hamper.

On the plaintiff's toys the words "Made in U.S.A.—A Renwal Product—Pat. Pend. U.S.A. & Canada," or similar words, appear on all except the wash basin. Considering the small size of the toys I think the defendant has done practically everything that it could be expected to do in marking them so as to indicate that they were its products.

But even a casual examination and comparison indicates very apparent differences between the products of the two companies.

The kitchen sinks are about as dissimilar as it would be possible to make them and still retain the similarity to a sink. The plaintiff's is much smaller, the sink being at the left side with one drainboard at the right. It has three drawers of differing sizes and two doors opening downwards. The defendant's sink has two drainboards with the sink centrally disposed; it has four drawers of equal size at the right and one at the top left. It has three doors all opening outwardly.

The kitchen stoves are equally dissimilar. The plaintiff's is obviously a gas stove with four burners, all on a solid black base at the left of the top of the stove. The raised portion at the back is plain in design but with a clock stamped on the center portion. The five gas switches are at the top left and underneath are two drawers. At the right are two further drawers of differing sizes. The

defendant's stove is an electric stove with four blue plates inserted in the plain white surface. The design of the vertical back portion is ornamented and irregular and also has a clock. There is one large cupboard under the electric switches at the right, and at the left two drawers extending to the top of the stove.

There are substantial differences also in the two refrigerators. The defendant's is somewhat larger and has a vegetable bin under the door (the plaintiff's has no such bin). The word "Reliable" appears prominently in blue on the front of the door and hinges, drawers, handles and latch are in blue. In each case the door opens at the right. More ornamentation appears on the plaintiff's refrigerator and it includes a circular design with line extensions on the door. The plaintiff's base is cut away in front but that is not so with the defendant's. Each has a cardboard back with ribs to retain it in place.

The kitchen chairs are about the same size. The main differences lie in the chair seats, those of the plaintiff being pebbled and in black while those of the defendant are grained and in blue; and in the backs which bear no similarity at all.

Each kitchen table has a plain top. The plaintiff's is somewhat larger and has but one drawer while the defendant's has two. As previously mentioned, each is marked on the under surface with the name of the manufacturer.

The bathroom hampers are also dissimilar. That of the plaintiff has a diamond pattern on the front and on each side thereof a strip of vertical weaving. It has a lid on the top. The defendant's has no lid and on the front only a pattern in horizontal weaving with no side strips. Each has a cardboard back and ribs for holding it in place. The plaintiff's name is stamped on the inner portion of the hamper, but, as stated above, the name of the defendant does not appear on its hamper.

The baths are about the same size. The spigot of the plaintiff's is in black and that of the defendant in blue. The word "Reliable" is prominently marked in blue on the top of the defendant's bath and the company's name is stamped on the under portion; the line design extends across the front and the left end. It is constructed so as

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

to be used in a corner, that is, the front and one end are exposed. The plaintiff's bath has black trim, has a flared-out front and is plain at both ends, indicating that it is similar to a senior built-in bath. The plaintiff's name appears prominently on the under portion.

The bathroom basins are also dissimilar. The plaintiff's has black taps and the bowl is oval, the sides and the top are cut off and squared. The defendant's trim is in blue, the bowl is square, each of the corners is built up. The pedestal bears the stamp "Reliable" and all its sides have a line design, whereas those of the plaintiff's are plain. The name of the company and "Made in Canada" also appear on the under side of the defendant's basin.

The toilet in general outline has some similarities due entirely to functional requirements. There are substantial differences, however. The trim on the plaintiff's is black and that of the defendant's is blue. The plaintiff's water box is quite plain and small, that of the defendant having a base which does not appear in the plaintiff's, and a portion of the front cut away. Each has the stamped name of the manufacturer. The rear part of the plaintiff's bowl is tapered so as to connect only with the central portion of the tank; that of the defendant's is flared outwardly to form the full base for the tank. The steps in the base or pedestal are different in size and number.

These comparisons which I have made lead me to the conclusion that in shape, form or get-up, the various articles of the defendant are not imitations of the plaintiff's toys, nor do they closely resemble them. I see nothing in the toys of the defendant which would lead one familiar only with the plaintiff's toys to infer that the toys of the defendant were put out by the plaintiff. As I have pointed out, the defendant's name, "Reliable," and "Made in Canada" appear upon all the defendant's toys except the hamper and that is so markedly different from the plaintiff's hamper that no one could be confused. I recognize that the mere marking of goods with the name of the manufacturer would not by itself be sufficient in all cases to avoid a charge of passing-off, but it is an element to be considered and in this case an important element as indicating the good faith of the defendant.

In the case of *A. G. Spaulding & Bros.* v. *A. W. Gamage Ld.* (1), Parker, L.J., in the House of Lords gave his opinion on the basis of passing-off actions as follows:

> My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such case the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

In the case before me there is no evidence whatever that there has been any confusion between the goods of the plaintiff and those of the defendant, or that anyone has been deceived into believing that the goods of the defendant were those of the plaintiff company, nor is there any evidence that the defendant company at any time represented or attempted to represent its goods as those of the plaintiff. The evidence of experienced buyers in Canada shows clearly that the defendant company has been well and favourably known for many years in Canada as a manufacturer of toys, and since 1941 or 1942 as a manufacturer of plastic articles. Its goods are advertised widely in several ways, including advertisements over the radio. Its reputation in Canada was established long before the goods of the plaintiff company were first displayed in Canada in March 1946. The defendant marked each of the toys here in question (except the hamper) with its name and "Made in Canada." At the time when the toys here in question first came on the market in Canada the plaintiff's toys had not been sold in Canada, and therefore it can hardly be found that the plaintiff had at that time established any goodwill in Canada for its toys.

The various allegations of the plaintiff on passing-off may be dealt with very shortly. It relies on the similarity in shape or configuration of the toys themselves. I accept the evidence of the defendant's witnesses that the nine toys

(1) (1915) 32 R.P.C. 273.

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

of the plaintiff and the defendant both simulated to a very marked extent the full size articles which had been in common use both in the United States and Canada long before the plaintiff conceived the idea of manufacturing doll house furniture. I do not think it necessary to examine that evidence in any detail, but I refer particularly to the evidence of the witnesses Wiles, Coughtrey, Sullivan, Hill, Radley and Marshall.

The plaintiff also alleges that in the size and colour of its toys the defendant has imitated those of the plaintiff. The uncontradicted evidence is that for doll house furniture the size used by the plaintiff had been standardized in the trade prior to 1940, and doll house furniture made in ivory and white (as well as in other colours) for kitchen and bathroom pieces prior to 1940.

The plaintiff also fails in its allegations that in manufacturing toys with trim of a different colour (such trim being added in the assembling process), with cardboard backs for certain of the items, and in selling these in boxes and with inserts, the defendant had imitated its goods and get-up in such a way that the public would be deceived. It is established beyond question that all of these practices were common to the trade for a great many years before they were adopted by the plaintiff.

Reference may be made to *J. B. Williams Company* v. *H. Bronnley & Co. Ld., J. B. Williams Company* v. *J. H. Williams,* (1). Cozens-Hardy, M. R., in rending judgment in the Court of Appeal, said at p. 771:

> What is it necessary for a trader who is plaintiff in a passing-off action to establish? It seems to me that in the first place he must, in order to succeed, establish that he has selected a peculiar—a novel—design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape, and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail. Now what he has to prove on the question of "calculated to deceive" cannot, I think, be better stated than it is in *Schweppes Ld.* v. *Gibbens,* where Lord Halsbury said:—"The whole question in these cases is whether the thing—taken in its entirety, looking at the whole thing—is such that, in the ordinary course of things, a person with reasonable apprehension and with proper eyesight would be deceived."

(1) (1909) 26 R.P.C. 765.

And at p. 773 Fletcher Moulton, L.J., said:

> The foundation of this action is that a certain get-up of an article has been associated with the article as produced by the particular manufacturer, and that to use that get-up, or anything that can be mistaken for that get-up by a reasonable person, is equivalent to an assertion that the goods are the goods of the Plaintiffs. The essence, therefore, of the action is that you must prove that there is a distinctive get-up, which has acquired that secondary meaning in the eyes of the public.

In *Payton & Co., Ld.* v. *Snelling, Lampard, & Co., Ld.* (1) Lindley, M. R., in the Court of Appeal said at p. 52:

> After all said and done, what have we to consider? What is it that the Plaintiffs must make out in order to entitle them to succeed in this action? They must make out that the Defendants' goods are calculated to be mistaken for the Plaintiffs', and, where, as in this case, the goods of the Plaintiff and the goods of the Defendant unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, what has the Plaintiff to make out? He must make out not that the Defendant's are like his by reason of those features which are common to them and other people, but he must make out that the Defendant's are like his by reason of something peculiar to him, and by reason of the Defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the Plaintiff's from other goods which have, like his, the features common to the trade. Unless the Plaintiff can bring his case up to that he fails.

As I have stated above there is no distinctive get-up in the toys of the plaintiff or in their packaging. Everything that they have done was common to the trade. The plaintiff had first introduced its toys on the United States market about February 1946 and in Canada about October 1946, and no effort was made to establish that any secondary meaning in the eyes of the public had been acquired.

The real question of importance is, when you look at the finished articles and the get-up of the packaging, are they things calculated to deceive? In my view they are not. Both parties hereto have merely taken what was common to the trade and the defendant has been careful throughout to indicate very clearly that the goods which it sold were made by it by fixing its trade name "Reliable" to all of the articles except one—the hamper—and its design is not that of the plaintiff's hamper, but follows very closely the design of Exhibit R15, a full size hamper purchased by the witness McGee in 1943. The boxes of the defendant company are marked on the top and on all four sides with the word "Reliable" and on two sides appear the full name and address of the defendant company.

(1) (1900) 17 R P C 48.

1949
RENWAL MANUFACTURING CO. INC. v. RELIABLE TOY CO. LTD. ET AL
Cameron J.

The gravamen of the plaintiff's case is that the defendant made miniature imitations of certain articles, which imitations had been previously made by the plaintiff. As both imitations were of the same type of objects, they were necessarily similar to a certain extent and that similarity exists in the construction of the articles in question. The right to make a toy imitation of a natural or artificial object was common to all the trade. There was no attempt by the defendant and no reason for attempting to deceive the public as to the origin of manufacture of its articles. The likeness was in the goods themselves.

I must find that there is no legal basis for an action based on unfair competition. The plaintiff's action will therefore be dismissed with costs to be taxed.

Judgment accordingly.

1949
Jan. 28
Feb. 17

BETWEEN:

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

AND

PETER BOYD COWPER, ET AL........DEFENDANTS.

Practice—Motion to add new defendant to an action—Applicability of Exchequer Court Rules 227 and 228 to an action in which Crown is a party—Assignability of claim against the Crown—Implicit acquiescence—Applicability of Art. 81, Code of Civil Procedure of the Province of Quebec—Exchequer Court Rules 2, 226, 227 and 228.

Motion under rules 227 and 228 of the General Rules and Orders of the Exchequer Court to add a new defendant to the action.

Held: That rules 227 and 228 of the General Rules and Orders of the Exchequer Court also apply in an action in which the Crown is a party.

2. That a claim against the Crown is assignable when there is an implicit acquiescence by it.

3. That under rule 2 of the General Rules and Orders of the Exchequer Court article 81 of the Code of Civil Procedure of the Province of Quebec is applicable.

MOTION to add a new defendant.

The motion was heard before the Honourable Mr. Justice Angers at Montreal.

André Forget and *Robert Dufresne* for the motion.

Antoine Geoffrion contra.

ANGERS J. now (February 17, 1949) delivered the following judgment:

This is a notice of motion on behalf of defendants Alfred Abraham Lessor and dame Ethel Lessor, wife of I. L. Weiner, for an order directing that Léopold Paré, tavern-keeper, of the City of Montreal, be joined as a defendant in the action and that the aforementioned defendants be placed out of court.

The action is one in expropriation. The information alleges in substance that: the land and real property therein described was taken under the provisions of the Expropriation Act by His Majesty the King for the purpose of a postal station by depositing a plan and description thereof in the registry office for the registration division of Montreal, wherein the said land and real property is situated, on May 26, 1947, whereby the said land and real property has become and remains vested in His Majesty; the defendant Cowper claims to have been the owner in fee simple of the said land and real property and of the buildings and improvements thereon at the time of deposit of the said plan and description and claims that he has sustained loss and damage in respect of his title and estate in said land and real property and buildings and improvements thereon by reason of said entry and taking thereof; under a lease passed before H. E. Herschorn, N.P., on May 16, 1944, and registered in the said registry office on May 22, the defendant Cowper leased to the defendants Alfred Abraham Lessor and dame Ethel Lessor part of the said property described in the lease as: "those certain premises in the City of Montreal bearing civic number 1254 University street, which premises are occupied as a tavern, including the storage room and space in the cellar at the north-west corner", the lease being for the term from May 17, 1944, until April 30, 1949, with the privilege for the lessees of continuing it upon the terms and conditions therein specified for a period of five years from May 1, 1949, by giving to the lessor three months previous notice in writing to that effect; the rental specified in the said lease is $3,000 per annum, payable by equal monthly payments of $250 each; among the conditions stipulated in the lease it is provided that the lessees shall not transfer their right

1949
THE KING
v.
COWPER
ET AL
Angers J.

therein nor sublet any part of the leased premises without the consent in writing of the lessor, which shall not be unreasonably withheld; subsequent to the deposit of the plan and description aforesaid and the vesting of the land and real property above described in His Majesty, the defendants Alfred Abraham Lessor and dame Ethel Lessor by deed passed before H. E. Herschorn, N.P., on July 29, 1947, sold and transferred to Léopold Paré the business which they were then carrying on together at civic number 1254 University street under the name of "Oxford Tavern", including the goodwill, the rights of the vendors to the Quebec Liquor Commission tavern licence and the furniture in the premises and purported to transfer unto the said Léopold Paré their right, title and interest in and to the lease aforesaid and undertook to obtain the necessary consent from the lessor for the transfer of the lease to the purchaser; in a letter to the defendants Alfred Abraham Lessor and dame Ethel Lessor, dated July 30, 1947, the defendant Cowper stated that he was prepared to make the transfer of the lease to the said Léopold Paré with the proviso that the latter was aware of the fact that the defendant Cowper had been given notice of expropriation by the Department of Public Works of the property situated at 1250-1254 University street and that there shall not be any guarantee that the said Paré would remain in the premises, for the reason that the site was vested in His Majesty the King; the defendant Cowper has been allowed to remain in possession of the said land and property until August 1, 1948, and has used them for his own benefit and has collected the rentals thereof without paying any rental or other compensation to His Majesty since the expropriation; on March 25, 1948, a demand was made on behalf of the Minister of Public Works requiring the defendants to furnish the said Minister with a statement showing the particulars of any estate and interest and every charge, lien and encumbrance to which the same is subject, which they may have or claim to have in the expropriated land and property, as required by the Expropriation Act R.S.C. 1927, chapter 64, section 26, the said statement to also show the claim made by any of them in respect of the estate or interest therein described; in reply to this demand the defendants Alfred Abraham Lessor and dame Ethel Lessor

stated that they had sold the "Oxford Tavern" on August 29, 1947, to Léopold Paré and that they hold no lien on said property; in reply to the aforesaid demand the defendant Cowper, through his attorneys, stated that he was the owner of the property, that a part thereof was affected by a lease in favour of Léopold Paré, assignee of the defendants Alfred Abraham Lessor and dame Ethel Lessor, and that he claims as compensation for the expropriation of his estate or interest in the said property the sum of $180,000; subsequently Cowper's attorneys gave a breakdown of the sum of $180,000 as comprising $138,000 for the land, at the rate of $30 per square foot for an area of 4,600 feet, and $42,000 for the value of the building; His Majesty the King is willing to pay to the defendants, or to whomsoever may be adjudged entitled thereto, the sum of $159,146.04 to be apportioned between them as the Court may decide, in full satisfaction of their respective rights, titles and interests, free from all privileges, hypothecs and encumbrances whatsoever, in the said land and real property and in full satisfaction of all their claims of every nature and kind whatsoever arising out of the expropriation; His Majesty the King has paid the defendant Cowper, as an advance on the amount of compensation to be adjudged in respect of the said land and real property, the sum of $110,000.

In support of their motion, the defendants filed an affidavit of Alfred Abraham Lessor in which the affiant, after referring to the lease between the defendant Cowper as lessor and the defendants Alfred Abraham Lessor and dame Ethel Lessor, wife of Isidore Leslie Weiner, as lessees and to the agreement dated July 29, 1947, between the defendants Alfred Abraham Lessor and dame Ethel Lessor on the one part and Léopold Paré on the other part, by which the former sold to the latter the business which they carried on together at 1254 University street under the name of "Oxford Tavern", including the goodwill and the right to the license issued by the Quebec Liquor Commission, the furniture and their right, title and interest in the lease aforesaid, and by which they undertook to obtain the necessary consent from the defendant Cowper for the

transfer of the lease to the purchaser, states that: on July 30, 1947, the defendant Cowper wrote a letter to dame Ethel Lessor and himself in which he agreed to the transfer of the said lease, with the proviso that the said Léopold Paré be made aware of the fact that the defendant Cowper had been given notice of expropriation by the Department of Public Works of the property situate at 1250-1254 University and that there should not be any guarantee that the said Paré would remain in the premises for the reason that the site was vested in His Majesty the King; he informed the said Paré of such notice of expropriation and of the remainder of the contents of the said letter; Paré thereupon commenced to exercise the right which he had acquired; unless and until the right of Paré to be a party to the present proceedings has been adjudicated upon, he is unable to make a statement of defence to the information.

During the argument on the motion, counsel for defendants put in evidence documents, which I deem apposite to quote partly or summarize briefly. The first one, marked as Exhibit A, is a letter from J. Alex. Prud'homme, K.C., on behalf of the Minister of Public Works to the defendants Cowper, Alfred Abraham Lessor and dame Ethel Lessor and to Léopold Paré, dated March 25, 1948, requesting that, pursuant to section 26 of the Expropriation Act, they furnish to the Minister a statement showing the particulars of any estate and interest and every charge, lien or encumbrance to which the same is subject, which they may have or claim to have in the property known as the "Oxford Hotel", situate at Nos. 1250-54 University street, being lots 1345-31 and 32 and part of lot 1346 on the official plan and book of reference for St. Antoine ward, City of Montreal, which has been acquired by His Majesty the King for the construction of a public work, according to a notice of expropriation and plan filed in the Registry Office of the Registration Division of Montreal on May 26, 1947. The letter says that the statement should also show the claim made by any of them in respect of the estate or interest therein described and that it should be furnished within ten days.

The next document, marked as Exhibit B, is a copy of a letter from Beaubien, Dufresne & Gagnon, Solicitors for Léopold Paré, to Geoffrion & Prud'homme, dated April 8, 1948, which reads thus:

Re: Le Gouvernement & Léopold Paré

Pour faire suite a la conversation au téléphone de ce jour entre notre M. Dufresne et votre M. Prud'homme nous devons vous dire que notre client, M. Paré, n'a reçu votre lettre du 25 mars dernier que le 5 courant et s'occupe présentement de réunir les données nécessaires pour lui permettre de faire sa réclamation et, à cet effet, il a besoin d'un délai additionnel. En conséquence, nous vous demanderions de bien vouloir lui accorder jusqu'au 16 avril afin de produire sa réclamation.

The third exhibit, marked C, is a letter from J. Alex. Prud'homme to Beaubien, Dufresne & Gagnon, dated April 9, 1948, in which there is, among others, the following statement:

Quoi qu'il en soit, nous n'avons pas d'objection à vous accorder jusqu'au 16 courant mais pas plus tard, pour la production de sa réclamation.

The last document filed in support of the motion, exhibit D, includes a copy of a declaration by the solicitors of Léopold Paré setting forth his interest in the "Oxford Hotel" and a copy of his claim arising from the expropriation of the said property, both dated April 15, 1948.

The declaration relates the deed of sale passed before H. E. Herschorn, N.P., on July 29, 1947, by which Alfred Abraham Lessor and dame Isidore Leslie Weiner agreed to sell to Léopold Paré the business carried on at No. 1254 University street under the name of "Oxford Tavern", including the goodwill, the right of the vendors to the tavern license issued by the Quebec Liquor Commission, the furniture and the right and interest in a lease executed in their favour by Peter Boyd Cowper, dated April 13, 1944, for the premises occupied by the said business, the said lease being for a period commencing on May 17, 1944, and ending on April 30, 1949, and for a rental of $3,000 per year, payable $250 on the 1st of each month.

The claim, totalling $170,212.69, is made up of various items which I do not think necessary to reproduce.

Counsel for plaintiff filed as Exhibit 1 an agreement between Alfred Abraham Lessor and dame Ethel Lessor, wife of Isidore Leslie Weiner, as parties of the first part and Léopold Paré as party of the second part, dated

1949
THE KING
v.
COWPER
ET AL
Angers J.

January 22, 1949, which, after referring to the aforesaid deed of sale by the parties of the first part to the party of the second part passed before H. E. Herschorn, N.P., on July 29, 1947, and the lease granted by Peter Boyd Cowper to the parties of the first part by deed passed before the same notary on May 16, 1944, and stating: that the premises covered by the lease form part of a building erected on lots Nos. 1345-31 and 32 and part of lot No. 1346 of the official plan and book of reference of St. Antoine ward; that the said property was taken under the authority of the Expropriation Act by His Majesty the King for the purpose of a public work, namely a postal station, by the deposit of a plan and description of said land and real property at the Registry Office for the Registration Division of Montreal on May 26, 1947, and had thus become vested in His Majesty the King; that as a consequence of these facts and in accordance with article 1660 of the Civil Code the said lease had become cancelled before the said sale of the tavern business of the parties of the first part, although the parties of the first part and, after the sale, the party of the second part were allowed to remain in possession of the premises temporarily; that the parties of the first part, in consequence of the expropriation and the cancellation of the lease, had a right to an indemnity from His Majesty in respect of the damages suffered on account of the said expropriation and cancellation and that proceedings are now pending before the Exchequer Court of Canada wherein His Majesty the King is plaintiff and the parties of the first part and the said Cowper are defendants, for the fixing of the indemnities respectively payable to the defendants, stipulates as follows:

The parties of the first part confirm having transferred and do hereby transfer to the party of the second part their right, title and interest in and to an indemnity due by His Majesty the King by reason of his having taken possession on May 16, 1947, under the authority of the Expropriation Act, of the said land and real property and on account of the fact that the parties of the first part were entitled as lessees to the use of part of the property built on said land, under a lease passed between the parties of the first part and Peter Boyd Cowper before H. E. Herschorn, N.P., on May 16, 1944, duly registered;

The consideration for the said transfer is included in the consideration for the sale of the said tavern business under the deed of sale entered into by the parties of the first part and the party of the second part before H. E. Herschorn, N.P., on July 29, 1947;

The party of the second part shall cause this agreement to be served upon His Majesty the King;

The parties of the first part shall endeavour on the basis of the prior agreement between the parties and of this agreement and its service upon His Majesty the King to have the party of the second part added as a party to the proceedings pending before the Exchequer Court of Canada wherein His Majesty the King is plaintiff and the parties of the first part and the said Peter Boyd Cowper are defendants, said proceedings having been issued in order to fix the indemnities payable to the respective defendants;

Should the parties of the first part be successful in adding the party of the second part as a party to the said proceedings, all obligations of the parties of the first part under this agreement shall cease;

Should the parties of the first part be unsuccessful in their endeavours to add the party of the second part as a party to the said proceedings, then the parties of the first part shall file such defence as the party of the second part will direct and shall prosecute the indemnity claim therein contained with due diligence, under the direction of the party of the second part; the preparation and filing of such defence and the presecution thereof to final judgment shall be at the expense of the party of the second part who shall retain his own counsel to represent the parties of the first part in that regard, the latter, however, retaining the right at their own expense to have their own counsel act in an advisory capacity;

The parties declare that, subject only to due compliance with the terms of this agreement and to the balance due by the party of the second part to the parties of the first part under the deed of July 29, 1947, between them, neither has against the other any claim.

It was submitted on behalf of defendants that the addition of parties to a suit is permitted by rules 226, 227 and 228 of the General Rules and Orders of the Court. A brief review of these rules seems expedient.

1949
THE KING
v
COWPER
ET AL
Angers J.

Rule 226 deals with cases of marriage, death, insolvency or devolution of estate by operation of law of any party to an action; obviously it does not comprehend the case with which we are concerned.

Rule 227 relates to the continuation of an action in case of an assignment or devolution of an estate or title *pendente lite* and enacts that "the action may be continued by or against the person to or upon whom such estate or title has come or devolved". This rule is certainly broader than the previous one. It covers the "assignment . . . or devolution of any estate or title *pendente lite*".

Rule 228 again widens the field within which the addition or change of parties in an action may take place. Its terms are practically unlimited. I deem it advisable to quote it textually:

> Where by reason of marriage, death or insolvency, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, or for any other cause, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained ex parte on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

I do not think that the meaning of the words "or any other event" contained in rule 228 can be restricted so as to apply only to events of the same kind or, to use the expression generally adopted by the authors, *ejusdem generis*. If it could be so restricted, the words would have no bearing: indeed I fail to see events which can be said to be of the same kind as marriage, death or insolvency. One must give this phrase its full implications. It is trite law that words and sentences must be given a meaning: Craies, Treatise on Statute Law, 4th ed., p. 68. Regarding the doctrine *ejusdem generis* see Craies, op. cit., p. 167; Maxwell, Interpretation of Statutes, 9th ed., p. 337; Beal's Cardinal Rules of Legal Interpretation, 3rd ed., 356; *Anderson* v. *Anderson* (1); *Owners of S.S. Magnhild* v. *McIntyre Brothers & Co.* (2); *Tillmanns & Co.* v. *SS. Knutsford, Limited* (3).

(1) (1895) 1 Q.B. 749, 755.
(2) (1920) 3 K.B. 321, 329.
(3) (1908) 2 K.B. 385, 405.

There is no genus or category in the present instance and the doctrine *ejusdem generis* has no application.

There is no doubt, to my mind, that rules 227 and 228 are fully applicable in cases between private parties. Do they also apply in a case in which the Crown is one of the parties? This is the problem which I have to solve.

Counsel for defendants relied on the decision in *Price* v. *The King* (1). I do not think that this case has any relevance; section 19 (*c*) of the Exchequer Court Act, with which it deals, is not pertinent.

The fact that Paré might have been unaware of the expropriation and have continued to pay his rent to the defendant Cowper is, as I think, immaterial.

It was argued on behalf of plaintiff that the assignment by the defendants Alfred Abraham Lessor and dame Ethel Lessor to Léopold Paré has no effect against the Crown and that the only persons who may have a claim are the assignors. It is generally recognized that a claim against the Crown is not assignable in the absence of acquiescence. Was there acquiescence by the Crown in this particular case? I shall deal with the question in a moment.

In *Powell* v. *The King* (2) it was held (*inter alia*) that the provisions respecting the assignment of choses in action found in the Revised Statutes of Ontario are not binding upon the Crown as represented by the Government of Canada.

In *The Queen* v. *McCurdy et al.* (3) Burbidge J. made the following observations (p. 319):

> In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty* v. *Odlum*, 3 T.R.

(1) (1906) 10 Ex. C.R. 105.
(2) (1905) 9 Ex. C.R. 364.
(3) (1891) 2 Ex. C.R. 311.

1949
THE KING
v.
COWPER
ET AL
Angers J.

681, Buller, J, while concurring with the other members of the court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen* v. *Smith* et al, 10 Can. S.C.R. 66, Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. In the case of *The Queen* v. *Dunn,* 11 Can. S.C.R. 385, the suppliant's case rested upon a transfer to him of moneys alleged to be due from the Crown to one Tibbitts. but the petition in that case (P. 392) contained an allegation that the transfer had been communicated to the Government and accepted by them.

See also *Arbuckle et al.* v. *Cowtan* (1).

I had the occasion to examine the question of assignability of a claim against the Crown in *Chipman* v. *The King* (2) to which counsel for plaintiff referred. The facts in that case differed materially from those existing herein: particularly there was no acquiescence whatever on the part of the Crown.

In the present case the Crown became aware of the transfer from Alfred Abraham Lessor and Ethel Lessor Weiner to Léopold Paré of their right, title and interest in and to the indemnity due by the Crown by reason of its having expropriated and taken possession of, among others, the premises bearing No. 1254 University street, in the City of Montreal, occupied as a tavern. It acknowledged the transfer and acquiesced in it, at least implicitly, by the letter exhibit A requesting the defendants and Paré to furnish to the Minister of Public Works statements showing the particulars of their respective claims.

Counsel for defendants submitted that under rule 2 it is enacted that in all suits in the Exchequer Court not otherwise provided for by any act of the Parliament of Canada or by any general rule or order of the Court, the practice and procedure shall, if the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits in the Superior Court of the Province

(1) (1803) 3 B. & P. 321, 328. (2) (1934) Ex. C.R. 152.

of Quebec; he concluded therefrom that article 81 of the Code of civil procedure is applicable; its first paragraph, which is the only one relevant, reads thus:

A person cannot use the name of another to plead, except the Crown through its recognized officers.

I think that counsel's submission in this respect is well founded. In support thereof he cited: *Savoie* v. *Rouleau et al.* (1) and *Bélanger* v. *Caron et al. and Morin et al., t.s. and Caron, contestant* (2). In addition to these decisions the following may be consulted beneficially: *Montreal Loan and Investment Co.* v. *Plourde* (3); *Bouchard* v. *Gagné et La Corporation du village de Mistassini* (4); *S. Chalifoux Ltée* v. *Côté* (5).

The motion of defendants Alfred Abraham Lessor and dame Ethel Lessor Weiner, in so far as it prays for an order that Léopold Paré be joined as a defendant in the action, is granted. I do not think however that the defendants Alfred Abraham Lessor and dame Ethel Lessor Weiner should, at least for the present, be put out of Court.

The costs of this motion will be costs in the cause.

Judgment accordingly.

1949
Apr. 28
May 4

BETWEEN:

HIS MAJESTY THE KING on the Information of the Attorney-General of Canada, ... } PLAINTIFF;

AND

REUBEN SHORE ....DEFENDANT.

Revenue—Excise Tax Act, R.S.C. 1927, c. 179, ss. 2(c) (u), 86 (1) (a) (i)—Action for payment of sales tax—Goods manufactured for a person by another and sold by the former—Person who holds a sales or other right to goods being manufactured on his behalf is the manufacturer or producer of the goods—"Manufacturer or producer".

(1) (1926) R.J.Q. 43 K.B. 79.
(2) (1940) R.J.Q. 78 S C. 429.
(3) (1903) R.J.Q. 23 S C 399
(4) (1933) 36 Q.P.R. 353.
(5) R J Q (1944) B.R. 83.

1949
THE KING
v.
SHORE

The action is to recover sales tax from defendant on goods manufactured for defendant by E. and M. pursuant to a contract and sold afterwards by the defendant himself who denies liability on the grounds he is not the manufacturer or producer of the goods and that he paid the sales tax to E. and M.

Held: That the defendant held a sales or other right to the goods being manufactured on his behalf and therefore was the manufacturer or producer of the goods.

2. That the defendant being the manufacturer or producer of the goods is liable for the sales tax thereon.

INFORMATION exhibited by the Attorney-General of Canada for the payment of sales tax under the provisions of section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended.

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

J. W. Pickup, K.C. for plaintiff.

Louis Herman, K.C. for defendant.

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

CAMERON J. now (May 4, 1949) delivered the following judgment:

The claim herein is for the payment of sales tax under the provisions of section 86(1) of the Excise Tax Act, R.S.C. 1927, ch. 179, as amended. The defendant for many years has been a retail jeweler carrying on business at Toronto under the name of R. Shore, Merchandise Distributors. Sometime prior to June 7, 1946, he had seen a toy electric iron in the United States and conceived the idea of having it made up in Canada and distributing it there. On that date he entered into a contract (Exhibit 2) with English and Metcalf of Toronto (also known as Leyden Machine and Tool Company, but referred to hereinafter as English and Metcalf), the essential parts of which are as follows:

1. The Party of the First Part agrees to purchase from the Party of the Second Part, 25,000 Toy Electric Irons, at the price of forty-seven cents (.47c) per unit, complete boxed and constructed as per sample and according to Ontario Hydro Specifications, payable as follows:

$2,000 deposit on order herewith, and the balance on completion of delivery of the order. The Party of the First Part agrees to pay in addition thereto, the sum of TWO THOUSAND ($2,000) Dollars, on August 15, 1946, on completion of the dies which are then to be the property of the Party of the First Part.

2. The Party of the Second Part agrees to supply the Party of the First Part with the said dies, and to commence delivery of the said merchandise on September 15, 1946, and deliver 1,000 units per day, thereafter until the said order is filled.

3. Time is to be the essence of the contract.

4. Understood that these irons will be manufactured solely for use of the party of the first part.

By a supplementary agreement dated August 9, 1946 (Exhibit 2), the following provision was added to the first contract:

1. It is understood and agreed between the Parties hereto that the said Parties of the Second Part shall not in any manner whatsoever either directly or indirectly through themselves or through any agent manufacture a similar article of merchandise as mentioned in the said Indenture of Agreement for a period of two years after the completion of the contract set forth in the said Indenture of Agreement.

Pursuant to the said contract a very large number of the toys were completely manufactured by English and Metcalf and delivered to the defendant who sold them to departmental stores and jobbers. The plaintiff alleges that the defendant as producer or manufacturer of the goods so sold by him is liable to a sales tax of eight per cent on the sale price of such goods as provided by section 86(1) (*a*) (i) of the Act, which is as follows:

86. 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, in any case other than a case mentioned in subparagraph (ii) hereof, 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.

It is admitted that if the defendant is liable for such sales tax, the amount claimed in respect thereof is correct. The defendant, however, denies all liability, alleging that he is not the manufacturer or producer of the toys. He submits that English and Metcalf were the manufacturers or producers of the goods and as such were solely liable for payment of the sales tax. He alleges further that he paid sales tax to English and Metcalf and should not now be required to pay again.

1949

THE KING v. SHORE

Cameron J.

There can be no doubt, I think, that the defendant was the "manufacturer or producer" of the goods within the meaning of section 2(*c*) (ii) of the Act which is as follows:

> 2. In this Act and in any regulation made thereunder, unless the context otherwise requires,
>
> (*c*) 'manufacturer or producer' includes
>
> (ii) any person, firm or corporation which 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.

It is clear from the contract and the evidence that English and Metcalf were manufacturing the toys for the defendant only. The dies to be used in their manufacture were made by English and Metcalf upon the instructions and at the expense of the defendant and they are still the defendant's property. English and Metcalf could not sell the toys to anyone but the defendant, and for a period of two years from the completion of the contract could not manufacture a similar article. At first the toys were painted but later, on the instructions of the defendant, were plated. On several occasions the prices to be paid therefor by the defendant to English and Metcalf were substantially increased beyond the price agreed upon in the contract due to the fact that the agreed price turned out to be insufficient to meet the costs of English and Metcalf. The defendant held a sales or other right to the goods being manufactured on his behalf by English and Metcalf and therefore, in my opinion, was the manufacturer or producer of such goods.

Reference may be made to *Palmolive Manufacturing Co. (Ontario) Limited* v. *The King; The King* v. *Colgate-Palmolive-Peet Co. Limited* (1). In that case a question arose as to whether the Ontario company which made the goods for the Canadian company, or the Canadian company which actually sold the goods, should be liable for the sales tax. Cannon, J., in delivering the judgment of the Court, said at p. 140:

> The above authorities satisfy me that we must, as matters of fact, identify the producer of the goods and determine the real price received by such producer when selling them to the public for consumption.

In the instant case the producer of the goods was undoubtedly the defendant and as such he was liable for

(1) (1933) S.C.R. 131.

the payment of the sales tax on the sale price of the goods when sold by him and computed in accordance with section 85(*a*).

As I have said, the defendant contends that he has already paid sales tax on these goods. It is significant, I think, that the contract between the defendant and English and Metcalf is silent as to which party should pay the sales tax. Exhibit A consists of a number of invoices rendered to the defendant by English and Metcalf and on which the words "sales tax included" appear. On some of these the words "Sales Tax Licence Number 5914" are typed and the defendant says that when negotiating the contract he saw the sales tax licence in the office of English and Metcalf. All the invoices as rendered were paid by the defendant. None of the invoices indicates the basis on which sales tax was computed by English and Metcalf or shows the sales tax as a separate item. In each case the defendant was billed only for the number of toys at the price agreed upon for their manufacture. In the absence of any clause in the contract requiring English and Metcalf to pay the sales tax, I am quite unable to find that the defendant, merely by paying bills marked "Sales tax included," did, in fact, pay any sales tax whatever. In any event, being the producer of the goods he was not liable to pay sales tax to English and Metcalf and payment to them does not exonerate him from liability to pay the tax to the plaintiff.

English and Metcalf did pay the plaintiff a total of $100 in respect of sales tax on the goods so made for the defendant and credit is given the defendant for such payment, as well as for an audit credit of $27.13.

My finding, therefore, is that the defendant is liable for the amount of sales tax claimed by the plaintiff, namely, $3,370.10, plus penalties imposed by section 106(4) amounting to $516.21 as of November 2, 1948, plus two-thirds of one per cent on $3,370.10 from November 2, 1948, to this date, an additional amount of $134.80, and being in all the sum of $4,021.11.

The plaintiff claims a further sum of $2.00 under the provisions of section 95(1) of the Act. Having found that the defendant was a manufacturer or producer during the

1949
THE KING
v.
SHORE
Cameron J.

year in question, and it being admitted that in that year he did not take out a licence as required by the subsection (although he did for the following year when requested to do so) he is liable for the payment of the licence fee, which by regulation was fixed at the sum of $2.00.

The plaintiff, therefore, is entitled to judgment against the defendant for the sum of $4,023.11, and costs to be taxed.

Judgment accordingly

1949
Feb. 10 & 11
Mar. 30

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

THE OWNERS OF THE M.S. *PACIFIC EXPRESS* .... PLAINTIFFS;

AND

THE TUG *SALVAGE PRINCESS*.. DEFENDANT.

Shipping—Ship "at home" struck by barge—Damages—Liabilty calculated on combined tonnage of tug and barge—Right to limitation of liability—Canada Shipping Act 1934, c. 44, s. 649.

Plaintiff ship while lying alongside the inner berth of the terminal dock in the harbour of Vancouver, B.C., and considered by the Court to be "at home" and entitled to assume she was in a place of safety, was struck by the corner of a barge which was being placed alongside her by defendant tug. The action is to recover compensation for the damages sustained by plaintiff ship.

Held: That the owners of the tug and barge are entitled to limit their liability under the provisions of the Canada Shipping Act, 1934, 24-25 Geo. V, c. 44, s. 649.

2. That the liability of the owners of defendant tug should be calculated on the combined tonnage of tug and barge.

ACTION for compensation for damages sustained by plaintiff ship when struck by barge being manoeuvered by defendant ship.

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

F. A. Sheppard, K.C. and *W. G. Lane* for plaintiffs.

D. N. Hossie, K.C. and *Ghent Davis* for defendant.

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

SIDNEY SMITH D.J.A. now (March 30, 1949) delivered the following judgment:

In this action the owners of the Norwegian motor-vessel *Pacific Express* (3,400 tons gross, 387 feet long, 52 feet beam) claim compensation for damages sustained by their vessel, in her berth, when struck by the corner of a rectangular derrick-barge called the *Giant* (235 tons gross, 92 feet long, 38 feet beam) while the *Giant* was being placed alongside the *Pacific Express* by the defendant tug *Salvage Princess* (89 tons gross, 67 feet long, 18 feet beam) on 16th November 1946. Both tug and barge were then owned by the Pacific Dry-Dock & Salvage Co. Ltd., and the crew of both were in the employment of this company. On the day of the occurrence the plaintiff ship may be regarded as being "at home", and entitled to assume she was in a place of safety, *The City of Seattle* (1). It is therefore clear that if the collision be established, liability must follow as of course, for the defence is a simple denial of the striking, and negligence will be presumed.

The plaintiffs claimed in their writ $6,000; but as so often happens this proved an under-estimate of their losses. Accordingly I granted an amendment whereby this amount was increase to $20,000. I also granted an amendment to the defendant who sought to set up in its defence a right to limit its liability. As will appear later, this should have been accomplished by way of counter-claim.

The vessel was lying alongside the inside berth of the Terminal Dock with her starboard side next to the wharf, and so heading west. I am satisfied from the evidence and a consideration of the chart that this is one of the quietest

(1) (1903) 9 Ex. C R. 146 at 149.

1949

PACIFIC EXPRESS *v.* SALVAGE PRINCESS

Sidney Smith D.J.A.

corners in Vancouver Harbour. On Friday the 15th November 1946 her No. 2 hold was inspected by the Chief Officer, preparatory to an expected visit from Mr. Robert Rennie (Lloyds Senior Surveyor at Vancouver) on the Monday, for the purpose of passing for fitness to receive refrigerated cargo. The Chief Officer found all in order. A bulk-head divides the after part of No. 2 hold from the fore part of the engine-room. On the same day the electrician was in that portion of the engine-room called the "schutzeroom," a small space four feet by twenty feet. This room is on the port side of the ship immediately abaft the bulk-head in question, and contains the instrument board for the electrical apparatus of the vessel. His object there and then was to change two fuses, and this he did. He too found everything in order.

On the Monday Rennie carried out the anticipated inspection, accompanied by the Chief Officer. In No. 2 hold they discovered that the ship's plating had been set inwards in the way of the bulk-head and the bulk-head itself damaged. On Monday also the electrician found certain electrical fittings in the "schutzeroom" dislocated and damaged. Later inspections disclosed that the ship's plating on the port side, at the bulk-head, had been indented for a length of nine feet and a height of three to four feet: that the deepest indent was two inches, tapering thence fore and aft, and up and down, to the extent mentioned. There was corresponding damage to the vessel members inside. This damage could only have been caused by a blow from the outside, occasioned at some time between the inspection on Friday, and its discovery on Monday. In effect the time interval may be narrowed, for on the Saturday afternoon the ship's port side was painted in the vicinity of and including the indented portion of plating. Subsequent examination showed this paint unmarred; so that the damage must have been caused between noon on Friday and the early afternoon of Saturday.

During that period the only craft of any consequence in any proximity to the vessel were the Barge *Giant* and the Tug *Salvage Princess*. On Saturday morning the tug berthed the *Giant* alongside for the purpose of hoisting some pistons out of the engine-room and conveying them

to North Vancouver for repairs. This was done. The tug had the barge made fast alongside her port side during the whole period. On Monday night the tug and barge returned with the pistons, which were then duly hoisted on board and replaced in the engine-room. The plaintiffs say that on the first arrival the starboard forward corner of the barge, while under control of the tug, struck the vessel's plating and did the damage which forms the subject of this action. In this I think they are right.

I accept in full the testimony of Rennie, an experienced ship's surveyor who gave his evidence with quiet confidence that was convincing. His inspection of the barge on the following Thursday revealed the starboard corner "which is massive wooden construction, (was) roughened and abraded and there were paint marks." These paint marks corresponded to the colour (gray) of the ship's side, corresponded in height above water to the dent in the ship's plating, and corresponded moreover to the position the barge would occupy for the purpose it had fulfilled. On the other hand, I do not think the defendant's witnesses told me the whole story. Given the known fact of the damage caused by an outside blow to the ship's plating there seemed no doubt, to me at least, in the surrounding circumstances, that such blow was occasioned by the starboard corner of the barge striking the ship. The only doubt I entertained was as to when the collision occurred—whether on arrival, while alongside, or when leaving. But after prolonged consideration and re-reading of all the evidence I am convinced that the collision took place on the arrival of the barge on the Saturday morning. There is direct evidence from the vessel's carpenter, Sture, confirming this view. I am not prepared to believe that the crew must necessarily have been aware of the blow. As Rennie says, "this was a welded ship of comparatively light structure" and again, "those dents are made much more easily than one would imagine." I am satisfied he has ample warrant for these views.

The plaintiff's witnesses (except Rennie and another who spoke only of the local conditions at the wharf) gave their evidence at Portland, Oregon, on commission. At that time evidence of a witness for the defendant was

1949
PACIFIC EXPRESS
v.
SALVAGE PRINCESS
Sidney Smith D.J.A.

also taken. This was a surveyor who inspected the *Pacific Express* at Portland. At the trial the defendant chose not to put in this evidence. Having in mind the decision of my predecessor in this Court, Chief Justice Macdonald, in *Gogstad* v. *S.S. Camosun* (1), I held that the defendant had the right to take this stand. But I was thus deprived of the benefit of hearing this testimony, which was perhaps to be regretted.

I find the defendant liable for the damage sustained by the *Pacific Express.* I find such damage was done by the Barge *Giant* while under control of the Defendant Tug, and was due to the negligence of those on board the said tug, all of whom were the servants of the owners of both tug and barge. But on the evidence I also find the owners of tug and barge entitled to limit their liability under the provisions of the Canada Shipping Act 1934, Ch. 44, Sec. 649.

The question then arises whether such liability should be calculated on the tonnage of the tug, or of the barge, or on the combined tonnage of tug and barge. On the authority of *The Ran; The Graygarth* (2), and *The Harlow* (3), I think the calculation must be made on their combined tonnage. It is true that the tug alone is sued in this action: and the defendant therefore contends that the liability must be confined to her tonnage only. But, with respect, this view seems to involve some confusion of thought. A defendant by entering an absolute appearance in an action *in rem* thereby renders himself personally liable for the amount of any judgment that may be recovered against him in that action. *The Dupleix* (4); *The Joannis Vatis* (No. 2) (5); *The Valsesia* (6). The defendants here, by the judgment in this action, thus become personally liable for the total damage suffered by the plaintiff vessel. They now by way of counter-claim,—a quite different proceeding —seek to limit their liability. But to do this they must bring into account the tonnage of those of their vessels as may have contributed to the damage by actual impact, or by their momentum. Liability must be calculated on the aggregate tonnage of the wrong-doing mass. I think this is

(1) (1940) 56 B.C.R. 156.
(2) (1922) P. 80.
(3) (1922) P. 175.
(4) (1912) P. 8.
(5) (1922) P. 213.
(6) (1927) P. 115.

the effect of *The Ran; The Graygarth* case *supra,* as explained in the *Harlow* case *supra.* Here the tonnage in question must be that of tug plus barge; for, to slightly modify the language of plaintiffs' submission, "the tug and derrick-barge were lashed together as a unit during the whole of the relevant period; it was a case of the one vessel, one owner, one master, one group of employees of that owner."

One final matter must be noted. The defendant should have raised its plea for limitation of liability in a counter-claim. It did not do so. The *Sonny Boy* (1). But the plaintiffs do not seek to take advantage of this omission and I therefore allow an appropriate amendment to be filed, so as to put the pleadings in order.

There will be judgment accordingly. Unless the parties can agree there will be a reference to the Registrar to assess the damages. Plaintiffs will have their costs.

Judgment accordingly.

1949
JAN. 11, 12 and 13
JAN. 14

BETWEEN:

CÉCILE MORIN........................SUPPLIANT;

AND

HIS MAJESTY THE KING..........RESPONDENT.

Crown—Petition of Right—Action for damages by a person injured while attending a wrestling exhibition organized with the co-operation of military authorities—Military police detailed for maintenance of order servants of the Crown and acting within scope of their duties—Negligence of military police to act makes Crown answerable for results thereof—Duty of the Crown to protect audience—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 50A.

Suppliant was injured during a mêlée between a wrestler and some spectators at a wrestling exhibition organized by the Knights of Columbus in co-operation with the local military authorities. The exhibition was given in the drill hall of the Army training camp and military constables had been detailed for the maintenance of order. Alleging failure of the military police to act during the mêlée suppliant sues the Crown for damages suffered by her.

(1) (1945) 61 B.C. 309.

1949
MORIN v. THE KING
ANGERS J.

Held: That the military police on duty at the wrestling exhibition were servants of the Crown and were acting within the scope of their duties and their employment. Their negligence to act makes the Crown answerable for the results thereof.

2. That the respondent had the duty to protect the audience at the wrestling exhibition. The distinction beween duty and liability does not arise here. *Jokela* v. *The King* (1937) Ex C R. 132; *The King* v. *Anthony* and *The King* v. *Thomson* (1946) S.C R. 569 reviewed and distinguished.

PETITION OF RIGHT by suppliant to recover alleged damages suffered by her while attending a wrestling exhibition organized with the co-operation of the military authorities.

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

Geo. René Fournier, K.C., for suppliant.

Joseph Marineau for respondent.

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

ANGERS J. now (January 14, 1949) delivered the following judgment:

La pétitionnaire réclame de l'intimé la somme de $13,637.68 pour dommages par elle subis à la suite d'un accident survenu à une séance de lutte dans le manège militaire du camp d'entraînement de Montmagny le 27 mai 1944.

La pétitionnaire, dans sa pétition de droit amendée, déclare en substance ce qui suit:

elle est âgée de 28 ans et jusqu'au 27 mai 1944 elle a toujours joui d'une excellente santé et de l'usage parfait de ses membres;

le 27 mai 1944 elle assistait, après avoir payé son entrée, à une séance de lutte dans le manège du camp d'entraînement militaire de Montmagny, séance qui avait été organisée sous le patronage des Huttes des Chevaliers de Colomb, Service de guerre, à Montmagny, et sous le patronage des autorités militaires à cet endroit et au bénéfice de l'un et l'autre;

vers dix heures et demie du soir, l'un des lutteurs engagés par les organisateurs de cette séance de lutte, un nommé Jacques Larouche, de Montréal, entra dans l'arène ivre et incapable de se contrôler; il fut l'objet d'interpellations de la part d'assistants inconnus de la pétitionnaire; il avait déjà donné des exhibitions de lutte à Montmagny, au même endroit, et il était reconnu pour sa violence, fait qui devait être à la connaissance des organisateurs;

ledit Larouche était à ce point sous l'effet des liqueurs alcooliques que l'auditoire généralement constata le fait et ce fut l'une des causes des interpellations qui lui venaient de toutes parts;

les autorités militaires et les membres et autorités des Huttes des Chevaliers de Colomb, ces derniers agissant comme mandataires et représentants du ministère de la Défense Nationale, et les organisateurs immédiats, soit Charles Dubé pour les Chevaliers de Colomb et le major Kirouac pour l'armée canadienne, qui agissaient sous la direction des premiers, savaient ou auraient dû savoir que ledit Larouche n'était pas en état de se contrôler et, connaissant sa violence, ils auraient dû l'empêcher d'entrer dans l'arène et exposer ainsi les assistants à être l'objet de ses violences;

la pétitionnaire était paisiblement assise sur un banc, à une bonne distance de l'arène, lorsque ledit Larouche perdit le contrôle de lui-même, courut à travers les spectateurs qui, pris de peur, s'écartaient de son passage et se dirigea vers l'endroit de la salle où se trouvait assise la pétitionnaire, dans le but d'aller frapper l'un des spectateurs, lorsque, montant sur un banc qu'il voulait enjamber, ledit Larouche tituba, s'enfargea, glissa et tomba de tout son poids sur la pétitionnaire, lui arrachant le bras droit de l'épaule;

sur son parcours de l'arène à l'endroit où était la pétitionnaire, ledit Larouche passa près de certains membres de la police militaire (Provost Corps) qui restèrent impassibles et lui laissèrent le passage; il y avait de plus, un peu partout dans la salle, des soldats et des membres de la police militaire qui ne firent rien pour arrêter ledit Larouche;

l'accident est dû à la faute, négligence et incurie des autorités militaires du centre d'entraînement de Montmagny, des membres des Huttes des Chevaliers de Colomb,

Service de guerre, au bénéfice desquels cette séance de lutte était organisée, ou du moins avec leur concours, dans les prémisses du ministère de la Défense Nationale;

ils (les autorités militaires et les membres des Huttes des Chevaliers de Colomb) ont commis la faute, la négligence et l'incurie de laisser lutter ledit Larouche qui n'était pas en état de le faire, qui ne se contrôlait pas et qui était connu par ses emportements et ses violences, ajoutant en outre à leur négligence le défaut de prendre les précautions nécessaires et de donner des instructions pour la protection des spectateurs et de la pétitionnaire en particulier;

les autorités militaires, les Huttes des Chevaliers de Colomb et les organisateurs de cette séance de lutte étaient tous, directement ou indirectement, des mandataires et représentants du ministère de la Défense nationale et, partant, de l'intimé;

la pétitionnaire, qui assistait paisiblement à cette séance de lutte, avait droit de s'attendre, de la part de l'intimé ou de ses représentants, qui étaient dans l'exercice de leurs fonctions, une protection adéquate;

la pétitionnaire fut immédiatement transportée en ambulance à l'Hôpital de l'Enfant-Jésus, à Québec, où elle fut mise sous les soins du docteur Verge; par la suite, elle fut hospitalisée à deux reprises à l'Hôtel-Dieu de Québec, sous les soins du docteur Giguère;

la pétitionnaire souffre aujourd'hui d'une incapacité partielle permanente de 50 p. 100, le bras droit sort constamment de la caisse de l'épaule et il lui est impossible d'en faire usage, de lever le moindre poids et même de coudre ou tricoter;

il fut constaté que la pétitionnaire souffrait de fracture fragmentaire de la tête de l'humérus, d'une luxation nette de l'épaule droite, de périarthrite, ce qui lui cause constamment des douleurs vives au moindre mouvement, même limité; l'état actuel de son bras équivaut pour elle à une amputation pour toute fin pratique;

l'avenir de la pétitionnaire au point de vue matrimonial se trouve sérieusement compromis par suite de cette infirmité, alors qu'auparavant son caractère et son apparence physique lui permettaient les plus belles espérances suivant sa condition sociale;

la pétitionnaire est en droit de réclamer pour incapacité partielle permanente une somme considérable qu'elle consent à réduire pour les fins des présentes à $10,000;

la pétitionnaire est en droit de réclamer pour dommages esthétiques une somme considérable qu'elle consent à réduire pour les fins des présentes à $2,000;

la pétitionnaire a droit de réclamer pour les souffrances qu'elle a endurées et qu'elle endurera une somme d'au moins $1,000;

les soins médicaux et frais d'hospitalisation se détaillent comme suit:

Hôpital de l'Enfant-Jésus	$ 33.18
Hôtel-Dieu de Québec	320.00
Docteur Alphonse Giguère	200.00
Docteur Willie Verge	50.00
Docteur Paul Bigué	20.50
Charles-H. Dubé (ambulance)	14.00
	$ 637.68

les sommes réclamées s'élèvent à $13,637.68.

Pour défense à la pétition de droit le Procureur Général du Canada, pour et au nom de Sa Majesté le Roi, plaide en substance ce qui suit:

il admet qu'il y eut une séance de lutte dans le manège du camp militaire d'entraînement de Montmagny le 27 mai 1944, sous le patronage des Huttes des Chevaliers de Colomb;

il admet que Jacques Larouche a été l'un des lutteurs engagés par les organisateurs et qu'il a été l'objet d'interpellations au cours de la lutte; il nie qu'il entra dans l'arène alors qu'il était ivre et incapable de se contrôler, qu'il avait déjà donné des exhibitions de lutte au même endroit à Montmagny et qu'il était reconnu pour sa violence et ses emportements;

les membres des Chevaliers de Colomb de Montmagny n'agissaient pas comme mandataires et représentants du ministère de la Défense Nationale;

Larouche n'est pas tombé sur la pétitionnaire;

les membres de la police militaire ont maintenu un service d'ordre parfait et Larouche n'avait pas perdu le contrôle de lui-même;

1949
MORIN
v.
THE KING
ANGERS J.

il admet que la séance de lutte fut organisée dans les prémisses du ministère de la Défense Nationale;

Larouche était en état de lutter et en fait il a complété la partie de lutte pour laquelle il était engagé;

les organisateurs de cette séance de lutte n'étaient pas les mandataires ou représentants du ministère de la Défense Nationale;

la pétitionnaire connaissait les risques toujours inhérents à de telles séances et elle les a assumés volontairement;

la pétitionnaire a été blessée en tombant d'un banc sur lequel elle s'était mise imprudemment debout et a culbuté avec le banc et d'autres personnes; Larouche n'est pas tombé sur elle et n'est même pas allé près d'elle;

les autres allégations de la pétition sont niées.

Pour réponse à la défense la pétitionnaire allègue en substance:

elle demande acte de l'admission à l'effet qu'il y eut une séance de lutte dans le manège du camp militaire de Montmagny le 27 mai 1944;

elle demande acte de l'admission à l'effet que Jacques Larouche a été l'un des lutteurs engagés par les organisateurs et qu'il a été l'objet d'interpellations au cours de la lutte;

elle demande acte de l'admission, qui s'infère du paragraphe 7 de la défense, à l'effet que les membres de la police militaire avaient la charge de maintenir l'ordre;

elle demande acte de l'admission à l'effet que cette séance de lutte fut organisée dans les prémisses du Ministère de la Défense Nationale à Montmagny;

elle prend acte que l'intimé prend dans sa défense le fait et cause dudit Larouche;

elle ne pouvait prévoir qu'il y aurait quelque danger pour elle à assister paisiblement, entourée de spectateurs, loin de l'arène, à un spectacle bien connu, sous la protection des membres de la police militaire; elle ne pouvait prévoir que ceux-ci ne feraient pas leur devoir et s'abstiendraient d'intervenir s'il surgissait quelque désordre;

elle nie les autres allégations de la défense.

Je crois opportun de récapituler brièvement la preuve.

L'intimé a produit, comme pièce A, un exemplaire d'une affiche qui a été exposée dans les rues pour annoncer la soirée de lutte mentionnée dans les plaidoiries. Cette affiche se lit en partie comme suit:

"LUTTE PROFESSIONNELLE—CAMP MILITAIRE
N° 54—MONTMAGNY
Samedi 27 mai —— A 8.30 hrs P.M.
Au profit de l'Harmonie de Montmagny
Au programme:
Jack Larouche 202 lbs *vs* Tarzan Chabot 190 lbs"

Suivent les noms et les poids des autres lutteurs et une indication de la durée de chaque lutte. L'affiche contient ensuite ceci:

"EN FINALE: COMBAT ROYAL AVEC 6 LUTTEURS
DANS L'ARÈNE
Admission: Générale, 35c. — Réservée: 50c. - 60c."

Les témoins ont évalué le nombre des spectateurs à 500, 600, 700 et même 1,000, parmi lesquels il y avait des militaires et des civils. Des invectives ont été lancées contre le lutteur Larouche par diverses personnes dans l'assistance, particulièrement par un homme dont le nom n'a pas été révélé et qui n'a pas été entendu comme témoin. Larouche a été vaincu; il a été jeté en bas de l'arène par son adversaire ou il en est descendu précipitamment. Au lieu d'aller à droite ou à gauche des bancs, où il y avait des allées conduisant à l'arrière de la salle, il s'est lancé au milieu des spectateurs, a sauté de banc en banc et en a renversé quelques-uns, entre autres celui sur lequel était assise la pétitionnaire. La preuve fait voir que celle-ci a été projetée sur le dos et qu'elle a subi une luxation de l'épaule droite, qu'elle s'est relevée seule, qu'elle a marché en se traînant entre les bancs vers l'arrière de la salle, que rendue là elle s'est sentie faiblir et qu'elle a constaté que son bras droit n'était "pas normal".

La pétitionnaire a reçu les premiers soins à l'hôpital militaire du camp et elle a été ensuite conduite chez le docteur Bigué, à Montmagny. Après examen celui-ci l'a fait transporter à l'hôpital de l'Enfant-Jésus, à Québec, où elle est restée du 28 mai au 3 juin 1944. Elle a été ensuite trans-

1949
MORIN
v.
THE KING
—
ANGERS J.
—

portée à l'Hôtel-Dieu, où elle a fait un premier séjour du 12 juillet au 20 juillet 1944. Elle est entrée de nouveau à l'Hôtel-Dieu sur l'avis de son médecin et elle y a fait un second séjour du 29 août au 5 novembre 1944.

Ces faits ne sont pas contestés.

Je crois qu'il y a lieu d'analyser brièvement les divers témoignages.

[Here the learned judge makes a summary of the evidence and proceeds]:

La preuve me paraît établir clairement que la soirée de lutte qui a eu lieu au manège du camp d'entraînement militaire de Montmagny le 27 mai 1944, organisée par les Huttes des Chevaliers de Colomb comme récréation pour les soldats, était sous le patronage conjoint du ministre de la Défense nationale et des Huttes des Chevaliers de Colomb.

Le maintien de l'ordre dans le manège avait été confié à la police militaire. Des membres de cette police se tenaient à la porte du manège et percevaient les droits d'admission (35 ou 60 cents, selon l'endroit du siège). C'est à l'un d'eux que la pétitionnaire et ses compagnons ont payé leurs places. Le nombre des policiers à l'intérieur du manège était d'une trentaine. Il y en avait un à chaque coin de l'arène.

Le programme comportait trois luttes et un *combat royal*. Un nommé Jack Larouche, pesant quelque deux cents livres, était de la première lutte. C'est lui qui a provoqué l'échauffourée durant laquelle la pétitionnaire a été blessée.

La preuve fait voir que des spectateurs ont proféré des invectives contre Larouche et que l'un d'eux, en particulier, s'est acharné contre lui, déclarant qu'il était saoul et qu'il était mieux d'aller se coucher. Défait par Chabot, Larouche a été projeté de l'arène par son adversaire où il en est descendu hâtivement—les témoins ne s'accordent pas sur ce point, mais la façon dont Larouche est sorti de l'arène n'offre aucun intérêt—et, au lieu de prendre l'une des allées conduisant à l'arrière de la salle, il s'est lancé dans la foule. Voulant apparemment atteindre celui qui l'avait insulté, il a sauté de banc en banc et il est parvenu à celui où était la pétitionnaire et l'a renversé, comme il l'avait fait pour les précédents, jetant ainsi la pétitionnaire sur le dos et lui

causant une luxation antérieure de l'humérus droit et un arrachement de l'acromion. La pétitionnaire déclare que Larouche est tombé sur elle. Certains témoins nient ce fait ou disent n'en rien savoir. Le fait ne me paraît pas avoir d'importance. Ce qui me semble indiscutable c'est que Larouche a renversé le banc et projeté la pétitionnaire sur le dos, lui infligeant la blessure que l'on connaît.

Les membres de la police militaire qui étaient dans le manège, au nombre d'une trentaine, avaient comme devoir et fonctions de maintenir l'ordre et de protéger les spectateurs. Lorsque Larouche s'est lancé comme un fou furieux à travers les bancs et les spectateurs, les policiers auraient dû l'arrêter et le conduire hors de la salle. Ils n'ont rien fait, mais sont restés complètement inertes. Étaient-ils paralysés par la frousse? Avaient-ils peur de Larouche? C'est chose possible, bien que peu compréhensible pour des soldats, mais cela n'atténue pas leur responsabilité. Ils avaient un devoir à remplir et ils y ont complètement failli.

Le cas qui nous occupe est régi par les articles 19 et 50A de la Loi de la Cour de l'Échiquier (S.R.C. 1927, chapitre 34).

La partie pertinente de l'article 19 se lit ainsi:

19. La cour de l'Échiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

L'article 50A est ainsi conçu:

50A. Aux fins de déterminer la responsabilité dans toute action ou autre procédure intentée par ou contre Sa Majesté, une personne qui, en tout temps depuis le vingt-quatrième jour de juin mil neuf cent trente-huit, était membre des forces navales, militaires ou aériennes de Sa Majesté pour le compte du Canada, est censée avoir été à cette époque un serviteur de la Couronne.

Les policiers en devoir au manège du camp d'entraînement militaire de Montmagny le 27 mai 1944 étaient, à mon avis, des serviteurs de la Couronne dans l'exercice de leurs fonctions et de leur emploi. Leur négligence d'agir rend la Couronne responsable de ce qui en est résulté.

Le procureur de la pétitionnaire a soutenu avec raison que la loi de la province où la cause d'action a pris naissance s'applique quand il s'agit de déterminer la respon-

1949
MORIN
v.
THE KING
—
ANGERS J.
—

sabilité. Ce principe a été consacré par la Cour Suprême du Canada en 1908 dans les causes de *The King* v. *Armstrong* (1) et *The King* v. *Desrosiers* (2) et il a été constamment suivi depuis: *Gauthier* v. *The King* (3); *Lapointe* v. *The King* (4); *Nichols Chemicals Co.* v. *Lefebvre* (5); *Rochon* v. *The King* (6); *Sabourin* v. *The King* (7); *Thiboutot* v. *The King* (8); *Tremblay* v. *The King* (9); *Zakrzewski* v. *The King* (10).

Les articles du Code Civil ayant trait au délit et au quasi-délit, qui peuvent avoir quelque pertinence, sont les articles 1053 et 1054. L'article 1053 décrète ceci:

> 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 imprudence, négligence ou inhabileté.

L'article 1054 contient, entre autres, les dispositions suivantes, qui pourraient être, en partie, applicables en l'espèce:

> 1054. Elle est responsable non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé par la faute de ceux dont elle a le contrôle, et par les choses qu'elle a sous sa garde.

Ces dispositions n'ajoutent rien à celles du paragraphe (*c*) de l'article 19 de la Loi de la Cour de l'Échiquier, si ce n'est qu'elles sont plus larges et plus compréhensives et incluent le délit aussi bien que le quasi-délit. Elles n'offrent guère d'intérêt dans le cas qui nous occupe, étant donné que le procureur de la pétitionnaire a invoqué les arrêts précités surtout en vue d'établir que, si l'on assume que les Chevaliers de Colomb étaient les mandataires de l'intimé, celui-ci est responsable de leurs actes aux termes de l'article 1730 du Code Civil, qui décrète:

> 1730 Le mandant est responsable envers les tiers qui contractent de bonne foi avec une personne qu'ils croient son mandataire, tandis qu'elle ne l'est pas, si le mandant a donné des motifs raisonnables de le croire.

Je ne crois pas qu'il s'agisse de mandat. C'est l'intimé lui-même, par son ministre de la Défense Nationale, qui a assumé la direction et la responsabilité de la soirée de lutte du 27 mai en son manège du camp militaire de Montmagny. C'est sa police militaire, sous les ordres du sergent Turcotte, qui était chargée d'y maintenir l'ordre. C'est la

(1) (1908) 40 S.C.R. 229, 248.
(2) (1908) 41 S.C.R. 71, 78.
(3) (1918) 56 S.C.R. 176.
(4) (1913) 14 Ex. C.R. 219.
(5) (1909) 42 S.C.R. 402.
(6) (1932) Ex. C.R. 161.
(7) (1911) 13 Ex. C.R. 341.
(8) (1932) Ex. C.R. 189.
(9) (1944) Ex. C.R. 1
(10) (1944) Ex. C.R. 163.

négligence de ses membres et leur complète inertie qui ont rendu possible la ruée féroce et brutale de Larouche à travers les sièges de la salle et le renversement du banc où était placée la pétitionnaire qui a projeté celle-ci violemment sur le dos, lui causant la blessure dont elle se plaint. Tout cela aurait pu être évité, si les constables de la police militaire, particulièrement Groulx qui était le plus près de l'endroit où Larouche est descendu de l'arène, moins peureux, eussent fait leur devoir et exécuté de façon satisfaisante les fonctions qui leur avaient été confiées. Je dois dire que le témoignage de Groulx ne m'a pas impressionné favorablement. Posté au coin de l'arène où montaient et descendaient les lutteurs, il était en position de voir les agissements de Larouche. Ses réticences et ses tergiversations affectent considérablement sa crédibilité.

Le procureur de l'intimé a plaidé que la pétitionnaire est restée figée sur place quand elle a vu venir Larouche, qu'elle était hallucinée et énervée à la vue de celui-ci et que c'est ce qui a causé l'accident. Ce n'est sûrement pas cela qui a renversé le banc sur lequel était la pétitionnaire et qui l'a jetée sur le dos. Il me semble incontestable que la course furieuse de Larouche à travers les sièges et ses sauts sur les bancs qui les ont culbutés, auxquels les policiers militaires n'ont pas jugé à propos de mettre aucun obstacle, sont responsables de l'accident.

L'avocat a prétendu que l'inaccomplissement par les membres de la police militaire des fonctions auxquelles ils étaient assignés ne constitue point une négligence au sens du paragraphe (*c*) de l'article 19 de la Loi de la Cour de l'Échiquier. En d'autres mots, les dispositions de ce paragraphe, selon lui, s'appliqueraient aux fautes de commission et non à celles d'omission. Au soutien de sa prétention le procureur de l'intimé a cité des décisions de la Cour suprême dans les causes, entendues ensemble parce que résultant du même accident, de *The King* v. *Anthony* et *The King* v. *Thompson* (1), et celle de cette Cour dans la cause de *Jokela* v. *The King* (2). Le sommaire du jugement dans cette dernière cause, clair et suffisamment complet, se lit ainsi:

Suppliant suffered personal injuries and loss by breaking through a plank on the sidewalk of a roadway leading to and from the north end of

(1) (1946) S.C.R. 569. (2) (1937) Ex. C.R. 132.

1949
MORIN
v.
THE KING
ANGERS J.

Chaudière bridge, an interprovincial bridge crossing the Ottawa river, and connecting the city of Ottawa, Ontario, and the city of Hull, Quebec.

By her petition of right suppliant charged "that the injuries and loss so caused to the suppliant are a direct result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. The said negligence consists particularly of failure to maintain or keep in proper repair the plank sidewalk aforesaid."

Held: That liability of the Crown for damages for any death, or injury to the person or to property, is qualified and limited by the Exchequer Court Act and cannot be enlarged except by express words or necessary implication, and liability for injury resulting from nonfeasance is excluded. *McHugh* v. *The Queen* (1900) 6 Ex. C.R. 374, followed.

Il est peut-être utile, pour préciser davantage les circonstances de l'accident, de citer quelques extraits du jugement du juge Maclean (p. 133):

The Chaudière bridge, a steel structure, was built many years ago by the Government of Canada, and by it since maintained. After crossing the bridge from the Ontario side there immediately follow several large rock ledges or islands, between which flow minor streams of the Ottawa river, and this formation continues to the shore line of the river on the Quebec side, which is virtually Main street, in the city of Hull. When the Chaudière bridge was constructed these rock ledges or islands were elevated or lowered, as the case might be, to the level or grade of the bridge, and over and across the same was constructed a roadway or approach to the bridge, called a "causeway" by one witness, and in a judgment rendered in the Superior Court of Quebec, to be later mentioned, called a "stone bridge"; I shall throughout employ the term "roadway". It is this roadway that constitutes the approach to the Chaudière bridge from the Hull side of the Ottawa river. On one side of the roadway is a wooden sidewalk built for pedestrians, and upon this sidewalk the suppliant was walking towards Hull, in September, 1935, when a plank in the sidewalk gave way beneath her, throwing her to the sidewalk and causing the injury and damages complained of.

Plus loin le savant juge ajoute (p. 135):

It will be observed that under s. 19 (c) of the Exchequer Court Act the liability of the Crown for damages for any death or injury to the person or to property is qualified and limited. The death or injury must happen on or in connection with a public work, and must result from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, and the Crown's liability cannot be enlarged except by express words or necessary implication. That provision would seem to exclude the case in which the injury resulted from nonfeasance. The petition of right in this case states that the alleged negligence "consists particularly of failure to maintain or keep in repair the plank sidewalk aforesaid," and all the suppliant's evidence was directed to establish the fact that the injury resulted from nonfeasance. The Crown is charged with not doing what was necessary to be done in order to prevent the roadway from becoming dangerous.

Le juge Maclean, dans ses notes, se réfère au jugement du juge Burbidge dans la cause de *McHugh* v. *The Queen* (1) et en cite un passage. Je me contenterai d'en reproduire le sommaire:

There is nothing in The Public Works Act (R.S.C. c. 36) in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-sec. (6) of sec. 16 of The Exchequer Court Act.

Ces jugements, basés sur l'*Acte des Travaux Publics* (S.R.C. 1886, ch. 36), ne me paraissent avoir aucune portée en l'espèce.

Dans les causes de *Thompson* v. *The King* et *Anthony* v. *The King* (*supra*) les faits sont, brièvement, les suivants.

Un contingent d'artilleurs étaient transportés en camion sur la route de Fort Mispec à la cité de Saint-Jean (N.-B.). Tandis que quelques-uns déchargeaient leurs carabines de l'arrière du camion, un artilleur nommé Morin prit part au tirage, utilisant des cartouches chargées. Il tira une balle traceuse sur la grange du pétitionnaire Anthony, avec le résultat que la grange prit feu et brûla avec son contenu appartenant au pétitionnaire Thompson.

Des munitions chargées étaient remises à tous les rangs, vu la nature de leurs devoirs à Fort Mispec. Lorsqu'une épreuve ou un thème de manœuvres devait avoir lieu, les munitions chargées étaient retirées et remplacées par des munitions à blanc. Quand l'épreuve était terminée, les munitions à blanc étaient reprises et des munitions chargées étaient fournies. Un compte des munitions chargées, distribuées et ensuite retirées, était tenu constamment. Lorsque des munitions à blanc étaient retirées il était impossible de les vérifier, parce que durant l'épreuve les soldats avaient tiré de temps à autre et les officiers devaient accepter leur parole relativement à la quantité de cartouches que chacun avait utilisées.

Des ordres prohibaient le tir sauf sur commandement d'un officier. Avant le départ du contingent, les munitions chargées remises à la batterie avaient été vérifiées. Morin avait eu la charge du dépôt d'armes à Fort Mispec, était devenu malade et, après avoir remis ses munitions chargées aux autorités et la clé du dépôt à son successeur (Bradley), il a été transporté à l'hôpital.

(1) (1900) 6 Ex. C.R. 374.

1949
MORIN
v.
THE KING
ANGERS J.

A son retour de l'hôpital, immédiatement avant le départ du contingent, Morin est allé trouver Bradley et lui a demandé la clé pour lui permettre de prendre ses effets personnels dans la bâtisse où le dépôt de carabines était situé. Ce dépôt était toujours fermé à clé et la clé en était confiée à un seul homme. Morin réussit à l'obtenir de son successeur et, tandis qu'il était dans le dépôt, il vola 26 cartouches de carabines Bren, comprenant des balles traceuses, obus incendiaires et boulets. Il remit ensuite la clé et partit avec le contingent pour Partridge Island.

Quelques artilleurs commencèrent à tirer des munitions à blanc de l'arrière du camion et Morin tira 26 cartouches, traceuses, incendiaires et à balle. Le tir commença près de Fort Mispec et continua sur une distance de quinze milles.

Quand le camion atteignit un point vis-à-vis la grange du pétitionnaire Anthony, Morin la visa et tira; la douille d'une balle traceuse a été ramassée, après le feu, sur la route vis-à-vis la grange.

L'honorable juge O'Connor, qui a entendu la cause, a décidé que Morin avait tiré une balle traceuse sur la grange du pétitionnaire Anthony et que celle-ci avait causé la destruction par le feu de la grange et des effets y contenus.

Le jugement relate que Morin a été accusé d'avoir illégalement et délibérément endommagé la grange du pétitionnaire Anthony en y mettant le feu au moyen d'une balle tirée par lui, qu'il a reconnu sa culpabilité et qu'il a été condamné.

Le savant juge déclare qu'en vertu de l'article 50A de la Loi de la Cour de l'Échiquier il en est venu à la conclusion que Morin, le sergent-major Williams et le lance-bombardier Haynes étaient membres de la 4e batterie côtière et des forces militaires de Sa Majesté le Roi aux droits du Canada et qu'ils doivent en conséquence être considérés comme des serviteurs de la Couronne.

Après avoir commenté et écarté plusieurs griefs soulevés par les pétitionnaires à l'encontre de la conduite de Morin et de Bradley, le juge O'Connor en arrive à la conclusion que le sergent-major Williams et le lance-bombardier Haynes ont été coupables de négligence, laquelle a résulté en la destruction de la grange du pétitionnaire Anthony et

de son contenu appartenant au pétitionnaire Thompson. Il me semble à propos de citer un passage du jugement (p. 37):

In my view he (Sergeant-Major Williams) knew the firing was going on and that he should have stopped it, but because he was pressed for time he did not do so. As a sergeant-major he knew or should have known the difference in sound between a truck backfiring and shots from rifles.

Lance Bombardier Haynes, who was riding in the truck with Morin, must have known that the men were firing all the way along.

I find that both Sergeant-Major Williams and Lance Bombardier Haynes knew that these gunners were firing from the back of the truck from Fort Mispec to Haymarket Square, and that their failure to stop this firing was negligence.

The destruction of the barn and the chattels was a natural consequence of this negligence. A reasonable person would have foreseen such damage, and the non-commissioned officers ought to have foreseen it, *see* Glasgow Corporation *v.* Muir, (1943) 112 L.J.P.C. 1.

Le jugement du juge O'Connor a été infirmé par la Cour Suprême (Rinfret, j. en c., Kerwin (diss.), Hudson, Rand et Estey (diss.), JJ.). L'honorable juge Rand, qui a rendu le jugement du juge en chef, du juge Hudson et de lui-même, après avoir déclaré que l'effet du paragraphe (*c*) de l'article 19 est de créer une responsabilité contre la Couronne pour négligence en vertu du principe *respondeat superior* et non d'imposer des devoirs à la Couronne en faveur des sujets (*The King* v. *Dubois* (1); *Salmo Investments Limited* v. *The King* (2), et précisé qu'il s'agit d'une responsabilité basée sur un acte délictueux de négligence commis par un employé agissant dans l'exercice de son emploi, fait les observations suivantes (p. 571):

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" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of respondent superior; the former does not.

Now I think it quite impossible to say that the act of Morin in shooting the incendiary bullet into the barn can be treated as an act of

(1) (1935) S C R. 378, 394 et 398 (2) (1940) S C.R. 263, 272.

1949
MORIN
v.
THE KING
ANGERS J.

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.

En rapport avec la prétention du procureur des intimés que le contingent de soldats et le camion en cause étaient sous la charge d'officiers ayant des responsabilités qui reliaient la Couronne à l'incident, le juge Rand dit qu'il assumera un degré d'autorité et de devoir général chez les deux sous-officiers allant jusqu'au droit d'exiger de Morin qu'il remette les cartouches chargées et qu'il examinera la prétention de l'avocat à ce point de vue.

Le savant juge relate ensuite les événements qui se sont déroulés le 24 avril, particulièrement le fait que Morin avait réussi à se procurer, par ruse, des cartouches chargées, et continue ainsi (p. 573):

Now, this ammunition was property belonging to the Crown, and the soldiers were entitled to make use of it only as they were discharging their duties. The order to turn it in when military exercises were being carried out was primarily a safeguard against its accidental use, for those so engaged and presumably for civilians who might be within the range of the operations.

Morin then was guilty of a breach of discipline in possessing the bullets and in discharging them; and when that fact became evident, the officer's military duty arose. There is some dispute whether the sergeant should have been able to distinguish the firing of live from blank ammunition, but I will take that to be so, and that there was a time before the barn was set afire when either could have acted.

Abordant la question du devoir des sous-officiers et de leur responsabilité au cas d'inexécution, le juge Rand exprime ces commentaires:

The conditions under which a duty toward A may give rise to a contemporaneous and independent duty toward B are not clearly settled; but here we have a special situation in which the primary duty arises. In the national organization, military and police agencies are necessary for the preservation of the national life and its order. For this purpose, men must, among other things, be entrusted with instruments of danger, and laws, rules and authority are set up to regulate their behaviour. But the duties so arising are essentially for the public interest. They are created within a structure of general law which postulates as a basic principle to which there are few exceptions, that a person is responsible only for his own act: Moon *v.* Towers, (1860) 141 E.R. 1306. Failure in relation to a duty undertaken or assumed directly toward the injured person becomes affirmative action in the obverse of actual conduct modified by the failure, and the actual conduct may be mere persistence in inaction; but where the injured person is not the one with whom the undertaking is made, then it must appear at least that he is within the intended range of benefit; Bélanger *v.* Montreal Water and Power Co., (1914) 50 Can. S.C.R. 356. In other circumstances, reliance by him on the undertaken conduct may be

necessary to establish the link of legal duty. I see nothing of those elements in the duty of an officer under military discipline in relation to acts of subordinates. The military law is a body of rules by which, among other objects, the possibilities of illegal and injurious action, whether by means of dangerous weapons entrusted to soldiers or otherwise, may be restricted; but it is a proposition which I am unable to accept that persons bearing that authority must have regard to private interests before they may safely abstain, in any situation, from exercising it. It would introduce fundamental questions of conflicting responsibilities, of excuses for failure to act and of legal causation; and so far as counsel have been able to discover, in generations of experience with military activities and personnel, it has never before been suggested. We enter here the field of executive action and the hierarchy of command.

La conclusion du jugement est en ces termes:

The failure of the sergeant or lance-corporal to act towards Morin was then 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.

L'honorable juge Kerwin, qui était dissident, après avoir relaté l'événement, émet cette opinion claire et précise (p. 577):

I am unable to accede to Mr. Varcoe's argument that Williams owed no duty to the suppliants. On the contrary, I am of opinion that he did owe such a duty and that it should be expected that damage would occur as a result of his negligence. Mr. Varcoe also pointed out that the expression in section 19 (*c*) of the Exchequer Court Act is "while acting within the scope of his duties or employment" and not that used at common law in master and servant cases, "in the course of his employment." It has already been pointed out in Lockhart *v.* Canadian Pacific Railway Company, (1941) S.C.R. 278, that this is the correct formula at common law and not "acting within the scope of his authority." While the latter and the wording used in section 19 (*c*) might appear linguistically similar, the statute should receive the same interpretation as the expression "in the course of his employment",—particularly when one takes into consideration the wording of the French text,

pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

So treated, the mere fact that Morin's act was deliberate cannot excuse the want of care on Williams' part, and on this ground and without expressing any opinion as to the other questions argued before us, I would dismiss the appeal with costs.

L'honorable juge Estey, aussi dissident, fait, entre autres, les observations suivantes (p. 579):

The duty of Williams may be placed upon another basis. The men began firing immediately they left Fort Mispec. This was contrary to orders in two respects. They were not supposed to have either live or blank ammunition in their possession, nor were they to discharge their rifles. Such orders exist for different reasons, one of which being that persons and property of both those in the services and of the public may not be injured or damaged.

1949

MORIN
v.
THE KING

ANGERS J.

Morin began firing near the B.O P. at Fort Mispec; whether that was before Williams passed the Haynes-Morin truck is not clear. It is clear that the boys commenced firing at the very outset and that Williams was in the last car as they left Fort Mispec After proceeding approximately a quarter of a mile this car passed the Haynes-Morin car. Williams, exercising reasonable care would have known, or should have known at the very outset that the men were discharging rifles and that at least one of them was discharging live ammunition, all of which was contrary to orders, and all this was upon a public highway where people travelled and along which people reside. One who is in a position where he ought to know is in the same position in law as one who knows: White *v.* Steadman, (1913) 3 K B. 340, 348.

In my opinion a man placed in the position of Williams would have foreseen the possibility of damage. Indeed, quite apart from any order, under such circumstances a reasonable man in the position of Williams would have foreseen the probability of damage and therefore in my opinion a duty rested upon Williams, acting in the place and stead of the master, to have exercised reasonable care.

Plus loin, après avoir commenté certains jugements, le savant juge ajoute (p. 581):

Williams, however, did not exercise reasonable care. That he heard the firing is clear, but as to the reports he said· I wasn't sure at the time it was blank shots,—I couldn't swear to that,—but it sounded to me like blanks.

He did not even know whether it was his men firing the shots but because he heard an alarm before leaving Fort Mispec he assumed that the infantry might be discharging rifles along the road or in the woods This assumption might have some validity had the firing not started at the very outset when he was nearby and had he been sure only blank ammunition was being fired, as he knew that the men upon manœuvres used only blank ammunition He made this assumption without any investigation or any inquiry until he got into Saint John where he "questioned the men and received no response." This in itself indicates that Williams was not satisfied with his own assumption. Upon all the evidence it appears clear that he paid no attention whatever to what the men were doing en route and only sought to excuse himself on the ground that he was in a hurry and had but a limited time to catch the boat. Such excuse does not relieve him of any responsibility.

L'honorable juge Estey résume ainsi, de façon brève et nette, sa conclusion (p. 583):

Under the circumstances of this case it was the failure of Williams, as the party in charge, to use reasonable care to restrain Morin from discharging live ammunition as he proceeded along the highway; that his failure in this regard was a cause of the destruction of the barn He owed the duty to use care in this regard towards the respondents as residents along the highway and his breach of that duty constituted negligence.

Avec déférence, je dois dire que j'aurais été enclin à adopter l'opinion exprimée par les juges Kerwin, Estey et O'Connor. A tout événement, je ne crois pas que cette

décision ait la portée que veut lui attribuer le procureur de l'intimé et qu'elle puisse s'appliquer en l'espèce. La distinction entre le devoir et la responsabilité ne se présente pas dans le cas qui nous occupe. L'intimé avait, à mon avis, le devoir de protéger les spectateurs à la séance de lutte. Il l'a compris et a fait placer dans le manège une trentaine de membres de sa police militaire. Ceux-ci ont été négligents, voire absolument inactifs, et leur négligence entraîne la responsabilité de la Couronne. Je noterai incidemment qu'il n'y avait pas de police civile dans le manège.

Le procureur de l'intimé a invoqué en outre un jugement du président de cette Cour dans la cause de Philippe Martin *v.* Sa Majesté le Roi, n° 23672. Le jugement a été rendu oralement séance tenante; le savant juge n'en a pas produit de motivés. J'ai lu les plaidoiries et je crois pouvoir tirer de cette lecture la conclusion que les militaires qui ont commis l'assaut brutal y relaté sur le pétitionnaire n'étaient pas dans l'exercice de leurs fonctions.

Il me reste à déterminer le montant des dommages subis par la pétitionnaire; je crois juste et raisonnable de les estimer à $2,180.68, comme suit:

Compte du docteur Verge	$ 50.00
Compte du docteur Bigué	20.50
Compte du docteur Giguère	200.00
Ambulance	14.00
Hôpital de l'Enfant-Jésus	33.18
Hôtel-Dieu — premier séjour	39.00
Hôtel-Dieu — second séjour	281.00
Pour incapacité totale pendant 8 mois	120.50
Pour incapacité partielle de 50 p. 100 pendant six mois	45.50
Pour incapacité partielle permanente de 5 p. 100	877.00
Pour souffrances	500.00

Il y aura jugement contre l'intimé pour la somme de $2,180, sans intérêt mais avec dépens.

Judgment accordingly.

1949
April 28-29
June 15

BETWEEN:

HIS MAJESTY THE KING on the Information of the Attorney General of Canada, ... PLAINTIFF;

AND

CONSOLIDATED MOTORS LIMITED, ... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(b)—Right to compensation for damage by severance—Measure of damages is depreciation in value of remaining property—Physical contiguity of lands or unity of actual use not necessary if there is unity of ownership conducing to advantage or protection of property as one holding or possession and control enhancing its value as a whole.

Plaintiff expropriated part of the defendant's property in the City of Winnipeg. The action was taken to obtain the adjudication of the Court as to the amount of compensation payable to the owner for the property taken and the damage to the remaining property by the severance of the expropriated part.

Held: That property may be injuriously affected within the meaning of section 19(b) of the Exchequer Court Act by the severance of other property from it by expropriation and the measure of damages is the depreciation in value of the remaining property in consequence thereof.

2. That where part of an owner's property has been expropriated and he makes a claim for damage to his remaining property on the ground that it has been injuriously affected by the severance of the expropriated property he need not show that the expropriated property and his remaining property were in physical contiguity or that there was unity in their actual use; it is enough if he can show that the unity of their ownership conduced to the advantage or protection of the property as one holding or that the possession and control of each part gave an enhanced value to the property as a whole, and that the severance of the expropriated property prejudiced him in his ability to use or dispose of the remaining property or otherwise depreciated its value.

3. That where an owner of property at or about the time of the expropriation has stated or declared the value of his property he ought not to be allowed to contend in proceedings taken to determine the amount of compensation payable to him that his property was of much greater value at the date of the expropriation either by itself or as conducing to the advantage or protection of his property as one holding or as giving an enhanced value to his property as a whole.

INFORMATION by the Crown to have the amount of compensation payable to the owner of expropriated property determined by the Court.

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

C. B. Philp K.C. and *A. H. Laidlaw* for plaintiff.

W. A. Johnston K.C. for defendant.

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

The PRESIDENT now (June 15, 1949) delivered the following judgment:

The Information exhibited herein shows that the defendant's lands described in paragraph 2 thereof were taken for the purposes of the public works of Canada by His Majesty the King under the Expropriation Act, R.S.C. 1927, chap. 64. The expropriation was completed on April 26, 1948, by depositing a plan and description of the lands in the Land Titles Office for the District of Winnipeg, being the office of the registrar of deeds for the registration division in which the lands are situate, as required by section 9 of the Act. Thereupon the said lands became vested in His Majesty and all the right, title or interest of the defendant thereto or therein was extinguished and converted by section 23 of the Act into a claim to compensation money therefor.

The parties have not been able to agree upon the amount of compensation money to be paid and these proceedings are brought for an adjudication thereof. The plaintiff offers the sum of $6,005 but the defendant claims $25,000 together with interest.

At the trial the defendant obtained leave to amend its statement of defence *inter alia* by adding thereto paragraph 14A reading as follows:

> The defendant says further that it owns additional lands in close proximity to the said lands being expropriated, which additional lands will be greatly reduced in value to the defendant by reason of this expropriation and the loss to the defendant of the lands now being expropriated and the defendant is thereby entitled to compensation in respect of such reduced value.

The defendant thus makes two claims for compensation, one for the value of the expropriated property and the other for the depreciation in value of its other lands by reason of the severance of the expropriated parcel therefrom.

1949
THE KING
v.
CONSOLIDATED
MOTORS
LIMITED
Thorson P

The expropriated property is on the east side of Main Street just a short distance north of York Avenue, with a frontage of 54·7 feet on Main Street and a depth of 120 feet to a paved lane at the rear between it and the Canadian National Railway embankment. The defendant purchased it from the City of Winnipeg in the spring of 1946 for $4,387, the city having acquired it at a tax sale many years previously. Prior to such purchase and since 1938 the defendant had been a lessee from the city. It had never used the property, which was vacant land, for its own purposes but had sub-let or let it to others, first in 1938 to Breen Motors Limited who gave up their sub-lease during the war, then in 1943 and 1944 to an auto wrecking company which used it for storing or parking their own cars, and finally in 1945 to Mr. N. D. Peters who used it for the display and sale of his own used cars. After the defendant became the owner of the property it let it to Mr. Peters, the tenancy being terminable on 30 days' notice and the rent reserved being $50 per month. At the date of the expropriation Mr. Peters was in occupation of it under this lease.

The defendant's claim for the value of the expropriated property presents no difficulty. It is just a few feet north of the property referred to in the case of *The King* v. *City of Winnipeg and George Hirtle and Robert Miller,* in which I gave judgment on May 6, 1949. It was agreed between counsel that all the evidence adduced in that case, except that of George Hirtle, should be considered as applicable in this one. Under the circumstances, the reasons for judgment in that case are, *mutatis mutandis,* applicable here and are incorporated herewith. In view of the fact that the properties in the two cases are only just a few feet apart I find no justification for ascribing a higher value per foot for the one than for the other. I, therefore, estimate the value of the expropriated property in this case as at the date of its expropriation at $150 per foot of frontage on Main Street or a total of $8,205.

The defendant's claim for compensation for the damage resulting from the severance of the expropriated property from its other lands is not as simple. The facts on which it is based were given by Mr. C. D. Roblin, the defendant's president and general manager, as follows. The defendant

acquired its first property on the east side of Main Street, being the most northerly 100 feet of its holdings, about 1920 and erected a two-storey building on it, which may be called its main premises. On these premises to which it moved about 1921 it had its office and carried on its retail sales of Studebaker and Willys cars and operated its service garage. A short time later it bought 50 feet immediately south of its main premises on which it erected an additional two-storey building with a party wall between it and the first one. In this building it operated its wholesale parts division, dealing in automotive parts and supplies for all makes of cars, which it ran as an independent operation separate from its retail sales. The wholesale parts division was really a business within a business under a separate manager and with its own accounting. In this second building some space on the ground floor was rented to Consolidated Industries Limited, a subsidiary company dealing in household appliances, and part of the second floor was used as a paint and fender shop. The two buildings had a continuous frontage of 150 feet on Main Street with a communicating door between them, while at the same time there was a desirable separation for the parts division which catered to the automotive trade generally, including customers who dealt in cars of makes other than those for which the defendant had its agency. The defendant is also the owner of other additional property with a frontage of 250 feet on Main Street immediately south of its wholesale parts division building. It had this under lease as far back as 1928 or 1930 and purchased it in 1939, the northerly 50 feet (lot 19) from the Hudson's Bay Company for $110 per foot and the southerly 200 feet (lots 15-18) from the City of Winnipeg for $12,800. Finally, the defendant acquired the expropriated property, as already explained, first by lease in 1938 and then by purchase in 1946. Between the southern limit of the 250 foot property and the northern limit of the expropriated property there is a frontage of 70 feet on Main Street on which there are two buildings belonging to persons other than the defendant and in which it has no interest except that its subsidiary, Consolidated Industries Limited, has, since the date of the expropriation, rented the most northerly 15 feet in the building immediately south of the 250 foot property for

1949
THE KING
v.
CONSOLIDATED
MOTORS
LIMITED
Thorson P.

the sale of Austin cars for which it has an agency. At the date of the expropriation the expropriated property was, as already stated, leased to Mr. N. D. Peters.

After the defendant had been in its main premises and its wholesale parts division building for some years it appeared that it might have to expand or change its method of operation. It was its experience and that of other automobile sales companies that from a service aspect the operation of business on more than one floor was uneconomic. The trend in the industry was towards single-storey premises. A change to this type of premises required more land and the defendant, which was not yet ready to make the change, took steps to get control of the necessary land. It was for this purpose that it leased and subsequently purchased the 250 foot property to the south of its buildings and later the expropriated property. When it acquired the 250 foot property in 1939 it used the north 50 feet of it for its own purposes and leased the rest. The outbreak of war postponed its plans but when the war was over it proceeded with them and in 1946 built the first unit of its new buildings, a service station with facilities for light repairs. This is a single-storey building, 80 feet long and set back 30 feet from the street. The north end of it is 120 feet south of the wholesale parts division building. Of this the north 50 feet was reserved as a lot for the display of the defendant's own used cars taken in trade and for customers' parking. The rest was kept for the proposed new garage and showroom, all to be on one floor. The 50 feet south of the new service station was used as a parking lot. There was no provision in the defendant's plans for the development of its 250 foot property for a new wholesale parts division building. It intended to put such a building on the expropriated property which it had acquired for that purpose. It would have preferred to secure the frontage immediately south of its 250 foot property but there was not a great handicap in having a separate property for it. Indeed, there would be some advantage in that, since it would give a more separate operation for its wholesale parts business and this would be helpful in dealing with customers who were dealers in competing cars. Obviously, the taking of the expropriated property put an end to the defendant's plan to put a new wholesale

parts division building on it. It contends that it is entitled to compensation for the damage resulting to it therefrom by reason of the severance of the expropriated property from its other lands.

In *The King* v. *Woods Manufacturing Co. Ltd.* (1) I had to consider a claim for damage by severance and was satisfied that such a claim is within the ambit of section 19(b) of The Exchequer Court Act, R.S.C. 1927, chap. 34, which provides as follows:

> 19. The Exchequer Court shall also have exclusive jurisdiction to hear and determine the following matters:
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

While there is no specific mention of damage by severance as a cause of action in either the Exchequer Court Act or the Expropriation Act, there is no limitation of the meaning of the words "injuriously affected" in section 19(b) of the Exchequer Court Act that would exclude it. If an owner's property is expropriated and his remaining property is depreciated in value as the result of such expropriation, surely it has been "injuriously affected" thereby. There is, therefore, no need of any specific mention of damage by severance as a cause of action, since one of the ways in which an owner's property may be injuriously affected within the meaning of section 19(b) of the Exchequer Court Act is by the severance of other property from it by expropriation. That there is a cause of action for damage to property injuriously affected by the severance from it of other property by expropriation and that the measure of damages is the depreciation in value of the remaining property in consequence thereof is established by the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (2).

Whether in the present case the facts support the defendant's claim presents a question that is not free from difficulty.

There are helpful English decisions under section 49 of the Lands Clauses Consolidation Act, 1845. For example, in *Holt* v. *Gas Light* and *Coke Co.* (3) it was held that where the lands injuriously affected by the taking of the expropriated property and the expropriated property were

(1) (1949) Ex. C.R. 9 at 20.
(2) (1922) 2 A.C. 315.
(3) (1872) 7 Q.B. 728.

1949
THE KING
v.
CONSOLIDATED
MOTORS
LIMITED
Thorson P.

held for the same common object the owner's right to compensation for damage by the severance of the expropriated property was not affected by the fact that the properties were not held under the same title and were not in physical contiguity. That lands can be "held with" other lands within the meaning of section 49 of the Lands Clauses Consolidation Act, 1945, in such a way as to give their owner a right of compensation for the damage sustained by him by reason of their severance from his other lands, even although the lands were not physically contiguous, was settled beyond dispute by the House of Lords in *Cowper Essex* v. *Local Board for Action* (1). In that case part of the owner's land, which was laid out as a building estate, was taken by a local board under an Act incorporating the Lands Clauses Consolidation Act, 1845, for the purposes of a sewage farm, whereby the value of other parts of the owner's land was depreciated. These other parts were situated near the part so taken but separated from it by intervening land, on which there was a railway, belonging to other persons. The Queen's Bench Division held that the owner was entitled to compensation for the damage to his other lands. The Court of Appeal (2) unanimously reversed this decision mainly on the ground that since the expropriated land was separated from the owner's other lands by the railway there had been no severance of his lands by the expropriation. The House of Lords unanimously reversed the decision of the Court of Appeal and laid down the principles to be applied in determining whether an owner, part of whose lands has been expropriated, has a right to compensation for damage to his remaining lands by reason of the taking of the expropriated land. Lord Halsbury L.C. made it clear that it was not necessary that the expropriated part should have been physically contiguous to the remaining lands. The issue was whether the unity of the estate had been interfered with and in each case this was a question of fact. Lord Watson was of a similar view. At page 167, he said:

> What lands are to be regarded as "severed" from those taken, is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held "with" each other, in the sense of the act;

(1) (1889) 14 A.C. 154. (2) (1886) 17 Q.B.D. 447.

and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter.

And then he stated:

But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation

Lord Macnaghten put the test as follows, at page 175:

Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership conduces to the advantage or protection of the property as one holding. That condition seems to be implied Otherwise the owner could hardly sustain injury by reason of the execution of the works on the lands taken

Although section 49 of the Lands Clauses Consolidation Act, 1845, has no specific counterpart in any Canadian Act the principles laid down in the *Cowper Essex* case (*supra*) to which I have referred are, I think, applicable in determining whether an owner has a right under section 19(b) of the Exchequer Court Act to compensation for damage to his property on the ground that it has been injuriously affected by the severance from it by expropriation of property formerly owned by him. They have been adopted by the Judicial Committee of the Privy Council in two Canadian cases. In *Holditch* v. *Canadian Northern Ontario Railway* (1) Lord Summer, delivering the judgment of the Board, said, at page 542:

The basis of a claim for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

He also gave formal, if indirect, approval of the principles laid down in the *Cowper Essex* case (*supra*) to which I have referred. It had been argued before the Board that the case before it was governed by that case but their Lordships were unable to agree in this view. Lord Summer said of the *Cowper Essex* case (*supra*), at page 543:

In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold

(1) (1916) A.C. 536.

1949
THE KING v. CONSOLIDATED MOTORS LIMITED
Thorson P.

as made a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking.

There was also an acceptance of the test used by Lord Macnaghten that it is enough "if the unity of ownership conduces to the advantage or protection of the property as one holding" and a finding that in the case under review the facts did not meet such a test. Finally, the *Cowper Essex* case (*supra*) was expressly followed in *Sisters of Charity of Rockingham* v. *The King* (*supra*). There Lord Parmoor, speaking for the Board, adopted Lord Macnaghten's test and also that of Lord Watson.

On the argument I was rather of the view that since there was no unity of use of the expropriated property and the defendant's other lands at the date of the expropriation the defendant had no cause of action for damage by severance. There is some support for this view in *Holt* v. *Gas Light and Coke Co.* (*supra*) but I have since come to the conclusion from the authorities cited that unity of actual use is not necessary provided that there is the unity of ownership and of possession and control that Lord Macnaghten and Lord Watson referred to. It is established that where part of an owner's property has been expropriated and he makes a claim for damage to his remaining property on the ground that it has been injuriously affected by the severance of the expropriated property he need not show that the expropriated property and his remaining property were in physical contiguity or that there was unity in their actual use; it is enough if he can show that the unity of their ownership conduced to the advantage or protection of the property as one holding or that the possession and control of each part gave an enhanced value to the property as a whole, and that the severance of the expropriated property prejudiced him in his ability to use or dispose of the remaining property or otherwise depreciated its value.

On this view of the law the defendant is, I think, entitled to succeed in its claim. I accept Mr. Roblin's statement that the defendant acquired the expropriated property solely for the purpose of having control of it for use in its new construction programme in the future. It is true that

it could continue to use its present wholesale parts division building, but it is also clear that it would be more advantageous to sell it along with its main premises as one unit. That is what the defendant intended to do and then build a new wholesale parts division building on the expropriated property. This it cannot now do. Under the circumstances, I think that it may fairly be held that the defendant's unity of ownership of the expropriated property and its other lands conduced to the advantage of its property as one holding and that its possession and control of both parts gave an enhanced value to the property as a whole. That being so, it is clear, in my judgment, that the severance of the expropriated property deprived the defendant of an advantage it had had and lessened its ability to use its other lands. It follows, I think, that it thereby suffered a depreciation in their value. The defendant's claim is thus within the scope of the test established by the cases.

Mr. Roblin put the quantum of the defendant's claim at $15,000 which he arrived at on the following basis. The loss of the expropriated property might force the defendant back to a two-storey new building instead of its intended single-storey one; the operation of business in such a building would necessitate the employment of an assistant shop foreman or service superintendent at a salary of $3,000 per year which would be saved if business were done on only one floor; and in five years this would amount to $15,000. I am unable to accept either the amount of Mr. Roblin's estimate or the basis upon which it was made. The measure of the defendant's damages is the depreciation in value of its other lands. This is not easy to fix, but the defendant has itself gone far in establishing the limit of its claim. On December 10, 1947, it wrote the Department of Public Works in reply to an inquiry from it that the price for the expropriated property was $10,940. There was no threat of expropriation at the time and it was then willing to part with its property for that amount. It ought not now to be allowed to contend that it was of much greater value at the date of the expropriation either by itself or as conducing to the advantage or protection of its property as one holding or as giving an enhanced value to its property as a whole. That the statement is admissible against the defendant's contention that it should be

1949

THE KING v. CONSOLIDATED MOTORS LIMITED

Thorson P.

compensated to the extent of $25,000 is clear. Nichols on Eminent Domain, second edition, puts the rule as follows, at page 1210:

> When the contention is made by an owner of land which has been taken, in whole or in part, or injuriously affected, by the exercise of the power of eminent domain, that his land was of greater value before the taking or injury than the condemning party is willing to concede, the latter may introduce evidence of statements or declarations made by the owner at or about the time of the taking, but not necessarily related to that subject, to the effect that the land was worth a less amount than he now contends to be the case. Such evidence is competent as an admission against interest upon the general principles of the law of evidence as one of the recognized exceptions to the rule against hearsay, and as an owner, simply by virtue of his ownership, is considered to have sufficient knowledge of the value of his property to make his opinion competent in his favour, it is not necessary to show by extrinsic evidence that he was qualified to meet the objection that the statement referred to a matter concerning which the defendant was not sufficiently informed.

The defendant is, however, entitled to some increase over the price of $10,940 which it was willing to take on December 10, 1947, by reason of the increase in land values in 1948 of which the witnesses in the *Hirtle* and *Miller* case (*supra*) spoke. Under all the circumstances I assess the amount of the injury done to the defendant's other lands as a result of the severance at $3,500.

There remains only the question of interest. The defendant has, through its tenant, been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent for it. In accordance with the long established rule of this Court it is not entitled to any allowance of interest: *The King* v. *Woods Manufacturing Co. Ltd.* (1).

There will, therefore, be judgment declaring that the lands described in paragraph 2 of the Information are vested in His Majesty the King as from April 26, 1948; that the amount of compensation to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $11,705 without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

---

(1) (1949) Ex C.R. 9 at 60.

BETWEEN:

PAN-AMERICAN TRUST COMPANY, ... APPELLANT,

1947 June 23 — 1949 July 20

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(p), 9B(2)(a), 9B(2)(b), 9B(2)(d), 9B(11), 9B(12), 9B(15), 84—Income received or accruing from a Canadian estate or trust—Dividends exempt from tax under s. 9B(2) by reason of ss. 9B(11) and 9B(12) do not lose exemption through being paid to trustee for non-resident.

A Swiss company had two Canadian subsidiaries, one, its Canadian operating company, Ciba Company Limited, and the other, an investment company, Anglo American Chemicals Ltd., a non-resident-owned investment corporation within the meaning of s. 2(*p*) of the Income War Tax Act. The dividends paid by these two companies to the Swiss company were exempt from tax under s. 9B(2) by reason of ss. 9B(11) and 9B(12). After the outbreak of the war the Swiss company incorporated the appellant and thereafter the dividends, instead of being paid to the Swiss company, were paid to the appellant which credited them to the Swiss company and paid them into a separate bank trust account. Dominion of Canada bonds were bought with some of the dividends and the interest thereon treated by the appellant in the same way as the dividends. The respondent considered tax was payable on the amounts thus received by the appellant under s. 9B(2) (*d*) and made a demand on the appellant for payment under s. 84(3).

Held: That where dividends would be exempt from the tax imposed by section 9B(2) by reason of sections 9B(11) and 9B(12), if paid direct to a non-resident, they do not lose their character as tax exempt dividends through being paid to a trustee for the non-resident and credited by such trustee to the non-resident and paid into a separate bank trust account, or thereby become subject to tax under paragraph (*d*) of section 9B(2) as income received or accruing from a Canadian estate or trust. *Archer-Shee* v. *Baker* (1927) A.C. 844 followed.

2. That the term "income received or accruing from a Canadian estate or trust" in paragraph (*d*) of section 9B(2) does not include income from property which a settlor has transferred to a trustee for himself and of which he has never ceased to be the beneficial owner.

3. That the Swiss company was the beneficial owner of the interest on the Dominion of Canada bonds in its character as such and not as income received or accruing from a Canadian estate or trust.

4. That the interest on the Dominion of Canada bonds was exempt from tax under section 9B(2) by reason of paragraph (*b*) thereof.

1949
PAN-AMERICAN TRUST COMPANY
v.
MINISTER OF NATIONAL REVENUE

Appeal under the Income War Tax Act.

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

Hon. J. L. Ralston, K.C. and *H. H. Stikeman* for appellant.

J. G. Ahern, K.C. and *J. G. McEntyre* for respondent.

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

THE PRESIDENT now (July 20, 1949) delivered the following judgment:

This is an appeal from a demand under the Income War Tax Act, R.S.C. 1927, chap. 97, as amended, for payment by the appellant of tax in respect of certain sums received by it in 1941, 1942 and 1943 for a Swiss Company known originally as the Society of Chemical Industry in Basle and later as Ciba Limited.

The facts are not in dispute. The Swiss company was organized over 60 years ago under the laws of Switzerland with its head office in Basle. It manufactured and dealt in pharmaceutical supplies, dyes, etc. In addition to operating a plant itself in Switzerland it also had large interests in other concerns in America and the United Kingdom. It is the parent company of the other companies hereinafter referred to. One of these, known as Ciba Company Limited, was incorporated in 1922 under the laws of Canada. It is the Swiss company's Canadian operating company. The other subsidiary, known as Anglo American Chemicals Ltd., is an investment corporation. It was incorporated in 1937 under the laws of Canada, after certain provisions of the Income War Tax Act relating to non-resident-owned investment corporations, designed to attract foreign investors to Canada, had come into effect. This subsidiary acquired all the Swiss company's holdings in the American and United Kingdom enterprises in which it had interests. Thereafter, Anglo American Chemicals Ltd. was recognized as a non-resident-owned investment corporation within the meaning of section 2(*p*) of the Act, which provides as follows:

2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,

(p) "Non-Resident-Owned Investment Corporation" means a company incorporated in Canada, at least ninety-five per centum of the aggregate value of whose issued shares and all of whose bonds, debentures and other securities or evidences of funded indebtedness are beneficially owned by persons who are non-residents of Canada or are owned or held by trustees for the benefit of non-resident persons or their unborn issue, or by a corporation whether incorporated or domiciled in Canada or elsewhere but in all other respects conforming to the foregoing requirements of this paragraph (p), the gross income of which is derived from one or more of the following sources:

(i) from the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property, or any interest therein;

(ii) from the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend;

(iii) from or by virtue of any right, title or interest in or to any estate or trust.

Provided, however, that the definition aforesaid shall not include a corporation the main business of which is the making of loans of five hundred dollars or less.

and, up to the end of 1940, the dividends paid by it to the Swiss company were by reason of section 9B(12) exempt from the tax that would otherwise have been imposed in respect thereof under paragraph (a) of section 9B(2). The provisions of the enactments referred to will be set out later.

After the outbreak of the war, however, the undesirability of sending moneys from Canada to the Swiss company in view of the nearness of the German forces made other arrangements necessary and in 1940 the Swiss company caused the appellant to be incorporated under the laws of Prince Edward Island. Then by an agreement dated January 21, 1941, it transferred to the appellant 100,000 preferred shares and 279,996 common shares of the capital stock of Anglo American Chemicals Ltd., 1,995 shares of the capital stock of Ciba Company Limited and $280,010.49 in 5 per cent promissory notes of Ciba Company Limited for the purposes and upon the terms and conditions set out in the agreement. Thereafter, in the years in dispute, the dividends on the shares of Anglo American Chemicals Ltd. and Ciba Company Limited, and the interest on the promissory notes of the Ciba Company Limited, instead of being paid to the Swiss company as theretofore, were paid to the appellant. The appellant credited the sums thus received by it to the Swiss company in a special account and kept them in a separate trust bank account called "Trust

1949
PAN-AMERICAN TRUST COMPANY v. MINISTER OF NATIONAL REVENUE
Thorson P.

Account No. 1". The appellant bought Dominion of Canada bonds with some of the moneys received by it as dividends and dealt with the interest thereon in the same way as the dividends and the interest on the notes. The appellant had no other business than to look after these Swiss company securities and payments.

The amounts thus received and credited by the appellant in the years in dispute were as follows: in 1941, dividends on the Anglo American Chemical Ltd. shares, $800,000, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, $15,824.23; in 1942, dividends on the Ciba Company Limited shares, $99,875, interest on Dominion of Canada bonds, $393.75, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, $24,-012.50; and in 1943, dividends on the Anglo American Chemicals Ltd. shares, $500,000, interest on Dominion of Canada bonds, $1,756.25, and interest on the Ciba Company Limited notes less 15 per cent tax withheld by Ciba Company Limited, $24,012.50.

The appellant reported the receipt of these amounts in its income tax returns for the years in question and claimed that they were not subject to tax under the Act. The taxing authorities, however, considered that tax was payable under paragraph (d) of section 9B(2) which reads as follows:

9B. (2) In addition to any other tax imposed by this Act an income tax of fifteen per centum is hereby imposed on all person who are non-residents of Canada in respect of

(*d*) All income for any taxation period received from a Canadian estate or trust, which income shall be deemed to include all income accruing to the credit of non-resident beneficiaries whether received by them or not during such taxation period. The tax payable by virtue of this paragraph shall be deducted by the trustee from the amount paid or credited to such beneficiary at the time of paying or crediting and shall be remitted to the Receiver General of Canada.

and, since the appellant had not withheld any tax from the amounts credited to the Swiss company, sought to hold the appellant itself liable for the amounts of such tax under the following provisions of section 84.

84. Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum.

(2) Any person who fails to remit any sum of money collected or withheld as required by this Act, or at such time as the Minister may in special cases prescribe, shall in addition to being liable for such sum of money so collected or withheld, be liable to a penalty of ten per centum of the said sum together with interest at the rate of ten per centum per annum.

(3) Where any sum of money is owing by virtue of the provisions of this section, the Minister shall make a written demand by registered letter to the person owing such moneys for the amount thereof and such demand shall constitute a notice of assessment for the purposes of this Act and sections fifty-five to seventy-four, both inclusive, of this Act shall apply *mutatis mutandis*.

and, pursuant to section 84(3), the Minister, acting through the Deputy Minister of National Revenue (Taxation), made a written demand on the appellant by registered letter, dated March 27, 1945, for the payment of tax for each of the years in dispute at the rate of 15 per cent of the "income accruing to the credit of non-resident beneficiaries" less the tax deducted and remitted by Ciba Company Limited, plus interest at 10 per cent per annum.

Since this demand constituted a notice of assessment the provisions of the Act relating to appeals from assessments were applicable and the appellant took an appeal thereunder to the Minister, who affirmed the assessment on the ground that "the tax was exigible under the provisions of paragraph (*d*) of subsection (2) of section 9B of the Act and the Appellant was properly assessed under the provisions of section 84 of the Act." Being dissatisfied with the Minister's decision the appellant now brings its appeal to this Court.

I shall deal first with the dividends paid by Anglo American Chemicals Ltd. and Ciba Company Limited to the appellant. It was contended for the appellant that paragraph (d) of section 9B(2) had no application to these dividends and that they were wholly exempt from tax under section 9B(2) by reason of sections 9B(11) and 9B(12), the Anglo American Chemicals Ltd. dividends under the latter and the Ciba Company Limited dividends under the former. Section 9B(11) read as follows:

9B(11) The tax imposed by subsection two hereof shall not apply in the case of dividends paid to a non-resident company by a Canadian Company, all of whose shares (less directors' qualifying shares) which have under all circumstances full rights are beneficially owned by such non-resident company: Provided that not more than one-quarter of the gross income of the Canadian Company is derived from interest and dividends other than interest and dividends received from any wholly owned sub-

1949
PAN-AMERICAN TRUST COMPANY v. MINISTER OF NATIONAL REVENUE
Thorson P.

sidiary company: Provided further that such non-resident company is not a company incorporated since the 1st April, 1933; but this proviso shall not apply if the Minister is satisfied that such incorporation was not made for the purpose of evading the tax imposed under subsection two of this section.

And section 9B(12) provided:

9B(12)(*a*) Dividends paid or deemed to be paid by Non-Resident-Owned Investment Corporations shall not be taxed under subsection two of this section, provided that there has been paid in respect of the income earned between the 1932 fiscal period and the fiscal period first taxed by reason of election under subsection four of section nine of this Act, or in respect of dividends equal in amount to the said income, an amount of tax, equal in the aggregate, to five per centum of the said income.

(*b*) Any dividends paid after the 1932 taxation period shall be deemed to have been a distribution of income earned after such period.

(*c*) Interest payable by Non-Resident-Owned Investment Corporations and falling due after the effective date of election under subsection four of section nine of this Act shall not be subject to the tax imposed by this section.

It is desirable to consider the place of paragraph (*d*) in section 9B(2) by which an additional income tax of 15 per cent was imposed on non-residents of Canada in respect of certain kinds of income. The section commences as follows:

9B(2) In addition to any other tax imposed by this Act an income tax of fifteen per centum is hereby imposed on all persons who are non-residents of Canada in respect of.

and then several paragraphs follow, specifying the particular kinds of items of income in respect of which the tax is imposed, as, for example, paragraph (*a*):

(*a*) All dividends received from Canadian debtors irrespective of the currency in which the payment was made, and

and paragraph (*b*):

(*b*) All interest received from or credited by Canadian debtors, if payable solely in Canadian funds, except the interest from all bonds of or guaranteed by the Dominion of Canada.

Then, after paragraph (*d*) there are other paragraphs dealing with a variety of kinds of items of income in respect of which tax is imposed. It was admitted that the several paragraphs of section 9B(2) are mutually exclusive of one another. This must be so, for otherwise the same item of income might be subject to tax under more than one paragraph and it ought not to be assumed, in the absence of clear terms, that Parliament intended such double taxation. It follows, therefore, that the "income" received or accruing from a Canadian estate or trust specified in paragraph (*d*)

must be something other than and different from the "dividends received from Canadian debtors" mentioned in paragraph (*a*). The result is that if there is to be any tax in respect of "dividends from Canadian debtors", such tax is exigible only by reason of paragraph (*a*) and can not be levied under paragraph (*d*). I think that it is equally clear that sections 9B(11) and 9B(12) expressly exempt from tax under section 9B(2) certain specific kinds of dividends that would otherwise be subject to tax under paragraph (*a*) thereof.

It was admitted that during the years in dispute Anglo American Chemicals Ltd. was a non-resident-owned investment corporation within the meaning of section 2(*p*) and that Ciba Company Limited was within the qualifications of section 9B(11). It follows—and this was not disputed by counsel for the respondent—that if Anglo American Chemicals Ltd. and Ciba Company Limited had paid the dividends direct to the Swiss company there could have been no doubt that they would have been exempt from tax under section 9B(2) by reason of sections 9B(12) and 9B(11). If there is any doubt as to whether they are exempt or not it is solely because of the fact that instead of being paid direct to the Swiss company they were paid to the appellant who, immediately upon their receipt, credited them to the Swiss Company in a special account and deposited them in a separate bank trust account. As I see it, the crux of the dispute in this case is whether this fact had the effect, as contended for the respondent, of changing the character of the amounts sought to be taxed from that of dividends within the meaning of sections 9B(11) and 9B(12) to that of income received or accruing from a Canadian estate or trust within the meaning of paragraph (*d*) of section 9B(2) and thus taking them out of the exemptions under sections 9B(11) and 9B(12) and making them subject to tax under paragraph (*d*) of section 9B(2). This contention is tantamount to saying that tax would not be payable in respect of the dividends if they went out of Canada to the non-resident but would be payable if they went to a trustee in Canada for the non-resident. I am unable to see what purpose Parliament could have had in making any such differentiation and am

1949
PAN-AMERICAN TRUST COMPANY v. MINISTER OF NATIONAL REVENUE
Thorson P.

of the view that, in the absence of clear and compelling words, an interpretation leading to such an anomalous result should not be adopted.

In answer to the respondent's contention counsel for the appellant submitted that when the appellant received the dividends as it did the Swiss company became the beneficial owner of them, that they maintained their identity and character as dividends notwithstanding the fact that they were paid into the bank trust account, and that the Swiss company's entitlement to them was in their character as dividends and not as income received or accruing from a Canadian estate or trust. The majority decision of the House of Lords in *Archer-Shee* v. *Baker* (1) strongly supports this view. There the appellant's wife, resident in the United Kingdom, was the life tenant of a trust fund under an American will, the trustees of which were resident in New York. The trust fund consisted entirely of foreign government securities, foreign stocks and shares, and other foreign property, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the order of the appellant's wife at a New York bank. The issue in the appeal against the assessment levied against the appellant in respect of his wife's income was whether such income arose from the specific securities, stocks and shares, and other property constituting the trust fund or from "possessions out of the United Kingdom other than stocks, shares or rents". The House of Lords, reversing the Court of Appeal, held that the appellant's wife was the beneficial owner of the securities, stocks and shares, and other property constituting the trust fund and was entitled to receive and did receive the interest and dividends thereof. In coming to this view they assumed that the law of trusts on this point was the same in New York as in England. That this assumption was erroneous was shown by their subsequent decision in *Garland* v. *Archer-Shee* (2). That fact, however, does not affect the applicability of the decision in the first *Archer-Shee* case (*supra*) to the facts of the present case, it being assumed that the

(1) (1927) 11 T.C. 749; (1927) A.C. 844.

(2) (1930) 15 T.C. 693; (1931) A.C. 212.

law of trusts on this point in Prince Edward Island is the same as that of England as laid down in the first *Archer-Shee case* (*supra*).

Similarly, it should be held in the present case that when the dividends were paid to the appellant and credited by it to the Swiss company the latter became the beneficial owner of such dividends and entitled to the amounts thereof in their character as dividends and not as income received or accruing from a Canadian estate or trust. I am quite unable to see how the amounts paid to the appellants as dividends could lose their character as such and assume that of income received or accruing from a Canadian estate or trust by reason of the fact that the appellant credited them to the Swiss company and paid them into a separate bank trust account for it. In my opinion, the intervention of the appellant as trustee for the Swiss company did not cause the amounts received by it to lose their character as tax exempt dividends under sections 9B(12) and 9B(11) or to become taxable income under paragraph (*d*) of section 9B(2).

I also accept counsel's argument that payment of the dividends to the appellant, who received them for the Swiss company, their beneficial owner, was sufficient payment to it to meet the requirements of sections 9B(12) and 9B(11) and entitle them to exemption thereunder.

This conclusion sufficiently disposes of the respondent's contention so far as the dividends are concerned, but if more were needed I would be of the view that the term "estate or trust" in paragraph (*d*) of section 9B(2) does not extend to a relationship such as that created by the agreement of January 21, 1941, between the Swiss company and the appellant, for while the appellant became the legal owner of the shares and other property thereby transferred the Swiss company never ceased to be the beneficial owner of such property and the income thereof. It also seems to me that the term "income received or accruing from a Canadian estate or trust" must mean something other than the income from property which a settlor has transferred to a trustee for himself and of which he has never ceased to be the beneficial owner.

1949
PAN-AMERICAN TRUST COMPANY
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

In view of what I have said I find it unnecessary to deal with the other arguments of counsel for the appellant against the respondent's claim for tax in respect of the dividends referred to.

Subsequently to the hearing of the appeal and after subsection (15) was added to section 9B in 1948 by Statutes of Canada, 1948, chap. 53, sec. 6(3), upon the application of counsel for the respondent and with the consent of counsel for the appellant I granted leave to the respondent to withdraw his plea that the Swiss company is subject to tax under paragraph (*d*) of section 9B(2) with respect to the dividends received by the appellant from Anglo American Chemicals Ltd. and to withdraw his claim against the appellant for the amount representing such tax with the interest and penalties related thereto, and pursuant to such leave the respondent on November 30, 1948, withdrew the said plea and claim. While the said withdrawal appears to have been made because of section 9B(15), I am of the view that it would have been equally justified under the law as it stood in the years for which the respondent's claim was made. There was never any basis for it.

Nor can I see any basis for the claim for tax on the interest on the Dominion of Canada bonds. They were bought out of the dividends deposited in the bank trust account kept by the appellant for the Swiss company and it was the beneficial owner of them as it had been of the dividends which they replaced. It was also the beneficial owner of the interest thereon in its character as such and not as income received or accruing from a Canadian estate or trust. Moreover, it seems to me that the interest is clearly exempt from tax under section 9B(2) by reason of paragraph (*b*) thereof to which I have already referred.

Nor can any valid claim be made in respect of the interest on the Ciba Company Limited notes in view of the fact that it had already withheld and remitted the 15 per cent tax thereon.

There being thus no foundation for the respondent's claim in respect of any of the amounts received by the appellant for the Swiss company, the appeal herein must be allowed with costs.

Judgment accordingly.

BETWEEN:

1948 Sept. 7 — 1949 June 8

JOSEPH A. COOPER,............. APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, C. 97, s. 6(1) (a) —"Income"—"Net" profit or gain or gratuity—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Annual fees paid by employee to union or alliance deductible from paid salary.

Held: That an employee bound to pay dues and assessments to an alliance which provides his job is entitled to deduct from his income such payments for purposes of income tax, and it is immaterial whether such expenditure is prescribed by the charter or by-laws of a society or by a contract or agreement between the employer and a union. (*Bond* v. *Minister of National Revenue* (1946) Ex. C.R. 577 followed).

APPEAL under the Income War Tax Act.

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

Clifford W. Brock, K.C. for appellant.

C. B. Philp, K.C. for respondent.

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

ANGERS J. now (June 8, 1949) delivered the following judgment:

This is an appeal, under the provisions of sections 58 and following of the Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant dated March 7, 1947, in respect of income tax for the taxation year 1945.

The facts may be summarized briefly as follows.

The appellant is a moving picture machine operator, commonly known as a projectionist, and carries on his occupation at the City of Winnipeg, in the Province of Manitoba; his income, as defined in the Income War Tax Act, is derived from the salary which he earns in his occupation as a moving picture machine operator.

1949
J. A. COOPER
v.
MINISTER OF NATIONAL REVENUE
Angers J.

During the taxation year ending December 31, 1945, and for several years prior thereto the appellant was employed in his occupation as moving picture machine operator by Famous Players Canadian Corporation Limited in one of the theatres operated by it in the City of Winnipeg and he received his salary for services rendered in his said occupation.

Famous Players Canadian Corporation Limited is a corporation organized under the laws of the Dominion of Canada and it operates a chain of moving picture theatres throughout Canada, in various cities and towns, including several theatres in the City of Winnipeg.

On April 15, 1942, an agreement was made between Famous Players Canadian Corporation Limited, as owner or lessor of, among others, the Capitol, Metropolitan, Gaiety, Uptown, Tivoli and Crescent theatres in Winnipeg, thereinafter referred to as the party of the first part, and Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, thereinafter referred to as the party of the second part, whereby it was agreed that the party of the first part would employ only moving picture machine operators supplied by the party of the second part, who are in good standing with the latter. A copy of this agreement, which remained in full force and effect and was the one existing between the parties during the taxation year 1945, was filed as exhibit 3.

The constitution and by-laws of the Motion Picture Projectionists, Winnipeg Local 299, adopted November 24, 1940, a copy whereof was marked as exhibit 1, stipulate that all dues of the Union shall be payable three months in advance and that they shall be declared in arrears on the first meeting day of the month following the date on which they are declared due: article 6, section 2.

I deem it apposite to make a brief recapitulation of the evidence. The only witnesses heard on behalf of the appellant is the appellant himself and Edward Louis Barr, projectionist and secretary of Local 299. No evidence was adduced for the respondent.

Joseph A. Cooper, the appellant, of the City of Winnipeg, who described himself as motion picture projectionist for

the last thirty-seven years and a member of Winnipeg Motion Picture Projectionists Local 299, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter called the Union for brevity's sake, testified that during the whole of the year 1945 he was a member of that Local and was employed by the Capitol theatre, Winnipeg.

He declared that the Capitol theatre is owned by Famous Players Canadian Corporation Limited and that his salary as a projectionist was $50 a week. He produced as exhibit 1 a copy of the Constitution and By-laws of the Motion Picture Projectionists, Winnipeg, Local No. 299 appearing to have been adopted on November 24, 1940, as exhibit 2 the Constitution and By-laws (39th edition), effective July 27, 1946, of the Union, as exhibit 3 a copy of the agreement dated April 15, 1942, between Famous Players Canadian Corporation Limited, owners or lessors of, among others, the Capitol theatre, Winnipeg, and Winnipeg Local 299 of the Union, and as exhibit 4 the membership card of the appellant for the season 1945-46.

Cooper stated that there is no other Capitol theatre in Winnipeg than the one by whom he was employed. He asserted that under the Constitution and By-laws exhibit 1 he paid as a member of the local union 299 his dues and assessments during the year 1945. He declared categorically that he could not become a member of Local 299 without being a member of the parent organization, to wit the Union. He swore that in order to hold his job he had to pay his dues and assessments as levied by the Union. It seems to me convenient to quote a passage of the witness' testimony (p. 7):

Q. By holding your job you mean that the position you held at the time in question with Famous Players at the Capitol Theatre?

A. That is correct.

Q. What standing does it give you by paying your dues? Is there an expression in the Union that you are in some kind of standing by paying dues?

A. Yes, I am in good standing with the organization, and therefore allowed the privileges and rights that the Local bestows on its members.

Q. What would happen in regard to your membership on your failure to pay dues in the Local Union?

A. I would be suspended or expelled and removed from the job I was holding.

1949
J. A. COOPER
v.
MINISTER OF NATIONAL REVENUE
Angers J.

In cross-examination Cooper said that he had been employed by the employer for whom he worked in 1945 since the year 1928 and that he joined the Union on October 31, 1915.

Edward Louis Barr, projectionist, of the City of Winnipeg and secretary of Local 299, testified that the appellant is a member of that Local and that he was in 1945. Looking at exhibit 4 Barr said it is the membership card for 1945-46, which shows the amounts paid by the appellant to Local 299. He explained that the payment of dues as a member of the Local keeps the member in good standing and renders him able to stay on his job.

Asked what would happen if a member failed to pay his dues to the Local, Barr replied that he would be fined and expelled. He asserted that in 1945 Cooper was employed by the Capitol Theatre, Winnipeg, and that the latter was under contract with Local 299 with regard to projectionists.

Section 1 of article 5 of the Constitution and By-laws of the Motion Picture Projectionists (exhibit 1) stipulates as follows:

> An applicant for resident membership or reinstatement must be a holder of a valid Projectionist license issued under "The Amustment (Amusement) Act". He shall be of good moral character and reputation.

Sections 1 and 2 of article 6 of the same Constitution and By-laws, regarding dues and assessments, provide:

> The dues of this union shall be:
> employed members $6.75 quarterly
> unemployed members $5 55 quarterly.
> All dues shall be payable three months in advance. Dues shall be declared in "arrears" on the first meeting day of the month following the date on which they are declared due.

Section 13 of article 21 of the Constitution and By-laws of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (exhibit 2) entitled "Forfeiture of Membership", enacts:

> Membership in this Alliance may be forfeited for non-payment of dues, by expulsion, for failure to apply for membership-at-large on the dissolution of a local union as provided in Section 25 of Article Nineteen of this Constitution, and in such other manner as is in this constitution and By-laws provided. No member of this Alliance shall be expelled or suspended, save for non-payment of dues and failure to apply for

membership-at-large upon the dissolution of a local union, unless such member has been accorded a fair trial in the manner set forth in Article Sixteen of this Constitution.

The first paragraph of the contract (exhibit 3) reads thus:

The Party of the First Part agrees to employ only Moving Picture Machine Operators supplied by the Party of the Second Part, and who are in good standing, and remaining so, with the Party of the Second Part.

This clause clearly means that the owners or lessors of the Capitol theatre, namely Famous Players Canadian Corporation Limited, agreed with the Winnipeg Local 299 that they will only employ moving picture machine operators of said local who are in good standing and remaining so.

In his return for the year ended December 31, 1945, Cooper deducted from his salary ($2,805.81) the sum of $35 for disbursements wholly, exclusively and necessarily laid out for the purpose of earning his income. In a notice of assessment, which appears to have been mailed to him on March 7, 1947, the said sum of $35 was disallowed. On March 22, 1947, the appellant served a notice of appeal upon the Minister of National Revenue in compliance with section 58 of the Income War Tax Act, in which he stated that he is a projectionist employed by a theatre in the City of Winnipeg and that, in order to maintain his position as such, he is compelled to belong to the Motion Picture Projectionists, Local 299, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and to pay dues to such Union. The appellant further stated that, if he refused or neglected to pay such dues, he would be unable to hold any position as a projectionist or work at his occupation and that he would be expelled from such Union.

As reasons for his appeal the appellant submitted:

(a) that the appellant is compelled to pay to the Union the sum of $3.10 per month for dues and the sum of $14.39, as set out in the assessment notice bearing date the 7th day of March, A.D. 1947, is the amount of taxation on such dues;

1949
J. A. COOPER
v.
MINISTER OF NATIONAL REVENUE
—
Angers J.
—

(*b*) that the sum of $37.20 paid by the appellant to the said Union for dues for the year 1946 was a proper expense and a proper deduction before the salary of the appellant became subject to income taxation;

(*c*) that the expenditure so made by the appellant to the said Union was considered by him and by all the members of the Union as obligatory in order to maintain their position as projectionists and to work at their occupations as such projectionists.

On August 18, 1947, the Minister affirmed the assessment and notified the appellant of his decision in accordance with section 59 of the Act. On September 15, 1947, the appellant, dissatisfied with the decision of the Minister, mailed to the latter a notice of dissatisfaction expressing the desire that his appeal be set down for trial and stating that, in addition to the facts and reasons set forth in the notice of appeal, he relies upon the following facts and reasons, which may be summarized as follows:

the taxpayer is a moving picture machine operator, what is commonly referred to as a projectionist, and resides in the City of Winnipeg;

the taxpayer's income is derived from the salary which he earns as a moving picture machine operator;

during the whole of the year ending December 31, 1945, the taxpayer was employed as moving picture machine operator by Famous Players Canadian Corporation Limited in one of its theatres in the City of Winnipeg and received a salary for services rendered in said occupation, the amount whereof is set forth in the taxpayer's return;

by an agreement in writing between Famous Players Canadian Corporation Limited and Winnipeg Local 299 of the Union it was agreed that Famous Players Canadian Corporation Limited would employ only moving picture machine operators supplied by the Union, who are in good standing and remaining so;

the said agreement was in full force and effect during the whole of the taxation year 1945;

the laws of the province of Manitoba provided that no person can follow the occupation of a projectionist without a course of instruction and a license and the taxpayer was duly licensed under the laws of the said province;

under the by-laws, rules and regulations of the said Union a member thereof, in order to be in good standing, must pay the dues and assessments levied by the Union; the dues and assessments so levied for the taxation year 1945 amounted to the sum of $3.10 per month or a total of $37.50, which were duly paid by the taxpayer and the latter remained a member in good standing of the Union during the said taxation year;

the expenditure by the taxpayer and by all members of the Union is obligatory in order to maintain their employment as projectionists or moving picture machine operators;

if the taxpayer had not paid his said dues or assessments to the Union he would not have been able to keep his employment with the said Corporation and to earn his salary;

the said dues and assessments are expenses wholly, exclusively and necessarily laid out or expended by the taxpayer for the purpose of earning the income within the meaning of paragraph (*a*) of subsection 1 of section 6 of the Income War Tax Act; the said sum of $37.50 paid by the taxpayer is a proper deduction for his income and is not taxable under the said Act.

In his reply to the notice of dissatisfaction the Minister denies the allegations in the notice of appeal and the notice of dissatisfaction, insofar as incompatible with the statements contained in his decision, and affirms the assessment as levied.

The case is governed by paragraph (*a*) of subsection 1 of section 6 of The Income War Tax Act. The relevant part of section 6 reads thus:

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

Under its contract with the Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Famous Players Canadian Corporation Limited, as owner or lessor of the Capitol Theatre of Winnipeg, was bound to employ only moving picture machine operators supplied by the said local, being in good standing with the said Union. As previously noted, in

1949
J. A. COOPER
v.
MINISTER OF NATIONAL REVENUE
Angers J.

order to be in good standing a member must have paid dues and assessments payable under the by-laws and constitution of the Union. It is the dues and assessments levied by the Union for the taxation year 1945 for which the appellant claimed exemption. The evidence discloses clearly that, if Cooper had not paid these dues and assessments, he would not have obtained his employment as projectionist or moving picture machine operator at the Capitol theatre.

Counsel for appellant relied on the decision of the President of this Court in *Bond* v. *Minister of National Revenue* (1). The facts in that case were briefly as follows. Bond was employed as counsel by the City of Winnipeg on a fixed salary. His duties were mainly those of a barrister but he also performed certain solicitor duties. To be entitled to practise he had to pay annual fees to the Law Society of Manitoba. The non-payment of such fees would bring about suspension from practice and striking off the roll.

The headnote fairly comprehensive contains, among others, the following statements:

2. That the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

3. That the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act

I deem it convenient to quote a brief excerpt from the judgment, which I consider pertinent (p. 585):

Section 6 (*a*) is an excluding section. It prohibits the deduction of disbursements or expenses "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Can it reasonably be said that the amount paid by the appellant to the Law Society falls within the exclusion of the section? I do not think so The appellant had to pay this amount in 1943 in order to be entitled to practise law in that year. It was an annual practising fee. If he did not pay it he would be suspended and then struck off the rolls Any attempt on his part thereafter to perform his duties would be contrary to law and constitute an offence for which he would be subject to a penalty and also to an injunction preventing him from continuing his attempt at practice. The payment of the amount was, therefore, necessary to the lawful and continuous performance of his duties and the earning of the income. Moreover, I think it was inherent in the contractual relationship between

(1) (1946) Ex. C.R. 577.

the appellant and the City of Winnipeg that he should continue to be a lawyer in good standing since his duties could not be performed without such standing. The maintenance of good standing was essential to the valid performance of his contract without which he could not earn the income. In my view, he had to pay the fees to earn the income and could not do so without paying them.

After stating that the expenditure was an annual one which the appellant could not escape and that "it constituted a working expense as part of the process of earning the income", the learned judge added (p. 586):

> In my view, the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act.

I do not believe it expedient to deal with the English decisions, since the law in England differs from ours.

In support of his contention that paragraph (*a*) of subsection 1 of section 6 is applicable herein and that the dues and assessments paid by the appellant cannot be deducted from his income as not being disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, counsel for respondent referred to the judgments in *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (1); *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (2); *Wales* v. *Graham* (3); *Simpson* v. *Tate* (4); *Mahaffy* v. *Minister of National Revenue* (5); *In re Salary of Lieutenant-Governors* (6); *Young* v. *C.N.R.* (7). I think it appropriate to review these cases succinctly.

In the case of *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (*supra*) the facts were briefly as follows. The appellant carried on the business of gold mining. Appeals from income tax assessments for the years 1929, 1931, 1932, 1933, 1935, 1936 and 1937 were brought because certain expenses and disbursements made by it were disallowed as deductions from the income. Some of these consisted of legal expenses incurred in defending actions in which attacks were launched against the company's title to its mining property or in which claims were made arising

(1) (1945) Ex. C.R. 257.
(2) (1944) A.C. 126.
(3) (1941) 24 Rep. of Tax Cases, 75.
(4) (1925) 9 Rep. of Tax Cases, 314.
(5) (1946) Ex. C R. 18.
(6) (1931) Ex. C R 232.
(7) (1931) 1 D.L.R. 645.

1949
J. A. COOPER
v.
MINISTER OF NATIONAL REVENUE
Angers J.

out of transactions connected with its financing arrangements. Other expenditures disallowed related to mining claims. The appellant had entered into an agreement whereby it had an option to buy such claims and the the right to do exploration, development and diamond drilling thereon. After making certain payments and doing considerable diamond drilling the appellant decided not to take up the option. Two other disbursements, one to one of its directors and the other in connection with the distribution of medals, were also disallowed. It was held by the President:

That legal expenses incurred by a taxpayer in maintaining the title to his property or protecting his income when earned, or in connection with the financing of his business are not expenditures directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed. *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1941) S.C.R. 19 and *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1944) A.C. 130 followed.

In the cases of *Montreal Coke and Manufacturing Co. and Minister of National Revenue* (*supra*) and *Montreal Light Heat & Power Consolidated and Minister of National Revenue* (*supra*) the facts may be summed up as follows. The appellants which had issued bonds, redeemable before maturity at a premium and payable both as to principal and interest at the bondholder's option in currency other than Canadian dollars, with a view to reducing their interest charges redeemed the bonds before maturity and reborrowed at lower rates of interest and on less onerous conditions as to payment. The expenses incurred in effecting those changes included the payment of premium on redemption, disbursements on account of exchange, discount to underwriters overlapping of interest payments, printing and other incidental expenses. On a claim by appellants that the expenditure had been incurred wholly, exclusively and necessarily for the purpose of earning income—by increasing their profits by the reduction of the annual interest payments—and was, accordingly, deductible for the purpose of assessment to income tax, it was held by the Judicial Committee of the Privy Council affirming the judgments of the Supreme Court of Canada:

That expenditure, to be deductible, must be directly related to the earning of income from the trade or business conducted; that the

businesses of the appellants were not to engage in financial operations and expenditure incurred in relation to the financing of their businesses was not laid out for the purpose of earning income in their businesses within the statutory meaning; and, accordingly, that under s. 6 (*a*) of the Income War Tax Act, 1927, that expenditure was not an allowable deduction.

View of the courts below that the deductions claimed also fell to be disallowed as being payments "on account of capital" within s. 6 (*b*) of the Act, not dissented from.

In *re Wales* (*Inspector of Taxes*) v. *Graham* (*supra*) the report shows that the respondent was until his retirement a divisional engineer to the London County Council, that candidates for such positions had to be corporate members of the Institution of Civil Engineers or hold other approved qualifications and that the retention of membership of the Institution was dependent upon payment of an annual subscription. On appeal against an assessment to Income Tax under Schedule E. for 1939-40 in an amount which included his salary to the date of retirement, the respondent contended that the proportion of his annual subscription to the Institution applicable to the period April 6 to July 6, 1939, should be allowed as a deduction from the assessment. The Crown contended that the amount claimed was not money expended wholly, exclusively and necessarily in the performance of respondent's duties; that it was not sufficient to show that the expense was necessarily incurred to secure or retain preferment in the office.

It was held by the High Court of Justice, King's Bench Division, that the respondent was not entitled to the deduction claimed.

In re *Simpson* (*Inspector of Taxes*) v. *Tate* (*supra*) the headnote, sufficiently clear and exact, is thus worded:

A County Medical Officer claimed to deduct his subscriptions to certain professional societies in the computation of his liability to Income Tax under Schedule E in respect of his salary. It was not a condition of his employment that he should be a member of these societies, but such membership is customary for County Medical Officers.

The Special Commissioners, on appeal, allowed the deductions sought.

Held, that the subscriptions in question were not expenses wholly, exclusively and necessarily incurred in the performance of the duties of the office of County Medical Officer, and that they were accordingly not admissible deductions in computing his liability to Income Tax.

In the matter of *Mahaffy and Minister of National Revenue* (*supra*) the appellant, a resident of Calgary, Province of Alberta, received as a member of the Legislative Assembly of the said province which meets at Edmonton

1949
J. A. COOPER
v.
MINISTER OF
NATIONAL
REVENUE
Angers J.

the sum of $2,000 as an allowance. In his income tax return for 1941 he deducted certain disbursements incurred for living expenses in Edmonton while in attendance at legislative sessions and for travelling expenses from Calgary to Edmonton and return for week-ends during the session. These deductions were disallowed and an appeal was entered. It was held by Cameron J.:

That the deductions claimed are not travelling expenses within the meaning of s. 5.1 (*f*) of the Income War Tax Act.

2 That such expenses are not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of Appellant and are not deductible.

3. That the expenses incurred by Appellant are not personal and living expenses within the meaning of s. 6.1 (*f*) of the Income War Tax Act.

I may say with deference that the decisions in the above five cases appear to me well founded. On the other hand, I think that they differ essentially from the case at bar. In neither of those cases the sums claimed as deductions from the income represent disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

Another case cited by counsel for respondent is *Young* v. *C.N.R.* (*supra*) which does not seem to me to have any pertinence.

I see no difference, for the purpose of income tax, between a member of the bar who is required to make an expenditure in order to be authorized to carry on his profession and a projectionist or, in fact, any other worker, who is bound to pay dues and assessments to form part of a local of an alliance which provides the jobs. Whether the expenditure be prescribed by the charter or by-laws of a law society or by a contract or agreement between the employer and a union seems to me immaterial. In each of these alternatives the lawyer or the projectionist has to pay a fee to be authorized to carry on his profession or trade. If the appellant had not remained a member in good standing of Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, he would not have obtained a position as a projectionist at the Capitol Theatre in Winnipeg or at any other moving picture theatre.

1949

J A. COOPER v. MINISTER OF NATIONAL REVENUE

Angers J.

After a careful examination of the evidence, written and oral, and an attentive perusal of the arguments by counsel and of the precedents, I have reached the conclusion that the appellant is entitled to deduct the sum of $35 from his income.

The appeal will therefore be allowed and the assessment in question set aside.

The appellant will be entitled to his costs against the respondent.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1949

April 19, 20, 21 & 22.

June 7

BETWEEN:

KALAMAZOO PAPER COMPANY and ACER, McLERNON LIMITED, } PLAINTIFFS,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,.................. } DEFENDANTS.

AND BETWEEN:

BRITISH COLUMBIA PULP & PAPER COMPANY LIMITED,.... } PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,.................. } DEFENDANTS.

AND BETWEEN:

QUATSINO NAVIGATION COMPANY LIMITED,.................. } PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,.................. } DEFENDANTS.

1949

KALAMAZOO PAPER COMPANY ET AL v. C.P.R. Co. ET AL

Smith D.J.A.

Shipping—Damage to cargo caused by negligence of vessel's officers—Vessel owner relieved from liability—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49—"Management" of the ship.

In an action by plaintiffs, the cargo owners, for damages alleged to have resulted from injury by sea water done to wood pulp sulphite carried by a steamship owned by defendant Canadian Pacific Railway Company and at the time operated under the terms of an agreement with the plaintiff Acer, McLernon Limited, the Court found that the damage to the cargo in question could have been prevented by reasonable investigation and appropriate action on the part of the vessel's officers and crew. The claim is for damage resulting after the beaching of the vessel due to proper measures not having been taken to safeguard the cargo then undamaged.

Held: That though the failure to pump the water out of the ship efficiently with all the facilities at hand damaged further cargo it was essentially a failure in a matter that vitally affected the management of the ship.

2. That the shipowner is relieved from responsibility by virtue of Article IV, Sec. 2(*a*) of the Schedule to The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49.

ACTION by the cargo-owners for damages resulting from injuries to their cargo while being carried in a steamship owned by the defendant Canadian Pacific Railway Company.

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

Alfred Bull, K.C. and *W. J. Wallace* for the plantiffs.

Hon. J. W. deB. Farris, K.C. and *J. A. Wright* for the defendants.

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

SIDNEY SMITH, D.J.A. now (June 7, 1949) delivered the following judgment:

In this consolidated action the plaintiff cargo-owners claim some $100,000 for injury by sea water done to certain of their bales of wood pulp sulphite while being carried from Port Alice, B.C. to Vancouver, B.C. in the steamship *Nootka,* owned by the defendant Canadian Pacific Railway Company and at the time being operated under the terms of an agreement with the second defendant. The defendants

resist the claim on the grounds, firstly, that the damage in question was due to a stranding (for which no blame is attributed to them) and the subsequent unpreventable invasion of water into the ship's forehold, and that all proper measures had been taken to protect the cargo; and, alternatively, that if those on board had in fact been negligent in their duty, such negligence occurred in the "Management" of the vessel and that the defendants were accordingly exempt from liability under Article IV, Sec. 2(*a*) of the Schedule to The Water Carriage of Goods Act, 1936, I Edward VIII C. 49, the terms of which had been incorporated in the relevant Bills of Lading.

The ss. *Nootka,* 251 feet long, 43 feet beam, 2068 tons gross tonnage, sailed from Port Alice for Vancouver at 0:40 a.m. on 29 July, 1947, and about 2 a.m. of the same day, in a dense fog, ran aground on Cross Island, in Quatsino Sound. She remained with her fore part fast aground for approximately one hour and forty minutes, then slipped off on the falling tide, and, in more or less thick weather, made her way to a nearby small bay, also named Quatsino, and tied up to the wharf there at 4:43 a.m. During this period her bilge pump (which could be used for pumping both hold bilges and ballast tanks) was kept in operation and there was evidence that she was making water forward. After lying at the wharf an hour or so the vessel was moved ahead more than once, so that the fore part might take the ground on a mud bank which happened to be conveniently situated there. Her stern remained fast to the wharf.

The *Nootka* contains four holds, two in the fore part and two in the after part. The two forward holds, known as Nos. 1 and 2, form however one common hold, with two hatches leading into it. I refer to this combination hold as the forehold. It consists of lower hold and 'tween-decks. Under the hold are two ballast tanks, known as Nos. 1 and 2 tanks, and at the material times No. 1 tank was half full of fuel oil and No. 2 was quite full of fuel oil, all for the ship's consumption. There had been built into the fore part of the hold, vertically, two fish oil tanks. These were empty. The space forward of the hold was occupied by the fore peak which was also empty except, presumably, for such ship's gear as is usually towed in such places.

1949
KALAMAZOO PAPER COMPANY ET AL v. C P R. Co. ET AL
Smith D J.A.

It will be convenient to mention here that plaintiffs' counsel in opening stated that his clients had no complaints of anything that occurred prior to the beaching at Quatsino, that their case was that proper measures had not thereafter been taken to safeguard the cargo then undamaged. He conceded the shipowner's right to limitation of liability under Sec. 649 of the Canada Shipping Act.

The ship was fully laden in all holds with wood pulp sulphite, and during the day of the 29th some of this was removed from the 'tween-decks of the forehold into two scows and the bilge pump was kept going. At eight o'clock that night Captain F. C. Clarke arrived by plane. He represented the cargo underwriters, and his purpose was to give whatever advice and assistance he could in the safeguarding of the cargo. As the case on the facts must stand or fall on the evidence of Captain Clarke, it is not unimportant to notice that he has been a surveyor with the Board of Marine Underwriters of San Francisco for the last 25 years, and of that period has been 18 years senior surveyor at Vancouver, B.C., and is so now. He is a master-mariner and had a useful career at sea for 17 years as officer and master in almost all types of vessel. In addition he had two years' experience in the repair and construction of wooden ships, and another two years in the operation and repair of combustion engines. This capable officer gave his testimony (which I fully accept) in a manner so frank and fair as to be altogether commendable. His views were supported in important technical aspects by other surveyors, notably by Mr. W. D. MacLaren, an expert of acknowledged experience and ability.

On boarding the vessel Captain Clarke noted that she was down by the head considerably, and that the discharge over the side from her bilge pump was not a very heavy one for a vessel in her apparent condition. He was informed by the Master that the forehold was flooded, and that no soundings had been recorded. He then went down into the engine-room and saw the Chief Engineer who when asked whether his pumps were going full speed, replied "Yes, I am taking all I can out of her." Capt. Clarke then examined the bulkhead between the engine-room (or properly, the stokehold) and the forehold, thinking it might

require shoring up. He found it dry but cold, for a distance up of over 13 feet which would be in excess of the 'tween-deck deck level. There was no appreciable bulging. After some further conversation with the chief engineer, in the course of which that officer remarked that he was not able to get the full benefit of the bilge suction pipe on the port side but that he was "doing very well in taking the capacity of his pumps," Captain Clarke returned on deck and examined the condition of the forehold. As to this he found that he had been misinformed. He showed, by the simple expedient of measuring with a lead-line the level of the water inside the hold and outside the ship, that it was a mistaken view that the hold was pierced, giving the sea free access. He found in fact the water in the hold over five feet lower than the surface of the sea. He then again entered upon the topic of pumps and as to what others were available. He was informed that there was a gasoline-driven, portable, air-raid precaution pump of 1½ H.P. on board, and thereupon gave instructions to have the same put into immediate operation in the hold. This was done. This pump had not hitherto been used that day except to pump water from a leaking scow; it was operating within one or two minutes of its installation and "throwing a fairly good flow." At 10 p.m. or thereabouts the water was found to be receding in the hold, and the situation was then and thereafter, under control: This may have been partly the result of some adjustment made by the chief engineer about that time to the bilge pump, the nature and effect of which Capt. Clarke did not know.

Next morning at breakfast Captain Clarke suggested "cracking" a certain water-tight door situated between the forehold and engine-room. This door operated vertically and was opened and shut from above by means of a screwed shaft. It thus in effect corresponded to the old type of sluice valves constructed at the bottom of water-tight bulkheads which, when opened, allowed the water to run from the bilge of one compartment to that of the next, or into the engine-room. The idea put forward was that this door should be raised a fraction of an inch from the floor level, and so afford a free run of water from the hold into the engine-room and thus into the bilges, where it would be available for immediate pumping overboard. This was

1949
KALAMAZOO PAPER COMPANY ET AL
v.
C.P.R. Co. ET AL
Smith D.J.A.

done with caution, under Capt. Clarke's supervision. A good stream of water flowed into the engine-room bilges and was apparently got rid of by the bilge pump without difficulty. This promptly further lowered the water in the hold; during the afternoon the vessel, being again afloat, was pulled back alongside the wharf. Later that day a salvage vessel arrived; a diver was sent down and reported the stem twisted, buckled plates, some loose and missing rivets, some spaces between plate facings, but no fractures. He performed some temporary wedging and plugging of these spaces, and next morning the ship proceeded back to Port Alice, and some days later to Vancouver where the damaged cargo was in due course salvaged and sold.

There was a good deal of vagueness about the pumping equipment of the vessel. Capt. Clarke found no one on board who could give him any information about the capacity of the bilge-pump. From the documents filed it would seem that the crew members in the deck department consisted of the Master, three officers and thirteen seamen. Only the Master and chief officer testified upon the trial. The engine-room members consisted of three engineers, three oilers and four firemen. None of these appeared to give me the benefit of his evidence on the pumping equipment of the ship or, more particularly, on the pumping measures taken during that critical period of 15 hours between 4:43 a.m. when the ship reached the wharf at Quatsino and the advent of Capt. Clarke at 8 o'clock that same evening. But I think it clear enough that the bilge pump was the only one employed; and at that, was running short of capacity, whether due to choked strum boxes in the hold bilges, or to some other cause, the evidence does not disclose.

In addition to the bilge pump and the A.R.P. pump, the vessel had another, called a fish oil pump, used for pumping oil out of the two oil tanks in the forehold. The compartments which, on account of damage, contained sea-water were the forehold, the No. 1 ballast tank and the fore-peak. The evidence indicates that this pump might have been serviceably employed in reducing the water in the fore-peak. No such attempt at any time was made.

Finally, in the pumping category, there was the circulating pump, to which was fitted the usual bilge injection. The circulating pump is used in conjunction with the condenser, whose function is to condense the exhaust steam from the engine back into water again. The steam is caused to pass among a multitude of horizontal metal tubes through the interior of which cold water drawn from outside the ship is pumped constantly. The pump which passes the sea water from the sea through the condenser tubes and back overboard is known as the circulating pump, and has a large pumping capacity. The water enters through an aperture in the ship's side known as the main injection. But inside the ship, in the engine-room bilges, there is another injection, known as the bilge injection. In an emergency, such as the flooding of the engine-room, the main injection may be closed and the bilge injection opened, which will result in the water inside the engine-room being pumped through the tubes of the condenser and thence discharged overboard. This may be an immediate and effective way of ridding an engine-room of water. But it has many disadvantages which were dwelt upon by defendants' witnesses and which concern the circumstances prevailing in the particular engine-room (and indeed throughout the ship) at the given time: to mention one such risk only: the clogging of the condenser tubes to such an extent as might put the whole condenser, and with it all steam-driven machinery out of action. Capt. Clarke and at least one other surveyor thought it could and should have been used in the present case; that the water from the forehold, released into the engine-room through the partially opened water-tight door in the bulkhead, could have been speedily disposed of by its function. While I accept this view, I do so without enthusiasm. I would not like to say anything that might weaken the conception of gravity of danger which alone is taken to justify the use of the circulating pump on the bilge injection. That gravity of danger had not been reached here. When Capt. Clarke arrived the damage had been done and he speedily showed that the available pumps, apart altogether from the circulating pump, could control the inflow of such water as invaded the vessel, and reduce the quantity in the hold. Moreover

1949
KALAMAZOO PAPER COMPANY ET AL v. C P.R. Co. ET AL
Smith D.J.A.

when the water-tight door had at last been slightly raised the bilge pump sufficed to handle the water that thereby escaped from hold to engine-room. There would seem then to be no occasion for accepting the added risk attendant upon the operation of the circulating pump on the bilge injection. When Capt. Clarke suggested this course to the chief engineer, he declined. I think he was right, as matters then stood, in so declining. But I think he was wrong in not earlier making use of the water-tight door in the manner and to the extent later exemplified by Capt. Clarke.

Capt. Clarke examined the vessel's hull on 12th August when in dry-dock at Vancouver, for the express purpose of ascertaining the area of leakage. He found that the sum of all the apertures in the vessel's plating did not exceed four square inches. Giving full consideration to the evidence adduced in support of the likelihood of a larger total aperture, I accept this finding. On the basis of his observations and conclusion Captain Clarke made some interesting calculations which showed that when the ship reached Quatsino, and was there beached in the mud some two hours after her release from Cross Island, she then had only 79 tons of sea water in her fore part (i.e. hold, ballast tank, fore-peak). The water then reached only a short distance above the tank-tops. His calculations demonstrated that if the water had been held there and then, and not allowed to gain in the hold as it did, only 32 per cent of the damaged cargo would have been affected. In his figures he made allowances for human re-action time which I thought generous. I have no reason to doubt his conclusions. Nor have I reason to doubt that if the competent and resolute measures taken by Capt. Clarke to clarify the ship's position and clear the forehold of water had been taken by her own officers when first beached, the result would have been the same; the rise of water in the hold checked and reduced by greater pumping achievement and 68 per cent of the damaged cargo saved. I adopt the language of Mr. MacLaren when he said that ". . . here was a case of a vessel grounding. The first job is to look after the ship . . . After she was put on the beach, at Quatsino I felt that the pumping should have been the dominant consideration." That is my view. Therein they failed.

1949
KALAMAZOO PAPER COMPANY ET AL v. C.P.R. Co. ET AL
Smith D.J.A.

I have a good deal of sympathy with the Master. I certainly did not form any over-all unfavourable opinion of him as a ship-master. He had just been through a trying ordeal and had successfully brought his ship to safety. In his opening, plaintiffs' counsel had no criticism of him in this regard. Nor have I: I think he then did well. He must have been under severe nervous reaction at Quatsino. He did not appear to have received any outside assistance or guidance as to cargo preservation prior to the arrival of Capt. Clarke; and none, save his, subsequent thereto. But then it was all too late. Moreover I think he may have put too much confidence in his chief engineer in the matter of the pumping arrangements. Be that as it may, the result was that here the damage to the cargo in question could have been prevented by reasonable investigation and appropriate action; and for that damage, to the extent indicated, the shipowner, unless relieved under the terms of The Water Carriage of Goods Act, must be held responsible. This must now be considered. I have not found it easy.

The relevant provisions of the Schedule to this Act read as follows:

Article III Sec. 2:

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV Sec. 2:

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

(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

It is evident (and has been often remarked) that viewed in one aspect any default of those on board which results in damage to cargo might well be regarded as a default in the shipowner's obligation to "carry, keep, care for" the goods; while viewed in another aspect the same default might equally well be looked upon as a "default . . . in the management of the ship" thus relieving the shipowner from the breach of his obligation. It follows that in every case most careful consideration must be given to what should be the determining factors in any decision on

1949

KALAMAZOO PAPER COMPANY ET AL v. C.P.R. Co. ET AL

Smith D.J.A.

whether Art. III 2 or Art. IV 2 (*a*) is the governing provision. Everything depends on the particular circumstances, as put by Romer L.J. in *Rowson* v. *Atlantic Transport Company Ltd.* (1).

> I think it is difficult, if not practically impossible, to attempt successfully to lay down any general principles as to how any particular case should be dealt with. I think one must look at the facts of each case as it arises, and on those facts determine upon which side of the line the case falls.

It seems to me the observation in Scrutton on Charter Parties, 14 Ed., p. 288, is very right, namely that the authorities are not in a very satisfactory condition, but that in view of the vagueness of the words to be construed this is hardly surprising. Apart from the decisions my own view would be that the statute was not designed to excuse a ship-owner for direct breach of an obligation towards the cargo, but that it did excuse him if he could show that the breach was solely and necessarily a breach in the management of the ship as a whole and could not be looked upon in any other light quite regardless of whether cargo was or was not on board. The authorities do not, I think, go quite that far.

The leading case on the meaning to be attached to the words "in the management of the ship" is *Gosse, Millerd Ltd.* v. *Canadian Government Merchant Marine* (2). In that case the ship, en route from ports in England to Vancouver, B.C., collided at Liverpool with a pier and damaged her stern; this necessitated drydocking there for repairs to her tail shaft. No. 5 hatch was opened to permit passage of workmen and materials to the damaged shaft. During a rainstorm no tarpaulins were spread over this hatch, with the result that rain water entered the hold and damaged a shipment of tin plates. The shipowner claimed immunity from liability for this cargo damage under Rule 2 (*a*) of Article IV of the Schedule, but this plea did not prevail. Mr. Justice Wright (afterwards Lord Wright) decided in favour of the plaintiff cargo-owners. His decision was reversed by a majority of the Court of Appeal, Greer L.J. dissenting, but was restored by the House of Lords.

(1) (1903) 2 K.B. 666 at 676. (2) (1929) A.C. 223.

The dissenting judgment of Greer L.J. (1) was approved and the following passage from it on page 743 is of value in the present case:

Further, I think it is incumbent on the Court not to attribute to Art. IV, r.2 (*a*). a meaning that will largely nullify the effect of Art. III, r.2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III, r.2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule. In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV, r.2 (*a*). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV, r.2 (*a*), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Art. IV, r.2 (*a*), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes.

In the House of Lords the Lord Chancellor, Lord Hailsham, used much the same language (2):

If the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion.

The plaintiffs' case is that at Quatsino Bay the ship was "safe", that the failure to keep down the water in the fore-hold reacted upon the cargo only, and had no effect upon anything that concerned the ship as a whole; in other words that the rising water as it inched itself to higher levels damaged ever more cargo, but with the ship "safe" in a safe berth, albeit aground forward and afloat aft, the same rising water, and the failure to stop it and reduce it, could not be said to affect the safety of the ship or any operation

(1) (1928) 1 K.B. 717. (2) (1929) A.C. at 233.

1949
KALAMAZOO PAPER COMPANY ET AL v. C.P.R. Co. ET AL
Smith D.J.A.

which could properly be regarded as being referable to the management of the ship, *qua ship,* as distinguished from the care of the cargo. On the authorities this cannot be regarded as a sound argument.

It is true that the Master agreed that the vessel, when beached, was "safe." It was quite the natural response to make to the question asked. But clearly the Captain did not regard the term as one that should be taken in any absolute sense. He meant no more than that she was then safe from sinking, the prevention of which, till then, had been uppermost in his thoughts and the objective of all his actions. But from the time of arrival at Quatsino Bay there was another anxiety pressing upon him, namely the safety of the bulkhead, and the question whether it would withstand the increasing pressure of the rising water and the swelling bales of pulp. This, too, was Captain Clarke's first concern when he stepped on board. He at once went below and examined the bulkhead, thinking it might require shoring up. But he found little or no bulging, and concluded shoring was not then necessary. I quite agree with the Master of the ship when he said that the giving way of the bulkhead "would have been a major (disaster)."

How different are the circumstances here from those in the *Gosse, Millerd* case (*supra*): There the rain, apart from damaging the cargo, made not one whit of difference to any conceivable operation of the ship, as a ship. This is made very clear by Viscount Sumner, a passage of whose speech at p. 240 reads as follows:

> What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween decks. They were lit by electricity. There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics, might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulin which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or of scraping the 'tween decks.

In the present case the facts are, in the view I feel bound to take, the exact opposite. What I think tends to obscure the real issue here is the circumstance that the rising water had such an immediate damaging effect on the cargo, and only what might be relatively regarded as a remote effect on any ship operation. But that cannot matter. Had soundings been taken on arrival at Quatsino Bay (or before) and the ship's actual condition ascertained and appreciated, and the water then in the ship pumped out or reduced in volume (as I have found it could and should have been with the vessel's facilities then available) the ship would again have come to life; she would once more have become a going concern; might even perhaps have found it possible to get under way and move under her own power to Port Alice, 12 miles distant, for survey and temporary repairs. The failure to pump efficiently with all facilities at hand most certainly damaged further cargo, but it was essentially a failure in a matter that vitally affected the management of the ship, viewed in the light of the authorities. It was a "want of care of vessel indirectly affecting the cargo"; or so it seems to me.

I have adopted *supra* a passage from *Rowson* v. *Atlantic Transport Company Ltd.*, but in my view, with the greatest respect, the decision in that case must now be regarded as unsound. It is inconsistent with the reasoning of Viscount Sumner in the *Gosse, Millerd* case. See also the comments of Wright J. (afterwards Lord Wright) in *Foreman and Ellams Ltd.* v. *Federal Steam Navigation Co. Ltd.* (1). Moreover (and with the like respect) it seems to me that Holmes J. went much too far in favour of the cargo owner in *The Germanic* (2) (cited in *Gosse, Millerd supra*).

The action will be dismissed. In the exercise of my discretion I think it right to make no order as to costs.

Judgment accordingly.

---

(1) (1928) 2 K.B. 424 at 443. (2) (1904) 196 U.S. 589.

1949
April 27
Aug. 4

BETWEEN:

WILLIAM JOHN McDONOUGH, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Taxable income—Income or capital gain—Profits acquired in promotion of amalgamation of several companies—Profits gained through resale of shares acquired under option are assessable for income tax—Sale of shares the essential feature of business carried on by appellant—Isolated transaction may be a trading or business one—Appeal dismissed.

Appellant effected an amalgamation of several mining companies under one new company after having found a purchaser for an initial block of shares which the appellant contracted to take up from the new company. By successive option agreements the appellant took up further blocks of shares, in each case having previously completed arrangements for the resale thereof at a profit.

The appellant was assessed for income tax on the profit made by him on the several sales of the company's stock. He appealed from such assessment to this Court. The Court found that the operations carried on by the appellant were of the same kind and carried on in the same way as those which are characteristic of transactions normally carried on by a mining promoter and underwriter. The purchase and resale of the shares was not unconnected with the business of a mine promoter but was an essential part thereof.

Held: That the sale of the shares which gave rise to the profits now assessed to the appellant was not merely incidental to but in reality was the essential feature of the whole business carried on by the appellant; it was a gain made in an operation of business in carrying out a scheme for profit making and, therefore, properly assessable for income tax.

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.

APPEAL under the Income War Tax Act.

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

W. E. McLean, K.C. and *G. E. Burson* for appellant.

J. D. McNish, K.C. and *T. Z. Boles* for respondent.

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

CAMERON J. now (August 4, 1949) delivered the following judgment:

The appellant appeals from assessments to income tax for the years 1939, 1940 and 1941. The basic facts—which are not in dispute—may be stated briefly. In 1939 the appellant conceived the plan of amalgamating a number of mining properties in the Township of Teck into one new company. The new company was incorporated and, under his agreement with the original owners and confirmed by agreement with the new company, the appellant agreed to buy certain shares therein and was given the option of purchasing additional shares from time to time at various prices as therein provided. In the same year he sold the shares which he had agreed to purchase and gave an option to purchase the remaining shares, all at prices in excess of what he had paid or agreed to pay therefor. The gross spread received by the appellant in those years totalled $20,400, from which it is admitted that $8,800 falls to be deducted as a proper deduction. The remaining sum of $11,600 has been added to the appellant's declared income over those three years. No question arises as to the amount or as to the manner in which the sum of $11,600 has been apportioned over the three years in question.

The assessments were made on the ground that the profits so made were "income" within the provisions of section 3 of the Income War Tax Act, 1927, ch. 97, s. 3, which defines taxable income as:

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 including . . .

The appellant submits that the profits here realized were the result of an isolated transaction of purchase and re-sale of property and that, therefore, they were not in

1949
McDonough v. Minister of National Revenue
Cameron J.

the nature of income but merely an accretion to capital. In support of that contention the well-known case of *Jones* v. *Leeming* (1) is cited. The headnote is as follows:

> The respondent joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. As the estate was too small for resale to a company for public flotation, they acquired a further option to purchase an adjoining estate. Ultimately the two estates were sold to a company at a profit. The respondent having been assessed to income tax on a sum representing his net share of the profit appealed. The Commissioners found that the respondent acquired the property or interest in the property with the sole object of turning it over again at a profit, and that he at no time had any intention of holding the property or interest as an investment, and confirmed the assessment. They subsequently found, on the case being referred back to them, that the transaction was not a concern in the nature of trade:—
>
> *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 under Case VI, of Sch. D of the Income Tax Act, 1918.

It is of particular importance to note that the judgment in the House of Lords (*supra*) was rendered "having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade." When the matter first came before Rowlatt, J., by way of appeal from the Commissioners (2), he referred the matter back to them to consider the question as to whether that which took place, was or was not a speculation or venture in the nature of trade. In a Supplementary Case they stated their findings as follows:

> The Commissioners, having considered the evidence and arguments submitted as to what took place in the nature of organizing the speculation, maturing the property, and disposing of the property, and after due consideration of the facts and arguments submitted to them, find that the transaction in question was not a concern in the nature of trade, and they sign the Supplementary Case accordingly.

Rowlatt, J. thereupon allowed the appeal following his own decision in *Pearn* v. *Miller* (3).

Both in the Court of Appeal (4), and in the House of Lords (*supra*), this finding of fact was accepted without review. In the Court of Appeal the Master of the Roles

(1) (1930) A.C 415.
(2) (1930) 1 K.B. 283.
(3) (1927) 11 T.C. 610.
(4) (1930) 1 K.B. 279.

intimated that had that Court not been bound by that finding of fact, the decision might have been otherwise. At p. 292 he said:—

> Now Rowlatt J., and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, "of organizing the speculation, of maturing the property," and the diligence in discovering a second property to add to the first, "and the disposing of the property," there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade.

That case is therefore distinguishable from the instant case where all the facts are to be found by the Court.

The general principle to be followed is stated in *Collins* v. *The Firth-Brearley Stainless Steel Syndicate* (1), where Rowlatt J. said:

> Now the principle I think is very clear and has been established by many cases. The appreciation of an article, the subject of property, whether it is the property of an individual or whether it is the property of a company, is not taxed as such; but it is taxed if the realization of that appreciation forms part of a trade, because then the trade is taxed, and this is an item in the trade. That is all there is in the principle.

Reference may also be made to *Rutledge* v. *The Commissioners of Inland Revenue* (2), where the Lord President said at p. 496:

> It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the Appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question . . . It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade," though it may be wholly insufficient to constitute by itself a trade.

It therefore becomes necessary to set forth all the surrounding facts and circumstances regarding the purchase and re-sale in the instant case.

(1) (1925) 9 T.C. 564. (2) (1929) 14 T.C. 490.

1949
McDONOUGH
v.
MINISTER OF NATIONAL REVENUE
—
Cameron J.
—

The appellant came to Canada in 1928 and for a short time was on instructional duty with the Royal Canadian Air Force. Then he became Senior Exploration Pilot for the Northern Navigation Company. From 1930 to 1932 he was engaged on his own account as an explorer and prospector. In 1932 he joined the Lindsley Organization and was engaged in prospecting and exploring. In 1934 he was prospector and field scout for the Mining Corporation of Canada. In 1936 he returned to the Lindsley Organization and remained with that group until April 30, 1939, as Senior Field Scout. He was Managing Director of Westfield, a company formed by the Lindsleys for exploration and development of mines. He severed his connection with that organization on May 1, 1939. The transactions here in question took place in the main between that date and December 15, 1939, when he joined the Royal Canadian Air Force. In April, 1940, he became Director of Operations and Assistant Managing Director of De Havilland Aircraft of Canada, remaining with that company until April, 1942, when he joined Central Aircraft Limited at London, Ontario. At the end of the war he formed the Trans-American Mining Corporation, Limited—an exploration and development company—of which he is still General Manager.

While it is apparent that the appellant since coming to Canada has been engaged mainly in exploring for and prospecting for mines it is stated and not denied that with the exception of the promotion of Amalgamated Kirkland Mines Limited, he had no experience whatever in the promotion of companies or the raising of capital for mining development.

As I have said, the appellant, immediately after he was released by the Lindsley interests on May 1, 1939, conceived the idea of bringing several mining properties into one company. What he then did is best stated by using his own words:

Immediately subsequent to the cessation of my employment with the Lindsley interests or Westfield, I then, on my own account, wished to get together certain mining properties with a view of having a mine—which I have been doing for the last twenty years in Canada—and I had in mind putting together a number of claims that had been long dormant for nearly thirty years. Those claims were, I should say, south and contiguous to the Lakeshore, Macassa and Teck-Hughes Mines . . .

Abortive efforts had been made, as I gave in my evidence a few minutes ago—for nearly thirty years to get those claims together, without success, and since the mining business was in a paralized condition and times were poor, as we approached the war and the company was no longer able to retain me and it was evident that a war was in sight—in the interim I decided to attempt to get the various holdings . . . and I was successful in putting those claims together. I used my own name to do those things and then, having obtained the claims, I tied them up . . . I offered to put those claims together and obtain money, if possible, for the development of them—*that is the usual procedure* . . . I happened one day to be in Mr. Fisher's office and I happened to mention about these claims and Fisher informed me that he was well-known to the man who controlled the Kirkland-Hunton Mines, the key to the whole situation—Fisher introduced me to a lawyer in the city who controlled—through his clients and friends—the Kirkland-Hunton Mine, and for that introduction this agreement came into being.

The agreement last referred to (Exhibit 1) is dated June 16, 1939, with one Harold Fisher. It recites that the appellant had obtained an option on certain mining properties for the purpose of amalgamation and that Fisher had been instrumental in assisting him in procuring the said option; it provided that each of the parties should exert his best efforts to obtain subscriptions for one-half the amount of money required to exercise the said option, and that all profits either in cash or shares, derived from the said option, or the underwriting of the shares of the company to be formed pursuant to the terms of the said option, should be divided equally between the parties thereto, after deduction of necessary expenses.

Fisher took no further part in the matter, all negotiations being carried on by the appellant. Fisher, however, was paid $8,800, that being one-half of the net profits resulting from the sale of shares.

On July 5, 1939, Exhibit 2 was signed. It is an agreement between three parties who were the owners of certain mining properties to form a company to be incorporated by the appellant and to be called Amalgamated Kirkland Mines, Limited (this company will hereafter be referred to as Amalgamated). It was to have a capital divided into 5,000,000 shares of a par value of one dollar each. Provision was made for transferring certain shares in the new company to the owners of the various properties brought into the merger. It was a further provision of the said agreement that following the organization of Amalga-

1949
McDONOUGH
v.
MINISTER OF NATIONAL REVENUE
Cameron J.

mated it would enter an agreement with the appellant to sell or option to him 2,000,000 shares of the company, of which 400,000 were to be by firm purchase at eight cents per share and payable by July 12, 1939; and the remaining 1,600,000 shares were to be optioned to him in lots of 200,000 each at prices varying from twelve to fifty cents a share to be taken up at stated intervals extending to November 5, 1941. The options were conditional on the firm payment of $32,000 for the 400,000 shares by July 12, 1939.

It was further provided that if the appellant carried out the options as due he would be given an option to purchase an additional 700,000 shares at eighty cents per share; and that if he carried out all the various options he would be given the first refusal to option or purchase any additional Treasury shares at prices to be fixed by the Board. By clause 10 the appellant was given the right to purchase 300,000 shares at the special price of one-half cent per share (in lots of 100,000 each) when he had paid into the Treasury certain specified amounts as the result of having taken up the options first mentioned. Provision was also made for the purchase of other properties, if possible, and it is in evidence that by the appellant's efforts several other properties were brought into Amalgamated.

It will be seen, therefore, that the whole transaction depended on the appellant paying into the new company the sum of $32,000 by July 12, 1939, in payment of 400,000 shares. The appellant had previously taken steps to interest certain mining companies in the financing of Amalgamated, namely, the Lindsley interests, Macassa Mines and International Mining Company. Finally, about June 15, 1939, Mr. Lindsley undertook to provide the money to finance Amalgamated and on July 10, 1939, Exhibit 3 was signed. It is an agreement between Northfield Mines, Inc.—one of Mr. Lindsley's private companies—and the appellant. After referring to the agreement of July 5, 1939, and the fact that the appellant had agreed also to bring two other properties into Amalgamated, it said:

And whereas Northfield is desirous of taking over from McDonough the financing of the New Company and McDonough has agreed to grant to Northfield the right to acquire shares of the New Company upon the terms hereinafter set forth.

And whereas McDonough has previously offered to International Mining Corporation (Canada) Limited the right to participate in the financing of the New Company to the extent of twenty-five per cent thereof, as disclosed by correspondence passing between the said parties and dated June 22nd, 1939, June 27th, 1939, and June 29th, 1939, copies of which have been furnished Northfield.

And whereas Northfield has agreed to assign to International Mining Corporation (Canada) Limited a twenty-five per cent interest in all rights which it acquires in connection with the financing of the New Company.

This agreement in essence provides that Northfield would purchase from the appellant the 400,000 shares of Amalgamated at the price of $36,000 (the appellant having agreed to pay $32,000 therefor to Amalgamated), and that the remaining 1,600,000 shares should be optioned by him to Northfield at a spread of two cents over the price which the appellant was required to pay Amalgamated therefor.

The appellant immediately caused Amalgamated to be incorporated and became its General Manager. The various properties were conveyed to it and the consideration for the transfers was paid as provided. Northfield paid over the sum of $36,000 and received 400,000 shares in Amalgamated.

A number of other exhibits were filed on behalf of the appellant. They are of importance only as an indication of the nature and scope of the operations carried on by the appellant and I shall give but a brief reference to each of them.

By Exhibit 4, dated July 11, 1939, Amalgamated adopted the agreement of July 5, 1939 (Exhibit 1), as if it had been a party thereto in place of the appellant, and released the appellant from all liability.

Exhibit 5 is an agreement dated July 11, 1939. It recites that Amalgamated is desirous of obtaining funds to carry on exploration, development and mining work and that the appellant is willing to supply funds for that purpose. The agreement then provides for the sale and option of shares in Amalgamated to the appellant in exactly the same manner as is provided for in Exhibit 1.

Exhibit 6 is an agreement dated July 20, 1939, by which the appellant agrees to use his best endeavours to cause Northfield to assign to International Mining Corporation

a 25 per cent interest in all rights which it acquires in connection with financing Amalgamated; and it also provides that if Northfield fails to carry out its options, International would have the right to do so.

Exhibit 7, dated August 15, 1939, is a confirmation of the agreement dated July 10, 1939 (Exhibit 3), and was made after Northfield had been incorporated.

Exhibit 8 is an agreement dated September 27, 1939, by which Amalgamated agrees with the appellant to extend the time for taking up the various options set forth in the agreement of July 11, in view of the outbreak of war, but by which the appellant also agreed forthwith to take up the purchase of 200,000 shares at twelve cents per share.

Exhibit 9 is an agreement dated September 28, 1939, by which the appellant agrees to sell to Northfield, International and Macassa, 200,000 shares of Amalgamated at fourteen cents per share, and the time of taking up further options was extended.

Exhibit 10 is an agreement dated September 29, 1939, by which Amalgamated and the former owners of the properties agreed to vary the terms of the agreement of July 5, 1939, in regard to the option to the appellant of 300,000 shares in Amalgamated at one-half cent per share, due to the outbreak of war.

Exhibit 11 is an agreement dated September 15, 1941, between Amalgamated and the appellant in which it is recited that the appellant had paid $150,000 to Amalgamated for 1,200,000 shares, and by which it was agreed that the appellant would forthwith purchase a further 20,000 shares, and the time for taking up the further option was extended, due to the war. The company further agreed that it would not sell or option further shares while any of the options to the appellant were in force.

Exhibit 12, dated September 15, 1941, is an agreement by which the appellant agrees to sell to the various companies therein named the 20,000 shares in Amalgamated, referred to in Exhibit 11, at a spread of two cents per share, and extending the time within which the said companies were to take up the remaining options.

Appellant's counsel attaches much weight to the fact that the appellant had had no previous experience in pro-

moting mining companies. But for years he had been engaged in exploring and prospecting for mines on behalf of various organizations that did promote and finance the development of mining companies, and undoubtedly he had a knowledge of how such matters were carried out. Quite naturally, therefore, when he gave up his position with Westfield he had the intention of putting his knowledge, experience and ability into a producing mine and he agrees that such was the case. He states: "I naturally wanted to look around and engage myself in prospecting ventures until such time as I was likely to be called up," and, "I had to carry on in my mining business and my prospecting endeavours until there was a war or there was not going to be a war," and *that if there had been no war he would have carried on his mining operations.*

In cross-examination he was asked whether it was his intention either temporarily or permanently to carry on in the mining business, and he agreed that such was the case. He agreed also that because of his past operating experience it was his intention to play a major role in the development and the financial development of the mining properties. Having no funds of his own to finance the development, he found it necessary to turn to Northfield and others to provide the money for that purpose. He was appointed General Manager of Amalgamated and received salary from the time of its incorporation until the end of 1939. He then gave up his position as General Manager, but remained as a director for some time and as such was called upon from time to time to give advice as to problems which arose in the development of the mine.

Certain additional facts are also well established. The appellant did not invest any of his own money in the purchase of the shares. Moreover, it was not his intention at any time to retain as his own property any of the shares which were purchased and re-sold. Before he bound himself to purchase the original 400,000 shares, he had made arrangements to re-sell them to Northfield at a profit; and at each subsequent purchase, Northfield or some of its associates had agreed to take up the options from the appellant before the appellant took up his option from Amalgamated. It is manifest throughout that the shares

1949
McDONOUGH
v.
MINISTER OF NATIONAL REVENUE
Cameron J.

were bought by or optioned to the appellant with the idea that they should be re-sold immediately, and, if possible, at a profit. That is evidenced by the agreement to share the profits of sale or underwriting with Fisher, and also by the fact that in order to enable the appellant to take up the first shares and to finance the development of the mine (which was the appellant's declared purpose), they had to be sold, the appellant having no means to do so himself.

These are the facts. The question then is whether the profits derived in that manner are of a revenue nature. I am of the opinion that they are as being profits or gain derived from a trade or business.

The appellant's salaried position had come to an end and he decided to use his knowledge and experience and to go into the business of promoting mines on his own account. I do not think there can be the least doubt that that was his intention for, as I have mentioned above, he said that he had to carry on in his mining business and prospecting endeavours, and that if there had been no war he would have carried on his mining operations. And what he did may properly be called his business. It engaged his entire time and attention from May, 1939, to December 15, 1939, and was discontinued only because he was recalled for duty in the Forces. It included all those matters which would normally be carried out by one in the business of a mine promoter, namely, the location of properties, securing options, the merging of all the properties, the formation of a new company and the arranging of finances for the necessary development.

While the appellant at the trial insisted that his purpose was to establish a mine and so help the country, it is quite apparent from all the evidence that his purpose throughout was to make a profit for himself, and his counsel admitted that such was the case. Now the only way in which it was possible for him to make a profit, under the plan which he himself had conceived, was to dispose of the shares which he agreed to buy, or on which he held options, at prices exceeding those which he was obliged to pay. That was the only way in which he could realize a profit or compensate himself for his time and effort in organizing

Amalgamated. He himself had no funds with which to develop a mine and the company could secure working capital only when the appellant paid for his shares out of monies which he received on the re-sale. The appellant, therefore, was not only engaged in the business of promoting the company, but of underwriting its shares, the latter being an essential feature of the business so far as the appellant was concerned, if not the main feature.

The principles to be followed in cases such as the present one were explained by the Lord Justice Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris* (1), where he said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.
>
> . . . It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental, but was . . . the essential feature of the business, speculation being among the appointed means of the company's gains.

In the present case there can be no doubt whatever that the sale of the shares which gave rise to the profits now assessed to the appellant was not merely incidental to but in reality the essential feature of the whole business carried on by the appellant. It was a gain made in an operation of business in carrying out a scheme for profit making and is, therefore, properly assessable to tax.

Reference may also be made to *Cooper* v. *Stubbs* (2).

The appellant, however, further submits that the purchase and re-sale of the shares was an isolated transaction outside of his usual business operations and unconnected

(1) (1904) 5 T.C. at 165 ff. (2) (1925) 10 T.C. 29.

1949
McDONOUGH
v.
MINISTER OF
NATIONAL
REVENUE
—
Cameron J.
—

therewith, and that, therefore, the profits were not made from a trade or business. It is true that in the years in question the appellant bought and sold shares only in one company and that all the purchases arose under the agreement of July 5, 1939 (Exhibit 2), and all the sales originated under the agreement of July 10, 1939 (Exhibit 3). From another point of view, however, they were not single transactions inasmuch as the sales and purchases aggregated over a million shares and were made over a period of more than two years. But 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. The President of this Court in *Atlantic Sugar Refineries, Ltd.* v. *Minister of National Revenue* (1), referred to the cases which support that proposition.

Reference may also be made to the case of *T. Beynon & Co. Ltd.* v. *Ogg* (2). There a company carrying on business as coal merchants, ship and insurance brokers, and as sole selling agents for various colliery companies, in which latter capacity it purchased wagons for its clients, made a purchase of wagons on its own account as a speculation and subsequently sold them at a profit. It contended that since the transaction was an isolated one, the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing its liability to income tax. But it was held that it was made in the operation of the company's business and properly included in the computation of its profit therefrom. Sankey, J. said at p. 132: "The only question one has to determine is which side of the line this transaction falls on. Is it . . . in the nature of capital profit on the sale of an investment? Or is it . . . a profit made in the operation of the appellant company's business?"

In the case of *The Commissioners of Inland Revenue* v. *Livingston* (3), the facts were that the respondents, a ship repairer, a blacksmith and a fish salesmen's employee, purchased as a joint venture a cargo vessel with a view to converting it into a steamdrifter and selling it. They were not connected in business and had never previously

(1) (1948) Ex. C.R. 622 at 631.
(2) (1918) 7 T.C. 125.
(3) (1926) 11 T.C. 538.

bought a ship. Extensive repairs and alterations to the ship were carried out and then the respondents sold the vessel at a profit. It was held that they were assessable to income tax in respect of it. At p. 542 the Lord President said:

I think the test which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade" is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade," merely because it was a single venture which took only three months to complete.

This statement of the test to be applied was approved by Rowlatt, J. in *Leeming* v. *Jones* (1). He regarded it as covering all the cases.

As I have indicated above, the operations carried on by the appellant were of the same kind and carried on in the same way as those which are characteristic of transactions normally carried on by a mining promoter and underwriter. The purchase and re-sale of the shares was not unconnected with the business of a mine promoter but was an essential part thereof.

Further reference may also be made to *Income Tax Case No. 118* (2). The headnote in that case is as follows:

Appellant was employed in an attorney's office. During the platinum "boom" he obtained information that norite, a formation in which platinum had been found to exist, was present in the northern part of the Rustenburg district. At that time no discoveries of platinum had been made within fifty miles of that particular area. Appellant, however, raised the necessary capital and acquired options over land in the area in question.

Shortly after the options had been acquired by him, appellant was able to sell them at a profit. This profit was included by the Commissioner for Inland Revenue in appellant's taxable income.

Against this assessment appellant appealed on the grounds that the profit in question was a receipt of a capital nature.

Held, dismissing the appeal and confirming the assessment made, that appellant had acquired the options for the purpose of disposing of them at a profit, and for that purpose had organized himself for carrying out a scheme of profit-making by exploiting the options for profit; the profits resulting were therefore the proceeds of a transaction in the nature of a business, and as such were within the statutory definition of gross income.

In that case the President of the Court said:

He intended to sell the options. He had no money to carry on mining operations. So from these facts the Court concluded that the appellant

(1) (1930) 1 K.B. 279 at 283. (2) 4 S.A.T.C. 71.

1949
McDONOUGH
v.
MINISTER OF
NATIONAL
REVENUE
Cameron J.

secured the options with the purpose of selling them. It was true, as has been pointed out in argument that this was the only transaction of its kind in which appellant had indulged, and one of the contentions was that because it was an isolated transaction it was not taxable. The Court could not agree with that contention. It seemed to the Court that the appellant organized himself with the help of a friend into carrying out a scheme for profit-making, the scheme for profit-making consisting of exploiting certain options for profit. He could not do so himself, and so he induced a friend to enter into the transaction in the nature of a business. "Business might be defined as anything which occupied the time and attention of a man for profit: the money of appellant's friend and the attention of the appellant had been directed to making a profit by selling the options.

I am therefore of the opinion that the appeals must fail, and they will be dismissed with costs.

Judgment accordingly.

1949
April 7-8
July 20

BETWEEN:

DOROTHY J. McDOUGALL,............APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Succession duty—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, s. 3(1) (g) as amended by 6-7 Geo. VI, c. 25, s. 3—Death benefits paid by a company to widow of one of its employees under a plan set up for that purpose—Beneficial interest in death benefits not accruing nor arising in favour of widow by survivorship or otherwise—Payment to widow purely voluntary on the part of company—No contractual relationship between employee and company as to payment of death benefits—Widow has no legal right to payment of death benefits—Payment so made not of a superannuation or pension character—Such payment outside the scope of the original section 3(1) (g) of the Act and its amendment—Succession—Appeal allowed.

When M., an employee of the Bell Telephone Company of Canada, died in 1946 the Company paid to his wife, the appellant, a sum of money under its "Plan for Employees' Pensions, Disability Benefits and Death Benefits" to which neither the deceased nor any other employee contributed any money, the Company providing for all the expenses of its operation. That payment was not included in the succession duty declaration. It was, however, incorporated into the assessment made by the respondent on the ground that the disposition of property made in that manner was a dutiable succession under the Dominion Succession Duty Act, 4-5 Geo. VI, c. 14 (1940-41), as amended. The appeal was taken from that part of the assessment only.

Held: That no "beneficial interest" (as that term is used in subsection 3(1) (*g*) of the Act) in death benefits accrued or arose in favour of the appellant by survivorship or otherwise upon the death of her husband. *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1947) 2 A.E.R. 78; *Re Williamson, Williamson et al* v. *Treasurer of Ontario* (1942) 3 D.L.R. 736 referred to.

2. That the payment to appellant was purely voluntary on the part of the company and outside the scope of the original subsection 3(1) (*g*) of the Act.
3. That no contractual relationship existed between the deceased and the Company as to the payments of death benefits.
4. That the appellant had no right in law to compel the Company to pay her the death benefits.
5. That the payment so made to appellant is not of a superannuation or pension character and, therefore, is not brought into tax by reason of the added part of subsection 3(1) (*g*) of the Act.

APPEAL under the Dominion Succession Duty Act.

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

Charlemagne Venne, K.C. for appellant.

Hugh O'Donnell, K.C. and *I. G. Ross* for respondent.

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

CAMERON, J. now (July 20, 1949) delivered the following judgment:

This is an appeal from an assessment made under the Succession Duty Act, ch. 14 of the Statutes of Canada, 1940-41, as amended. One D. H. McDougall (hereinafter called "the Deceased"), who died on October 22, 1946, domiciled in Montreal, was at that date an employee of the Bell Telephone Company of Canada (hereinafter referred to as "the Company") and had been in its employ continuously since 1922. Following his death, that Company paid to his wife, the appellant, for her own personal use and benefit, two sums totalling $11,100 in accordance with its policy of making grants to dependants of deceased employees under the plan which it called "Plan for Employees' Pensions, Disability Benefits, and Death Benefits." The respondent in assessing the estate of the deceased to succession duty has added that amount to the value of

1949
McDOUGALL
v.
MINISTER OF
NATIONAL
REVENUE
Cameron J

the estate as declared by the appellant on the ground that the disposition of property in that manner was a dutiable succession under the Act. An appeal is now taken from that part of the assessment only.

"Succession" is defined by section 2(m) of the Act and includes any disposition of property deemed by section 3 to be included in a succession.

It is submitted by the respondent that the assessment is valid under the provisions of section 3(1) (*g*) of the Act. As originally enacted, that subsection was as follows:

> 3.(1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—
>
> (*g*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

I shall hereafter refer to subsection (*g*) as above quoted as the original part of subsection (*g*).

By 6-7 Geo. V., ch. 25, subsection (*g*) was repealed and a new subsection (*g*) was substituted therefor. The new subsection contained all the original subsection, followed by the words:

> including superannuation or pension benefits or allowances payable or granted under legislation of the Parliament of Canada or of any Province, or under any other superannuation or pension fund or plan whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada, or of any Province thereof, or out of any fund established for the purpose, which benefits or allowances shall be deemed for the purposes of the Act to have been purchased, acquired, or provided by the deceased.

This part of the subsection I shall hereafter refer to as the added part of subsection (*g*). The new subsection as amended was in effect at the time of Mr. McDougall's death.

The Company's first plan, called "Employees' Pension and Benefit Fund," was established in 1917 pursuant to by-law 16 enacted in February, 1917. Clause 1 of that by-law was as follows:

> Nothing in this By-law contained and nothing which may be done in pursuance hereof shall create expressly or by implication or inference any contract or contractual relation or obligation between the Company and any employee or the legal representatives or dependants of any employee. The pensions and allowances heretofore granted, or which may hereafter be granted to any such employee, representative or dependant shall be

deemed alimentary and for personal use, and shall not be assigned or otherwise alienated, and shall not confer upon any employee, representative, dependant or any other person any right or interest capable of being assigned or otherwise alienated, or of being seized, attached, garnisheed, or otherwise made subject to any process or proceeding in law or equity.

The by-law provided for the appointment by the Board of a Committee with such powers and duties regarding the administration and carrying out of the plan as the Board might direct. All payments of pensions and allowances were to be charged to a reserve fund of $400,000 and provision was made for its maintenance, such reserve being continued also for the general purposes of the Company. So far as I am made aware, that by-law has remained in force since its enactment.

The original plan has been frequently modified and amended either by the Board or the Committee. The employees as such have had no part in its initiation or administration, nor were they consulted at any time in regard thereto, and there is no evidence that its terms were at any time the subject of collective bargaining between the Company and its employees. As of January 1, 1928, a material change occurred in the plan. All reserves then on hand and which had previously been available for payment of pensions and benefits were transferred to the Royal Trust Company as Trustee of a fund to be known as the "Pension Fund," and the Company undertook to maintain that fund by periodic charges to operating expenses. Thereafter, that Pension Fund existed only for payment of pensions. After January 1, 1928, all other benefits (accident, sickness disability and death benefits) were charged to the operating accounts of the Company when and as paid. Since 1928, no separate fund has been available for payment of such benefits. The original plan was in effect at the time when the deceased entered the employ of the Company. It is admitted that from the time he joined the Company he had full knowledge of the plan as varied from time to time, as had all other employees. Neither the deceased nor any other employee contributed any money to any of the benefits provided for in the plan and no deductions were made from their salaries or wages, the Company alone providing for all the expenses and outlays incidental thereto. Exhibit 1 is the plan in effect as of October 22, 1946.

1949
McDougall
v.
Minister of National Revenue
Cameron J

The deceased at the time of his death was still an employee of the Company. His wife and one daughter, aged fourteen, survived him.

Mr. McDougall's death resulted from sickness and the Committee therefore proceeded under the provisions of section 7(2) of the plan which refers to "Sickness Death Benefits" and is as follows:

(2) In the event of the death of any employee, occurring on or after January 1, 1930, and resulting from sickness as defined in Paragraph 1 of Section 6 of this Plan, hereinafter referred to as death by sickness, if the employee's term of employment has been two years or more there may be paid (and, in the circumstances described in sub-paragraph 4 (*a*) of this Section, there shall be paid) a Sickness Death Benefit which shall not be in excess of Two Hundred and Fifty Dollars ($250) or an amount computed according to the following schedule, whichever is greater:

Employee's Term of Employment	Maximum Sickness Death Benefit
2 but less than 3 years	4 months' wages
3 " " " 4 "	5 " "
4 " " " 5 "	6 " "
5 " " " 6 "	7 " "
6 " " " 7 "	8 " "
7 " " " 8 "	9 " "
8 " " " 9 "	10 " "
9 " " " 10 "	11 " "
10 years or more	12 " "

Payment of the Sickness Death Benefit, subject to the conditions imposed in Paragraph 5 of this Section and elsewhere in this Plan, shall be made to the employee's beneficiaries, as provided in Paragraph 4 of this Section.

By the provisions of section 7(4), the persons who may be beneficiaries of Sickness Death Benefits are limited to the wife (or husband) and the dependent children, and other dependent relatives of the deceased. Section 7, however, provides (subject to the provisions of section 7(4) (*c*) not here applicable) that the maximum Sickness Death Benefits shall be paid to the wife of the deceased if living with him at the time of his death (and in certain cases the husband of the deceased employee), or to the child or children of the deceased employee, and supported by him; but that if the deceased left him surviving both a wife and child, or children (as therein described), that "the Committee, in its discretion, may pay the Death Benefit to or for any one or more of such possible beneficiaries in such portions as it may determine." In this

case the Committee exercised its discretion by paying the maximum amount to the appellant; and further exercised the discretion given it by section 7(5) by paying that amount in two instalments, instead of in monthly sums equal to the monthly wages of the deceased. The payments so made to the appellant were charged to and paid out of the operating expenses of the Company.

It is submitted by the respondent that the benefits or allowances here granted are within the original part of the subsection; that while the deceased did not purchase or provide the beneficial interest which accrued or arose by the survivorship of the appellant by direct payment of any amount, that the benefits or allowances are part of the consideration for his services and were therefore a provision made by him. A careful consideration of the plan and of the evidence leads me to the conclusion that this submission cannot be supported and that the payment of Death Benefits to the appellant was, in fact, voluntary on the part of the Company.

Section 1 of the plan (Exhibit 1) is as follows:

The Bell Telephone Company of Canada undertakes, in accordance with this Plan, to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness or when they are retired from service, or, in the event of death, to their dependent relatives.

This "undertaking" of the Company to provide the monies requisite to the operation of the various parts of the plan would seem, *prima facie*, to be an offer or promise to the employees and, if communicated to and accepted by them, the prospective benefits might be looked upon as part of the consideration for their services, and therefore, being a provision made by them, come within the original part of section 3(1) (*g*).

But the "undertaking" to provide the benefits is made "in accordance with this Plan" and is therefore subject to the further provisions contained in the plan. Section 10 which follows authorizes the Board of Directors to vary the plan as they see fit and to terminate the plan.

The Board of Directors of the Company may from time to time as they deem it advisable and shall at intervals not exceeding five year periods cause an investigation or investigations to be made into the working of this Plan including actuarial evaluations of the Pension Fund, and may make such changes (if any) in the said Plan as they may in

1949

McDOUGALL v. MINISTER OF NATIONAL REVENUE

Cameron J.

their discretion see fit *or may terminate this Plan*; but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder and changes involving the pension benefits or the rate of contribution to the Pension Fund shall be subject to evaluation by a duly qualified actuary.

While, therefore, such changes or alterations in the plan would not affect the rights of an employee to any benefit or pension to which he had become entitled by award, it is clear to me that the Board of Directors could at any time, without the consent of any employee, cancel the entire plan as to the payment of Sickness Death Benefits, even after the death of an employee and at any time before the Committee had actually paid the benefits to the dependent relatives, and such dependent relatives would have no legal right thereafter to payment of any amount.

Section 8(2) of the plan, while no doubt intended primarily for the protection of the employees and dependent relatives, would seem also to effectively preclude them from taking any proceedings against the Company to enforce payment of Sickness Death Benefits. It is as follows:

8(2) The pensions and benefits provided herein shall be deemed alimentary and for personal use, and shall not be assigned or otherwise alienated, and shall not confer upon any employee, representative, dependent, or any other person any right or interest capable of being assigned or otherwise alienated, or of being seized, attached, garnisheed, *or otherwise made subject to any process or proceeding in law or equity.*

Reading these sections together with paragraph 1 of By-law 16 (*supra*), I have reached the conclusion that they are repugnant to the idea that the award and payment of the benefits are anything else but voluntary. They negative the suggestion that the Company's undertaking in section 1 of the plan is part of the consideration for an employee's services and is "a provision made by him." If, therefore, the deceased's dependants had endeavoured to enforce payment of the benefits, they could not, in my opinion, have done so successfully. Reference may be made to in *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1). The facts in that case were that:

On the sale of N.'s interest in a partnership firm to M. and V., a term of the sale was that M. and V. should undertake to pay certain annuities, and, by a deed dated Feb. 4, 1942, made between M., V. and

(1) (1947) A.E.R., vol. 2, p. 78.

N., M. and V. agreed to pay certain annuities to N.'s three daughters from the death of N. The deed provided, *inter alia*, that the annuities should be paid by quarterly payments to the persons "entitled thereto," that each annuity should be paid exclusively out of income brought into charge to income tax, and that M. and V. charged "all their respective interests in the profits and assets of the partnership firm with payment of" the annuities. N. died on May 5, 1943, and the question was whether the daughters were liable for estate duty and succession duty in respect of the annuities provided to be paid by the deed.

It was held:

(i) on the true construction of the deed, notwithstanding the use of the word "entitled to," the annuitants had no rights thereunder either at common law or in equity, except the right to retain any sums paid to them.

(iii) the word "interest" in the Finance Act, 1894, s. 2(1) (*d*), meant such an interest in property as would be protected by the courts, and the annuities payable under the deed were, therefore, not annuities within the meaning of s. 2(1) (*d*), and the annuitants were not liable to estate duty in respect of them.

(iv) since the annuitants had no right to sue for the annuities, they did not become "entitled" to them within the meaning of that phrase in the Succession Duty Act, 1853, s. 2, and, therefore, they were not liable to succession duty in respect of them.

In that case the Court had to consider the provisions of section 2(1) (*d*) of the Finance Act, 1894, which was as follows:

(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . .

(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

It will be observed that the wording of subsection (*d*) is identical with the original part of subsection (*g*) of section 3(1) of the Act now under consideration. In the case cited, Wynn-Parry, J. said at p. 80:

The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by Mr. Noad, the deceased. However, the vital question is: Did any beneficial interest, within the meaning of that phrase as used in the section, accrue to the plaintiffs on the death of Mr. Noad? In my view, the word "interest" in the sub-section means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and counsel for the Crown, does not contend to the contrary—that the effect of the deed of Feb. 4, 1942, is not to create any trust in favour of the annuitants. It further appears clear to me, from the reasoning of the Court of Appeal in *Re Schebsman, Ex p. Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd. & Schebsman*, that at common law the annuitants have no right to sue Mr. Miller or Mr. Vos under the deed. On the receipt

1949

McDOUGALL
v.
MINISTER OF
NATIONAL
REVENUE

Cameron J.

by each of the annuitants of any payment in respect of her annuity, the property in the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as each annuitant is concerned, the deed is *res inter alios acta,* and she has no right there under.

And at pp. 82-3 he said:

On its true construction, I cannot find—and this is really admitted—that the deed confers on any of the annuitants any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed. In my view, the annuitants are not persons to whom the deed purports to grant something or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place on the word as appearing in the Finance Act, 1894, s. 2 (1) (*d*).

. . . .

on the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section. Therefore, I hold that the annuitants are not liable to estate duty in respect of the annuities.

Counsel for the respondent submits, however, that even if the plan as initiated was purely voluntary on the part of the Company, yet at the time of the deceased's death it had been put on a contractual basis by reason of changes made therein. I have already considered his argument as to the effect to be given to the "undertaking" of the Company as contained in section 1 of the plan. He refers also to Exhibit "D", a pamphlet entitled "Questions and Answers Concerning Amendments to Plan for Employees' Pensions, Disability Benefits and Death Benefits." It bears the name "The Bell Telephone Company of Canada" and is said to be effective February 22, 1939. On the first page thereof there appears the following:

QUESTIONS AND ANSWERS CONCERNING YEAR 1939
AMENDMENTS TO THE PLAN FOR EMPLOYEES'
PENSIONS, DISABILITY BENEFITS AND
DEATH BENEFITS

1. *Question*

Why is the Plan being distributed in pamphlet form to employees?

Answer

In view of important amendments recently made to the Plan, as detailed in this series of Questions and Answers, it is considered an opportune occasion to more fully acquaint employees with the various provisions of the Plan.

2 *Question*

What important amendments have been made to the Plan?

Answer

(*a*) The Plan, when first established in 1917, contained a stipulation that the Plan was tentative only. This stipulation has been removed from the revised Plan.

(b) The Plan previously stipulated that there was no contract or contractual relation or obligation between the Company and any employee or the legal representatives or the dependents of any employee. This stipulation has been removed from the revised Plan and the payment of pensions and benefits, subject to the provisions of the Plan, is now an obligation of the Company.

(c) The Plan previously contained the provision that pensions or benefits could be suspended or terminated, in the discretion of the Employees' Benefit Committee, in cases of misconduct or conduct prejudicial to the interests of the Company. This provision has been removed from the revised Plan.

The remainder of the pamphlet deals almost entirely with pension matters with which I am not here concerned.

It is submitted that by reason of the above questions and answers, the Company made it clear to the employees that thereafter the payment of pensions and benefits became a contractual obligation of the Company which could be enforced by the employees, their legal representatives or the dependants of employees. It is to be noted first, however, that the "obligation" of the Company is "subject to the provisions of the plan." I have already referred to the provisions of section 8(2) which provides that the pensions and benefits shall not be made subject to any process or proceeding in law or equity; and to section 10 which authorizes the Board to amend the plan as it deems advisable and to terminate the plan entirely. There is no evidence whatever that the Board of Directors authorized the issue of the pamphlet Exhibit "D" which I assume was put out by the Committee. But even if the Board did so it would appear that it had no power to create any contractual relationship between the Company and its employees as to payment of pensions and benefits. As I have already noted, By-law No. 16, so far as I am made aware, remained in force and effect throughout and the Board's powers to approve and amend the plan from time to time are expressly limited by the provisions of clause 1 of By-law 16, the opening sentence of which is as follows:

Nothing in this by-law contained and nothing which may be done in pursuance hereof shall create expressly or by implication or inference any contract or contractual relation or obligation between the Company and any employee or the legal representatives or dependants of any employee.

If, however, I am in error in concluding that there was no contractual relationship between the Company and its

1949
McDOUGALL v. MINISTER OF NATIONAL REVENUE
Cameron J

employees regarding payment of such death benefits to employees' dependants, and such relationship did in fact exist, I would be of the opinion that the dependants (in this case the widow and/or child of the deceased) would have no right of action against the Company for such benefits. If any such contract existed it was between the Company and its employees. No representations were made to the "dependants" and it could not be said that they were parties to any agreement with the Company or the Committee in charge of the plan. Moreover, it is clear that no trust was created in favour of any of the dependants. At common law, therefore, so far as the "dependants" are concerned, the contract, if any such existed, was *res inter alios acta* and they had no enforceable rights therein. The dependants of deceased employees are not persons to whom the contract (if any) purports to grant something or with whom some agreement is purported to be made, and in these circumstances there was no beneficial interest arising or accruing by survivorship or otherwise to them on the death of the deceased (see *Re Miller's Agreement, Uniacke* v. *Attorney-General, supra*).

Reference may also be made to *Re Williamson, Williamson et al.* v. *Treasurer of Ontario* (1). That was a case under the Succession Duty Act of Ontario, R.S.O., 1937, ch. 26, in which similar payments under the plan of the Bell Telephone Company were under consideration. Section 10(*b*) of the Ontario Act was identical in language with the original part of subsection 3(1) (*g*) of the Dominion Act, except that the word "annuity" was omitted at the beginning of the subsection. Plaxton, J. held that the payments were voluntary and not a provision made by the deceased and that if the payments had been withheld by the Company the dependants could not have succeeded in an action to enforce payment. He also stated that while there was no evidence before him that the plan had been brought to the attention of the deceased employee in that case, his decision would have been the same had it been established that he had knowledge of the plan. It may be noted, however, that in the report of that case it is not stated that Exhibit "B" (above referred to) was in evidence.

(1) (1942) 3 D.L.R. 736.

My finding, therefore, is that the payments made to the appellant by the Company were voluntary and outside the scope of the original subsection (*g*).

It is of interest to note that in the administration of s. 2(1) (*d*) of the English Finance Act, referred to above, one of the requirements in matters of this sort is that the recipients must have either individually or collectively an enforceable right to the benefits. Reference may be made to Green's Death Duties, Second Edition, p. 104, where it is stated as follows:

> In the case of provident and superannuation schemes or funds, connected with the deceased's employment, Estate duty is payable under s. 2(1) (*d*) wherever—
>
> (1) there was a contract or arrangement between the deceased on the one hand, and his employers or the trustees or the other contributors on the other hand, under which the benefits in question are payable to the deceased's relatives or nominees; and
>
> (2) the recipients have either individually or collectively an enforceable right to the benefits; and
>
> (3) the deceased contributed, either voluntarily or compulsorily, to the scheme; or, if he did not contribute directly, the benefits are part of the consideration for his services.

The respondent alternatively submits that the payments so made to the appellant are brought into tax by the added part of subsection (*g*). The amendment, I think, was intended to declare that "superannuation or pension benefits or allowances," payable or granted as therein provided, constituted one form of "annuity or other interest" as used in the opening words of the subsection. He submits that the added part of the subsection is not limited in its application to benefits or allowances of a superannuation or pension character, but that all "allowances" payable or granted as therein provided are deemed to be successions and therefore subject to tax. The payments made to the appellant were no doubt "allowances" but it is clear that they were not of a superannuation or pension character. The deceased had not been superannuated or placed on pension and nothing in the nature of superannuation or pension accrued to the appellant.

In my view this submission of the respondent cannot be supported. I am quite unable to find that the word "allowances" as used in the subsection can be taken by itself and without reference to the preceding words "superannua-

1949
McDOUGALL
v.
MINISTER OF NATIONAL REVENUE
Cameron J

tion or pension benefits or," or as bringing into tax allowances which are other than those of a superannuation or pension character. I am of the opinion that the word "allowances" is used merely as an alternative to the word "benefits" with the intention that payments of a superannuation or pension character, whether payable as "benefits" or granted as "allowances" should be brought into tax if payable or granted as therein provided. If there were any doubt on this matter, it is entirely removed in my opinion by consideration of the words that follow: "payable or granted under legislation of the Parliament of Canada or of any province, *or under any other superannuation or pension fund or plan.*" Excluding those benefits or allowances payable or granted under Provincial or Dominion legislation (with which I am not here concerned), the benefits or allowances which are brought into tax are those which are payable or granted *"under any other superannuation or pension fund or plan."* There can be no question, I think, that the "fund or plan" referred to in the part I have underlined must be of a superannuation or pension character.

On the ground, therefore, that the payments to the appellant were not superannuation or pension benefits or superannuation or pension allowances, I must find that they are not brought into tax by reason of the added part of section 3(1) (*g*). Having already found that they are not within the ambit of the original part, it follows that the appeal must be allowed. Having reached that conclusion, it is not necessary to consider the question as to whether or not they were paid "out of any fund established for the purpose."

The assessment as to this item was erroneously made and the appeal must be allowed with costs.

Inasmuch as the appellant (in order to secure the release of the said payments) paid the succession duties in regard thereto, under protest, she is entitled to repayment of the said sum which I am advised is $578.49. If the parties are unable to agree on the proper amount, the matter may be spoken to.

Judgment accordingly.

BETWEEN: 1949

Feb. 8
Aug. 18

JACOB JOHN MORCH, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48(3), 71—The Income Tax Act, S. of C. 1948, c. 52, ss. 48(1), 108—Interpretation Act, R.S C. 1927, c. 1, 21(2), 21(3)—Words not to be read into an Act without clear need or reason—Proceedings under section 71 not prevented by pending appeal against assessment—Use of different words in amending Act not necessarily indicative of change of meaning of amended Act—Doubtful whether an Act may be construed by reference to a subsequent enactment.

The applicant applied for an order setting aside a certificate registered under sec. 71 of the Income War Tax Act and all proceedings taken thereon on the ground that his appeals against the assessments on which the certificate was based were still pending and that sec. 71 did not authorize the registration of a certificate or the issue of a writ in such circumstances. In the alternative, he applied for an order staying further proceedings on the certificate and the writ of *fieri facias* issued thereunder.

Held: That where the words of a section are clear and precise no limitation or proviso should be read into it unless there is clear need or reason for so doing.

2. That proceedings may be taken under section 71 of the Income War Tax Act, notwithstanding the fact that the taxpayer has taken an appeal or objection against the assessment and such appeal or objection is still outstanding.

3. That the unpaid amount which section 48(3) orders the taxpayer governed by it to pay forthwith after the notice of assessment is sent to him may properly be certified under section 71 after two months have elapsed from the date of mailing the notice of assessment, whether an appeal or objection against the assessment has been taken or not.

4. That it does not follow as a matter of course that in every case where Parliament has used different words in an amending Act from those used in the amended one that a difference in meaning was intended; there are many cases where the amending enactment although couched in different terms from the amended one is, without saying so, merely declaratory of its true meaning.

5. That it is doubtful in the case of a statute to which the Interpretation Act applies whether resort may be had in aid of its construction to the terms of a subsequent amendment.

1949
MORCH
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

Application to set aside certificate under section 71 of the Income War Tax Act and proceedings thereon, or to stay proceedings under writ of *fieri facias*.

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

G. E. Beament K.C., for applicant.

J. D. C. Boland for respondent.

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

THE PRESIDENT now (August 18, 1949) delivered the following judgment:

This is an application for an order setting aside the certificate of the Deputy Minister of National Revenue for Taxation herein, dated January 18, 1949, and registered in this Court on the same date, and all proceedings taken thereon or, in the alternative, for an order staying all further proceedings on the said certificate and the writ of *fieri facias* issued out of this Court herein on January 18, 1949, until the appeals from the assessments referred to in the said certificate have been finally disposed of.

The certificate was made and registered and the writ of *fieri facias* issued under section 71 of the Income War Tax Act, R.S.C. 1927, chap. 97, which provides as follows:

71. All taxes, interest and penalties payable under this act remaining unpaid, whether in whole or in part after two months from the date of mailing of the notice of assessment, may be certified by the Commissioner of Income Tax.

2. On the production to the Exchequer Court of Canada, the certificate shall be registered in the said Court and shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for the recovery of a debt of the amount specified in the certificate, including interest to date of payment as provided for in this Act and entered upon the date of such registration.

3. All reasonable costs and charges attendant upon the registration of such certificate shall be recoverable in like manner as if they were part of such judgment.

Under this section the Deputy Minister of National Revenue for Taxation, as the person described in the first subsection thereof as the Commissioner of Income Tax is now known, on January 18, 1949, certified the amounts

of income tax and interest payable by the applicant under the Act and remaining unpaid under the income tax assessments against him for the years 1941 to 1946, of which notice had been mailed to him on July 20, 1948, and September 1, 1948, and on the same date the said certificate was registered in this Court. Thereupon, on the same date a writ of *fieri facias* was issued out of this Court directed to the Sheriff of the County of Hastings, in which the applicant resides, commanding him that of the lands, goods and chattels of the applicant he should cause to be made the sums stated in the certificate.

On the return of the motion it was shown that the applicant had paid the whole amount due under the assessment for 1941 on January 31, 1949, but that in respect of the other assessments he had duly served the Minister with notices of appeal against the assessments for 1942 to 1945 within one month from September 1, 1948, and a notice of objection against the assessment for 1946 within two months from the said date, that being the date of mailing of the notices of assessment for the years 1942 to 1946, and that the Minister had not yet made any decision with respect to the said notices of appeal or notice of objection.

On these facts counsel for the applicant sought to have the certificate and writ set aside on the ground that section 71 did not authorize the registration of a certificate or the issue of a writ in a case such as this.

Counsel's basic contention was that section 71 provided a summary method for the recovery of taxes, interest and penalties payable under the Act that were not in dispute but was not applicable in the case of assessments where an appeal against the assessment had been taken and had not been finally disposed of. He thus read into the section a proviso or limitation, which he contended was implicit in its words, that its applicability was confined to cases where no appeal had been taken against the assessment involved or the appeal against it had been finally dismissed or, in other words, that the section applied only in cases where taxes, interest and penalty were payable under the Act as the result of a valid and binding assessment and that the unusual, if not extraordinary, procedure permitted

1949
MORCH v. MINISTER OF NATIONAL REVENUE
Thorson P.

by it could not be resorted to in the case of an assessment that was not final or binding by reason of being still *sub judice*.

Related to this contention was the submission that section 71 is ambiguous and that two interpretations of its words are possible; that in such cases the Court should take the same view as that of Lord Loreburn L.C., in *Attorney General* v. *Till* (1) where he said, at page 51:

where various interpretations of a section are admissible, it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive.

and avoid an interpretation of the section that would lead to an unreasonable or oppressive result; that Parliament could not have intended that proceedings should be taken in this Court that would be tantamount to a judgment of it in respect of an assessment the correctness of which has been challenged and might have to be passed upon by it; and that, under the circumstances, the Court should choose an interpretation consistent with the Act as a whole rather than one that would produce such an unreasonable or oppressive result.

There are, I think, several reasons for refusing to accept such a limited view of the scope of the section and preferring the submission made by counsel for the respondent that the words of the section are clear and precise and that under it the Deputy Minister of National Revenue for Taxation could, after an assessment had been made and two months had elapsed from the date of mailing of the notice of assessment, certify the taxes, interest and penalties payable under the Act and remaining unpaid under the assessment, notwithstanding the fact that an appeal from the assessment had been taken and was still pending, have the said certificate registered in this Court and obtain the issue of a writ of execution thereunder.

In the first place, I agree with counsel for the respondent that the words of the section are clear and precise and plainly lend themselves to the construction which he placed on them. I find no ambiguity in them. There is, therefore, no justification for cutting down their meaning or reading into the section the proviso or limitation that it has no application in cases of an assessment against

(1) (1910) A.C. 50.

which there is an appeal still outstanding. No such limitation or proviso is expressed and none should be inserted unless there is clear need or reason for it. Maxwell on Interpretation of Statutes, 9th edition, at page 14, states it as a rule that nothing is to be added to or taken from a statute, unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express. The same rule was put by Lord Mersey in *Thompson* v. *Goold & Co.* (1) in these words:

> It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

and by Lord Loreburn L.C. in *Vickers* v. *Evans* (2) as follows:

> we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

I find no need or reason for limiting the scope of the applicability of the section as counsel for the appellant sought to do and cannot see anything to justify the inference that Parliament intended such a restriction of it. Nor would any such limitation follow from the application of what has been called the "golden rule" laid down by Lord Wensleydale in *Grey* v. *Pearson* (3) where he said:

> in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

I am unable to find anything in the construction advanced for the respondent that would lead to any absurdity or repugnancy or inconsistency with the rest of the Act or any need or reason for modifying the grammatical or ordinary sense of the words of the section.

Moreover, even if the words of the section were capable of the restricted meaning ascribed to them by counsel for the applicant I see no reason for preferring his interpretation to that put forward on behalf of the respondent. I find nothing unusual or extraordinary, and certainly nothing unreasonable or oppressive, about the summary procedure which Parliament has provided by section 71 or in the view that a certificate can be registered and a writ

(1) (1910) 79 L.J.K.B. 905 at 911.
(2) (1910) 79 L.J.K.B. 954 at 955.
(3) (1857) 6 H.L.Cas. 61 at 106.

1949
MORCH
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

of execution issued under it even in the case of an assessment against which an appeal has been taken and is still pending. Indeed, it might be considered surprising if Parliament, in the interests of effective and speedy tax collection, had not made some such provision. Certainly, the restricted view of the applicability of the section taken by counsel for the applicant is not free from objection. It would follow from it that, as a matter of law, an appeal against an assessment would operate automatically as a stay of proceedings under section 71 as long as the same is pending. If that were so, a taxpayer could, by his own act in appealing against his assessment, postpone proceedings against him under the section and thereby, in certain circumstances, delay and possibly defeat the collection of the income tax payable by him. What need or reason can there be for substituting an interpretation permitting such a result for that put forward for the respondent? I cannot see any. There is nothing unusual or extraordinary, or unreasonable or oppressive, in the interpretation of section 71 that it does not permit a taxpayer to stay proceedings under it by the simple expedient of appealing against the assessment. Nor can it be soundly contended that Parliament could not have intended that proceedings should be taken under section 71 in the case of an assessment against which there is a pending appeal. I find some help in disposing of this contention in the manner in which the appropriate legislative bodies in the provinces have dealt with the somewhat analogous subject of the effect of an appeal from a judgment as a stay of execution of it or proceedings under it. In Ontario under Rule 500 of the Supreme Court of Ontario Rules of Practice, 1928, an appeal from a judgment generally operates as a stay of execution of it unless otherwise ordered by a judge of the Court of Appeal. But in all but one of the other provinces the rule is otherwise. For example, in Manitoba Rule 659 of The King's Bench Rules, 1939, provides that an appeal to the Court of Appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, but a judge may order a stay either unconditionally or on terms. There are similar provisions in other provinces: *vide* Nova Scotia, Order 57, Rule 13 of The Rules of the

Supreme Court, 1920; New Brunswick, Order 58, Rule 16 of The Rules of the Supreme Court, 1927; Saskatchewan, Rule 15 of the Rules of the Court of Appeal, 1942; Alberta, Rule 610 of The Consolidated Rules of the Supreme Court, 1944. Nor does an appeal operate automatically as a stay of execution of the judgment appealed from in Quebec; *vide* Article 1248 of The Code of Civil Procedure. And in British Columbia the stay of execution is made subject to specified conditions; *vide* section 30 of the Court of Appeal Act, R.S.B.C. 1943, chap. 10. Only in Prince Edward Island does an appeal seem to operate automatically as a stay of proceedings: *vide* Order 57, Rule 7 of The Rules of the Supreme Court, 1929. The great majority of the legislative bodies in the provinces charged with the making of rules of procedure have thus found nothing unreasonable or oppressive in providing that an appeal should not operate automatically as a stay of execution of the judgment appealed from. There cannot, therefore, be much force in the argument that Parliament could not have intended a similar effect in the case of section 71. Moreover, there is a complete answer to the argument that Parliament could not have intended proceedings under section 71 in the case of an assessment subject to a pending appeal in the fact that it clearly showed that such was its intention when the Act was revised in 1948: *vide* section 48(1) and section 108 of The Income Tax Act, Statutes of Canada, 1948, chap. 52, to which I shall later refer. I find no reason for assuming that Parliament intended otherwise when it enacted section 71.

Not only has the applicant thus failed to show any need or reason for the restricted view of the applicability of the section taken by counsel on his behalf, but there is also, I think, sound ground for the opinion that his interpretation of it is open to more serious objection than the wider view taken on behalf of the respondent. Under the latter the interests of both the taxpayer and the public can be adequately protected. The taxing authorities are not prevented from taking what seem to be necessary steps to collect the tax that may be payable by the mere act of the taxpayer himself in appealing against the assessment. The onus is on him to show that the assessment appealed against

1949
MORCH
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

is erroneous either in law or in fact and until it is so found it remains valid. At any rate, its invalidity is not to be assumed from the mere fact that an appeal has been taken against it. There can thus be no serious objection to proceedings under section 71 if they should be deemed necessary in the interests of the public to collect the tax if the appeal from the assessment should be dismissed, provided that the position of the taxpayer is not thereby unjustly prejudiced. Just as in the case of the provincial rules to which I have referred the provincial legislative bodies have felt that there was adequate protection for the appellant in the power of a judge or the court to order a stay of execution of the judgment appealed from in a proper case so, I think, the taxpayer against whom proceedings have been taken under section 71 can be adequately protected from injury by the Court's power to order a stay of further proceedings under the section and thus preserve as far as possible the rights of both the public and the taxpayer. There is no similar safeguard in the public interest in the result that might follow if the applicant's restricted view of the applicability of the section were adopted. Under such view the taxpayer could, by appealing against the assessment, prevent the taxing authorities from taking any steps under section 71 even where the taking of such steps might be necessary to collect the tax that is payable and so deal with his assets during the pendency of the appeal as to put them out of the reach of the taxing authorities. Thus even if the matter were to be determined on the basis of which interpretation is the more reasonable one I would be of the opinion that the respondent's interpretation is to be preferred.

In my judgment, proceedings may be taken under section 71, notwithstanding the fact that the taxpayer has taken an appeal or objection against the assessment and such appeal or objection is still outstanding.

I shall now deal with the argument which counsel for the applicant based on section 48(3) of the Act. He pointed out that the applicant was governed by it and had to pay his income tax by instalments and referred to the provision in the section that if after examination of the taxpayer's returns it is established that the instalments

paid by him amount, in the aggregate, to less than the tax payable "he shall forthwith after notice of assessment is sent to him under section fifty-four of this Act pay the unpaid amount thereof together with interest thereon." He argued that until such notice is sent the amount payable by the taxpayer is payable purely on his own estimate of his income but that after the notice is sent and prior to the assessment becoming final and binding his liability under the section is to pay forthwith an amount which is the difference between his own estimate and that of the Minister and that such amount is not a tax payable under the Act within the meaning of "taxes, interest and penalties payable under the Act" as used in section 71. There is no merit in this argument. The amount which section 48(3) orders the taxpayer to pay forthwith is the difference between the amount paid by him by instalments according to his own estimate of his income and the amount of the assessment made by the Minister after the taxpayer's returns have been examined. It is thus the amount remaining unpaid under such assessment. There is no difference between the character or nature of such assessment and that of any other assessment made by the Minister, or between the character or nature of the amount payable under it and that payable under any other assessment. The fact that section 48(3) orders the taxpayer governed by it to pay the amount remaining unpaid under the assessment forthwith after the notice of assessment is sent to him does not affect the nature or character of the amount so ordered to be paid. All that is done is to alter the time of its payment and make it forthwith after notice of the assessment is sent to him instead of within the usual month from such date as provided under section 54(2). It is well to keep in mind that the notice of assessment is not the same thing as the assessment. The former is merely a piece of paper whereas the latter is an important administrative Act within the exclusive function of the Minister, the character of which was discussed fully in *Pure Springs Company Limited* v. *Minister of National Revenue* (1). It is not the sending of the notice of assessment that makes

(1) (1946) Ex. C.R. 471 at 498.

1949
MORCH
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

the amount referred to in section 48(3) payable. It merely fixes the time for its payment. The amount itself is payable under the assessment made by the Minister, as the words "unpaid amount thereof" indicate. It is thus a tax payable under the Act like any other tax payable under it, and clearly within the meaning of "taxes, interest and penalties payable under the Act" as used in section 71. I am quite unable to see how an appeal or objection against the assessment can affect the matter. Even if there were some substance generally in the argument that proceedings cannot be taken under section 71 in the case of an assessment against which an appeal or objection has been taken and is still pending on the ground that the amount payable thereunder cannot be certified until the appeal or objection has been disposed of and the correctness of the assessment has ceased to be in dispute, no such argument is tenable in the case of an unpaid amount under an assessment made under section 48(3). There can be no dispute about its payability. The section makes it payable forthwith after the notice of assessment is sent to the taxpayer governed by it. It is thus made payable even before an appeal or objection against the assessment can be taken at all. The time of its payability is fixed and there is nothing in the Act to alter it. It therefore remains payable forthwith after the notice of assessment is sent, whether an appeal or objection against the assessment is taken or not. In my view, it is beyond dispute that the unpaid amount which section 48(3) orders the taxpayer governed by it to pay forthwith after the notice of assessment is sent to him may properly be certified under section 71 after two months have elapsed from the date of mailing the notice of assessment, whether an appeal or objection against the assessment has been taken or not.

Counsel for the applicant submitted that there was support for his contention that the amount ordered to be paid by section 48(3) was not included in the term "taxes, interest and penalties payable under the Act" as used in section 71 in the fact that when section 71 was revised in 1948 and replaced by section 108 of The Income Tax Act Parliament deemed it necessary to use different language

from that which it had used previously and that a change of meaning was thereby intended. Section 108(1) of The Income Tax Act reads as follows:

108(1) An amount payable under this Act that has not been paid or such part of an amount payable under this Act as has not been paid may, upon the expiration of 30 days after the default, be certified by the Minister.

With this there should also be read section 48(1) of The Income Tax Act, which provides:

48.(1) The taxpayer shall, within 30 days from the day of mailing of the notice of assessment, pay to the Receiver General of Canada any part of the assessed tax, interest and penalties then remaining unpaid, whether or not an objection to or appeal from the assessment is outstanding.

There can be no doubt that such an amount as that ordered to be paid by section 48(3) of the Income War Tax Act would fall within the meaning of the term "an amount payable under this Act" as used in section 108(1) of The Income Tax Act. The submission of counsel for the appellant, as I understand it, was that in section 108(1) of The Income Tax Act, Parliament substituted the words "an amount payable under this Act" for the words "taxes, interest and penalties payable under this Act" which it had used in section 71 of the Income War Tax Act, and that by the use of such different words Parliament intended a different meaning and recognized that there were "amounts" payable under the Act other than "taxes, interest and penalties". The use of the word "amount" in place of the words "taxes, interest and penalties" was relied upon in support of the restrictive interpretation that would exclude from the ambit of the words "taxes, interest and penalties" as used in section 71 such an amount as section 48(3) ordered a taxpayer governed by it to pay.

In support of this restriction of the scope of section 71 counsel relied upon a statement of Lord Hanworth M.R. in *Hamilton* v. *Commissioners of Inland Revenue* (1). There, after pointing out that in an amending Act the same words had not been used as in the amended one, the Master of the Rolls said:

The consequent and resultant effect is that one assumes, when different words are used, that some change must be intended by the choice of those different words.

(1) (1931) 16 T.C. 213 at 228.

1949
MORCH
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

To this may be added a similar statement by Lord Macmillan, in delivering the judgment of the Judicial Committee of the Privy Council in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1). There he said:

> When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation it is far from uncommon to find amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the Department considers to be attended with undesirable results.

These two statements are subject to comment. No exception can be taken to them if they are read in the light of their context and with reference to the enactments being construed. But if they are taken as statements of a rule of general application then, with the utmost respect, I express the opinion that they are too broad. It does not follow as a matter of course that in every case where Parliament has used different words in an amending act from those used in the amended one that a difference in meaning was intended; there are many cases where the amending enactment although couched in different terms from the amended one is, without saying so, merely declaratory of its true meaning. And other qualifications of the broad language of the two statements could be given. It may also be pointed out that in both cases the learned judges were considering the meaning of the amending act, and not as counsel sought to do, construing the amended Act in the light of the amending one and the fact that the language in it was different. There is conflict of judicial opinion in the United Kingdom as to whether or to what extent resort may be had in aid of the construction of a statute to the terms of a subsequent enactment. But whatever may be the situation in the United Kingdom or elsewhere than in Canada, I think it is at least doubtful whether such an aid to construction is permissible in Canada in the case of a statute, such as the Income War Tax Act, to which the Interpretation Act, R.S.C. 1927, chap. 1, applies, in view of section 21 of the said Act which provides in part as follows:

> 21. 2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.

(1) (1948) 4 D.L.R. 776 at 781.

1949

MORCH
v.
MINISTER OF NATIONAL REVENUE

Thorson P.

3. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

It is not necessary to decide the question in this case for, quite apart from the legal question involved, there is, in my opinion, no substance in the submission. Even if the word "amount", as used in section 108 of The Income Tax Act, is different from the words "taxes, interest and penalties", as used in section 71 of the Income War Tax Act, and wider in its coverage, it does not follow at all that the term used in section 71 is not wide enough to include the amount which section 48(3) orders the taxpayer governed by it to pay. In my view, for the reasons already given it is clearly wide enough to do so.

It follows from what I have said that the application for an order setting aside the registration of the certificate and the issue of the writ of *fieri facias* herein must be dismissed.

As to the alternative application for an order staying all further proceedings on the certificate and the writ of *fieri facias,* on the conclusion of the argument I allowed the same only to the extent that pending the disposition of the appeals the respondent was not to take sale proceedings or such steps as would completely alter the applicant's position in case he should be successful in his appeals. I see no reason for any further or other order in the matter.

Neither party will be entitled to costs.

Judgment accordingly.

BETWEEN:

1949

March 21
July 23

EDWIN COMSTOCK COSSITT, ... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession Duty—Dominion Succession Duty Act 4-5 Geo. VI, c. 114, s. 31—The Conveyancing and Law of Property Act R.S.O. 1937, c. 152, s. 24—Disclaimer of power to encroach upon capital of an estate—Liability for succession duty determined by lex domicilii of deceased—Appeal from assessment for succession duty allowed.

1949

COSSITT
v.
MINISTER OF NATIONAL REVENUE

O'Connor J.

Appellant was bequeathed the income from an estate and the power to use part or all of the capital of such estate. Appellant by instrument in writing disclaimed and refused to accept the portion of the legacy authorizing him to encroach upon the capital of the said estate, or in any way to exercise such power of encroachment. Appellant was assessed for succession duties on the basis that the legacy to him constituted a gift of the entire residue of the estate. He appealed to this Court from such assessment.

The Court found that appellant did not exercise the power to encroach upon the capital nor did he intend to do so. Nor did he by acquiescence accept the power.

Held: That the appellant was given a gift of the income and the power to use the capital and by virtue of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 24, he had the right to disclaim the power to use the capital, and the effect of the execution of the disclaimer by appellant was to void *ab initio* the power of appointment and place him as regards his liabilities, burdens and rights in the same position as if no gift had been made to him.

2. That the law of the province in which the deceased was domiciled applies and the provisions of The Conveyancing and Law of Property Act of Ontario are applicable.

APPEAL under the Dominion Succession Duty Act.

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

J. W. Pickup, K.C. and *A. G. Parish, K.C.* for appellant.

Douglas Watt, K.C. and *I. G. Ross* for respondent.

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

O'CONNOR J. now (July 23, 1949) delivered the following judgment:

This is an appeal from an assessment made under the Dominion Succession Duty Act (1940-41), Statutes of Canada, chapter 14, as amended by chapter 25 of the Statutes of 1942.

The facts are not in dispute. Kate Louise Cossitt, late of the town of Brockville, died on or about the 15th March 1944, and Letters Probate were granted on the 18th April 1944, to the appellant, the executor named in the will of the deceased.

By paragraph 3 of said will, the said Kate Louise Cossitt provided that all of her estate was to be given, devised and

bequeathed to the executor on certain trusts set forth in the said will. The trusts contained in sub-paragraphs (*f*) and (*g*) of said paragraph 3 are in part as follows:—

> (*f*). To invest and keep invested the residue of my estate and to pay the net income derived therefrom to my said son Edwin Comstock Cossitt during his lifetime, with power to him at any time to use for his benefit such amount or amounts out of the capital of the said residue as he may wish.
>
> (*g*). Upon the death of my said son, the residue of my estate or the amount thereof remaining shall be held in trust for the issue of my said son or some one or more of them in such proportions and subject to such terms and conditions as my said son may by his last Will direct, provided . . .

On the 20th July 1944, the Inspector of Succession Duties wrote to the solicitors for the appellant enclosing a statement of the estimated succession duty. The estimate was arrived at on the basis of the appellant having only the income of the residue for life. The estimated amount was then paid to the department.

On the 6th March 1947, the respondent, pursuant to section 22(1) of the Act, mailed to the appellant a notice of assessment. The assessment was made on the basis that clause 3(*f*) of the will constituted a gift of the entire residue of the estate to the appellant. The difference between the estimated duty and the duty fixed under the assessment was $26,070.74.

Upon receipt of this assessment the appellant executed a disclaimer, in part as follows:—

> *AND WHEREAS* Paragraph No. 3(*f*) of said Will is in terms as follows:
>
> (*f*). To invest and keep invested the residue of my estate and to pay the net income derived therefrom to my said son, Edwin Comstock Cossitt during his lifetime, with power to him at any time to use for his benefit such amount or amounts of the capital of the said residue as he may wish.
>
> *AND WHEREAS* the beneficiary named therein, the undersigned Edwin Comstock Cossitt, is desirous of disclaiming the legacy or benefit contained in said paragraph, whereby he is empowered to encroach upon the capital of the said estate.
>
> NOW THIS INDENTURE WITNESSETH that I, the said Edwin Comstock Cossitt, do by these presents hereby disclaim and refuse absolutely to accept the portion of the said legacy authorizing me to encroach, or in any way exercise said power of encroachment so created.

And by letter dated April 28, 1947, (Exhibit 6), the solicitors for the appellant sent the disclaimer to the Department of National Revenue.

1949
COSSITT
v.
MINISTER OF NATIONAL REVENUE
O'Connor J.

On May 29, 1947, the appellant served upon the respondent a notice of appeal from the assessment.

By a letter dated June 12, 1947, (Exhibit 7), the solicitors for the appellant remitted to the Department the sum of $26,070.74 stating that the assessment had been appealed and that the remittance was made "strictly without prejudice to such appeal."

The respondent pursuant to section 37 of the Act, notified the appellant of his decision, confirming the assessment, whereupon the appellant notified the respondent that he desired his appeal to be set down for trial, and the respondent replied confirming the assessment.

Evidence was given by the appellant that since the death of his mother he had never exercised the power nor had he any intention of so doing.

Subparagraph (*f*) of paragraph 3 of the will provided:

(*a*) and to pay the net income derived therefrom to my said son, Edwin Comstock Cossitt, during his lifetime,

(*b*) with power to him at any time to use for his benefit such amount or amounts out of the capital of the said residue as he may wish.

What was given to the appellant was therefore, (*a*), a gift of the income during his lifetime, and, (*b*), the power to use part or all of the capital.

No question arises as to (*a*). Here we are only concerned with the effect of (*b*).

What the appellant was given under (*b*) was not "property" but "power," and until he exercised such "power" in his own favour he was not "entitled to property" within the meaning of those words in section 2(*m*).

"Entitled" in section 2(*m*), in my opinion, should be given the same meaning set out by Wynn-Parry, J., in *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1), in which after discussing the word "entitled" in section 2 of the Succession Duty Act, 1853, he said at p. 83:—

The word "entitled," as used in this section, appears to me necessarily to carry the implication that, for a person to be entitled to property under this section, it must be capable of being postulated to her that she has a right to sue for and recover such property.

Until the appellant exercised the power in his own favour, he would not have the right to sue for and recover the capital.

(1) (1947) 2 All E.R. 78.

While what was given the appellant was "power" and not "property" yet because the appellant could exercise it in his own favour such "power" was practically the equivalent to "property" and could reasonably be treated as "property" for the purposes of taxation. This was pointed out by Lord Selborne in *Charlton* v. *Attorney-General* (1), in referring to the 4th section of the Succession Duty Act, 1853, under which general powers of appointment confer successions, he said:—

If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exerciseable by a single person in any way which he may think fit.

Such power is treated as property for the purposes of taxation by section 31 of the Dominion Act, which provides:—

31. Where a general power to appoint any property either by instrument *inter vivos,* or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

The effect of section 31, in my opinion, is that where a general power to appoint any property is given to any person, such person shall be deemed to have derived a succession of such property from the deceased.

In my opinion, there was not a succession within section 2(*m*), but 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.

Counsel for the appellant contended that (*b*) did not give the appellant a general power of appointment, and therefore, it did not come within section 31 of the Act. That while it was something that the Court might consider to be like a power to appoint, or something having the same effect, it was not a power to appoint of any kind, and, in any event, was not a general power of appointment, because there was no power to do anything for the benefit of anyone else. What could be done was solely for the benefit of the appellant himself.

(1) (1879) 4 A.C. 427.

1949

COSSITT v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The authorities on this question, however, are against that contention.

In *Re Richards, Uglow* v. *Richards* (1), Farwell, J., after distinguishing in *Re Pedrotti's Will* (2), held a direction that:—

in case such income shall not be sufficient she is to use such portion of "the capital" as she may deem expedient.

gave the wife a general power of appointment *inter vivos,* over the capital, but refrained from expressing an opinion as to whether she could exercise it by will.

In *Re Ryder, Burton* v. *Kearsley* (3), Warrington, J., followed the decision in *Re Richards* (*supra*) and held that the provision:—

I authorize my husband so long as he is entitled to the income of part or of 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.

gave the husband a general power of appointment *inter vivos.*

In *Re Shuker's Estate, Bromley* v. *Reed* (4), Simonds, J., followed the decisions in both *Re Richards* and *Re Ryder* and held that the provision:—

and 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 or sale proceeds thereof.

conferred a general power of appointment upon the widow.

The basis of these decisions, is, in my opinion, that the party executing the power could execute it for his own benefit. See *Platt* v. *Routh* (5), per Abinger, C.B., at p. 789, followed by Grimmer, J., in *Provincial Secretary-Treasurer* v. *Schofield* (6). Here the appellant could exercise the power in his own favour and this would enable him to dispose of the property as an absolute owner.

But such succession is subject to disclaimer. Green's Death Duties, 2nd ed. points out, first, at p. 371, that:—

It was long ago laid down that:—"a man cannot have an estate put into him in spight of his teeth." That acceptance of a gift is to be assumed unless the contrary appear. *Thompson* v. *Leach* (1690) 2 V.R.A. 198, 206.

And again at p. 413:—

The general principle, that duty is chargeable in accordance with the strict legal rights of the parties, without regard to any arrangements

(1) (1902) 1 Ch. 76.
(2) (1859) 27 Beav. 583.
(3) (1914) 1 Ch. 865.
(4) (1937) 3 All E.R. 25.
(5) (1840) 151 E.R. 618, 55 R.R. 777.
(6) (1923) 2 D.L.R. 1144 at 1147.

which they may make amongst themselves, applies to Succession duty as well as Legacy duty, subject to a similar exception in the case of a disclaimer.

2nd ed., 34 Halsbury's Laws of England states at p. 123:

The donee need not accept the gift (*Thompson* v. *Leach*, (1690) 2 V.R.A. 198, 206; *Townson* v. *Tickell*, (1819) 3 B. & Ald. 31, 37); but unless by the will the duty of doing some act to show his election is put upon him, his acceptance of the gift is presumed, and the property vests in him unless and until he disclaims. (*Townson* v. *Tickell*, (1819) 3 B. & Ald. 31, 37. *Re Arbib and Class's Contract*, (1891) 1 Ch. 601, C.A.)

What happened here, was that the appellant waited for three years before he disclaimed, and then he only did so to avoid the payment of the tax, disclosed by the assessment which was made at that time. The question then I think is this. Did the appellant accept or exercise the power at any time before the disclaimer was executed, or, knowing of the power and having done nothing for three years, has the appellant by acquiescence accepted the power?

The evidence of the appellant was that he had not at any time exercised the power and that he had not at any time any intention of so doing, and I accept his evidence as to this.

He negotiated with both the Succession Duties Branches of the Dominion Government and of the Province of Ontario, at least to the extent of filing Succession Duty Affidavits. As a result of whatever he did, the Succession Duties Branch of the Dominion Government issued a tentative statement of duties based on the appellant having only the income of the residue for life, and the appellant settled the succession duties with the Province of Ontario on the same basis. All this confirms his evidence that he did not exercise the power and that he never had any intention of doing so.

Having settled the duties with the Succession Duties Branch of the Province of Ontario on that basis, and having received a tentative statement of duties from the Succession Duties Branch of the Dominion of Canada on the same basis, there was never any need or object of the appellant executing a disclaimer until he received the assessment from the Department of the respondent.

1949

COSSITT v. MINISTER OF NATIONAL REVENUE

O'Connor J.

I reach the conclusion that the appellant did not exercise the power nor did he intend to do so, nor did he by acquiescence accept the power.

The respondent contends that there were not two distinct gifts given to the appellant which would permit him to take one and disclaim the other, but there was a single and undivided gift and the appellant therefore had to take the whole or none.

What the appellant was given was a gift of the income and the power to use the capital. By reason of the provisions of section 24 of The Conveyancing and Law of Property Act, R.S.O. (1937) c. 152, the appellant had, in my opinion, the right to disclaim the power to use the capital.

Section 24 of the Act provides:—

24(1). A person to whom a power, whether coupled with an interest or not, is given may by deed disclaim or re-release or contract not to exercise the power.

(2). A person disclaiming shall not afterwards be capable of exercising or joining in the exercise of the power, and on such disclaimer the power may be exercised by the other or others or the survivor or survivors of the others of the persons to whom the power is given unless the contrary is expressed in the instrument creating the power. R.S O. (1927), c. 137, s. 24.

The respondent contends that the provisions of this provincial act are not applicable in determining the liability for duty under the Dominion Succession Duty Act.

The questions here must be determined by the law of the province in which the deceased was domiciled, and the provisions of section 24(1) (*supra*) are applicable, in my opinion.

The position does not differ from that arising under section 19(*c*) of the Exchequer Court Act of Canada. That is a Dominion statute, but the liability of the Crown is determined by the law of negligence of the province in which such alleged negligence occurred. *The King* v. *Armstrong* (1); *Canadian National Railway Company* v. *St. John Motor Line Limited* (2); followed in *The King* v. *Snell* (3).

Referring to section 6(*b*) of the Dominion Succession Duty Act which levies duties where the deceased was at the time of his death domiciled outside of Canada upon

(1) (1908) 40 S.C R. 229, 248.

(2) (1930) S C.R. 482, 488.

(3) (1947) S.C.R. 219, 222.

1949

COSSITT
v.
MINISTER OF NATIONAL REVENUE

O'Connor J.

or in respect of the succession to all property situated in Canada, Rand J., in *Minister of National Revenue* v. *Fitzgerald,* (not yet reported), said:—

The applicable section of the Act is 6 (b) and the duty is based on the operation of the territorial law in vesting a title to property which is within its jurisdiction.

The effect of the execution of the disclaimer by the appellant, was to void *ab initio* the power of appointment and put the donee as regards his liabilities, burdens and rights, in the same position as if no gift had been made to him. *Silcock* v. *Roynon* (1).

The appeal will therefore be allowed and the assessment will be referred back to the Minister for an adjustment of the figures consequential on the allowance of the appeal.

The appellant is entitled to the costs of the appeal.

Judgment accordingly.

1948
Sept 20

1949
Aug. 31

BETWEEN:

JAMES E. WILDER, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 3(b), 5(k)—An Act respecting the Revised Statutes of Canada, S. of C. 1924, c. 65, ss. 3, 8—"Annuities or other annual payments received under the provisions of any contract"—Ambiguity in the Revised Statutes, 1927—Enumerated paragraphs of s. 3 not statements of sources of income—Exemption granted by s. 5(k) confined to income from annuity contracts like those with Dominion Government.

The appellant sold most of his assets to an incorporated company in consideration of one dollar and several covenants by it, one of which was to pay him an annuity during his lifetime of $1,000 per month. The income tax assessments for the years in review included the amounts of the payments thus received by the appellant in his taxable income. On his appeals from the assessments he contended that he was taxable only in respect of that part of the annuity that was truly income and, alternatively, that he was entitled to an exemption in respect thereof.

Held: That if an ambiguity appears in the Revised Statutes of 1927 which did not exist in the Act repealed thereby it should be resolved by adopting the meaning that is consistent with that of the repealed Act.

(1) (1843) 2 Y. & C. Ch. Cas. 376.

1949
WILDER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

2. That the enumerated paragraphs of section 3 are not statements of sources of income from which only the annual profit or gain is taxable; the subject matter of each is included as an item of taxable income in the definition thereof given by the section.

3. That in order to have the benefit of an exemption in respect of the income from an annuity contract entered into prior to June 25, 1940, under paragraph (*k*) of section 5 as enacted in 1940, the taxpayer claiming such exemption must show that the contract under which he received his annuity was an annuity contract like the annuity contracts with the Dominion Government.

4. That even if it were conceded that the appellant's contract was an annuity contract he has wholly failed to show that it was an annuity contract like the annuity contracts issued by the Dominion Government.

5. That the appellant's contract was not an annuity contract but a contract for the sale and purchase of his assets.

APPEALS under the Income War Tax Act.

The appeals were heard by the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

H. N. Chauvin K.C. for appellant.

P. Dalmé and *E. S. MacLatchy* for respondent.

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

THE PRESIDENT now (August 31, 1949) delivered the following judgment:

These are appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, against assessments for the years 1941, 1942 and 1943. The facts are simple. By a memorandum of agreement in writing and under seal, dated February 6, 1932, the appellant sold practically all his assets, particulars of which are set out in the agreement, to Wilder Norris Limited, a corporation having its principal place of business in Montreal, in consideration of the sum of one dollar and the covenants of the said corporation contained in the said agreement, one of which was as follows:

> (*b*) To pay to the Vendor as and from the first day of December 1931 an annuity during his lifetime of $1,000 per month;

On the assessments for each of the years referred to the sum of $12,000, which the appellant had received from Wilder Norris Limited pursuant to this covenant, was included in his taxable income. He appealed against the

said assessments to the Minister, who affirmed them, and now, being dissatisfied with the Minister's decision, brings his appeals to this Court. The issue in each appeal is the same, namely, whether or to what extent the payments of $1,000 per month received by the appellant as aforesaid constitute taxable income in his hands.

Two arguments were put forward on his behalf; first, that the payments were not annual profit or gain but part of the consideration to him for the sale of his assets and were, therefore, not income but capital payments, notwithstanding that they were described as an annuity, and, secondly, that if they were taxable as annuities he was entitled to an exemption of $5,000 per year in respect thereof under paragraph (*k*) of section 5 of the Act.

It was held by the Minister that the said amounts were income within the meaning of paragraph (*b*) of section 3 of the Act, as enacted in 1940, Statutes of Canada, 1940, chap. 34, sec. 8, which reads as follows:

> (*b*) annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided.

In *O'Connor* v. *Minister of National Revenue* (1) I had occasion to consider the meaning of the expression "annuities or other annual payments" as used in paragraphs (*b*) and (*g*) of section 3 and am of the view that the payments here in question were clearly "annuities or other annual payments" within the meaning of paragraph (*b*).

Counsel for the appellant did not attempt to dispute this. His submission was that under the said paragraph (*b*) only that portion of the annuity that represented income was taxable. The opening portion of section 3 of the Act, which defines taxable income, reads as follows:

> 3. 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 including

(1) (1943) Ex. C.R. 168.

1949
WILDER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

and then several paragraphs setting forth various items, of which (*b*) is one, follow. Counsel contended that paragraph (*b*) is qualified by the concluding words of the main body of the section, "the annual profit or gain from any other source", and that the various items enumerated in the several paragraphs are included in the words "any other source". Thus the submission is that the several paragraphs of section 3 are enumerations of sources of income and not items of taxable income. On that assumption it is urged that the "annuities or other annual payments" referred to in paragraph (*b*) are sources of income in respect of which Parliament intended to tax only the annual gain or profit. From this it would follow in the case of the monthly payments in question that only that portion of them that was income would be taxable, and that the balance, being return of capital, would not be.

There are several cases in which a similar submission has been made but, while some support for it may be found in some observations in these cases, there is no judicial decision on the question. Counsel relied particularly on the statement of Davis J. in *Shaw* v. *Minister of National Revenue* (1) where, after citing the concluding words of the opening portion of section 3 to which I have already referred and the provisions of paragraph (*b*), as it then read, relating to policies of insurance, he said:

> It is income that is being taxed and not capital. The governing words of sec. 3, in so far as life insurance policies are concerned, are "and also the annual profit or gain from any other source including". I am unable to read the provision as bringing into charge something which, when its true nature is looked at, is of a capital nature which otherwise would not have been chargeable. Obviously the whole of the $8,400 annual payment, with which this appeal is solely concerned, was not "profit or gain".

There is room in this statement for the inference that Davis J. considered that the items set forth in the enumerated paragraphs of section 3 are sources of income from which only the annual gain or profit is taxable. Certainly, the language of the section lends itself to the possibility of such construction. In *Samson* v. *Minister of National Revenue* (2) I viewed it with favour. There I referred to the salaries, indemnities or other remuneration of members of the Senate and House of Commons and officers

(1) (1939) S.C.R. 338 at 346. (2) (1943) Ex. C.R. 17 at 36.

thereof, enumerated in paragraph (*d*) of section 3, as a source from which the annual profit or gain was included in taxable income as defined by section 3. In *O'Connor* v. *Minister of National Revenue* (1) it was contended that if the payments there in question came within paragraph (g) of section 3 the appellants were taxable only in respect of the annual profit or gain from such payments on the ground that paragraph (*g*) is merely a statement of one of the sources from which only the annual profit or gain is taxable income. In that case, in view of the conclusion I had reached I found it not necessary to deal with the contention or the argument of counsel for the respondent in reply to it. In *Mahaffy* v. *Minister of National Revenue* (2) it was argued on behalf of the appellant who sought certain deductions from his allowance as a member of the Legislative Assembly of Alberta that it was only his annual profit or gain from his allowance that constituted taxable income and Cameron D. J., as he then was, while disposing of the appeal on other grounds, suggested that as the word "source" was used in the concluding line of the opening portion of section 3 it could be argued that it refers to all the paragraphs of the section and that the various classifications therein detailed are given as "sources" of income rather than items of taxable income. There was no mention of the point in the judgment of the Supreme Court of Canada in that case (3). Finally, I refer to *Lumbers* v. *Minister of National Revenue* (4) in which an argument similar to that raised in this case, while not made in this Court, was presented to the Supreme Court of Canada. It is stated in the appellant's factum in that case that the amendment of section 3 (by which paragraph (*b*) in the form already cited was enacted in 1940) does not extend the definition of "income" to include annuity payments, and that these are still only classed as sources of income and therefore only the income from annuity payments is liable to taxation. There is no reference to this argument in the judgment of the Supreme Court of Canada.

(1) (1943) Ex. C.R. 168.
(2) (1946) Ex. C.R. 18.
(3) (1946) S.C.R. 450.
(4) (1943) Ex. C.R. 202; (1944) S.C.R. 167.

1949

WILDER
v.
MINISTER OF NATIONAL REVENUE

Thorson P.

While the contention seems plausible in the case of the subject matter of some of the enumerated paragraphs of section 3 I have come to the conclusion that it is not sound. There are several reasons for this opinion. The first is an historical one. What makes the contention seem possible is the presence of the word "including" immediately after the word "source", as if it were referable to it, and just before the enumerated paragraphs, as though the subject matter of each were included in the word "source". It is only since the revision of the statutes in 1927 that such a construction has seemed possible. Prior thereto it would not have occurred to any one. Immediately before such revision the opening portion of section 3 was in exactly the same form as that cited, except that after the word "source" there was a semi-colon. Then there were the following words:

including the income from but not the value of property acquired by gift, bequest, devise or descent;

now contained in paragraph (*a*). It was plain from this arrangement that the subject matter of the words following the word "including" was included in the definition of taxable income given by section 3 as an item thereof and not as a source of income from which only the annual profit or gain was taxable. There would not have been even a semblance of plausibility in a contrary construction. It would seem therefore, that such ambiguity as there is in the section was introduced into it by the Commissioners charged with the revision, for there was no such ambiguity there previously. The proper construction, under the circumstances, is indicated by sections 3 and 8 of "An Act respecting the Revised Statutes of Canada", Statutes of Canada, 1924, chap. 65. Section 3 reads in part as follows:

3. The said Commissioners in consolidating the said statutes, and in incorporating therewith the Acts or parts of Acts passed subsequent thereto and selected for inclusion therein as above provided, may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and may make such minor amendments as are necessary to bring out more clearly what they deem to be the intention of Parliament or to reconcile seemingly inconsistent enactments or to correct clerical or typographical errors.

And section 8 provides in part:

8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

1949
WILDER
v.
MINISTER OF
NATIONAL
REVENUE
—
Thorson P.
—

It follows that if an ambiguity appears in the Revised Statutes which did not exist in the Act repealed thereby it should be resolved by adopting the meaning that is consistent with that of the repealed Act.

A second reason for rejecting the appellant's contention is that it would not make sense as applied to the subject matter of some of the enumerated paragraphs. If it is correct to construe the said paragraphs as statements of sources of income and not items of taxable income such construction must be applicable to all of them. That it cannot be so is obvious in the case of some of them as, for example, in that of paragraph (*a*). If it were accepted it would follow that what is taxable thereunder would be "the annual profit or gain from the income from but not the value of property acquired by gift, bequest, devise or descent". Such a provision would not make sense and the intention to enact it should not be attributed to Parliament in the absence of clear and compelling words. The inapplicability of the construction to other paragraphs of the section could also be shown.

For the reasons given I have now no hesitation in finding that the enumerated paragraphs of section 3 are not statements of sources of income from which only the annual profit or gain is taxable; the subject matter of each is included as an item of taxable income in the definition thereof given by the section.

Counsel for the appellant properly conceded that if the "annuities or other annual payments" referred to in paragraph (*b*) are not sources of income his first contention must fail. He could not then rely upon the statement of Davis J. in the *Shaw* case (*supra*) and look at the true nature of the payments in question and determine their taxability accordingly: *vide* the remarks of Hudson J. in *Lumbers* v. *Minister of National Revenue* (1). The question whether a particular sum is to be included as an item of taxable income does not necessarily depend on whether its true nature is that of income or capital, for if Parliament has decided to make it taxable that is the end of the matter, whatever its so-called true nature may be. The subject of annuities is in point. It could be strongly argued that when a person buys an annuity the payments of it to him

(1) (1944) S.C.R. 167 at 172.

are a mixture of return of capital and interest, only the latter of which, according to its true nature, is income. Yet such an argument is futile once Parliament has decided, as it did when it enacted paragraph (*b*), to include the whole amount of the annuity as an item of taxable income. The matter is for Parliament to decide. If it should allow an exemption in respect of such income that also is a matter of policy for it.

In my view, the payments of $1,000 per month received by the appellant were within the meaning of the term "annuities or other annual payments" as used in paragraph (*b*) of section 3 and the whole amounts thereof were taxable income in his hands, unless he can show that they are within the ambit of the exception referred to in the paragraph.

This brings me to counsel's second argument, namely, that if the amounts of the payments were items of taxable income the appellant was entitled to an exemption of $5,000 per year in respect thereof under paragraph (*k*) of section 5 as enacted in 1940, Statutes of Canada, 1940, chap. 34, sec. 13, which reads in part as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*k*) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the statutes of 1930 and section six of chapter forty-three of the statutes of 1932:

To appreciate his argument it is necessary to consider the provisions referred to. The paragraph was first enacted in 1930, Statutes of Canada, 1930, chap. 24, sec. 3, assented to on May 30, 1930, and made applicable to income of the 1929 taxation period and fiscal periods ending therein and subsequent periods. The exemption then granted was in the following terms, in part:

> (*k*) the income to the extent of five thousand dollars only derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts,

The paragraph was amended in 1932, Statutes of Canada, 1932, chap. 43, sec. 6, assented to on May 26, 1932, and made applicable on that date. The exemption granted by the 1932 amendment was, in part, as follows:

> (*k*) twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada:

subject to the following proviso, *inter alia*:

> And provided further that the income arising out of annuity contracts entered into prior to the coming into force of this paragraph (*k*) shall continue to be exempt as heretofore provided by section three of chapter twenty-four of the statutes of 1930;

Under these provisions it was urged that the appellant was entitled to an exemption of $5,000 per year under the paragraph as enacted in 1930 and made applicable to such an annuity as that received by him by its amendment in 1940. The steps in the reasoning leading to this conclusion were as follows, namely, that by the amendment of paragraph (*b*) of section 3 in 1940 "annuities or other annual payments received under the provisions of "any" contract" were first made subject to tax; that by the amendment of paragraph (*k*) of section 5 in the same year the exemption previously granted was extended to "the income arising from "any" annuity contract entered into prior to June 25, 1940," to the extent provided by the enactments of 1930 and 1932; that the words "any annuity contract" in the said amendment mean "any contract by which an annuity is provided" and that the word "extent" was referable only to the amount of the exemption granted in 1930 and 1932; that the annuity received by the appellant was provided by a contract between him and Wilder Norris Limited; that such contract was, therefore, an annuity contract and the payments received under it were income from an annuity contract within the meaning of paragraph (*k*) as enacted in 1940; and that since such contract was entered into on February 6, 1932, before the 1932 amendment of paragraph (*k*) came into effect, the appellant was unaffected by the reduction of the exemption to $1,200 per year effected thereby but entitled to the exemption of $5,000 per year conferred by the 1930 enactment as made applicable to the payments in question by the 1940 amendment.

There are several reasons for not accepting this argument. In the *Lumbers* case (*supra*) I referred to the statement of Sir W. J. Ritchie C.J. in *Wylie* v. *City of Montreal* (1):

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

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

1949

WILDER v. MINISTER OF NATIONAL REVENUE

Thorson P.

and, at page 211, put the rule to be applied in dealing with claims of exemption from income tax as follows:

a taxpayer canot succeed in claiming an exemption from income tax unless his claim comes clearly within the provision of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

In my opinion, the appellant cannot meet the requirements of this rule. I am unable to agree with the view that paragraph (*k*) of section 5 as enacted in 1940 extended the exemption granted in 1930 or 1932. Although its language makes such a contention seemingly possible this is due to faulty draftsmanship and all that Parliament intended by it was to preserve the existing exemption only in respect of the income from annuity contracts entered into prior to the twenty-fifth day of June, 1940, and permit no exemption in respect of the income from any annuity contract entered into thereafter. The enactment thus served as a notice that in respect of the income from annuity contracts entered into on June 25, 1940, or subsequently, there would be no exemption. In this view the use of the word "any" in the paragraph does not extend the exemption to income from any annuity contract where there was no exemption previously but is merely an inaccurate and loose way of describing and including all annuity contracts of the kind referred to in the 1930 and 1932 legislation. During the course of the argument I was inclined to the view that the expression "to the extent" in the paragraph was referable only to the amount of the exemption granted in 1930 and 1932 but after further consideration I agree with counsel for the respondent that it is not so limited. The exemption that is preserved is limited not only to the extent of the amounts of the exemption but also to the extent of the kinds of annuity contracts in respect of the income from which there was an exemption under the 1930 and 1932 enactments.

There is support for this construction in the case of *Lumbers* v. *Minister of National Revenue* (1) to which I have already referred. There an insurance company issued a policy of insurance to the appellant on December 11, 1918, whereby in consideration of the payment of an

(1) (1943) Ex. C.R. 202;
(1944) S.C.R. 167.

annual premium for twenty years it assured his life and promised to pay him a monthly income at the end of the endowment period of twenty years, if he were alive, or in the event of his death during such period to pay the income to his wife named as beneficiary in the policy. At the end of the endowment period he had the right either to take the commuted value of the policy in a lump sum upon its surrender or to receive the monthly income payments as promised in the policy. He elected to receive the latter commencing January 1, 1939. On his income tax assessment for the year 1940 the amount of the monthly payments received by him during that year was included as taxable income. In his appeal from the assessment he claimed that he was entitled to an exemption under paragraph (*k*) of section 5, either of the whole amount of the monthly payments, which was less than $5,000, under the 1930 provisions of the paragraph or, in the alternative, of $1,200 under the 1932 amendment. I need not set out the arguments of counsel for the appellant in that case. It is sufficient to say that I held that his contract was not an annuity contract within the meaning of paragraph (*k*) of section 5, on two grounds; first, that even if it were considered an annuity contract it was not like the annuity contracts with the Dominion Government; and secondly, that at the time it was entered into it was not an annuity contract but a life insurance endowment contract with annuity benefits flowing therefrom after certain conditions had been complied with. On appeal to the Supreme Court of Canada the judgment of this Court was affirmed. As I read the reasons for judgment of Hudson J., speaking for the Chief Justice and Kerwin J. as well as for himself, he approved of both of the grounds above referred to, but Rand J., speaking also for Taschereau J., although he considered it extremely doubtful whether, at the time it was made, the contract could properly be described as an "annuity contract" did not find it necessary to decide the point, there being, in his opinion, ample grounds for the ruling that it was not "like" a government annuity contract. Although the argument raised on behalf of the appellant in this case, namely, that the use of the word "any" in the 1940 amendment of paragraph (*k*) indicated an intention by Parliament to extend the exemption beyond the scope

1949
WILDER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

of that previously granted except as to the extent of the amount thereof, was not raised or suggested in the *Lumbers* case (*supra*) it is clear that the *ratio decidendi* of that case was that in order to have the benefit of an exemption in respect of the income from an annuity contract entered into prior to June 25, 1940, under paragraph (*k*) of section 5 as enacted in 1940 the taxpayer claiming such exemption must show that the contract under which he received his annuity was an annuity contract like the annuity contracts with the Dominion Government.

Moreover, although the wording of the 1940 amendment of paragraph (*k*) is not as clear as it might be and the use of the word "any" seems to open the door to the construction urged by counsel for the appellant, I am of the view, having regard to the circumstances under which the exemption was originally granted and the purpose behind it, that such construction is not a reasonable one. The exemption was first granted soon after the decision of this Court in *Kennedy* v. *Minister of National Revenue* (1) and probably to remedy the situation disclosed by it. There had apparently been controversy as to the taxability of Dominion Government annuities in view of representations on the part of the Crown to purchasers of them that they were exempt from income tax, but Audette J. held that they were taxable income within the meaning of the Act and that any representations to the contrary were without any force or effect and could not change the law as enacted. If Parliament had granted an exemption only in respect of the income from Dominion Government annuities there would no doubt have been cause for complaint of unfair discrimination on the part of provincial governments and companies that were competing with the Dominion Government in the sale of annuities. Consequently, Parliament decided that all purchasers of annuities, whether from the Dominion Government or from Provincial Governments or from companies, should be put on an equal footing in the matter of exemption from income tax, with the qualification that in the case of annuity contracts issued by provincial governments or companies there would be no exemption unless such contracts were like the annuity contracts with the Dominion Government. If there was

(1) (1929) Ex. C.R. 36.

1949
WILDER
v.
MINISTER OF NATIONAL REVENUE
Thorson P.

any doubt about this qualification it was wholly removed by the 1932 amendment. The legislation of 1930 and 1932 went no further than this. The reason for the exemption and its limitations was readily understandable. But I can see no reason why Parliament should decide in 1940 to cut off the exemption altogether in respect of the income from all annuity contracts entered into after June 25, 1940, and make the whole of such income taxable and at the same time extend the scope of the existing exemption to cases of annuity contracts where there had been no exemption previously. There would be no purpose in such a course of action and no need for it. While it is true that in 1940 paragraph (*b*) of section 3 was amended this was for the purpose of ensuring that annual payments of the kind that were in question in the *Shaw* case (*supra*) should be subject to tax. There was no extension in the scope of the taxability of income from annuity contracts such as would require any extension of the scope of the existing exemption. There were no considerations similar to those that moved Parliament to grant the exemption in the first place. Under the circumstances, I am of the opinion that the construction put on the paragraph by counsel for the respondent, namely, that in respect of the income from any annuity contract entered into prior to June 25, 1940, Parliament intended merely to preserve the exemption granted under the 1930 and 1932 enactments, is a much more reasonable one than that of counsel for the appellant. I therefore repeat what I said in the *Lumbers* case (*supra*), at page 213:

> I cannot see anything in the amendment of 1940 which would extend the scope of exemption from income tax to income from contracts that would have been excluded from the exemptions granted by the legislation of 1930 or 1932.

It follows from what I have said that in order to succeed in his claim for exemption the appellant must show not only that his contract with Wilder Norris Limited was an annuity contract but also that it was an annuity contract like the annuity contracts with the Dominion Government referred to in the 1930 and 1932 enactments. Since the onus of showing compliance with the requirements of an exempting provision of the Act is on the taxpayer claiming the exemption, it must be held that even if it were conceded that the appellant's contract was an annuity

1949
WILDER v. MINISTER OF NATIONAL REVENUE
Thorson P.

contract he has wholly failed to show that it was an annuity contract like the annuity contracts issued by the Dominion Government. On this ground alone his claim for exemption must fail.

I am also of the view that his contract with Wilder Norris Limited was not an annuity contract, even although he received an annuity under one of its provisions. I cannot accept the argument that the words "annuity contract" mean or include every contract by which an annuity is provided. The covenant by Wilder Norris Limited to pay the appellant an annuity of $1,000 per month was only part of the consideration paid by it for the sale by the appellant of his assets. There were several other covenants from which income would arise. The contract was not an annuity contract but a contract for the sale and purchase of the appellant's assets. It was thus more than an annuity contract. Paragraph (*k*) gives an exemption only in respect of the income from an annuity contract. There is no exemption in respect of the income from a contract for the sale and purchase of assets. In my view, it is not permissible to stretch the terms of the paragraph to the extent that would be necessary to give effect to the appellant's contention. Almost the same point came up in the *Lumbers* case (*supra*) where I held, as already stated, that the appellant's contract in that case was not an annuity contract but a life insurance endowment contract with annuity benefits flowing from it and that the exemption from income tax granted by the paragraph did not extend to the income from such a contract. There should, I think, be a similar finding in the present case, namely, that the contract between the appellant and Wilder Norris Limited was not an annuity contract within the meaning of the paragraph and that he is not entitled to any exemption in respect of the monthly payments received by him.

There being no error in the assessments by which such monthly payments were included as taxable income in his hands, his appeal therefrom must be dismissed with costs.

Judgment accordingly.

1949
June 23 & 24
Aug. 18

BETWEEN:

JOGGINS COAL COMPANY LTD. APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 5(1) (a)—Allowance for exhaustion of coal mine—Allowance made by Minister and apportionment between lessor and lessee where no agreement exists is final and conclusive—Court has no power to review such apportionmnt and determination—Appeals dismissed.

Held: That where there is no agreement between a lessor and a lessee of a mine as to the apportionment between them of the allowance for exhaustion established by virtue of s. 5(1) (*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, as it read for the taxation years 1939, 1940 and 1941, such lessor and lessee must accept the apportionment of such allowance as made by the Minister of National Revenue and from such apportionment there is no appeal.

2. That the Minister has *full* power to make apportionment and his determination is *conclusive* and the Court has no power to review such apportionment as he has made.

APPEALS under the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Cameron at Halifax.

C. B. Smith, K.C. and *W. S. K. Jones* for appellant.

R. T. Donald and *A. J. MacLeod* for respondent.

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

CAMERON J. now (August 18, 1949) delivered the following judgment:

These appeals have to do with assessments to income tax and excess profits tax for the years 1939-40-41. The appellant asserts that for each of the years its income was derived from mining coal in the "40 Brine Seam" in the Province of Nova Scotia; that it was the lessee of that mine from the Province of Nova Scotia as lessor, and that under the provisions of section 5(1) (*a*) of the Income War Tax Act,

1949
JOGGINS COAL CO. LIMITED
v.
MINISTER OF NATIONAL REVENUE
Cameron J.

R.S.C. 1927, ch. 97, as amended, it was entitled to deduct from its taxable income 10 cents per ton for all coal mined by it on the ground that the Province of Nova Scotia, although the lessor of the mine, was not a taxpayer. Alternatively, it alleges that if the Province of Nova Scotia was not the lessor of the mine, that Tantramar Coal Company, Limited (hereinafter called Tantramar), was the lessor and that in the absence of an agreement between Tantramar and the appellant as to the apportionment of the allowance for exhaustion, the apportionment made by the Minister should be amended in view of the special facts and circumstances, later to be stated.

It is admitted that in each of the years in question the Minister exercised his discretion by fixing 10 cents per ton as the amount to be allowed for exhaustion of coal mines in the Province of Nova Scotia, and no exception is taken as to the amount of such allowance. The dispute is as to how much of that deduction, if any, should have been allowed to the appellant. There is no dispute as to the tonnage of coal mined.

Before considering the legal problems involved in the appeals, it is necessary to set out the facts in some detail.

The Province of Nova Scotia is the owner of all coal mines in that province. On June 2, 1923, the Province, as lessor, executed two mining leases Nos. 140 and 141 (Exhibits 9 and 10) in favour of Messrs. Sherwood and Swanson as lessees, these leases being renewals of two former leases similarly numbered. The renewals were for a period of 20 years and were therefore in effect throughout. Three seams of coal were included in the leases, namely, the "Fundy Seam," the "Dirty Seam" and the "40 Brine Seam", but it is only with the last-mentioned that the appellants are directly concerned.

Certain proceedings were taken by one Ralph S. Parsons in the Supreme Court of Nova Scotia in regard to properties included in these leases; and on April 1, 1936, following a judgment in that Court, the sheriff of the County of Cumberland sold, conveyed and assigned to Parsons all benefits in the said leases, *inter alia,* the expressed consideration being the sum of $8,000. That conveyance is Exhibit 1. I think it must be assumed that as of that date Parsons

became the lessee under Leases 140 and 141, and that he was accepted as such by the Province of Nova Scotia. But in his evidence Parsons stated that he never had any personal interest in the leases, but at all times had held them for Tantramar.

By agreement dated June 4, 1937 (Exhibit 11), Parsons entered into an agreement with Fundy Coal Company, Ltd., to sell to it, *inter alia,* all his interest in the said leases. There is no evidence that the consideration stated in that agreement was ever paid. On June 7, 1937, Fundy Coal Company, Ltd. assigned all its rights therein to Tantramar (Exhibit 12), the latter agreeing to indemnify the assignor from all its liability under the agreement of June 4, 1937. That document was recorded in the Mines Office for the Province. While there is no evidence that Parsons has assigned his interest in Leases 140 and 141 to Tantramar, I think that in view of his statement that he held the leases at all times for Tantramar, it may be assumed that at that date Tantramar was in fact the lessee under Leases 140 and 141.

By indenture dated April 19, 1938 (Exhibit 13), Tantramar as lessor granted to the Shore Coal Company, Ltd. as lessee, *inter alia,* the right and privilege of mining and extracting coal from the "Fundy Seam" and the "Dirty Seam", reserving a rental of 15 cents per ton on all coal mined; the lessor agreeing to pay royalties due the Department of Mines and other charges, but not the rent due the Department of Mines under Leases 140 and 141. That document is referred to as a lease.

On June 1, 1939, an agreement (Exhibit 2) was entered into between Tantramar and Parsons as vendors and J. H. Winfield as purchaser.

By that agreement the sole and exclusive right or option to mine and purchase such coal as the purchaser desired to win from the "40 Brine Seam" under the terms and conditions thereinafter recited was granted by the vendors to the purchaser. A royalty ranging from 10 cents to 5 cents per ton was reserved to the vendors and the purchaser agreed to pay the royalties under Leases 140 and 141 on all coal won from the "40 Brine Seam", to the Province of Nova Scotia. One of the purposes of the purchaser therein

1949
JOGGINS COAL CO. LIMITED v. MINISTER OF NATIONAL REVENUE
Cameron J.

—if not the main purpose—was to complete the construction of Bayview No. 8 shaft or slope for the purpose of winning coal from adjacent areas. It was therefore agreed that the purchaser should mine all marketable coal which it would be practical to win from the shaft, and upon that being done he was to have an indefeasible right to the exclusive use of that shaft for the purpose of winning coal from adjacent areas. The purchaser had the right to construct any other shaft and on certain conditions would then acquire a similar indefeasible right therein for the same purpose. The purchaser was given full right to assign or sublet the operation of mining coal and all his other rights under the agreement. It was further provided that if the purchaser at any time ceased active operations, any coal remaining in the seam should revert to and be the sole property of the vendors. That document was filed in the Mines Office and ratified by the Minister of Mines under section 28(2) of the Mines Act on December 17, 1940, as was also the document next referred to.

By agreement dated September 2, 1939, (Exhibit 3), Winfield assigned all his interest in the agreement of June 1, 1939, to the appellant company which agreed to carry out and perform all the covenants therein binding on Winfield.

It is established that throughout Parsons paid the Province the annual rental of $60 in respect of Leases 140 and 141; but that under the terms of the lease the Province repaid such rentals in full to him when the royalties received exceeded the rent, and Parsons then in turn paid the refund to Tantramar. It is also established that the appellant in each of these years paid the Province the royalties on coal mined by it on the "40 Brine Seam" and also paid to Tantramar and Parsons the royalties payable to them by the agreement of June 1, 1939. Parsons endorsed these royalty cheques over to Tantramar, reserving no part for himself.

In its returns the appellant deducted from its income in each of the years 10 cents per ton for all coal mined by it. Tantramar, however, applied for a similar allowance. It was suggested that Tantramar and the appellant should agree as to the apportionment of the allowance but that was not done. In 1939 Tantramar had received royalties

at the rate of 10 cents per ton from the appellant and in its return claimed a depletion allowance of 10 cents per ton. Its claim was allowed in full and while the appellant had claimed an allowance of $2,910.90, that was disallowed, the whole apportionment having been made to Tantramar. In 1940 the appellant paid Tantramar royalties at varying rates, the total amounting to $7,578.86. That was its total income for that year and the respondent allowed depletion to it in a like sum, Tantramar therefore paying no tax. The remainder of the exhaustion allowance, amounting to $1,223.46, was apportioned to the appellant who had made a claim for $10,044.50. In 1941 a similar procedure was followed and the appellant, while claiming $12,510.90, was allowed a deduction of only $2,520.29.

In effect, therefore, the appellant was allowed only to deduct what remained after Tantramar was permitted a deduction of an amount sufficient to relieve it of all income tax. The royalties paid by the appellant to Tantramar in 1940 and 1941 were at various times 10 cents, 5 cents and 7½ cents per ton, and since at times they were less than 10 cents a ton, the surplus allowance for exhaustion over and above what was claimed by Tantramar became available and was allowed to the appellant. It is difficult to reconcile the figures but I am informed that the discrepancies arose because in some cases computations were made on the basis of long tons and in others on short tons. In any event, there is no suggestion that in any year the full deduction of 10 cents per ton was not allowed to one or both of the claimants.

It is clear from all the evidence that the respondent, for the purpose of apportioning the allowance, treated Tantramar as the lessor and the appellant as lessee.

For the taxation year 1939, section 5(1) (*a*) was as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and

1949
JOGGINS COAL CO. LIMITED v. MINISTER OF NATIONAL REVENUE
Cameron J.

in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

It is submitted by the appellant that this subsection confers on it a statutory right to an allowance for exhaustion in such amount as the Minister may deem just and fair. The case of *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (1) is cited in support of that contention. That case had to do with depreciation. Lord Thankerton in delivering judgment in the Privy Council said at p. 485:

Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J. in which the Chief Justice concurred, and in which he states (p. 249): "The appellant was entitled to an exemption or deduction in 'such reasonable amount as the Minister, in his discretion, may allow for depreciation.' That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles."

In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision, unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

I think that it follows from that judgment that the Minister had a duty to fix such an amount for exhaustion for the year 1939 as he might deem just and fair; and that had the appellant been the owner of the coal being exhausted—and not a lessee—it would unquestionably have been entitled to a deduction of the full amount fixed by the Minister as just and fair—namely, 10 cents per ton. But that judgment had to do solely with the interpretation of the first part of the subsection. The question of apportionment of an allowance for exhaustion between a lessor and lessee referred to in the remaining part of the subsection did not arise. So far as I am aware, the only judicial reference to the words beginning, "And in the case of leases of mines . . ." is that of Estey, J. who, in his judgment in *D. R. Fraser & Co.* v. *The Minister of National Revenue* (2) said:

It was suggested that the concluding words of section 5(1) (*a*) "his determination shall be conclusive" meant that the Minister's determination should be final. It would appear rather that these words relate only

(1) (1939) 4 D.L.R. 481. (2) (1947) S.C.R. 157 at 169.

to a disagreement which may arise between the lessor and the lessee, in which case the Minister makes the apportionment and "his determination shall be conclusive". It does not refer back to the earlier part of the section dealing with the granting or refusing of an allowance.

In that case, of course, he was considering the subsection as amended in 1940, but the then wording of that part of the subsection was identical with the wording of the last part of the subsection in 1939.

As I have said, the appellant claims to be a lessee of the mine. It asserts first that by agreement of June 1, 1939, Tantramar and Parsons assigned all their rights in the mining lease to it, and that until such time as it might default under the agreement and the lease reverted to Tantramar and Parsons, the Province of Nova Scotia was the lessor and the appellant the lessee of the mine, Tantramar and Parsons having no interest therein for the years in question. If that be the case, then the appellant says that as the Province of Nova Scotia is not a taxpayer the full depletion allowance should be made to the appellant. I reject this latter suggestion entirely, inasmuch as it is the responsibility of the Minister, in the absence of an agreement, to apportion the allowance as between the lessor and the lessee, presumably taking into consideration their relative interests in the capital asset being exhausted and not on the basis of whether they are or are not taxpayers. Alternatively, the appellant says that if Exhibit 2 was not an assignment of the lease by Tantramar, it was in effect a sublease in which Tantramar was sub-lessor and the appellant, by assignment from Fundy Coal Company, became sub-lessee, and that the apportionment in 1939 of all the allowances to Tantramar and none to the appellant should be amended.

In his defence the respondent denies that the appellant was at any time a lessee of the mine and alleges that it had merely a licence to mine coal, coupled with an interest to go upon the property for that purpose. I do not think it is necessary for the purpose of this appeal to decide that question. I am content to assume—but without actually determining the point—that the appellant was in fact a lessee of the mine. Nor do I think it is of any importance to decide whether the appellant was lessee to the Crown in the right of the Province or a sub-lessee from Tantramar

1949
JOGGINS COAL CO. LIMITED
v.
MINISTER OF NATIONAL REVENUE
Cameron J.

or a lessee from the Crown. It is concerned only in what portion of the allowance is made to it. Assuming, therefore, that it was a lessee of one or the other, the latter part of the subsection must determine its rights. Admittedly, there was no agreement between the appellant and its lessor as to the apportionment, and therefore, "The Minister shall have full power to apportion the deduction between them and his determination shall be final and conclusive."

In effect, the subsection provides that the Minister must accept any agreement between the lessor and lessee as to the apportionment of the deduction; but that if they fail to reach an agreement, then they must accept his apportionment and from that there is no appeal. The Minister has *full* power to make the apportionment and his determination shall be *conclusive*. In my opinion, therefore, the Court has no power to review such apportionment as he has made. His power in that regard may seem to be an arbitrary one, but in fact it is not so. Full opportunity is given to the parties themselves who have entered into the lease and who presumably have full knowledge of their respective capital interests in the asset being exhausted, to conclude the matter themselves. And it is only when they have failed to do so that the Minister has jurisdiction to decide the matter for them.

And I think, also, that if the Minister on the material before him reaches the conclusion that the full deduction should be allowed to the lessor and none to the lessee (as was done in this case for the year 1939), that it is quite within his power to do so. In apportioning the allowance his main consideration would be the relevant positions of the lessor and lessee as to their interests in the capital asset in the process of being wasted, and the cost thereof. So far as the appellant is concerned, the evidence before the Minister established that it had paid nothing at the time it acquired the right to mine the coal; and that the only capital cost to it for the coal it mined was the total of the royalties paid to the Province and to Tantramar, all of which expenditures over the three years in question had been allowed to the appellant as operating expenses, which it had claimed they were. See *Fraser Lumber Co.* v.

Minister of National Revenue (*infra*). Moreover, full depreciation had been allowed on all items for which depreciation was claimed and to which the appellant was entitled. On the other hand, it would appear that Tantramar had paid substantial amounts to Parsons for Leases 140 and 141. He said that Tantramar had reimbursed him for practically all that he had paid the sheriff at the time he had received the sheriff's deed, and while he did not specify the amount, the expressed consideration of the deed was $8,000. Some part of that sum was no doubt attributable to the "40 Brine Seam," but on the evidence it is impossible to say exactly how much.

I think, also, that reading subsection 5(1) (*a*) as it was in 1939, and the apportionment by the Minister being conclusive, the Court is not entitled to inquire as to whether the apportionment was against sound and fundamental principles. That principle applied to the fixation of a just and fair amount for exhaustion, but not, I think, to the apportionment by the Minister which is conclusive. But in any event, it is not shown that the Minister violated any sound and fundamental principles. Full opportunity was given to the appellant over many months to present its full case before the appeal was disallowed; all the necessary material was before the Minister and he was not influenced by anything not relevant to the matter. I am not prepared, therefore, to find that the Minister proceeded on any wrong principle.

What I have said above refers to the apportionment made by the Minister for the taxation year 1939. But it applies with equal force to the apportionments made for the years 1940 and 1941. In these years the section read as follows:

Depletion 5.1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

1949
JOGGINS COAL CO. LIMITED v. MINISTER OF NATIONAL REVENUE
—
Cameron J.
—

The section as it then read was considered in the case of *D. R. Fraser Co. Ltd.* v. *The Minister of National Revenue* (1). It was decided by the Privy Council (affirming the judgment of the Supreme Court of Canada (2), which had affirmed the judgment in this Court (3),) that the subsection as so amended conferred on the Minister a discretion to determine whether any allowance at all should be made, and also as to how much should be allowed, and that there was no statutory right to any allowance for exhaustion. The subsection itself in plain terms confers on the Minister also the sole right to apportion the allowance between a lessor and lessee when they themselves have failed to agree thereon. In the instant case, for the years 1940 and 1941, the Minister did determine that an allowance should be made and that it should be at the rate of 10 cents per ton; and then, as he had authority to do, he apportioned it in a certain way between Tantramar and the appellant in the proportions I have indicated above. From that apportionment there can, I think, be no appeal, the determination of the Minister being conclusive.

In my opinion, therefore, all the appeals must fail and they will be dismissed with costs.

Judgment accordingly.

1948
Sept. 10
—
1949
Aug. 25
—

BETWEEN:

MOOSE JAW FLYING CLUB LTD., APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(h) and 51—Profits of non-profit company distributed as dividends on liquidation attract income tax—S. 51 of Income War Tax Act includes liquidator—Onus on taxpayer claiming exemption to bring himself within the Act—Appeal dismissed.

Appellant, incorporated in 1928 as a non-profit company, never declared nor paid any dividends from that date until 1942 when a liquidator was appointed for the purpose of winding-up the appellant under the

(1) (1948) 4 D.L.R. 776.
(2) (1947) S.C.R. 157.
(3) (1946) Ex. C.R. 211.

provisions of the Companies Winding-up Act of Saskatchewan. Appellant paid no income tax during those years. The liquidator made two distributions of the assets of the appellant, in 1943 and in 1944. These assets consisted of paid up capital and money on deposit in a bank. In 1947 the appellant was assessed for income tax for the years 1940 and 1941 and from such assessment appealed to this Court.

1949
MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE
Angers J.

The Court found that the objects for which the appellant was incorporated as set forth in the Memorandum of Association, were not solely for civic improvement, recreation purposes or any other of the purposes specified in s. 4(*h*) of the Income War Tax Act, and that it carried on an enterprise which was beyond the scope of the functions of a club coming under that section of the Act.

Held: That the profits made by appellant and paid out as dividends when the club was liquidated are subject to income tax.

2. That s. 51 of the Income War Tax Act includes a liquidator as well as a trustee in bankruptcy or assignee.

3. That the onus rests on one claiming exemption from income tax under a provision of the statute to bring himself clearly within the words of such exemption.

APPEAL under the Income War Tax Act.

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

L. McTaggart, K.C. for appellant.

H. J. Schull, K.C. for respondent.

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

ANGERS J. now (Aug. 25, 1949) delivered the following judgment:

This is an appeal, under the provisions of sections 58 and following of the Income War Tax Act, 1917, and amendments thereto, from the assessment of Moose Jaw Flying Club Limited for the fiscal years ended October 31, 1940 and 1941.

Pleadings were filed. It may be convenient to make a brief recapitulation thereof.

The statement of claim of the appellant, made by its liquidator, namely Executors & Administrators Trust Company Limited, alleges in substance:

1949
MOOSE JAW FLYING CLUB LIMITED v. MINISTER OF NATIONAL REVENUE
Angers J.

the appellant company, a body corporate incorporated under the Companies Act of the Province of Saskatchewan in 1928, was operated for civil improvement and no dividends or profits were ever declared or paid at any time, inasmuch as it was a non-profit company;

on February 19, 1947, the Deputy Minister of National Revenue for taxation assessed the appellant for income tax in the year 1940 amounting to $1,391.99 and for income tax in the year 1941 amounting to $7,266.24;

officers of the appellant interviewed the inspector of Income Tax at Regina, Saskatchewan, in March 1941, with regard to the assessment of income tax for the years 1940 and 1941, and pursuant to advice received at that time, the appellant claimed exemption from tax under section 4(*h*) of the Income War Tax Act and amendments thereto and were instructed that no assessment for income tax for the said years would be made nor was any assessment made until February 19, 1947;

the notice claiming exemptions was contained in a communication from the appellant's solicitors addressed to the inspector of Income Tax, at Regina, dated March 5, 1941;

by a special resolution passed at a special general meeting of the shareholders of Moose Jaw Flying Club Limited held on June 16, 1942, Executors and Administrators Trust Company Limited was appointed liquidator for the purpose of winding up the appellant company under the provisions of the Companies Winding up Act, being Chapter 119 of the Revised Statutes of Saskatchewan 1940:

Executors & Administrators Trust Company Limited as liquidator distributed the assets of the company to the shareholders on record but at no time were any dividends ever declared or paid to any of the shareholders;

as a result of an interview with the assessor for Income Tax, Regina, in April 1944, one H. H. Bamford, now deceased, was informed by such assessor that a clearance for income tax would be granted to the liquidator of Moose Jaw Flying Club Limited and such information was conveyed by the said Bamford, inspector in the winding up proceedings to the said Executors & Administrators Trust

Company Limited, and the latter, relying upon such information, distributed all the assets of Moose Jaw Flying Club Limited to its shareholders;

wherefore Executors & Administrators Trust Company Limited, on behalf of the appellant claims:

(*a*) that it may be declared that Moose Jaw Flying Club Limited was a non-profit organization operated for civic improvement and should be exempt from payment of any income tax as provided in section 4(*h*) of the Income War Tax Act;

(*b*) in the alternative, inasmuch as any profits made by the company were never distributed until the winding up, such profits are taxable only in the hands of the shareholders and not as earnings of the appellant company;

(*c*) that the surplus paid out to shareholders of the appellant over and above the original paid-up capital stock should be declared taxable as income of the individual shareholders and not as that of the appellant.

In his statement of defence the respondent pleads as follows:

he admits that the appellant is a body corporate incorporated under the Companies Act of the Province of Saskatchewan in 1928;

he admits that on February 19, 1947, the Deputy Minister of National Revenue assessed the appellant for income tax in the year 1940 amounting to $1,391.99 and in the year 1941 amounting to $7,266.24;

he admits that by special resolution passed at a general meeting of the shareholders of the appellant on June 16, 1942, the Executors & Administrators Trust Company Limited was appointed liquidator for the purpose of winding up the appellant company;

he admits that Executors & Administrators Trust Company Limited, in its capacity as liquidator, distributed the assets of the appellant to shareholders on record;

he denies the other allegations of the statement of claim and the respondent specifically says:

1949
MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE
—
Angers J.
—

the appellant is not a club, society or association operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes within the meaning of paragraph (*h*) of section 4 of the Income War Tax Act and is therefore not exempt from payment of income tax on the profit or gain received by it for the fiscal years ended October 31, 1940 and 1941, and such profit or gain is properly taxable in its hands.

A brief resume of the evidence seems to me expedient.

A letter from Grayson & McTaggart, Barristers and solicitors, to the inspector of Income Tax, Regina, dated March 5, 1941, a copy whereof was filed as exhibit 1, contains, among others, the following statements:

> Moose Jaw Flying Club Limited has never paid any dividends nor does it intend to pay any to its members. So that there would be no doubt about the matter this Company, on the 11th day of January 1941, passed a special resolution authorizing an amendment to the Memorandum of Association prohibiting the declaration of dividends. Application has been made to the Court of King's Bench for an Order confirming such Resolution in accordance with the provisions of the Companies Act and for your information we now enclose copy of Amended Memorandum of Association and copy of Order granted by the Honourable Mr. Justice Bigelow on the 19th day of February.
>
> We understood that there was some discussion with your office concerning this matter previously, but we have no correspondence in regard to it. Our advice was that the situation that it was never intended to pay any dividends to members of the Company was communicated to you and that you took the position that if that was the fact then no income tax would be payable. Your records might disclose that situation. In fact, no dividends have ever been paid nor will they be paid now.
>
> Despite this, the requirements of the legislation in question may necessitate the Company filing annual returns. If that is so, then please instruct us and we shall arrange with the Company to file those returns with you.
>
> We should explain to you that on February 20th we forwarded a copy of the Amended Memorandum of Association and of the Order confirming special resolution and the amendment to the Registrar of Joint Stock Companies, but he has not yet returned the certificate of its having been filed with him to us.

A duly certified copy of an Order by Bigelow, J. dated February 19, 1941 (exhibit 2), dealing with the amendment of the memorandum of association of Moose Jaw Flying Club Limited, reads partly thus:

> IT IS HEREBY ORDERED that this Court doth hereby confirm the special resolution passed at the meeting of the shareholders of the company held on the 11th day of January, A.D. 1941, reading as follows:

BE IT RESOLVED that the Memorandum of Association be amended by adding to paragraph numbered 3 thereof the following paragraph, namely,

(*m*) Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.

AND IT IS FURTHER ORDERED that the Memorandum of Association of Moose Jaw Flying Club Limited be altered by adding thereto under paragraph 3 the following provision, that is to say:—

'Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.'

A certificate by the Registrar of Joint Stock Companies dated February 21, 1941 showing that a copy of the memorandum of association of Moose Jaw Flying Club Limited, as altered by the order of Bigelow, J., was registered under the provisions of subsection 2 of section 51 of the Companies Act, 1933, was filed as exhibit 3. Said subsection 2 reads thus:

A resolution under this section shall not take effect until a copy has been filed with the registrar, who shall thereupon issue under his seal of office a certificate showing the alteration effected by the resolution.

A page of the Moose Jaw Times-Herald of August 1, 1942, in which appears a notice by Executors & Administrators Trust Company Limited, as liquidator of Moose Jaw Flying Club Limited, requesting the creditors of the company to send it their claims on or before October 1, 1942, and notifying them that on their failure so to do the liquidator, at the expiry of this delay, shall be at liberty to distribute the assets of the company among the parties entitled thereto, having regard to the claims of which the liquidator will have then received notice, was produced as exhibit 4.

A list of the company's shareholders, to which is attached a page showing the cash on deposit at the Imperial Bank at Moose Jaw ($319.12), the amount retained in the bank to take care of payments of $51 each to six unlocated shareholders whose names are mentioned ($306) and a surplus of $13.12, was filed as exhibit 5.

A statement of receipts and disbursements of Moose Jaw Flying Club Limited, prepared by the liquidator, dated August 31, 1948, from 1942 to 1947 inclusive, was marked as exhibit 6.

1949

MOOSE JAW FLYING CLUB LIMITED v. MINISTER OF NATIONAL REVENUE

Angers J.

A certified copy of an order of Mr. Justice Doiron, dated April 6, 1944, in the matter of The Voluntary Winding Up of Moose Jaw Flying Club Limited, was filed as exhibit 7; it reads in part as follows:

IT IS HEREBY ORDERED that Executors & Administrators Trust Company Limited, liquidator under the Companies Winding Up Act of the Province of Saskatchewan of Moose Jaw Flying Club Limited, be and it is hereby authorized to distribute the sum of $2,537.33 less expenses among the known shareholders of Moose Jaw Flying Club Limited as set out in the Stock Register.

A letter dated September 19, 1944, addressed by M. H. Anderson, acting inspector of Income Tax, to George F. Connor, Moose Jaw, inspector in the winding up of Moose Jaw Flying Club Limited, produced as exhibit 8, contains, among others, the following statements:

Ottawa has ruled that inasmuch as the above company distributed income during 1942 period on the basis of $30 per $10 share, it does not come within the purview of section 4(*h*) of the Income War Tax Act, and therefore would be considered as taxable in the years in which it was in operation. This being so, it will be necessary to issue assessment for those years for which a profit was made, namely, 1938, 1940 and 1941.

If the surplus has all been distributed the onus of payment of the company's taxes will be on the shareholders, who will also be taxable on their individual proportion of the undistributed earned surplus of the company at the date operations ceased.

Filed as exhibit 9 is a certified copy of a solemn declaration by James Wilson, dated June 16, 1944, to which are annexed copies of a statement of receipts and disbursements dated June 2, 1944, marked at exhibit A in the declaration, and of a notice by Executors & Administrators Trust Company Limited dated April 20, 1944, marked as exhibit B, regarding a meeting of the shareholders of Moose Jaw Flying Club Limited for the purpose of having the accounts of the liquidator laid before it and hearing any explanation which may be given by the latter. In his declaration, after relating that Moose Jaw Flying Club Limited entered into a voluntary winding up, that H. H. Bamford and George T. Connor were appointed inspectors, that Executors & Administrators Trust Company Limited was appointed liquidator and that the affairs of Moose Jaw Flying Club Limited are fully wound up, Wilson states:—

6. That prior to the resolution winding up the Moose Jaw Flying Club Limited all the assets had been sold and disposed of by the

Company and its only assets consisted of moneys on deposit in the branch of the Imperial Bank of Canada at Moose Jaw, Saskatchewan.

7. That pursuant to the provisions of Section 34 of The Companies Winding Up Act notice of a General Meeting of the Company was published in the issue of the Saskatchewan *Gazette* dated the 1st day of May, A.D. 1944, and now produced and shown to me and marked as exhibit B to this my declaration is a true copy of the Notice which was published in the said issues of the Saskatchewan *Gazette*.

8. That at the general meeting of the company the accounts were all laid before it and an explanation was given at the time and place indicated in exhibit B.

10. That there remains undisposed of the sum of Three Hundred and Twenty and 43/100 ($320.43) dollars as shown in Exhibit "A" and such moneys are on deposit in the branch of the Imperial Bank of Canada at Moose Jaw, Saskatchewan; that all the shareholders have been paid in full and all the debts of the company have been paid in full and there remains six shareholders who cannot be located at the present time and there is due to each such six shareholders the sum of Fifty-one ($51.00) dollars and their names and addresses are appended to Exhibit "A".

11. That Executors and Administrators Trust Company Limited have made an effort to locate the said shareholders but have been unsuccessful in doing so . . .

A review of the oral evidence seems advisable.

James Wilson, who was in June 1942 and is still accountant for Executors & Administrators Trust Company Limited, testified that on June 16 his company was appointed liquidator, under the Companies Winding Up Act of the Province of Saskatchewan, of Moose Jaw Flying Club Limited and that H. H. Bamford and J. T. Connor were appointed inspectors.

He declared that, when his company undertook the winding up of Moose Jaw Flying Club Limited, the assets of the latter consisted of cash in the bank, that, on the date of the resolution authorizing the liquidation, there were $11,804 on deposit and that the paid-up capital represented 213 shares at $10 each. Referring to the copy of the Moose Jaw Times-Herald of August 1, 1942 (exhibit 4), he declared that the notice therein contained was also published in the issues of August 8, 15 and 22. He asserted that his company did not receive notice of any claim from the Income Tax Department prior to the distribution of the assets on April 8, 1943, and April 19, 1944, and that these distributions were the only ones made by the company. He stated that the first distribution was $40 on 207 shares and the second one $11 on the same number of

1949
MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE
Angers J.

shares. He identified and deposited the list of shareholders and the statement of receipts and disbursements marked respectively 5 and 6.

He said that a letter was turned over to his company by George T. Connor, one of the inspectors in the liquidation, received by him from the inspector of Income Tax. Shown a letter dated September 19, 1944, addressed to George F. Connor, signed M. H. Anderson, acting inspector of Income Tax, he acknowledged it as the one mentioned. Counsel for respondent admitted that the letter had been written. Wilson declared categorically that this letter was the first advice received by his company with regard to income tax.

He asserted that the only distributions of assets made by the company were those of April 8, 1943, and April 19, 1944, as disclosed in exhibit 5.

He was asked if Bamford, in his quality of inspector, had made a report of the meeting of the inspectors in April 1944 authorizing the second distribution; an objection was made by counsel for the respondent on the ground that this evidence would constitute hearsay. As Bamford is dead, I am of opinion that the question should be allowed. Wilson's answer was: "The report was that he had interviewed the assessor for the income tax department, and he had informed him that the company being a non profit organization was not liable for income tax". According to him the distribution was made very shortly after. He added that he got the impression at the time that a clearance would follow, although he could not say that Bamford made this statement.

In cross-examination Wilson declared, with reference to the six shareholders who did not receive their share of the distribution, that the money is available to them, if they can be found, and is on deposit in the Imperial Bank of Canada, at Moose Jaw, in the name of the liquidator.

Re-examined, Wilson specified that the account in the Imperial Bank was in the name of Executors & Administrators Trust Company Limited as liquidator of Moose Jaw Flying Club Limited.

Ernest Cullum Bird, chief corporation assessor of the Income Tax Department, at Regina, from January 1941

to September 1946, testified that he had charge of the returns of Moose Jaw Flying Club Limited during that period and that, when the returns for the years 1940 and 1941 were filed, exemption was allowed under section 4(*h*) of the Income War Tax Act. He stated that later on that position was changed, when information was received that a distribution had been made by the liquidator.

Objection was taken to the witness' evidence concerning the allowance or disallowance of the exemption claimed on the ground that exemption can only be allowed by a certificate signed by the Minister; the objection was reserved. After giving the matter due consideration, I have come to the conclusion that the evidence is admissible. Shown a copy of letter (exhibit 8) addressed to George T. Connor, Bird admitted that he had written it. He however did not acknowledge that September 19, 1944, was the date on which the Income Tax Department changed its view. Perhaps I had better quote an extract from the deposition (p. 28):

A. It wouldn't, because this is as a result of—correspondence took place between our office and head office and finally Ottawa rules that this, this company should be assessed as an ordinary company. So that might have been quite long—this may have been correspondence over quite a long period of time—I don't know, I can't tell you now. I have been out of the office two years and if that was all the correspondence kept on the department file,—

Q That is between Ottawa and your branch office at—

A. I can just say that I sent it down to Ottawa under exemption under 4(*h*) until this next came through to our office and immediately it changed the complexion and they were held by Ottawa that they should be taxed as an ordinary corporation.

He thought that the distribution of the assets by the liquidator caused the change of view of the Department about the exemption.

To the question as to whether he had ever had a conversation with Bamford, Bird answered rather evasively (p. 30);

Q Now did you ever have a conversation with Mr. H. H. Bamford, now deceased, with regard to this?

A. Oh, nothing special. I used to call on Mr. Bamford when I was over in Moose Jaw as a personal friend, I mean that is all, and I do recollect saying that the Flying Club was going to be taxable owing to this distribution but I couldn't tell you what the conversation was, it was just a casual remark, I didn't go up to interview him with regard to the thing.

1949

MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE

Angers J.

Q. Well, did you have a conversation with him at any time that exemption had been allowed?

A. No, not to my knowledge.

Q. Under section 4(*h*)?

A. After the original new assessment had been sent back from Ottawa I might have written to him or I might have told him that apparently as this had been accepted by Ottawa a certificate would be issued in due course, but I wouldn't swear to that.

Re-called Wilson asserted that he had sent to the Income Tax Department a complete list of the shareholders of Moose Jaw Flying Club Limited, indicating the number of shares held by each of them as of October 30, 1941.

Counsel for respondent put in evidence as exhibit A a copy of a memorandum dated November 12, 1946, supposedly made by the registrar of Joint Stock Companies, stating that under the provisions of subsection 2 of section 217 of the Companies Act (R.S.C. 1940, chap. 113) the names of certain companies were struck off the register, among which appears "The Moose Jaw Flying Club, Moose Jaw, Sask."

The case is governed by paragraph (*h*) of section 4 of the Income War Tax Act. The relevant part of section 4 reads thus:

> The following incomes shall not be liable to taxation hereunder;
>
> (*h*) The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member;

Subsection 1 of section 19 enacts:

> On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

It is admitted that no dividends were declared or paid prior to June 16, 1942, date on which Executors & Administrators Trust Company Limited was appointed liquidator of Moose Jaw Flying Club Limited.

The evidence discloses that there were two distributions of the assets of Moose Jaw Flying Club Limited, one on April 8, 1943, and the other on April 19, 1944.

The notices of assessment were only mailed on February 19, 1947; the long delay between the filing of the returns of income by the taxpayer and these notices is difficult to understand. Be that as it may, the Minister of National

Revenue is given very extensive, almost unlimited, powers under section 55 of the Act regarding assessment, re-assessment or additional assessments, which is in the following terms:

Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

Reference was made by counsel for appellant to section 51, which is worded as follows:

Every trustee in bankruptcy, assignee, administrator, executor or other like person, before distributing any assets under his control shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, interest and penalties properly chargeable against the person, property, business or estate, as the case may be, remains outstanding.

Distribution without such certificate shall render the trustee in bankruptcy, assignee, administrator, executor and other like person personally liable for the tax, interest and penalties.

I do not think that this section has any relevance to the question at issue.

The evidence discloses that after the two distributions of assets made by the liquidator on April 8, 1943, and April 19, 1944, there remained in the bank, in the name of the liquidator, a sum of $319.12 intended to take care of payments of $51 each to six unlocated shareholders, whose names appear on page 2 of exhibit 5.

Counsel for appellant submitted that the distribution by the liquidator of the company's assets did not constitute a dividend and in support of his contention relied on the case of *Gagné* v. *Minister of Finance* (1). The facts therein are briefly as follows: The Canadian Rattan Chair Company Limited was incorporated in 1911 with a capital of $43,500, made up of 435 shares of the par value of $100 each. Gagné had been its manager since 1912 and up to 1920 he held 11 shares of the stock. On April 27, 1920, he bought 424 shares at figures running from $90 to $200 a share, being the remaining issued capital stock of the company, thereby becoming the owner of all the shares. On the same day the company declared a dividend of 92 per cent payable in the month of May following. This dividend amounted to $40,020. On the portion of the accumulated profits earned since the inception of the Act, namely $18,936.62, the tax was levied but the balance

(1) (1925) Ex. C.R. 19.

1949

MOOSE JAW FLYING CLUB LIMITED v. MINISTER OF NATIONAL REVENUE

Angers J.

($21,083.38) was not taxed. The dividend was paid out of the accumulated profits. Gagné contended that, when he purchased these shares, the taxable profits of the company were apportioned to the former shareholders in the purchase price paid to them for their stocks and that the dividend paid to him represented a return of his capital or a refund of the moneys he had paid to purchase with the capital its inherent proportion of accumulated profits, as the value of his investment was, by the payment of the dividend, reduced by the amount it represented and that in the interval such investment could not have produced such revenue. The appellant further contended that this dividend is not a revenue but a replacement of capital.

Audette J. could not agree with these contentions. I deem it convenient to quote an extract of his judgment (p. 21):

> The dividend before being declared did not exist and it is quite a fallacy to contend that before he purchased the shares and before the company had declared their dividend the latter ever existed, or that in this transaction the vendors were realizing the profits that the company had apportioned to them, and that such profits formed part of the price of the stock. How could that be if the dividend did not exist at that time. How also could that be applied when he purchased for $90 a par value share of $100, thus establishing a discrimination among the old shareholders.
>
> These a priori contentions of the appellant rest neither upon law, upon trade customs or upon sound logic. The unsound principles involved therein are subversive to stable and logical structure, and eliminating them is leaving the determination of the question at bar a task free from difficulty.
>
> The appellant's contention is neither equitable nor meritorious and seems to challenge common sense.
>
> The dividend paid to the appellant—although of a large percentage—was declared and paid in the usual course in 1920 and I fail to see any reason to distinguish it from the every day business transactions.

I do not think that this judgment can be of much assistance to the appellant.

It was argued on behalf of appellant that there is no liability on the part of a company to pay tax until the money on hand is distributed. It was further urged that the sums paid to the shareholders by the liquidator did not constitute a dividend but were in fact a return of the capital invested. Counsel relied on the decision in *Inland Revenue Commissioners* v. *Burrell* (1).

(1) (1924) 2 K.B. 52.

The headnote reads thus (p. 52):

On the winding up of a limited company the undivided profits of past years and of the year in which the winding up occurred were distributed among the shareholders, of whom the respondent was one:

Held, that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only.

At page 62 Pollock, M. R. says:

These sums have not been distributed to the shareholders as dividends. The voluntary liquidation has deprived the directors of the power of declaring a dividend.

Counsel acknowledged that by virtue of section 19 of the Income War Tax Act such distribution "shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income". He submitted however that the appellant had never declared any dividends and that, while the accumulated income was in the treasury, it was not assessable. He intimated that once it was subtracted from the treasury and distributed to the shareholders it became dividends and that the Crown in such a case must follow these assets into the hands of the shareholders. He added that the Crown was supplied with a list of the shareholders after September 1944 and accordingly knew what each of them received. Counsel then cited definitions of the word dividend. I do not think it necessary to deal with this question at great length; subsection 1 of section 19 is clear and unequivocal; I will merely refer briefly to the authorities cited.

In the case of *Henry* v. *Great Northern Railway Company* (1), dividend was defined by the Lord Chancellor thus (p. 15):

It was argued that the word "dividend" must be taken, *ex vi termini*, to apply merely to one fund to be divided, and that it could not in its true meaning be extended to any fund afterwards to be brought into division. But it must be observed that the word "dividend", as used in this and similar cases, is never used with strict accuracy, if strict accuracy depends upon its primary meaning. The word "dividend", if we look to its derivation, means obviously the fund to be divided, not the share of any particular partner or person in that fund, and strict language would require us to speak, not of the dividend which each shareholder is entitled to receive, but of his aliquot portion of the dividend.

(1) (1858) 27 L.J. Ch. 1.

1949
MOOSE JAW FLYING CLUB LIMITED v. MINISTER OF NATIONAL REVENUE
Angers J.

Lord Justice Knight Bruce made the following comments (p. 18):

The word "dividend" carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring, and, of course, where there is a context, it is liable to be affected by that context.

In the case of *Dupuis Frères Ltée* v. *Minister of Customs and Excise* (1), the definition of the word dividend, taken from the Oxford Dictionary, reads thus (p. 211):

According to the Oxford Dictionary, a dividend is the sum payable as the profits of a joint stock company and received as (by) an undivided holder as his share.

It may be apposite to note that, before setting forth this definition, the Honourable Mr. Justice Audette made the following observations (p. 210):

The dividend paid upon these preferred shares is clearly and distinctly from the earned profits. The dividend in question was actually paid out of the profits and for all purposes remains a dividend. And notwithstanding any agreement, arrangement, or contract between the company and its shareholders—allowed under the law of the province—it is obvious that a provincial law could not *ex proprio vigore* operate in derogation of the right of the Federal Crown to tax under the B.N.A. Act. The federal Act gives the right to tax profits and that right is paramount. Sec. 3 of the taxing Act defines the taxable "income" as the net profit or gain . . . whether such gains are divided or distributed.

The judgment in *Waterous* v. *Minister of National Revenue* (2), is not, to my mind, pertinent. Waterous Limited, having accumulated profits, declared a dividend and paid in Victory Bonds. The appellant, a shareholder, in his income return, claimed that he should not pay income tax on this dividend because it was paid in Victory Bonds, which were exempt from Income Tax. It was held (*inter alia*) by Audette, J. that (p. 110): "the payment of the distributed dividend in question in *bonds* does not bring the transaction within the *obligation* of the bond above recited which introduces the exemption in taxes "and" it is not the payment of the bond at maturity and it is not the payment of interest upon presentation and surrender of coupons."

Further on (p. 111):

The dividend paid and distributed from the gains and profits of the company remains a gain and profit in the hands of the shareholder, whether that dividend is paid in kind, specie or in bond; because it is all through a dividend from, and of, profit and gain; it remains of such nature in the hands of both the company and the shareholder. What you cannot do directly, you cannot do indirectly.

(1) (1927) Ex. C.R. 207. (2) (1931) Ex. C.R. 108.

In re *Hill* v. *Permanent Trustee Co. of New South Wales* (1), Lord Russell of Killowen, who delivered the judgment of the Judicial Committee of the Privy Council, expressed the following opinion (p. 731):

> A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus" or any other name, it still must remain a payment on division of profits.

In the case of *Commissioners of Inland Revenue and Blott* (2), the report discloses that an assessment to super-tax under the Finance (1909-10) Act, 1910, was made upon respondent for an allotment to him of bonus shares in a limited company, that in the previous year the company had passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing, in payment of that bonus, a distribution among them of certain of its unissued shares credited as fully paid and that the said shares had been allotted pursuant to the said resolution.

It was held by Viscount Haldane, Finlay and Cave, Lords Dunedin and Sumner dissenting, "that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his 'total income from all sources for the previous year' within the meaning of s. 66, sub-s. 2, of the Act, inasmuch as they were not part of his income but were an addition to his capital in that year."

The next case relied upon by appellant is that of *Commissioners of Inland Revenue* v. *Fisher's Executors* (3). The headnote, exact and fairly comprehensive, reads thus:

> A limited company with large undistributed profits resolved to capitalize part of these profits and to distribute them pro rata among its ordinary shareholders as a bonus in the form of 5 per cent debenture stock. The stock was duly issued, the conditions providing that the company might redeem the stock after a certain time and in certain events.
>
> The respondents, who had received their due proportion of the above debenture stock, were assessed to super tax under the Finance (1909-10) Act, 1910, for a certain year in respect of their stock:
>
> *Held,* that the bonus paid in debenture stock was not income in the hands of the respondents and was therefore not liable to super tax.

(1) (1930) A.C. 720.
(2) (1921) A.C. 171.
(3) (1926) A.C. 395.

1949

MOOSE JAW FLYING CLUB LIMITED v. MINISTER OF NATIONAL REVENUE

Angers J.

In the matter of *Commissioner of Income Tax, Bengal* v. *Mercantile Bank of India Limited et al* (1), investment company, carrying on business in India, which had capitalized its accumulated profits, issued to its shareholders bonus debentures; these were subsequently redeemed. The Judicial Committee of the Privy Council, affirming the judgment of the High Court, held that the shareholders did not thereby receive any taxable income, profits or gains.

The report in *Swan Brewery Co. Ltd.* v. *The King* (2), reveals the following facts. Section 6 of the Dividend Duties Act, 1902 (of Western Australia) provides that a company carrying on business in Western Australia and not elsewhere which declares a dividend shall pay a duty equal to one shilling for every twenty shillings of the amount or value of such dividend. Section 2 of said Act, as amended by the Dividend Duties Amendment Act, 1906, provides that "dividend" shall include "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors". The appellant passed a resolution that (1) the capital of the company be increased by £101,450 divided into 81,160 shares of £1 5s each; (2) that the sum of £101,450, being a portion of accumulated profits standing to the credit of the reserve fund, be transferred to the credit of the share capital account; (3) that the shares be allotted as fully paid up among the shareholders prorata. It was held by the Judicial Committee of the Privy Council: "that those transactions were in effect a declaration of a dividend amount to £101,450 within the Dividend Duties Act, 1902, and that the appellant company was liable to pay duty upon that amount under that Act."

I fail to see how this decision can be of any benefit to the appellant.

It was argued by counsel for appellant that section 51 of the Income War Tax Act does not apply to a liquidator under the Winding Up Act as he is not included in the phrase "and other like person". He relied on re *Ollman* (3), *Halsbury's Laws of England*, second edition, volume

(1) (1936) A.C. 478.
(2) (1914) A.C. 231.
(3) (1925) 57 O.L.R. 340.

31, page 495, paragraph 631, and *The Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (1).

In *re Ollman* Mr. Justice Riddell held that the words "or for some other cause" should not be construed as "other such like" accoıding to the *ejusdem generis* rule. I do not think that this decision has any relevance herein.

In Halsbury's Laws of England, second edition, volume 31, page 495, paragraph 631, we find the following observations:

> As a rule, general words following specific words are limited to things *ejusdem generis* with those before enumerated, although this, as a rule of construction, must be controlled by another equally general rule, that statutes ought, like wills or other documents, to be construed so as to carry out the objects sought to be accomplished by them, and general words may be limited with respect to the subject-matter in relation to which they are used.

In the case of *The Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (*supra*) Lord Halsbury expressed the following opinion (p. 489 in fine):

> If understood in their widest sense the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them.

The *ejusdem generis* rule is well established; Maxwell, Interpretation of Statutes, 9th ed., p. 336; Craies, Treatise on Statute Law, 4th ed., p. 165; Beal, Cardinal Rules of Legal Interpretation, 3rd ed., p. 355; *Regina* v. *Edmundson* (2); *Rex* v. *Special Commissioners of Income Tax* (3); *Trustees of Psalms and Hymns* v. *Whitwell* (4); *Ystradyfodwg and Pontypridd Sewerage Board* v. *Bensted* (5).

I believe that the wording of section 51, which mentions a trustee in bankruptcy and an assignee, is wide enough to comprise a liquidator.

It was submitted by counsel for respondent that a person claiming exemption from income tax under some provision of the statute must bring himself clearly within the word of the exemption and that the onus to do so rests on him.

(1) (1887) 12 A.C. 484.
(2) (1859) 28 L.J.M.C. 213.
(3) (1922) 8 Reports of Tax Cases 367, 373.
(4) (1890) 3 Reports of Tax Cases 7, 11.
(5) (1907) 5 Reports of Tax Cases 230, 241.

1949
MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE
Angers J.

Exemption provisions must be construed strictly. This, in my opinion, is well settled law: *Baymond Corp. Ltd.* v. *The Minister of National Revenue* (1); *Lumbers* v. *The Minister of National Revenue* (2); *Roenisch* v. *Minister of National Revenue* (3); *The Credit Protectors (Alberta) Ltd.* v. *The Minister of National Revenue* (4); *Wylie* v. *City of Montreal* (5); *Cox* v. *Rabbits* (6); *Versailles Sweets Ltd.* v. *Att'y-Gen'l for Canada* (7).

It was urged on behalf of respondent that, before a company can claim the exemption, it must establish that it was organized solely for one of the purposes mentioned in section 4(*h*). These purposes are, as usual, described in the Memorandum of Association. Among them are the following:

(*a*.1.) To carry on the business of instructors and teachers of the methods and arts of aviation and to recommend to the proper authorities, pupils and pilots for grants of certificates of standing and of proficiency and for such purposes to conduct such lectures, classes, experiments and flying tests as may be necessary and as may lawfully be carried on and to arrange for the services of such instructors and or air engineers and or other experts as may be approved by the Department of National Defence or other lawful authority where approval is necessary.

(*a*.2.) To acquire by gift or lease or purchase or in any other lawful way such aeroplanes, airships, balloons, or other form of air craft and such equipment and such aerodromes and hangars and other buildings lands or premises as may be reasonably necessary for any of the purposes of the company.

(*a*.6.) To carry on any other business which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value or render profitable any of the company's rights or properties.

(*a*.7.) To establish and maintain lines or regular services of aircraft of all kinds and carry on the business of carriers of passengers and goods by air, sea, river, canal, railway and otherwise, and to enter into contracts for the carriage of mails, passengers, goods and cattle by any means and either by the company's own aircraft and conveyances or by or over the aircraft, vessels, conveyances and railways of others; and to enter into contracts with any person or company as to interchange of traffic, running powers or otherwise and in connection with any of the objects aforesaid to carry on the business of railway contractors, shippers, shipbuilders, omnibus proprietors, engineers, manufacturers of machinery and railway cars, omnibus, and coach builders; and to carry on the business of ware-housemen and storers of goods, wares and merchandise of every kind and description whatsoever or any other trade or business what-

(1) (1945) Ex. C.R. 11.
(2) (1943) Ex. C.R. 202 at 211.
(3) (1931) Ex. C.R. 1, 4.
(4) (1947) Ex. C.R. 44.
(5) (1885) 12 S.C.R. 384, 386.
(6) (1878) 3 A.C. 473, 478.
(7) (1924) 3 D.L.R. 884.

soever which can in the opinion of the company be advantageously carried on by the company in connection with it as ancillary to the general business of the company.

(*d*) To enter into partnership or into any arrangement for sharing profits, union of interest, reciprocal concessions or co-operation with any person or company.

Paragraph (*m*), added pursuant to the order of Bigelow, J., reads thus:

(*m*) Notwithstanding what is herein set out the payment of any dividends to its members is hereby prohibited pursuant to the provisions of Section 9 of the Companies Act, being Chapter 21 of the Statutes of Saskatchewan 1933.

It was urged by counsel for respondent that these objects cannot be said to be solely for civic improvement, recreation purposes or any other of the purposes specified in the exempting clause, namely clause 4(*h*). I agree with this contention.

In answer to his opponent's intimation that clause (*m*), added to the Memorandum of Association pursuant to the order of Mr. Justice Bigelow, converts the appellant company into a non-profit company since it is prohibited from declaring dividends, counsel for respondent submitted that the profits of the appellant company, which are reflected in the value of its shares, will ultimately inure to the benefit of the shareholders through a winding up proceeding. He pointed out that we have a company capitalized at $2,130 which gathered profits of over $11,000 in 1941 and of $3,895.57 in 1940, that there is nothing in the order of Mr. Justice Bigelow dealing with the final distribution of capital upon a winding up of the company and that, as long as the capital and accumulated income of the company will inure eventually to the benefit of the shareholders upon a winding up, the appellant company cannot come within the provisions of section 4(*h*). Counsel for respondent drew the attention of the Court to the fact that the appellant was authorized by the order of Mr. Justice Doiron to distribute its accumulated income and that, in fact, it did distribute it among its shareholders.

Reverting to the proposition that the purpose for which a company is organized is to be found in its memorandum of agreement, I wish to refer to two decisions wherein the

1949
MOOSE JAW FLYING CLUB LIMITED
v.
MINISTER OF NATIONAL REVENUE
Angers J.

question has been fully expounded; *Bowman* v. *Secular Society Ltd.* (1) and *Corporation of the City of Toronto* v. *Bell Telephone Co. of Canada* (2). As the present notes are rather extensive, I do not think that commentaries on these two judgments are apposite.

I may note incidentally that the declaration made by Bamford, inspector of Income Tax, at a meeting of the inspectors in April 1944, to the effect that he had interviewed the assessor for the Income Tax Department and informed him that the appellant, being a non-profit organization, was not liable for income tax, cannot bind the Crown: *Jacques Cartier Bank and The Queen* (3); *Kennedy* v. *Minister of National Revenue* (4); *Mayes* v. *The Queen* (5) *National Dock and Dredging Corp. Ltd.* v. *The King* (6); *The King* v. *McCarthy* (7); *The King and Vancouver Lumber Co.* (8), affirmed by the Supreme Court and the Judicial Committee of the Privy Council; *Western Vinegars Ltd.* v. *Minister of National Revenue* (9).

The appellant carried on an enterprise which was beyond the scope of the functions of a club coming under paragraph (*h*) of section 4. See *Carlisle and Silloth Golf Club* v. *Smith* (10).

After a careful perusal of the evidence and an attentive study of the law and of the precedents, I have reached the conclusion that the appeal must be dismissed and that the assessments made under the provisions of the Income War Tax Act and the decision of the Minister affirming them must be affirmed.

The respondent will be entitled to his costs.

Judgment accordingly.

---

(1) (1917) A.C. 406.
(2) (1905) A.C. 52.
(3) (1895) 25 S.C.R. 84.
(4) (1929) Ex. C.R. 36, 38.
(5) (1891) 2 Ex. C.R. 403.
(6) (1929) Ex. C.R. 40, 42.
(7) (1919) 18 Ex. C.R. 410.
(8) (1914) 17 Ex. C.R. 329; (1920) D.L.R. 6.
(9) (1938) Ex. C.R. 39, 41.
(10) (1913) 3 K.B. 75.

BETWEEN:

1949 Oct. 24 — Oct. 26

FRED JAMES BLACKWELL ..... 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, ss. 3, 7(b)—Whether profits of a commercial traveller representing several business concerns exempt from liability to excess profits tax—"Carrying on business"—Meaning of word "profession".

The appellant is a commercial traveller residing at London, Ontario. During the years in dispute he represented several mills or business houses and obtained orders for their merchandise. He was paid solely by commissions and paid his own expenses. He was assessed to excess profits tax under the Excess Profits Tax Act, 1940, as amended, but contended that he was not carrying on business within the meaning of the Act but was merely an employee of the commercial concerns for whom he obtained orders and, alternatively, that his profits were exempt as being those of a profession within the meaning of section 7(*b*) of the Act.

Held: That the appellant's activities as a commercial traveller constituted the carrying on of a business within the meaning of the Excess Profits Tax Act, 1940, and that his profits therefrom were subject to excess profits tax under it.

2. That the occupation of a commercial traveller is not a profession within the meaning of section 7(*b*) of the Act.

APPEALS under the Excess Profits Tax Act 1940.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

R. B. Law K.C. for appellant.

R. S. W. Fordham K.C. and *A. Fergusson* for respondent.

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

The President now (October 26, 1949) delivered the following judgment:

These are appeals from assessments under The Excess Profits Tax Act, 1940, Statutes of Canada 1940, chap. 32, levied against the appellant in respect of the years 1942, 1943 and 1944.

1949
BLACKWELL
v.
MINISTER OF
NATIONAL
REVENUE
Thorson P.

The facts are not in dispute. The appellant is a commercial traveller and resides in London, Ontario. During the years in question he represented several mills or business houses, nine altogether in 1942 and 1943 and eight in 1944. His activities consisted in travelling throughout his territory with samples of the merchandise of the business concerns he represented, calling on customers, displaying the samples and soliciting and obtaining orders for the merchandise. When he obtained such orders he sent them to the credit manager of the mill or business house concerned. If the order was accepted the merchandise was shipped to the customer and thirty days after the date of such shipment the appellant was paid a commission based on its amount. He received no salary, wages or remuneration from any of the mills or business houses except these commissions and if a customer did not pay for the goods the commission that had been paid to him thereon was charged back to him. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He had no office or office staff and no telephone, typewriter or stationery of his own. The samples he carried belonged to the concerns he represented. In the course of his activities he incurred expenses for such items as hotels and meals, baggage and sample rooms, telephone, telegrams and tips, rail fares and excess baggage, car, gasoline, oil, etc. He did not send in any expense accounts in respect of these items to any of his mills or business houses or apportion them amongst them but assumed them all himself. The particulars of his commissions with the amount received from each mill or business house for each of the years in question appear in his income tax returns. In no year could it be said that they came virtually from one concern.

The appellant was assessed under The Excess Profits Tax Act, 1940, for each of the years in question in respect of the total commissions received by him less the expenses which he had paid and less the sum of $5,000. From these assessments he appealed to the Minister who affirmed them. Being dissatisfied with the Minister's decision he brought his appeals to this Court.

On these facts it was contended on his behalf that he was not subject to tax under The Excess Profits Tax Act at all on the ground that he was not carrying on a business within the meaning of the Act but was merely an employee of the commercial concerns for whom he obtained orders. This argument involves consideration of section 3 of the Act which provides in part as follows:

3.(1) In addition to any other tax or duty payable under any other Act and as herein provided, there shall be assessed, levied and paid

(*a*) a tax in accordance with the rate set out in the Third Part of the Second Schedule to this Act, upon the profits during the taxation period; and

(*b*) a tax in accordance with the rates set out in the First Part of the Second Schedule or in the Second Part of the Second Schedule to this Act upon the profits or the excess profits respectively during the taxation period, whichever of such taxes is the greater in amount, of every person residing or ordinarily resident in Canada or who is carrying on business in Canada:

And section 2(1) (*g*) of the Act defines "profits" in the case of taxpayers other than corporations as follows:

2.(1) In this Act and in any regulations made under this Act, unless the context otherwise requires, the expression,

(*g*) "profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act,* and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act*:

There is no definition of the word "business" in either the Income War Tax Act or The Excess Profits Tax Act. It has been said that it has the widest possible meaning and that it means anything which occupies the time, attention and labour of a man for the purpose of profit. In *Smith* v. *Anderson* (1) Jessel M.R. described it as "a word of extensive use and indefinite signification". If this view of it is adopted there can, I think, be no doubt that the appellant, as a commercial traveller, was carrying on a business. But counsel contended that in The Excess Profits Tax Act the word "business" is not used in its widest signification but has a restricted meaning and that Parliament did not intend to subject commercial travellers such as the appellant to tax under the Act. He urged that a substantial body of persons was not under the Act at all and that the appellant was one of them. It was

(1) (1880) 15 Ch. D. 247 at 258.

1949
BLACKWELL v. MINISTER OF NATIONAL REVENUE
Thorson P.

essential, according to his submission, that, before a person could be subject to excess profits tax under the Act, capital should be employed by him and that he should be the proprietor of a business. And he urged that the appellant's occupation did not meet these tests; no capital was employed by him and he could not be described as the proprietor of a business; he was merely a part time employee working for the various business concerns for whom he took orders. Counsel sought support for his contention in various sections of the Act.

I am unable to accept this contention. While there is no Canadian decision on the question whether the profits of a commercial traveller are subject to tax under The Excess Profits Tax Act, 1940, there is a decision in the United Kingdom under similar legislation namely, section 12 of the Finance (No. 2) Act, 1939. In *Marsh* v. *Commissioners of Inland Revenue* (1) the facts were that the appellant was employed by P. and P. as a commercial traveller on a basis of salary and commissions on orders taken; and that he also travelled for other firms with the permission of P. & P. and received commissions from them on the orders he obtained. He was assessed to excess profits tax on the ground that he was carrying on a trade or business as a commercial traveller and contended that there was no evidence on which the Commissioners could find that he was carrying on a business at all. Macnaghten J. held that if he had been employed solely by P. & P. he could not be held to be carrying on a trade or business; but because he acted for other firms there was evidence on which the Commissioner could conclude that he was carrying on the business of a commercial traveller and he was, therefore, assessable to excess profits tax in respect of that business. A seemingly contrary decision in *Binney* v. *Commissioner of Inland Revenue* (2) has now no bearing on the question since the legislation on which it was based has been altered. There should, in my opinion, be a finding similar to that in *Marsh* v. *Commissioner of Inland Revenue* (*supra*) on the facts of the present case, namely, that the appellant's activities as a commercial traveller constituted the carrying on of a business within the meaning of The Excess Profits Tax

(1) (1943) 1 All E.R. 199. (2) (1920) 1 A.T.C. 155.

Act, 1940, and that his profits therefrom were subject to excess profits tax under it. If he had been operating for only one mill there would have been support for counsel's contention that he was merely an employee but the facts in their entirety are against it. The appellant was free to go and solicit orders as he saw fit for any one of the business concerns for whom he acted. He had his own car, as his claims for deduction of expenses show, and he paid his expenses himself. He operated from his own house and selected his own customers. His remuneration depended on his own efforts and their results. He was not subject to the direction or control of any one of the mills or business houses but was independent of them. He was his own master. The facts are inconsistent with his being merely an employee and consistent with his carrying on a business. I find that that is what he was doing. Counsel's argument that he was outside the ambit of the Act cannot, therefore, be sustained.

The next argument for the appellant was that if he was carrying on a business his profits therefrom were exempt from tax as being the profits of a profession pursuant to section 7(*b*) of the Act, which reads as follows:

> 7. The following profits shall not be liable to taxation under this Act:—
>
> (*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

In *Lumbers* v. *Minister of National Revenue* (1) the rule to be applied in dealing with claims of exemption from income tax was put as follows:

> a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act; he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

(1) (1943) Ex. C.R. 202 at 211.

1949
BLACKWELL
v.
MINISTER OF
NATIONAL
REVENUE
Thorson P.

Thus if the appellant is to succeed in his claim for exemption under the first part of section 7(*b*) he must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, all of which are questions of fact, is on the appellant; if he fails in respect of any of them his appeal must be dismissed. In *Bower* v. *Minister of National Revenue* (1) I had occasion to consider section 7(*b*) of the Act and referred to several United Kingdom decisions on similar enactments there in which the meaning of the word "profession" was dealt with: *vide Commissioners of Inland Revenue* v. *Maxse* (2); *Currie* v. *Commissioner of Inland Revenue* (3); *Webster* v. *Commissioners of Inland Revenue* (4); *Carr* v. *Inland Revenue Commissioners* (5); and *Neild* v. *Commissioners of Inland Revenue* (6). I need refer particularly only to the statements of Lord Sterndale M. R. in the *Currie* case (*supra*), at page 335, and of Du Parcq L.J. in the *Carr* case (*supra*), at page 166, cited in the *Bower* case (*supra*). Having regard to the facts of the present case I have no hesitation in saying that even if all due allowance is made for the fact that the meaning of the word "profession" has been greatly enlarged so as to bring within its ambit occupations that were not previously regarded as professions it would be a distortion of it to say that it extends to the activities of a commercial traveller. Certainly the ordinary reasonable man, referred to by Du Parcq L.J., would not for a moment think that the occupation of a commercial traveller was a "profession". Moreover, the appellant has not shown that his profits, even if it were conceded that they are those of a profession, depended wholly or mainly upon his personal qualifications. When he was asked what his success as a commercial traveller depended upon he mentioned his personality, his ability to show his merchandise to the best advantage, his health and his experience but on cross-examination he stated that his merchandise was the most

(1) (1949) Ex. C.R. 61.
(2) (1919) 1 K.B. 647.
(3) (1921) 2 K.B. 332.
(4) (1942) 2 All E.R. 517.
(5) (1944) 2 All E.R. 163.
(6) (1946) 2 All E.R. 405; (1947) 1 All E.R. 480, (1948) 2 All E.R. 1071.

important factor in his success. In my view, the appellant has wholly failed to show that his claim for exemption comes within the ambit of section 7(*b*).

1949

BLACKWELL *v.* MINISTER OF NATIONAL REVENUE

Thorson P.

Since the assessments appealed against have not been shown to be erroneous either in fact or in law the appeals herein must be dismissed with costs.

Judgment accordingly.

BETWEEN:

UNION OIL COMPANY OF CALIFORNIA, ... APPELLANT;

1949

Oct. 5

Oct. 12

AND

THE REGISTRAR OF TRADE MARKS and S. F. LAWRASON & CO. LIMITED, ... RESPONDENTS.

Trade mark—"Cleanx"—"Clearex"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38 ss. 2(k), 2(l), 2(o), 26(c), 38—Similarity of word marks—Distinctiveness of word mark dependent on sound or idea, not on form—Test of similarity in sound of word marks a matter of first impression—Similarity of wares—Onus of proving no reasonable probability of deception on applicant for registration of trade mark.

Appellant applied to register "Clearex" as a word mark for use as applied to "liquid glass cleaners". Objection to the proposed registration was taken by the respondent which had obtained the registration of "Cleanx" as a specific trade mark for use as applied to "cleaning compounds and polishing compounds for floors, metals and the like of all descriptions" and the Registrar refused the application under section 38 of The Unfair Competition Act, 1932. From such refusal the appellant appealed.

Held: That the appeal which the form of a word or a combination of words may make to the eye must be excluded from consideration in determining whether such word or combination has the essential quality of distinctiveness, without which it cannot be a trade mark at all. The distinctiveness, if there is any, must be in the idea or sound suggested by the sequence of the letters and/or numerals in the mark and their separation into groups, and not in their form. The distinctiveness must thus be one of sound or idea and not one of form. The appeal which the form may make to the eye cannot be a test.

1949

UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS

Thorson P.

2. That if two word marks are to be held similar within the meaning of section 2 (*k*) of the Act it can only be by reason of the similarity of their sound or the idea suggested by them, since their form can have no bearing on the question.

3. That the answer to the question whether two word marks are confusingly similar in sound must nearly always depend on first impression. *Aristoc Ld.* v. *Rysta Ld.* (1945) A.C. 68 at 86 followed.

4. That "Clearex" and "Cleanx" are confusingly similar in sound and idea within the meaning of section 2(*k*) of the Act.

5. That the wares for which the registration of "Clearex" was sought are similar to those for which "Cleanx" was registered within the meaning of section 2(*l*) of the Act.

6. That the onus of proving that there is no reasonable probability of deception is on the applicant for registration of a trade mark.

APPEAL from the refusal by the Registrar under section 38 of The Unfair Competition Act, 1932, of the appellant's application to register "Clearex" as a word mark.

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

R. Quain K.C. for appellant.

M. B. K. Gordon and *R. S. Smart* for respondent S. F. Lawrason & Co. Limited.

W. P. J. O'Meara K.C. for respondent Registrar.

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

THE PRESIDENT now (October 12, 1949) delivered the following judgment:

This is an appeal from the Registrar's refusal, under section 38 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, of the appellant's application to register the word "Clearex" as a word mark for use as applied to "liquid glass cleaners". The application was dated June 22, 1945, and received in the Patent and Copyright Office on August 10, 1945. On April 20, 1946, the Registrar informed the appellant's attorney that it was suggested that the word "Clearex" as applied to liquid glass cleaners, was confusingly similar to the word "Cleanx", as applied to "cleaning compounds and polish-

ing compounds for floors, metals and the like of all descriptions", which had been registered as a specific trade mark under the Trade Mark and Design Act, R.S.C. 1927, chap. 201, on August 31, 1928, in Trade Mark Register No. 204, Folio 44605, on the application of the respondent S. F. Lawrason & Co. Limited, hereinafter called the respondent, and that in view of section 26 of The Unfair Competition Act, 1932, it did not appear to be registrable. Then on February 5, 1947, under section 38(1) of the Act, the Registrar, being in doubt as to whether or not the appellant's application should be granted by reason of the respondent's prior registration, by registered letter requested the respondent to state on or before March 5, 1947, whether it had any objection to the proposed registration, and if so, the reasons for such objection. On March 3, 1947, the respondent through its patent solicitors objected to the registration and set out its reasons therefor. On March 6, 1947, the Registrar sent a copy of the respondent's objection to the appellant's solicitor to which he made no response. Finally, under section 38(2) of the Act, the Registrar, being of the opinion that the reasons for the respondent's objection were not frivolous, refused the application and on April 15, 1947, notified the appellant's solicitor accordingly. It is from this refusal that the present appeal is taken.

As I see it there are two main issues in the appeal, one being whether the wares in connection with which the appellant seeks to register "Clearex" as a word mark are similar to those to which the respondent's trade mark "Cleanx" is applied, and the other whether "Clearex" and "Cleanx" are similar trade marks.

I shall deal first with the question whether the two marks are similar. Section 2(k) of the Act defines what is meant by "similar" in relation to trade marks as follows:

2(*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.

1949
UNION OIL COMPANY OF CALIFORNIA
v.
REGISTRAR OF TRADE MARKS
Thorson P.

Reference should also be made to the statutory definition of a word mark in section 2(*o*) which reads as follows:

2.(*o*) "Word mark" means a trade mark consisting only of a series of letters and/or numerals and depending for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or as a series.

Prior to the coming into force of The Unfair Competition Act, 1932, there was no division of trade marks into design marks and word marks, but since this division and in view of the statutory definition of a word mark it seems clear that the appeal which the form of a word or a combination of words may make to the eye must be excluded from consideration in determining whether such word or combination has the essential quality of distinctiveness, without which it cannot be a trade mark at all. The distinctiveness, if there is any, must be in the idea or sound suggested by the sequence of the letters and/or numerals in the mark and their separation into groups, and not in their form. The distinctiveness must thus be one of sound or idea and not one of form. The appeal which the form may make to the eye cannot be a test. Such a test is of importance in determining the distinctiveness of a design mark in view of its definition by section 2(*c*) of the Act, but it is not applicable in the case of a word mark. It must, I think, follow from the definition of a word mark given by section 2(*o*) that if two word marks are to be held similar within the meaning of section 2(*k*) it can only be by reason of the similarity of their sound or the idea suggested by them, since their form can have no bearing on the question.

It should be noted that the division of trade marks made by the Canadian Act does not obtain in the United Kingdom or the United States. It is, therefore, important to keep the statutory definition of a word mark in mind in applying United Kingdom or United States decisions to cases under the Canadian Act.

Whether two trade marks are similar within the meaning of section 2(*k*) may be said to be a question of fact, but it would be more nearly correct to regard it as a matter of opinion. In determining whether the marks are similar the Court must attempt to put itself in the position of dealers in or users of the wares in association with which

1949

UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS

Thorson P.

they are used and determine what effect their contemporaneous use in the same area in association with such wares would be likely to have on the minds of such dealers or users. There are cases which present no difficulty, as for example, where the marks are so definitely similar or so definitely not similar that there would be general recognition of their similarity or dissimilarity. But in between these extremes there are the cases where the contemporaneous use of the marks in the same area might have one effect on the mind of one dealer or user and the contrary one on the mind of another. In such cases the judge is faced with great difficulty, for he is required to determine the likely effect on the mind of the dealer or user, apart from his own reaction to the question, yet he is almost inevitably bound to be influenced by it. With a view to reducing the extent of this subjective attitude and attaining as large a degree of objectivity as possible the Courts have from time to time laid down certain principles as guides to be followed. Cases in which trade marks have been held to be similar are numerous and lists of such similar marks are to be found in such text books as Kerley on Trade Marks, 6th Edition, at pages 295-304, and Fox on Canadian Law of Trade Marks and Industrial Designs, at pages 80-88. But it is well established that, except when some general principle is laid down, cases of the similarity of other marks under other circumstances are of little assistance: *vide Coca-Cola Company of Canada Limited* v. *Pepsi-Cola Company of Canada Limited* (1).

In *The British Drug Houses Ltd.* v. *Battle Pharmaceuticals* (2) certain general principles were laid down both in this Court and in the Supreme Court of Canada. In the Supreme Court Kerwin J., who delivered the judgment of the Court, followed the judgment of the House of Lords in *Aristoc Ld.* v. *Rysta Ld.* (3), which adopted a passage in the dissenting judgment of Luxmoore L.J., in the Court of Appeal as a fair statement of how the Court should approach the question of the similarity of trade marks. The passage appears in the speech of Viscount Maugham, at page 86:

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the

(1) (1942) 2 D.L.R. 657 at 661.
(2) (1944) Ex. C.R. 239; (1946) S.C.R. 50.
(3) (1945) A.C. 68.

1949
UNION OIL COMPANY OF CALIFORNIA
v.
REGISTRAR OF TRADE MARKS
Thorson P.

limits of s. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

I think it may fairly be said that this is now the leading statement of the test to be applied in determining whether words in trade marks are confusingly similar.

I find no difficulty in the present case and have no hesitation in coming to the conclusion that the first impression of users of or dealers in the wares in association with which the marks "Clearex" and "Cleanx" are used, whether by the test of sound or by that of idea, would likely be that they are confusingly similar. I, therefore, find that the marks so resemble each other in sound and so clearly suggest 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.

I now come to the issue whether the wares are similar. Section 2(*l*) defines what is meant by "similar" in relation to wares as follows:

2.(l) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

My remarks with regard to the difficulty of arriving at an objective determination of whether marks are similar, in view of the influence which the judge's own reaction must almost inevitably have on it, apply also in the case of

the question whether wares are similar within the meaning of section 2(*l*), but perhaps to a lesser extent because the section indicates that certain conditions must be complied with before any question of confusing similarity can arise, namely, that the wares have common characteristics or that there is a correspondence of the classes of persons by whom they are ordinarily dealt in or used, or because of the manner or circumstances of their use. If none of these conditions are fulfilled no question of confusing similarity can arise at all. It is only if the wares meet one of these requirements that the question whether they are confusingly similar need be considered.

The respondent has his mark "Cleanx" registered for use as applied to "cleaning compounds and polishing compounds for floors, metals and the like of all descriptions" and the appellant seeks to register his mark "Clearex" for use as applied to "liquid glass cleaners".

The evidence on this appeal was all adduced by affidavits. For the respondent, evidence was given by the respondent's general manager, Albert E. Wells, of London, Ontario, where the respondent has its head office and principal place of business, and by Thomas Treehuba, an operator of an Imperial Oil station in London. The facts appearing from this evidence relating to the respondent's wares may be summarized as follows, namely, that the respondent directs a large part of its business to the manufacture and sale of chemical cleaning compounds which are sold under various trade marks; that the compounds in association with which the trade mark "Cleanx" is used are used for the cleaning of glass bottles, dishes, windows, automobile windshields, drinking glasses, metals, garage floors, floors, walls, paints, automobile radiators, and also for laundry purposes, dry cleaning purposes and cleaning purposes in the electroplating industry; that the said compounds are sold in containers of from 5 to 400 pounds; that before use they are dissolved in water in the proportions of from one to two up to six to eight ounces per gallon and that for actual cleaning purposes they are always used in liquid form rather than in powder form; that certain grades of the cleaner sold under the trade mark "Cleanx" make a clear solution when dissolved in water which has been softened and distilled; that some

1949
UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS
Thorson P.

grades foam and others do not; that the large bulk sales of the "Cleanx" product are made to the industrial trade but sales in small quantities are from time to time made to the retail trade; that one grade of the "Cleanx" cleaner is sold in liquid form as "Cleanx X"; that the sale of cleaning compounds under the trade mark "Cleanx" have been extensive and that the respondent has advertised them widely.

For the appellant, evidence as to the wares was adduced by the affidavits of Arthur C. Stewart of Los Angeles, California, the vice-president in charge of sales of the appellant, Marcellus T. Flaxman, of Whittier, California, a chemist, Martin Shanahan, of Vancouver, British Columbia, the president of Shanahans Ltd., the exclusive Canadian distributor of the "Clearex" glass cleaner, and Vivian S. Young, a housewife in Vancouver, British Columbia. There are also other affidavits relating to matters other than that which we are now discussing. Before I refer to the evidence relevant to the similarity of the wares I should say that on the objection of counsel for the respondent I ruled that certain statements in the affidavits were inadmissible such as, for example, statements based on information and belief for reasons similar to those in *Battle Pharmaceutical* v. *Lever Brothers Limited* (1), statements based on hearsay, and expressions of opinion on matters which are for the Court to determine. There was also objection to the affidavits on the ground that they contained arguments rather than statements of fact. With these observations I summarize the appellant's evidence as to the nature of the wares as follows, namely, that the "Clearex" liquid cleaner is essentially a volatile liquid alcohol dissolved in water to form a clear aqueous solution, that its cleaning action is due to its liquid alcohol content, that it contains substantially no solid soaps or other normally solid chemical cleaning compounds such as "Cleanx", and that its particular convenience as a glass cleaner is due to the fact that the alcohol makes it evaporate quickly on easy wiping, leaving no solid residue, whereas an aqueous solution or suspension of a solid soap or detergent such as "Cleanx" will evaporate slowly and leave the solid material behind as a residue unless very

(1) (1946) Ex. C.R. 277.

carefully wiped off; that the liquid "Clearex" is sold ready for use in six ounce containers adopted for use with a plastic spray attachment, and in refill twelve ounce bottles and one gallon bottles without spray attachments; that it could not be sold as a solid product to be dissolved in water prior to use, as is "Cleanx"; that the sales are largely made through grocery stores and like retail outlets, for domestic consumption by housewives, and not for industrial use; and that the product has been marketed for use as a glass cleaner for windows and windshields. The evidence of Mr. Flaxman was particularly directed to the differences between the liquid glass cleaner composition sold under the mark "Clearex" and the compound "Cleanx" even in its liquid form. Without disclosing what the solid material in "Clearex" is he says that it is not a soap and without saying that "Cleanx" is a detergent he refers to it as if it were. There is no evidence as to whether it is a detergent or not.

Counsel for the appellant contended that the wares for which it sought the registration of "Clearex" were not similar to those for which the respondent had its registration of "Cleanx". In support of his contention he stressed the following differences, namely, that "Cleanx" is sold as a powder and "Clearex" only as a liquid; that "Cleanx" has a soapy texture and appearance when dissolved whereas "Clearex" has not; that "Cleanx" leaves a residue on glass but "Clearex" does not; that for the most part the markets for the two products are different, "Clearex" being sold mainly to grocers and consumers and not to industrial plants; that the packages in which "Cleanx" is sold are very different from the bottles in which "Clearex" is sold; and finally that the "Clearex" liquid glass cleaner is not a compound. I am not able to accept counsel's contention. No doubt there are some differences in the wares, but this does not prevent them from being similar. Indeed, the use of the word "similar" necessarily connotes difference for without difference there would be identity, not similarity. The wares are not different because one is usually sold in powder form and the other always as a liquid, particularly since both are used only as liquids and, in fact, one grade of the "Cleanx" cleaner is sold in liquid form. Nor can the fact, even if

1949
UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS
Thorson P.

it were established, that one product has a soapy texture and the other not and that one leaves a residue on the glass and the other does not make them different. Moreover, Mr. Wells' affidavit establishes that certain grades of "Cleanx" make a clear solution when dissolved in softened and distilled water and that if the proportions were used as are used by the appellant the liquid "Cleanx" would not leave any more residue on glass than "Clearex" does. Nor does the fact that one product is sold in small bottles and the other in large containers make the wares different. And there is no substance in the suggestion that the "Clearex" liquid glass cleaner is not a compound. A substance need not be a solid to be a compound. Indeed, Mr. Flaxman's affidavit makes it clear that the liquid is a compound. He speaks of it as a composition and says that its exact composition cannot be disclosed.

Against counsel's contentions two facts stand out. One is that both wares have the basic common characteristic of being cleaning compounds. The respondent has his mark "Cleanx" to be applied to cleaning compounds "of all descriptions" and it makes no difference whether the compound is solid or liquid. The other fact is that there are uses to which the two products are put that are similar. Both cleaners are used by service stations for cleaning windshields. Two of the conditions of similarity referred to in section 2(1) are thus complied with. The wares have common characteristics and the manner or circumstances of their use is similar.

In his affidavit Thomas Treehuba swears that as an operator of an automobile service station he has used the cleaning compounds which were sold to him under the trade mark "Cleanx" in liquid form for the cleaning of automobile windshields and windows and for the cleaning of windows and floors in his service station and that if he saw a liquid cleaning product to be used for the cleaning of glass which bore the trade mark "Clearex", he would be led to believe that it was the product of the respondent which it was putting out in liquid form for the special purpose of cleaning glass. While there are statements by other persons that they would not be confused as, for example, by Mrs. Young, I am of the opinion that other users of "Cleanx" would be led, as Mr. Treehuba says

he would be, to believe that a liquid cleaner under the name "Clearex" was put out by the same persons as put out "Cleanx". Under the circumstances I find that the wares for which the appellant seeks to register "Clearex" are similar within the meaning of section 2(1) to those which the respondent has the right to apply and does apply its mark "Cleanx". Both issues are thus found against the appellant.

Even if there were some doubt as to whether the statement of Mr. Treehuba or that of Mrs. Young that if she saw a liquid solution of a detergent for sale as a cleaner for glass windows and bearing the trade mark "Cleanx" she would not be led to believe that it was a product of the same manufacturer or distributor as "Clearex", should be accepted, that would not help the appellant. The registration of a proposed trade mark is not an absolute right—*vide F. Reddaway & Co. Ld.'s Application* (1). There is a heavy onus on the applicant for the registration of a trade mark. In *Eno* v. *Dunn* (2) it was held by Lord Watson that where a section prohibits the registration, with respect to the same goods or descriptions of goods, of a trade mark so nearly resembling a trade-mark already on the register with respect to such goods or descriptions of goods as to be calculated to deceive, the applicant for registration must satisfy the comptroller or the Court that the trade-mark which he proposes to register does not come within the scope of the prohibition. He summed up the positions of the applicant in these words:

> here he is *in petitorio,* and must justify the registration of his trade-mark by shewing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio* his application ought to be disallowed.

There has been full acceptance of this statement: *vide McDowell's Application* (3). And in *Aristoc, Ld.* v. *Rysta, Ld.* (4) Viscount Maugham put the rule thus:

> It is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark.

Moreover, I am of the view that the fact that the Registrar refused the appellant's application under section 38 and not under section 37 does not affect the nature of the

(1) (1927) 44 R.P.C. 27 at 35.
(2) (1890) A.C. 252 at 257.
(3) (1927) 44 R.P.C. 335 at 341.
(4) (1945) A.C. 68 at 85.

1949
UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS
Thorson P.

onus resting on the appellant. That onus is a very heavy one and I have no hesitation in finding that the appellant has not discharged it.

The result is that the appeal must be dismissed and, since the contest has been between the appellant and the respondent, the dismissal will be with costs to the respondent S. F. Lawrason & Co. Limited. The Registrar will not be entitled to costs.

Judgment accordingly.

INDEX

ACTION BY THE HEIRS OF A RETIRED JUDGE TO RECOVER HIS ANNUITIES WITHHELD WHILE HOLDING THE OFFICE OF LIEUTENANT-GOVERNOR.
See CROWN, No. 3.

ACTION FOR DAMAGES BY A PERSON INJURED WHILE ATTENDING A WRESTLING EXHIBITION ORGANIZED WITH THE CO-OPERATION OF MILITARY AUTHORITIES.
See CROWN, No. 4.

ACTION FOR PAYMENT OF SALES TAX.
See REVENUE, No .4.

ACTION FOR RETURN OF MONEY PAID AS SUBSIDY,
See CROWN, No. 1.

ALLEGATIONS OF AFFIDAVIT IN SUPPORT OF MOTION INSUFFICIENT.
See PRACTICE, No. 2.

ALLOWANCE FOR COMPULSORY TAKING.
See EXPROPRIATION, No. 1.

ALLOWANCE FOR EXHAUSTION OF COAL MINE.
See REVENUE, No. 12.

ALLOWANCE MADE BY MINISTER AND APPORTIONMENT BETWEEN LESSOR AND LESSEE WHERE NO AGREEMENT EXISTS IS FINAL AND CONCLUSIVE.
See REVENUE, No. 12.

AMBIGUITY IN THE REVISED STATUTES, 1927.
See REVENUE, No. 11.

AN ACT RESPECTING THE REVISED STATUTES OF CANADA, S. OF C. 1924, C. 65, SS. 3, 8.
See REVENUE, No. 11.

ANNUAL FEES PAID BY EMPLOYEE TO UNION OR ALLIANCE DEDUCTIBLE FROM PAID SALARY.
See REVENUE, No. 6.

ANNUITIES OR OTHER ANNUAL PAYMENTS RECEIVED UNDER THE PROVISIONS OF ANY CONTRACT.
See REVENUE, No. 11.

APPEAL ALLOWED.
See REVENUE, Nos. 2. 3 & 8.

APPEAL DISMISSED.
See REVENUE, Nos. 7, 12 & 13.

APPEAL FROM ASSESSMENT FOR SUCCESSION DUTY ALLOWED.
See REVENUE, No. 10.

APPEAL FROM COMMISSIONER OF PATENTS DISMISSED.
See PATENTS, No. 1.

APPELLANT RESIDING OR ORDINARILY RESIDENT IN CANADA.
See REVENUE, No. 3.

APPLICABILITY OF ART. 81, CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC.
See PRACTICE, No. 3.

APPLICABILITY OF EXCHEQUER COURT RULES 227 AND 228 TO AN ACTION IN WHICH CROWN IS A PARTY.
See PRACTICE, No. 3.

APPLICABILITY OF LAWS OF THE PROVINCE OF QUEBEC RELATING TO PRESCRIPTION AND LIMITATION OF ACTIONS.
See CROWN, No. 3.

APPLICABILITY OF PRESCRIPTION BY THIRTY YEARS.
See CROWN, No. 3.

APPLICATION FOR DISMISSAL OF ACTION FOR WANT OF PROSECUTION MADE AND GRANTED WITHOUT NOTICE TO OTHER PARTY.
See PRACTICE, No. 1.

ARMY ACT, (BRITISH), S. 190 (4).
See REVENUE, No. 3.

ARTICLE OF MANUFACTURE MAY NOT BE THE SUBJECT OF A REGISTERED DESIGN.
See TRADE MARK, No. 2.

ARTS. 380 AND 381, CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC.
See PRACTICE, No. 2.

ARTS. 1241, 1602, 1666, 2186, 2188, 2242, 2250, 2260 (6), 2267 CC.
See CROWN, No. 3.

ASSIGNABILITY OF CLAIM AGAINST THE CROWN.
See PRACTICE, No. 3.

AUXILIARY SERVICE SUPERVISOR WITH ARMED FORCES OVERSEAS NOT A MEMBER OF THE MILITARY FORCES OF CANADA.
See REVENUE, No. 3.

BENEFICIAL INTEREST IN DEATH BENEFITS NOT ACCRUING NOR ARISING IN FAVOUR OF WIDOW BY SURVIVORSHIP OR OTHERWISE.
See REVENUE, No. 8.

CANADA SHIPPING ACT 1934, C. 44, S. 649.
See SHIPPING, No. 1.

CARRYING ON A PROFESSION A QUESTION OF FACT.
See REVENUE, No. 1.

"CARRYING ON BUSINESS".
See REVENUE, No. 14.

CLAIM FOR SUBSIDIES ON SALE OF GASOLINE.
See CROWN, No. 2.

"CLEANX".
See TRADE MARK, No. 3.

"CLEAREX".
See TRADE MARK, No. 3.

"CLECO".
See TRADE MARK, No. 1.

"CLECO-COLA".
See TRADE MARK, No. 1.

"COCA-COLA".
See TRADE MARK, No. 1.

COMMODITY PRICES STABILIZATION CORPORATION.
See CROWN, No. 1.

COURT HAS NO POWER TO REVIEW SUCH APPORTIONMENT AND DETERMINATION.
See REVENUE, No. 12.

CROWN.

1. ACTION BY THE HEIRS OF A RETIRED JUDGE TO RECOVER HIS ANNUITIES WITHHELD WHILE HOLDING THE OFFICE OF LIEUTENANT-GOVERNOR. No. 3.

CROWN—*Continued*

2. ACTION FOR DAMAGES BY A PERSON INJURED WHILE ATTENDING A WRESTLING EXHIBITION ORGANIZED WITH THE CO-OPERATION OF MILITARY AUTHORITIES. No. 4.
3. ACTION FOR RETURN OF MONEY PAID AS SUBSIDY. No. 1.
4. APPLICABILITY OF LAWS OF THE PROVINCE OF QUEBEC RELATING TO PRESCRIPTION AND LIMITATION OF ACTIONS. No. 3.
5. APPLICABILITY OF PRESCRIPTION BY THIRTY YEARS. No. 3.
6. ARTS. 1241, 1602, 1666, 2185, 2186, 2188, 2242, 2250, 2260 (6), 2267 CC. No. 3.
7. CLAIM FOR SUBSIDIES ON SALE OF GASOLINE. No. 2.
8. COMMODITY PRICES STABILIZATION CORPORATION. No. 1.
9. DUTY OF THE CROWN TO PROTECT AUDIENCE. No. 4.
10. MILITARY POLICE DETAILED FOR MAINTENANCE OF ORDER SERVANTS OF THE CROWN AND ACTING WITHIN SCOPE OF THEIR DUTIES. No. 4.
11. NEGLIGENCE OF MILITARY POLICE TO ACT MAKES CROWN ANSWERABLE FOR RESULTS THEREOF. No. 4.
12. NO POWER IN COURT TO SET ASIDE FINDING AND DECISION. No. 1.
13. OFFICE OF LIEUTENANT-GOVERNOR A MANDATE, NOT A LEASE OF MANUAL, PROFESSIONAL OR INTELLECTUAL WORK. No. 3.
14. ORDER 010A OF THE OIL CONTROLLER. No. 2.
15. P.C. 1195, FEBRUARY 19, 1941. No. 2.
16. P.C. 7475, AUGUST 26, 1942, s. 3 (6). No. 1.
17. PETITION OF RIGHT. NOS. 2, 3 & 4.
18. "PLACE". No. 2.
19. "PLACE" MEANS GEOGRAPHICAL LOCALITY AND NOT PLACE OF BUSINESS. No. 2.
20. PRESCRIPTION BY FIVE YEARS NOT APPLICABLE. No. 3.
21. PRESCRIPTION OF CLAIM RAISED BY DEFENCE. No. 3.
22. RENUNCIATION TO PRESCRIPTION. No. 3.
23. RES JUDICATA. No. 3.
24. SUPPLIANTS NOT ENTITLED TO SUBSIDY. No. 2.
25. THE EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, ss. 19 (c), 50A. No. 4.
26. THE EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 32. No. 3.

CROWN—*Continued*

CROWN—*Action for return of money paid as subsidy—Commodity Prices Stabilization Corporation—P.C. 7475, August 26, 1942, s. 3(6)—No power in Court to set aside finding and decision.*—The action is one to recover from defendant money paid by the Commodity Prices Stabilization Corporation Ltd. to defendant as a subsidy in connection with imported paper used by the defendant in the manufacture of tea bags. Section 3(6) of P.C. 7475 dated August 26, 1942, provides: (6) In any case where the Corporation finds, whether as a result of any such report or accounting or otherwise, that a person has received any sum of money by way of subsidy which the Corporation decides would not have been paid if all relevant facts and circumstances had been known at the time of application therefor, such person shall within thirty days from the date of demand in writing by the Corporation, pay to the Corporation such sum of money. *Held:* That when the Corporation has made its finding under subsection 3(6) of P.C. 7475 and has made a demand for payment in writing, the amount of the demand is due and payable within thirty days from the date of the demand and the Court has no right to substitute its finding as to whether all relevant facts and circumstances were known to the Corporation for the finding of the Corporation itself, since the Corporation alone has the power to find the facts mentioned therein and the Court has no power to set aside that finding and decision. HIS MAJESTY THE KING v. HARRY E. HUNT.. 1

2.——*Petition of Right—Claim for subsidies on sale of gasoline—"Place"—P.C. 1195, February 19, 1941—Order 010A of the Oil Controller—"Place" means geographical locality and not place of business—Suppliants not entitled to subsidy.*—Suppliants seek to recover from respondent certain subsidies on gasoline imported into Canada by suppliants, one of which carried on business as a retailer of gasoline and lubricating oils through the operation of a main terminal in Toronto, Ontario, and sixteen service stations in the Toronto area; the other suppliant operates a main terminal and twelve stations in Montreal, Quebec. P.C. 1195, February 19, 1941, empowered the Oil Controller "subject to the approval of the Minister to fix or regulate the price or fix the maximum price or the minimum price at which oil may be sold in any place, area or zone by or to any person . . ." and pursuant to such power the Order of the Oil Controller 010A provided that "the price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941 . . ." *Held:* That the word "place" as used in P.C. 1195 and Order 010A means a geographical locality and not a "place of business", and establishes a

CROWN—*Continued*

ceiling price in each geographical locality and not on an outlet basis. 2. That the price at which suppliants could sell gasoline was not the price at which they had been selling at each of their stations, but the maximum price at which it had been sold during the basic period in Toronto and Montreal. JOY OIL COMPANY LIMITED and JOY OIL LIMITED v. HIS MAJESTY THE KING............................ 136

3——*Petition of Right—Action by the heirs of a retired judge to recover his retiring annuities withheld while holding the office of Lieutenant-Governor—Prescription of claim raised by defence—Res judicata—Applicability of laws of the province of Quebec relating to prescription and limitation of actions—Office of Lieutenant-Governor a mandate, not a lease of manual, professional or intellectual work—Applicability of prescription by thirty years—Prescription by five years not applicable—Renunciation to prescription—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 32—Arts. 1241, 1602, 1666, 2185, 2186, 2188, 2242, 2250, 2260(6), 2267 cc.*—In an action by which suppliants seek to recover from the respondent a sum of $30,500 the issue of prescription of the claim was raised by the defence. *Held:* That there is no *res judicata* insofar as the issue of prescription of the claim is concerned The sole question to be determined on the question of law set down for hearing before trial was whether the office of Lieutenant-Governor of a province is or is not "a public office under His Majesty *in respect of his Government of Canada.*" It was adjudged it is not. *Carroll* v. *The King* (1947) Ex. C.R. 410; (1948) S.C.R. 126. 2. That the laws of the province of Quebec relating to prescription and the limitation of actions do apply since the cause of action arose and the debt was payable in that province. 3. That the office of Lieutenant-Governor of a province is a mandate, not a lease of manual, professional or intellectual work. 4. That the prescription by thirty years is the only one applicable, the action being neither for arrears of rents, of interest, of house-rent or land-rent of fruits natural or civil, nor for hire of labour, nor the price of manual, professional or intellectual work, which are all prescribed by five years as enacted by Arts. 2250, 2260(6) cc. 5. That if the prescription by five years was applicable there was a renunciation prescription on the part of the respondent. JULIETTE CARROLL *et al* v. HIS MAJESTY THE KING 169

4.——*Petition of Right—Action for damages by a person injured while attending a wrestling exhibition organized with the co-operation of military authorities—Military police detailed for maintenance of order servants of the Crown and acting within scope of their duties—Negligence of military police to act makes Crown anserwable for results thereof—*

CROWN—*Concluded*

Duty of the Crown to protect audience—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 50A.—Suppliant was injured during a mêlée between a wrestler and some spectators at a wrestling exhibition organized by the Knights of Columbus in co-operation with the local military authorities. The exhibition was given in the drill hall of the Army training camp and military constables had been detailed for the maintenance of order. Alleging failure of the military police to act during the mêlée suppliant sues the Crown for damages suffered by her. *Held:* That the military police on duty at the wrestling exhibition were servants of the Crown and were acting within the scope of their duties and their employment. Their negligence to act makes the Crown answerable for the results thereof. 2. That the respondent had the duty to protect the audience at the wrestling exhibition. The distinction between duty and liability does not arise here. *Jokela* v. *The King* (1937) Ex. C.R. 132; *The King* v. *Anthony* and *The King* v. *Thomson* (1946) S.C.R. 569 reviewed and distinguished. CECILE MORIN v. HIS MAJESTY THE KING.. 235

DAMAGE TO CARGO CAUSED BY NEGLIGENCE OF VESSEL'S OFFICERS.
See SHIPPING, No. 2.

DAMAGES.
See SHIPPING, No. 1.

DEATH BENEFITS PAID BY A COMPANY TO WIDOW OF ONE OF ITS EMPLOYEES UNDER A PLAN SET UP FOR THAT PURPOSE.
See REVENUE, No. 8.

DEFINITION OF INFRINGEMENT.
See TRADE MARK, No. 1.

DELAY ON PART OF PLAINTIFF.
See PRACTICE, No. 2.

DEPRECIATION NOT PREVENTED BY MAINTENANCE.
See EXPROPRIATION, No. 1.

"DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME".
See REVENUE, No. 6.

DISCLAIMER OF POWER TO ENCROACH UPON CAPITAL OF AN ESTATE.
See REVENUE, No. 10.

DISTINCTIVENESS OF WORD MARK DEPENDENT ON SOUND OR IDEA, NOT ON FORM.
See TRADE MARK, No. 3.

DIVIDENDS EXEMPT FROM INCOME TAX RECEIVED DURING THE YEAR LOSSES INCURRED IN EARNING THE INCOME ARE NOT APPLICABLE TO REDUCE THE AMOUNT OF SUCH LOSSES.
See REVENUE, No. 2.

DIVIDENDS EXEMPT FROM TAX UNDER S. 9B(2) BY REASON OF SS. 9B(11) AND 9B(12) DO NOT LOSE EXEMPTION THROUGH BEING PAID TO TRUSTEE FOR NON-RESIDENT.
See REVENUE, No. 5.

DOMINION SUCCESSION DUTY ACT, 4-5 GEO. VI, C. 14, S. 3 (1) (G) AS AMENDED BY 6-7 GEO. VI, C. 25, S. 3.
See REVENUE, No. 8.

DOMINION SUCCESSION DUTY ACT 4-5 GEO. VI, C. 14, S. 31.
See REVENUE, No. 10.

DOUBTFUL WHETHER AN ACT MAY BE CONSTRUED BY REFERENCE TO A SUBSEQUENT ENACTMENT.
See REVENUE, No. 9.

DUTY OF THE CROWN TO PROTECT AUDIENCE.
See CROWN, No. 4.

EARNED INCOME.
See REVENUE, No. 2.

ENUMERATED PARAGRAPHS OF S. 3 NOT STATEMENTS OF SOURCES OF INCOME.
See REVENUE, No. 11.

EVIDENCE BY AFFIDAVIT OR INTERROGATORIES OR BEFORE A COMMISSIONER.
See PRACTICE, No. 2.

EVIDENCE OF MUNICIPAL ASSESSMENT INADMISSIBLE AS PROOF OF VALUE.
See EXPROPRIATION, No. 1.

EXCESS PROFITS TAX.
See REVENUE, NOS. 1 AND 14.

EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, SS. 19(a), 19(b), 47.
See EXPROPRIATION, No. 1.

EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 19(b).
See EXPROPRIATION, No. 2.

EXCHEQUER COURT RULE 127 COVERS ANY DEFAULT.
See PRACTICE, No. 1.

EXCHEQUER COURT RULES 2, 164 AND 169.
See PRACTICE, No. 2.

EXCHEQUER COURT RULES 2, 226, 227 AND 228.
See PRACTICE, No. 3.

EXCHEQUER COURT RULES 127, 128, 250, 251 AND 252.
See PRACTICE, No. 1.

EXCISE TAX ACT, R.S.C. 1927, C. 179, SS. 2 (c) (ii), 86 (1) (a) (i).
See REVENUE, No. 4.

EXEMPTION GRANTED BY S. 5 (k) CONFINED TO INCOME FROM ANNUITY CONTRACTS LIKE THOSE WITH DOMINION GOVERNMENT.
See REVENUE, No. 11.

EXEMPTION PROVIDED BY S. 4 (t) (1) OF THE INCOME WAR TAX ACT NOT APPLICABLE.
See REVENUE, No. 3.

EXPROPRIATION.

1. ALLOWANCE FOR COMPULSORY TAKING. No. 1.
2. DEPRECIATION NOT PREVENTED BY MAINTENANCE. No. 1.
3. EVIDENCE OF MUNICIPAL ASSESSMENT INADMISSIBLE AS PROOF OF VALUE. No. 1.
4. EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, ss. 19 (*a*), 19 (*b*), 47. No. 1.
5. EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, s. 19 (*b*). No. 2.
6. EXPROPRIATION ACT, R.S.C. 1927, C. 64, ss. 9, 23. Nos. 1 AND 2.
7. MEASURE OF DAMAGES IS DEPRECIATION IN VALUE OF REMAINING PROPERTY. No. 2.
8. NO INTUITIVE POWER TO ESTIMATE DEPRECIATION. No. 1.
9. NO RIGHT TO COMPENSATION EXCEPT AS CONFERRED BY SS. 19 (*a*) AND 19 (*b*) OF EXCHEQUER COURT ACT. No. 1.
10. NO RIGHT TO COMPENSATION EXCEPT FOR VALUE OF PROPERTY. No. 1.
11. NO RIGHT TO COMPENSATION FOR LOSS BY DISTURBANCE OF BUSINESS APART FROM VALUE OF PROPERTY. No. 1.
12. NO RIGHT TO INTEREST WHEN OWNER LEFT IN UNDISTURBED POSSESSION. No. 1.
13. PHYSICAL CONTIGUITY OF LANDS OR UNITY OF ACTUAL USE NOT NECESSARY IF THERE IS UNITY OF OWNERSHIP CONDUCING TO ADVANTAGE OR PROTECTION OF PROPERTY AS ONE HOLDING OR POSSESSION AND CONTROL ENHANCING ITS VALUE AS A WHOLE. No. 2.

EXPROPRIATION—*Continued*

14. PRINCIPLE OF REINSTATEMENT OR REPLACEMENT NOT APPLICABLE IN DETERMINING AMOUNT OF COMPENSATION. No. 1.
15. RIGHT TO COMPENSATION FOR DAMAGE BY SEVERANCE. No. 2.
16. RIGHT TO COMPENSATION FOR LOSS BY SEVERANCE. No. 1.
17. UNWILLINGNESS OF OWNER TO SELL IRRELEVANT. No. 1.
18. VALUE OF PROPERTY IN USE NOT A TEST OF VALUE. No. 1.
19. VALUE OF PROPERTY TO OWNER MEANS REALIZABLE MONEY VALUE. No. 1.

EXPROPRIATION — *Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(a), 19(b), 47—No right to compensation except as conferred by ss. 19(a) and 19(b) of Exchequer Court Act—No right to compensation except for value of property—Evidence of municipal assessment inadmissible as proof of value—Right to compensation for loss by severance—Depreciation not prevented by maintenance—No intuitive power to estimate depreciation—Value of property to owner means realizable money value—Value of property in use not a test of value—Principle of reinstatement or replacement not applicable in determining amount of compensation—Unwillingness of owner to sell irrelevant—No right to compensation for loss by disturbance of business apart from value of property—Allowance for compulsory taking—No right to interest when owner left in undisturbed possession.*—Plaintiff expropriated property in the City of Hull in two separate parcels on one of which there was a factory. The action was taken to have the amount of compensation payable to the owner determined by the Court. *Held:* That sections 19*(a)* and 19*(b)* of the Exchequer Court Act not only confer jurisdiction upon the Court to hear and determine claims for compensation in respect of expropriated property but also establish rights to such compensation that would not otherwise exist, and the owner of expropriated property has only such rights as these sections confer. 2. That section 47 of the Exchequer Court Act permits compensation to the owner of expropriated property only to the extent of the value of the property as at the date of expropriation. 3. That evidence of municipal assessments is inadmissible as proof of the value of expropriated property, but may be helpful as a check against excessive valuations. 4. That when an owner's remaining property has suffered depreciation in value by reason of the severance from it of property formerly held with it the owner has a claim for loss by severance within the ambit of section 19*(b)* of the Exchequer Court Act. 5. That the assumption that a property can be so well maintained that it will

EXPROPRIATION—*Continued*

remain as good as new indefinitely is erroneous. Depreciation goes on in spite of maintenance. 6. That it is fallacious to assume that a person can by intuition determine the amount of depreciation in a building merely by looking at it, without calling to his aid either his own experience or the general experience applicable to similar buildings. 7. That the method of ascertaining separately the amount of each element or factor that should be taken into account in estimating the value of expropriated property and adding such amounts together to arrive at the amount of compensation payable to the owner is erroneous. 8. That the value of the expropriated property to the owner means its realizable money value. 9. That it is not the value of the property in use, but its value in exchange with all its attributes including its adaptability for profitable use, that is the measure of the compensation payable to the owner for its loss. 10. That neither the unwillingness of the owner to sell his property nor the price at which he would be willing to sell it has any bearing on its value. 11. That an owner's loss by disturbance of his business as the result of the expropriation of his property can be taken into account by the Court only to the extent that it would be considered by a purchaser in deciding how much he would be willing to pay for the property or affect the price which the owner might reasonably expect to receive for it if he wished to sell it. HIS MAJESTY THE KING v. WOODS MANUFACTURING COMPANY LIMITED........ 9

2.——*Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(b)—Right to compensation for damage by severance—Measure of damages is depreciation in value of remaining property—Physical contiguity of lands or unity of actual use not necessary if there is unity of ownership conducing to advantage or protection of property as one holding or possession and control enhancing its value as a whole.*—Plaintiff expropriated part of the defendant's property in the City of Winnipeg. The action was taken to obtain the adjudication of the Court as to the amount of compensation payable to the owner for the property taken and the damage to the remaining property by the severance of the expropriated part. *Held:* That property may be injuriously affected within the meaning of section 19(*b*) of the Exchequer Court Act by the severance of other property from it by expropriation and the measure of damages is the depreciation in value of the remaining property in consequence thereof. 2. That where part of an owner's property has been expropriated and he makes a claim for damage to his remaining property on the ground that it has been injuriously affected by the severance of the expropriated property he need not show that the expropriated property and his remaining property were in physical

EXPROPRIATION—*Concluded*

contiguity or that there was unity in their actual use; it is enough if he can show that the unity of their ownership conduced to the advantage or protection of the property as one holding or that the possession and control of each part gave an enhanced value to the property as a whole, and that the severance of the expropriated property prejudiced him in his ability to use or dispose of the remaining property or otherwise depreciated value. 3. That where an owner of property at or about the time of the expropriation has stated or declared the value of his property he ought not to be allowed to contend in proceedings taken to determine the amount of compensation payable to him that his property was of much greater value at the date of the expropriation either by itself or as conducing to the advantage or protection of his property as one holding or as giving an enhanced value to his property as a whole. HIS MAJESTY THE KING v. CONSOLIDATED MOTORS LIMITED.................... 254

EXPROPRIATION ACT, R.S.C. 1927, C. 64, SS. 9, 23.
See EXPROPRIATION, NOS. 1 AND 2.

FILING OF PETITION FOR A PATENT DOES NOT IN ITSELF CONSTITUTE A REQUEST FOR AN EXTENSION UNDER S. 28A OF THE PATENT ACT 1935.
See PATENTS, No. 1.

GOODS MANUFACTURED FOR A PERSON BY ANOTHER AND SOLD BY THE FORMER.
See REVENUE, No. 4.

IMPLICIT ACQUIESCENCE.
See PRACTICE, No. 3.

IMPORTANCE OF EVIDENCE OF ACTUAL CONFUSION.
See TRADE MARK, No. 1.

IMPROVED METHOD OF ATTAINING OLD OBJECT IS NOT INVENTION.
See PATENTS, No. 2.

INCOME.
See REVENUE, NOS. 2, 7 AND 13.

"INCOME".
See REVENUE, No. 6.

INCOME OR CAPITAL GAIN.
See REVENUE, No. 7.

INCOME RECEIVED OR ACCRUING FROM A CANADIAN ESTATE OR TRUST.
See REVENUE, No. 5.

INCOME TAX.
See Revenue, Nos. 2, 3. 5, 6, 7, 9, 11, 12 and 13.

INCOME WAR TAX ACT R.S.C. 1927, C. 97, SS. 2 (m), 4 (m), 6 (1) (a) (b).
See Revenue, No. 2.

INCOME WAR TAX ACT R.S.C. 1927, C. 97, SS. 2 (p), 9B (2) (a), 9B (2) (b), 9B (2) (d), 9B (11), 9B (12), 9B (15), 84.
See Revenue, No. 5.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 3.
See Revenue, No. 7.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 3, 3 (b), 5 (k).
See Revenue, No. 11.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 4 (h) AND 51.
See Revenue, No. 13.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 4 (t) (1), 9 (1) (a), 9 (1) (b).
See Revenue, No. 3.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 5 (1) (a).
See Revenue, No. 12.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 6 (1) (a).
See Revenue, No. 6.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 48 (3), 71.
See Revenue, No. 9.

INDUSTRIAL DESIGN.
See Trade Mark, No. 2.

INFRINGEMENT.
See Patents, No. 2.

INFRINGEMENT.
See Trade Mark, Nos. 1 and 2.

INFRINGEMENT OF DESIGN MARK BY WORD MARK.
See Trade Mark, No. 1.

INTERPRETATION ACT, R.S.C. 1927, C. 1, S. 21 (2) (3).
See Revenue, No. 9.

INTRODUCTION OF TRADE VARIATIONS INTO OLD DESIGN CANNOT MAKE IT NEW OR ORIGINAL.
See Trade Mark, No. 2.

INVESTMENT INCOME.
See Revenue, No. 2.

ISOLATED TRANSACTION MAY BE A TRADING OR BUSINESS ONE.
See Revenue. No. 7.

LACK OF INVENTION.
See Patents, No. 2.

LIABILITY CALCULATED ON COMBINED TONNAGE OF TUG AND BARGE.
See Shipping, No. 1.

LIABILITY FOR SUCCESSION DUTY DETERMINED BY LEX DOMICILII OF DECEASED.
See Revenue, No. 10.

"LOSSES INCURRED" MEANS THOSE INCURRED IN OPERATING A BUSINESS AND NOT NET LOSSES.
See Revenue, No. 2.

"LOSSES SUSTAINED IN THE PROCESS OF EARNING INCOME DURING THE YEAR LAST PRECEDING THE TAXATION YEAR."
See Revenue, No. 2.

"MANAGEMENT" OF THE SHIP.
See Shipping, No. 2.

"MANUFACTURER OR PRODUCER".
See Revenue, No. 4.

MEANING OF "PROFESSION".
See Revenue, No. 1.

MEANING OF WORD "PROFESSION".
See Revenue, No. 14.

MEASURE OF DAMAGES IS DEPRECIATION IN VALUE OF REMAINING PROPERTY.
See Expropriation, No. 2.

MEMBER OF THE "PERSONNEL" OR AN "AUTHORIZED FIELD REPRESENTATIVE" OF THE Y.M.C.A. NOT A SERVANT OR EMPLOYEE OF THE CANADIAN GOVERNMENT.
See Revenue, No. 3.

MILITARY POLICE DETAILED FOR MAINTENANCE OF ORDER SERVANTS OF THE CROWN AND ACTING WITHIN SCOPE OF THEIR DUTIES.
See Crown, No. 4.

MILITIA ACT, R.S.C. 1927, C. 132, SS. 21, 69, 2 (e).
See Revenue, No. 3.

MOTION TO ADD NEW DEFENDANT TO AN ACTION.
See Practice, No. 3.

MOTION TO EXAMINE PLAINTIFFS RESIDING IN A FOREIGN COUNTRY AND UNABLE TO COME TO CANADA TO GIVE EVIDENCE BEFORE THE COURT.
See PRACTICE, No. 2.

MOTION TO SET ASIDE JUDGMENT DISMISSING ACTION FOR WANT OF PROSECUTION.
See PRACTICE, No. 1.

NEGLIGENCE OF MILITARY POLICE TO ACT MAKES CROWN ANSWERABLE FOR RESULTS THEREOF.
See CROWN, No. 4.

"NET" PROFIT OR GAIN OR GRATUITY.
See REVENUE, No. 6.

NO CONTRACTUAL RELATIONSHIP BETWEEN EMPLOYEE AND COMPANY AS TO PAYMENT OF DEATH BENEFITS.
See REVENUE, No. 8.

NO INTUITIVE POWER TO ESTIMATE DEPRECIATION.
See EXPROPRIATION, No. 1.

NO PASSING-OFF UNLESS A PERSON WITH REASONABLE APPREHENSION AND PROPER EYESIGHT WOULD BE DECEIVED.
See TRADE MARK, No. 2.

NO POWER IN COURT TO SET ASIDE FINDING AND DECISION.
See CROWN, No. 1.

NO RIGHT TO COMPENSATION EXCEPT AS CONFERRED BY SS. 19 (a) AND 19 (b) OF EXCHEQUER COURT ACT.
See EXPROPRIATION, No. 1.

NO RIGHT TO COMPENSATION EXCEPT FOR VALUE OF PROPERTY.
See EXPROPRIATION, No. 1.

NO RIGHT TO COMPENSATION FOR LOSS BY DISTURBANCE OF BUSINESS APART FROM VALUE OF PROPERTY.
See EXPROPRIATION, No. 1.

NO RIGHT TO INTEREST WHEN OWNER LEFT IN UNDISTURBED POSSESSION.
See EXPROPRIATION, No. 1.

NOVELTY AND ORIGINALITY REQUIRED TO RENDER VALID REGISTRATION OF A DESIGN.
See TRADE MARK, No. 2.

OFFICE OF LIEUTENANT-GOVERNOR A MANDATE, NOT A LEASE OF MANUAL, PROFESSIONAL OR INTELLECTUAL WORK.
See CROWN, No. 3.

ONUS OF PROOF OF COMPLIANCE WITH CONDITIONS OF EXEMPTION PRESCRIBED BY S. 7 (B) ON APPELLANT.
See REVENUE, No. 1.

ONUS OF PROVING NO REASONABLE PROBABILITY OF DECEPTION ON APPLICANT FOR REGISTRATION OF TRADE MARK.
See TRADE MARK, No. 3.

ONUS ON TAXPAYER CLAIMING EXEMPTION TO BRING HIMSELF WITHIN THE ACT.
See REVENUE, No. 13.

ORDER 010A OF THE OIL CONTROLLER.
See CROWN, No. 2.

ORDERS IN COUNCIL P.C. 16/1391 OF APRIL 10, 1940, P.C. 37/6070 OF OCTOBER 30, 1940, P.C. 1087 OF FEBRUARY 21, 1944, P.C. 44/1555 OF MARCH 8, 1944, P.C. 3254 OF MARCH 2, 1944, P.C. 3228 OF MAY 3, 1945.
See REVENUE, No. 3.

PASSING OFF.
See TRADE MARK, NOS. 1 AND 2.

PATENTS.

1. APPEAL FROM COMMISSIONER OF PATENTS DISMISSED. No. 1.
2. FILING OF PETITION FOR A PATENT DOES NOT IN ITSELF CONSTITUTE A REQUEST FOR AN EXTENSION UNDER S. 28A OF THE PATENT ACT 1935. No. 1.
3. IMPROVED METHOD OF ATTAINING OLD OBJECT IS NOT INVENTION. No. 2.
4. INFRINGEMENT. No. 2.
5. LACK OF INVENTION. No. 2.
6. PATENT FOR IMPROVEMENTS IN PARKING METERS. No. 2.
7. PRACTICE. No. 1.
8. PRIOR ART. No. 2.
9. SUBJECT MATTER. No. 2.
10. UTILITY. No. 2.

PATENTS—*Practice—Filing of Petition for a patent does not in itself constitute a request for an extension under s. 28A of the Patent Act 1935—Appeal from Commissioner of Patents dismissed.—Held:* That s. 28A of the Patent Act 1935 contemplates something of a definite nature which would draw to the attention of the Commissioner of

PATENTS—*Concluded*

Patents the fact that the provisions of that section were being invoked so that he could then consider whether the necessary requirements of subsections *(b)* and *(c)* of s. 28A had been complied with as a preliminary to granting extension to November 15, 1947; the mere filing of the petition for a patent does not constitute a request for extension. IN RE W. O. BEYER'S APPLICATION 115

2. —— *Infringement — Patent for improvements in parking meters—Lack of invention—Subject matter—Prior art—Utility—Improved method of attaining old object is not invention.*—The action is one for infringement by defendants of plaintiff's patent. The invention claimed by plaintiff relates to improvements in or relating to parking meters. The main object of the invention was to overcome the tendency in some meters for the violation signal to indicate a violation before the paid-for predetermined time had in fact elapsed. The defendants denied infringement and questioned the validity of plaintiff's patent. The Court found that the alleged invention disclosed in plaintiff's patent is merely an improved mode of attaining an old object, it being a mere mechanical device which solved no engineering problem and required no exercise of the inventive faculty to achieve its object which was accomplished by merely a skilled application of tools and well understood processes in the art. Plaintiff's patent was therefore invalid as lacking subject matter and there could be no infringement. *Held:* That a mere workshop improvement does not constitute invention. 2. That since plaintiff's alleged invention is merely a different method of achieving a result already known in the art defendants could infringe plaintiff's patent only by making use of the particular method described or by means substantially the same. INTERNATIONAL VEHICULAR PARKING LIMITED v. MI-CO METER (CANADA), *et al*.................... 153

PATENT FOR IMPROVEMENTS IN PARKING METERS.
See PATENTS, No. 2.

PAY AND ALLOWANCES.
See REVENUE, No. 3.

PAYMENT SO MADE NOT OF A SUPERANNUATION OR PENSION CHARACTER.
See REVENUE, No. 8.

PAYMENT TO WIDOW PURELY VOLUNTARY ON THE PART OF THE COMPANY.
See REVENUE, No. 8.

P.C. 1195, FEBRUARY 19, 1941.
See CROWN, No. 2.

P.C. 7475, AUGUST 26, 1942, S. 3 (6).
See CROWN, No. 1.

PERSON WHO HOLDS A SALES OR OTHER RIGHT TO GOODS BEING MANUFACTURED ON HIS BEHALF IS THE MANUFACTURER OR PRODUCER OF THE GOODS.
See REVENUE, No. 4.

PETITION OF RIGHT.
See CROWN, NOS. 2, 3 AND 4.

PHYSICAL CONTIGUITY OF LANDS OR UNITY OF ACTUAL USE NOT NECESSARY IF THERE IS UNITY OF OWNERSHIP CONDUCING TO ADVANTAGE OR PROTECTION OF PROPERTY AS ONE HOLDING OR POSSESSION AND CONTROL ENHANCING ITS VALUE AS A WHOLE.
See EXPROPRIATION, No. 2.

"PLACE".
See CROWN, No. 2.

"PLACE" MEANS GEOGRAPHICAL LOCALITY AND NOT PLACE OF BUSINESS.
See CROWN, No. 2.

PRACTICE.

1. ALLEGATIONS OF AFFIDAVIT IN SUPPORT OF MOTION INSUFFICIENT. No. 2.
2. APPLICABILITY OF ART. 81. CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC No. 3.
3. APPLICABILITY OF EXCHEQUER COURT RULES 227 AND 228 TO AN ACTION IN WHICH CROWN IS A PARTY. No. 3.
4. APPLICATION FOR DISMISSAL OF ACTION FOR WANT OF PROSECUTION MADE AND GRANTED WITHOUT NOTICE TO OTHER PARTY. No. 1.
5. ARTS. 380 AND 381, CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC. No. 2.
6. ASSIGNABILITY OF CLAIM AGAINST THE CROWN. No. 3.
7. DELAY ON PART OF PLAINTIFF. No. 2.
8. EVIDENCE BY AFFIDAVIT OR INTERROGATORIES OR BEFORE A COMMISSIONER. No. 2.
9. EXCHEQUER COURT RULE 127 COVERS ANY DEFAULT. No. 1.
10. EXCHEQUER COURT RULES 2, 164 AND 169. No. 2.
11. EXCHEQUER COURT RULES 2, 226, 227 AND 228. No. 3.
12. EXCHEQUER COURT RULES 127, 128, 250, 251 AND 252. No. 1.

PRACTICE—*Continued*

13. IMPLICIT ACQUIESCENCE. No. 3.
14. MOTION TO ADD NEW DEFENDANT TO AN ACTION. No. 3.
15. MOTION TO EXAMINE PLAINTIFF RESIDING IN A FOREIGN COUNTRY AND UNABLE TO COME TO CANADA TO GIVE EVIDENCE BEFORE THE COURT. No. 2.
16. MOTION TO SET ASIDE JUDGMENT DISMISSING ACTION FOR WANT OF PROSECUTION. No. 1.

PRACTICE—*Motion to set aside judgment dismissing action for want of prosecution—Application for dismissal of action for want of prosecution made and granted without notice to other party—Exchequer Court Rule 127 covers any default—Exchequer Court Rules 127, 128, 250, 251 and 252.*—Motion under rule 127 of the General Rules and Orders of the Exchequer Court to set aside a judgment dismissing an action for want of prosecution. *Held:* That under rule 128 of the General Rules and Orders of the Exchequer Court an application to dismiss an action for want of prosecution may be made and granted without notice being given to the other party. Rule 128 is an exception to Rules 251 and 252 of the same General Rules and Orders. 2. That rule 127 of the General Rules and Orders of the Exchequer Court covers any default. The text "may be relieved against *any default* under any of these rules" is unrestricted. PORTER BROTHERS LIMITED v. HIS MAJESTY THE KING.................. 103

2.——*Motion to examine plaintiffs residing in a foreign country and unable to come to Canada to give evidence before the Court—Evidence by affidavit or interrogatories or before a Commissioner—Exchequer Court Rules 2, 164 and 169—Arts. 380 and 381, Code of Civil Procedure of the Province of Quebec—Delay on part of plaintiffs—Allegations of affidavit in support of motion insufficient.*—Motion of the plaintiffs under rules 164 and 169 of the General Rules and Orders of the Exchequer Court to examine two of the plaintiffs who reside in France by affidavit or subsidiarily *viva voce* by interrogatories or before a Commissioner. In support of the motion an affidavit of the plaintiffs' solicitor in Canada states that the two plaintiffs "are unable to come to Canada to give evidence before this Court". *Held:* That the plaintiffs' motion is tardy. 2. That the said statement in the affidavit is insufficient; no reasons are alleged therein to support it. RENE DE JACZYNSKI *et al* v. LOUIS JOSEPH LEMIEUX 214

3.——*Motion to add new defendant to an action—Applicability of Exchequer Court Rules 227 and 228 to an action in which Crown is a party—Assignability of claim against the Crown—Implicit acquiescence—*

PRACTICE—*Concluded*

Applicability of Art. 81, Code of Civil Procedure of the Province of Quebec—Exchequer Court Rules 2, 226, 227 and 228.—Motion under rules 227 and 228 of the General Rules and Orders of the Exchequer Court to add a new defendant to the action. *Held:* That rules 227 and 228 of the General Rules and Orders of the Exchequer Court also apply in an action in which the Crown is a party. 2. That a claim against the Crown is assignable when there is an implicit acquiescence by it. 3. That under rule 2 of the General Rules and Orders of the Exchequer Court article 81 of the Code of Civil Procedure of the Province of Quebec is applicable. HIS MAJESTY THE KING v. PETER BOYD COWPER, *et al*.... 214

PRACTICE.
See PATENTS, No. 1.

PRESCRIPTION BY FIVE YEARS NOT APPLICABLE.
See CROWN, No. 3.

PRESCRIPTION OF CLAIM RAISED BY DEFENCE.
See CROWN, No. 3.

PRINCIPLE OF REINSTATEMENT OR REPLACEMENT NOT APPLICABLE IN DETERMINING AMOUNT OF COMPENSATION.
See EXPROPRIATION, No. 1.

PRIOR ART.
See PATENTS, No. 2.

PROCEEDINGS UNDER SECTION 71 NOT PREVENTED BY PENDING APPEAL AGAINST ASSESSMENT.
See REVENUE, No. 9.

PROFITS ACQUIRED IN PROMOTION OF AMALGAMATION OF SEVERAL COMPANIES.
See REVENUE, No. 7.

PROFITS GAINED THROUGH RESALE OF SHARES ACQUIRED UNDER OPTION ARE ASSESSABLE FOR INCOME TAX.
See REVENUE, No. 7.

PROFITS OF NON-PROFIT COMPANY DISTRIBUTED AS DIVIDENDS ON LIQUIDATION ATTRACT INCOME TAX.
See REVENUE, No. 13.

REASONABLE APPREHENSION OF LIKELIHOOD OF CONFUSION A QUESTION OF FACT FOR THE COURT.
See TRADE MARK, No. 1.

RENUNCIATION TO PRESCRIPTION.
See CROWN, No. 3.

RES JUDICATA.
See CROWN, No. 3.

REVENUE.

1. ACTION FOR PAYMENT OF SALES TAX. No. 4.
2. ALLOWANCE FOR EXHAUSTION OF COAL MINE. No. 12.
3. ALLOWANCE MADE BY MINISTER AND APPORTIONMENT BETWEEN LESSOR AND LESSEE WHERE NO AGREEMENT EXISTS IS FINAL AND CONCLUSIVE. No. 12.
4. AMBIGUITY IN THE REVISED STATUTES, 1927. No. 11.
5. AN ACT RESPECTING THE REVISED STATUTES OF CANADA, S. OF C. 1924, c. 65, ss. 3, 8. No. 11.
6. ANNUAL FEES PAID BY EMPLOYEE TO UNION OR ALLIANCE DEDUCTIBLE FROM PAID SALARY. No. 6.
7. "ANNUITIES OR OTHER ANNUAL PAYMENTS RECEIVED UNDER THE PROVISIONS OF ANY CONTRACT." No. 11.
8. APPEAL ALLOWED. NOS. 2 AND 8.
9. APPEAL DISMISSED. NOS. 3, 7, 12 AND 13.
10. APPEAL FROM ASSESSMENT FOR SUCCESSION DUTY ALLOWED. No. 10.
11. APPELLANT RESIDING OR ORDINARILY RESIDENT IN CANADA. No. 3.
12. ARMY ACT, (BRITISH), s. 190 (4). No. 3.
13. AUXILIARY SERVICE SUPERVISOR WITH ARMED FORCES OVERSEAS NOT A MEMBER OF THE MILITARY FORCES OF CANADA. No. 3.
14. BENEFICIAL INTEREST IN DEATH BENEFITS NOT ACCRUING NOR ARISING IN FAVOUR OF WIDOW BY SURVIVORSHIP OR OTHERWISE. No. 8.
15. "CARRYING ON BUSINESS". No. 14.
16. CARRYING ON A PROFESSION A QUESTION OF FACT. No. 1.
17. COURT HAS NO POWER TO REVIEW SUCH APPORTIONMENT AND DETERMINATION. No. 12.
18. DEATH BENEFITS PAID BY A COMPANY TO WIDOW OF ONE OF ITS EMPLOYEES UNDER A PLAN SET UP FOR THAT PURPOSE. No. 8.
19. "DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME." No. 6.
20. DISCLAIMER OF POWER TO ENCROACH UPON CAPITAL OF AN ESTATE. No. 10.

REVENUE—*Continued*

21. DIVIDENDS EXEMPT FROM INCOME TAX RECEIVED DURING THE YEAR LOSSES INCURRED IN EARNING THE INCOME ARE NOT APPLICABLE TO REDUCE THE AMOUNT OF SUCH LOSSES. No. 2.
22. DIVIDENDS EXEMPT FROM TAX UNDER s. 9B (2) BY REASON OF ss. 9B (11) AND 9B (12) DO NOT LOSE EXEMPTION THROUGH BEING PAID TO TRUSTEE FOR NON-RESIDENT. No. 5.
23. DOMINION SUCCESSION DUTY ACT, 4-5 GEO. VI, c. 14, s. 3 (1) (g) AS AMENDED BY 6-7 GEO. VI, c. 25, s. 3. No. 8.
24. DOMINION SUCCESSION DUTY ACT, 4-5 GEO. VI, c. 14, s. 31. No. 10.
25. DOUBTFUL WHETHER AN ACT MAY BE CONSTRUED BY REFERENCE TO A SUBSEQUENT ENACTMENT. No. 9.
26. EARNED INCOME. No. 2.
27. ENUMERATED PARAGRAPHS OF s. 3 NOT STATEMENTS OF SOURCES OF INCOME. No. 11.
28. EXCESS PROFITS TAX. NOS. 1 AND 14.
29. EXCISE TAX ACT, R.S.C. 1927, c. 179, ss. 2 (c) (ii), 86 (1) (a) (i). No. 4.
30. EXEMPTION GRANTED BY s. 5 (k) CONFINED TO INCOME FROM ANNUITY CONTRACTS LIKE THOSE WITH DOMINION GOVERNMENT. No. 11.
31. EXEMPTION PROVIDED BY s. 4 (t) (1) OF THE INCOME WAR TAX ACT NOT APPLICABLE. No. 3.
32. GOODS MANUFACTURED FOR A PERSON BY ANOTHER AND SOLD BY THE FORMER. No. 4.
33. INCOME. NOS, 2, 7 AND 13.
34. "INCOME". No. 6.
35. INCOME OR CAPITAL GAIN. No. 7.
36. INCOME RECEIVED OR ACCRUING FROM A CANADIAN ESTATE OR TRUST. No. 5.
37. INCOME TAX. NOS. 2, 3, 5, 6, 7, 9, 11, 12 AND 13.
38. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. (2) *(m)*, 4 *(n)*, 6 (1) *(a)* *(b)*. No. 2.
39. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 2 *(p)*, 9B (2) *(a)*, 9B (2) *(b)*, 9B (2) *(d)*, 9B (11), 9B (12), 9B (15), 84. No. 5.
40. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 3. No. 7.
41. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 3, 3 *(b)*, 5 *(k)*. No. 11.
42. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 4 *(h)* AND 51. No. 13.
43. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 4 *(t)* (1), 9 (1) *(a)*, 9 (1) *(b)*. No. 3.

REVENUE—*Continued*

44. Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) *(a)*. No. 12.
45. Income War Tax Act, R.S.C. 1927, c. 97, s. 6 (1) *(a)*. No. 6.
46. Income War Tax Act, R.S.C. 1927, c. 97, ss. 48 (3), 71. No. 9.
47. Interpretation Act, R.S.C. 1927, c. 1, s. 21 (2) (3). No. 9.
48. Investment income. No. 2.
49. Isolated transaction may be a trading or business one. No. 7.
50. Liability for succession duty determined by lex domicilii of deceased. No. 10.
51. "Losses incurred" means those incurred in operating a business and not net losses. No. 2.
52. "Losses sustained in the process of earning income during the year last preceding the taxation year." No. 2.
53. "Manufacturer or producer". No. 4.
54. Meaning of "profession". No. 1.
55. Meaning of word "profession". No. 14.
56. Member of the "personnel" or an "authorized field representative" of the Y.M.C.A. not a servant or employee of the Canadian Government. No. 3.
57. Militia Act, R.S.C. 1927, c. 132, ss. 2 *(e)*, 21, 69. No. 3.
58. "Net" profit or gain or gratuity. No. 6.
59. No contractual relationship between employee and company as to payment of death benefits. No. 8.
60. Onus of proof of compliance with conditions of exemption prescribed by s. 7 *(b)* on appellant. No. 1.
61. Onus on taxpayer claiming exemption to bring himself within the Act. No. 13.
62. Order in Council P.C. 16/1391 of April 10, 1940, P.C. 37/6070 of October 30, 1940, P.C. 1087 of February 21, 1944, P.C. 44/1555 of March 8, 1944, P.C. 3254 of March 2, 1944, P.C. 3228 of May 3, 1945. No. 3.
63. Pay and allowances. No. 3.
64. Payment so made not of a superannuation or pension character. No. 8.
65. Payment to widow purely voluntary on the part of the company. No. 8.
66. Person who holds a sales or other right to goods being manufactured on his behalf is the manufacturer or producer of the goods. No. 4.

REVENUE—*Continued*

67. Proceedings under section 71 not prevented by pending appeal against assessment. No. 9.
68. Profits acquired in promotion of amalgamation of several companies. No. 7.
69. Profits gained through resale of shares acquired under option are assessable for income tax. No. 7.
70. Profits on non-profit company distributed as dividends on liquidation attract income tax. No. 13.
71. Sale of shares the essential feature of business carried on by appellant. No. 7.
72. S. 51 of Income War Tax Act includes liquidator. No. 13.
73. Succession. No. 8.
74. Succession Duty. Nos. 8 and 10.
75. Such payment outside the scope of the original section 3 (1) *(g)* of the Act and its amendment. No. 8.
76. Taxable income. No 7.
77. The Conveyancing and Law of Property Act R.S.O. 1937, c. 152, s. 24. No. 10.
78. The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32 as amended, ss. 3, 7 *(b)*. No. 14.
79. The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 7 *(b)*. No. 1.
80. The Income Tax Act, S. of C. 1948, c. 52, ss. 48 (1), 108. No. 9.
81. The Optometry Act, R.S.S. 1940, c. 221, ss. 2 (1), 29 (1). No. 1.
82. Use of different words in amending Act not necessarily indicative of change of meaning of amended Act. No. 9.
83. Whether profits of a commercial traveller representing several business concerns exempt from liability to excess profits tax. No. 14.
84. Whether profits of a profession dependent on personal qualifications a question of fact. No. 1.
85. Whether profits of optometrist exempt from liability to excess profits tax. No. 1.
86. Widow has no legal right to payment of death benefits. No. 8.
87. Words not to be read into an Act without clear need or reason. No. 9.

REVENUE—*Excess profits tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 7 (b)—Whether Profits of optometrist exempt from liability to excess profits tax—Onus of proof of compliance with conditions*

REVENUE—*Continued*

of exemption prescribed by s. 7 (b) on appellant—Meaning of "profession"—The Optometry Act, R.S.S. 1940, c. 221, ss. 2 (1), 29 (1)—Carrying on a profession a question of fact—Whether profits of a profession dependent on personal qualifications a question of fact.—The appellant is an optometrist at Humboldt, Saskatchewan, and claimed that his profits were exempt from liability to taxation under The Excess Profits Tax Act, 1940, by reason of section 7 *(b)* thereof. He had attended the School of Optometry at Toronto, served an internship with a practising optometrist in Saskatchewan, passed an examination set by the University of Saskatchewan, obtained a professional certificate from the Saskatchewan Optometric Association, of which he was a member, and was licensed to practise as an optometrist or optician. His office consisted of a waiting room, a refracting room and a laboratory. There was a neon sign overhanging the entrance with a pair of eyes painted on it. He carried a professional card in seven local papers, put his name and description on cards, notes and blotters sent to former patients, but did no other advertising. The appellant kept a case history sheet for each person who consulted him complaining of visual defects, headaches or sore eyes. If there was any disease or pathological condition of the eyes he referred the patient to a medical doctor, but if there was no such condition he examined their eyes with a view to ascertaining the correction required to remedy any defect of visual acuity that might be disclosed. If glasses were required he wrote the prescription on the case history sheet. Then a suitable mounting or frame was selected and the necessary measurements for fitting the patient were taken. The appellant did not grind any lenses but otherwise assembled the frames and mountings. He then verified the lenses to make sure they answered the prescription and fitted them to the patient. The appellant charged an all inclusive fee for all the services rendered including the supplying of the glasses, without breaking it up in any way. The appellant did not sell goggles or binoculars or other similar articles, nor make up prescriptions for doctors or other optometrists. The Minister decided that the appellant's profits were not the profits of a profession within the meaning of section 7 *(b)* of the Act. Being dissatisfied with the Minister's decision the appellant brought his appeal to this Court. *Held:* That the onus of showing that the assessment appealed against is erroneous either in fact or in law lies on the appellant. 2. That since the appellant is claiming the benefit of exemption from liability by reason of the provisions of section 7 *(b)* of the Act, he must show that every condition prescribed by it for the granting of the exemption has been complied with. 3. That the appellant must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, which are all questions of fact, is on the appellant. 4. That whether a man carried on a profession is in the last resort a question of fact. 5. That the appellant combined the professional services of an eye specialist with the business of a dispenser of glasses but that fact cannot constitute his combined activities the carrying on of a profession. 6. That even if the appellant's combined activities as optometrist and optician constituted the carrying on of a profession and the profits sought to be charged were the profits of such profession, the appellant would have to prove that the profits were wholly or mainly dependent upon his personal qualifications. 7. That the appellant's profits were not wholly or mainly dependent upon his personal qualifications. FRANK C. BOWER *v.* MINISTER OF NATIONAL REVENUE.................... 61

2.——*Income—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, ss. 2 (m), 4 (n), 6 (1) (a) (b)—"Losses sustained in the process of earning income during the year last preceding the taxation year"—Dividends exempt from income tax received during the year losses incurred in earning the income are not applicable to reduce the amount of such losses—"Losses incurred" means those incurred in operating a business and not net losses—Earned income—Investment income—Appeal allowed.*—Appellant in the years 1942 and 1943 was engaged in the business of coal mining in the Province of Alberta. In its income tax return for the taxation year 1943 appellant deducted, *inter alia,* an amount for losses incurred in carrying on its business for the preceding year. Appellant had received in such a year a certain amount of money from other companies by way of dividends, such receipts being exempt from income tax in appellant's hands by virtue of s. 4 *(n)* of the Income War Tax Act. Respondent deducted such amount of dividends received by appellant from the amount claimed by it for the losses claimed and assessed appellant for income tax accordingly. Appellant appealed to this Court. *Held:* That the losses deductible are the losses sustained in the operation of or carrying on the business of the taxpayer and not the net losses of the taxpayer. LUSCAR COALS LIMITED *v.* MINISTER OF NATIONAL REVENUE.......... 83

3.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4 (t) (1), 9 (1) (a), 9 (1) (b)—Militia Act, R.S.C 1927, c. 132, ss. 2 (e), 21, 69—Army Act, (British), s. 190 (4)—Orders in Council P.C. 16/1391 of April 10, 1940, P.C. 37/6070 of October 30, 1940, P.C. 1087 of February 21, 1944,*

REVENUE—*Continued*

P.C. 44/1555 of March 8, 1944, P.C. 3254 of March 2, 1944, P.C. 3228 of May 3, 1945—Pay and allowances—Auxiliary Service Supervisor with Armed Forces overseas not a member of the Military Forces of Canada—Exemption provided by s. 4 (t) (1) of the Income War Tax Act not applicable—Appellant residing or ordinarily resident in Canada—Member of the "personnel" or an "authorized field representative" of the Y.M.C.A. not a servant or employee of the Canadian Government—Appeal dismissed.—Appellant was assessed for the years 1943, 1944 and 1945 in respect to pay and allowances received while overseas. Assessments were made and affirmed on the basis that he was there and then an Auxiliary Service Supervisor of the Y.M.C.A. with the Armed Forces and therefore entitled only to the exemption granted by Order in Council P.C. 1087 as amended by P.C. 3254, which is that one-fifth of the pay, including dependents' allowances, is not subject to taxation, and from such assessments he appealed. *Held:* That appellant was not during the years in question a member of the Military Forces of Canada and therefore not entitled to the exemption provided by section 4 *(t)* (1) of the Income War Tax Act. 2. That appellant was residing or ordinarily resident in Canada within section 9 (1) *(a)* of the Income War Tax Act during the period in question. 3. That appellant being at all times one of the "personnel" or an "authorized field representative" of the Y.M.C.A. was not a servant or employee of the Government of Canada within the meaning of section 9 (1) *(b)* of the Income War Tax Act. ELPHINSTONE MATHER RUSSELL v. MINISTER OF NATIONAL REVENUE..... 91

4.——*Excise Tax Act, R.S.C. 1927, c. 179, ss. 2 (c) (ii), 86 (1) (1) (i)—Action for payment of sales tax—Goods manufactured for a person by another and sold by the former—Person who holds a sales or other right to goods being manufactured on his behalf is the manufacturer or producer of the goods—"Manufacturer or producer".*—The action is to recover sales tax from defendant on goods manufactured for defendant by E. and M. pursuant to a contract and sold afterwards by the defendant himself who denies liability on the grounds he is not the manufacturer or producer of the goods and that he paid the sales tax to E. and M. *Held:* That the defendant held a sales or other right to the goods being manufactured on his behalf and therefore was the manufacturer or producer of the goods. 2. That the defendant being the manufacturer or producer of the goods is liable for the sales tax thereon. HIS MAJESTY THE KING v. REUBEN SHORE.................... 225

5——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2 (p), 9B (2) (a), 9B (2) (b), 9B (2) (d), 9B (11), 9B (12), 9B (15), 84—Income received or accruing*

REVENUE—*Continued*

from a Canadian estate or trust—Dividends exempt from tax under s. 9B (2) by reason of ss. 9B (11) and 9B (12) do not lose exemption through being paid to trustee for non-resident.—A Swiss company had two Canadian subsidiaries, one, its Canadian operating company, Ciba Company Limited, and the other, an investment company, Anglo American Chemicals Ltd., a non-resident-owned investment corporation within the meaning of s. 2 *(p)* of the Income War Tax Act. The dividends paid by these two companies to the Swiss company were exempt from tax under s. 9B (2) by reason of ss. 9B (11) and 9B (12). After the outbreak of the war the Swiss company incorporated the appellant and thereafter the dividends, instead of being paid to the Swiss company, were paid to the appellant which credited them to the Swiss company and paid them into a separate bank trust account. Dominion of Canada bonds were bought with some of the dividends and the interest thereon treated by the appellant in the same way as the dividends. The respondent considered tax was payable on the amounts thus received by the appellant under s. 9B (2) *(d)* and made a demand on the appellant for payment under s. 84 (3). *Held:* That where dividends would be exempt from the tax imposed by section 9B (2) by reason of sections 9B (11) and 9B (12), if paid direct to a non-resident, they do not lose their character as tax exempt dividends through being paid to a trustee for the non-resident and credited by such trustee to the non-resident and paid into a separate bank trust account, or thereby become subject to tax under paragraph *(d)* of section 9B (2) as income received or accruing from a Canadian estate or trust. *Archer-Shee* v. *Baker* (1927) A.C. 844 followed: 2. That the term "income received or accruing from a Canadian estate or trust" in paragraph *(d)* of section 9B (2) does not include income from property which a settlor has transferred to a trustee for himself and of which he has never ceased to be the beneficial owner. 3. That the Swiss company was the beneficial owner of the interest on the Dominion of Canada bonds in its character as such and not as income received or accruing from a Canadian estate or trust. 4. That the interest on the Dominion of Canada bonds was exempt from tax under section 9B (2) by reason of paragraph *(b)* thereof. PAN-AMERICAN TRUST COMPANY v. MINISTER OF NATIONAL REVENUE........ 265

6.——*Income tax—Income War Tax Act, R.S.C. 1927, C. 97, s. 6 (1) (a)—"Income"—"Net" profit or gain or gratuity—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Annual fees paid by employee to union or alliance deductible from paid salary.—Held:* That an

REVENUE—*Continued*

employee bound to pay dues and assessments to an alliance which provides his job is entitled to deduct from his income such payments for purposes of income tax, and it is immaterial whether such expenditure is prescribed by the charter or by-laws of a society or by a contract or agreement between the employer and a union. (*Bond* v. *Minister of National Revenue* (1946) Ex. C.R. 577 followed). JOSEPH A. COOPER v. MINISTER OF NATIONAL REVENUE.... **275**

7.——*Income—Income tax—Income War Tax Act, R.S.C. 1927, C. 97, s. 3—Taxable income—Income or capital gain—Profits acquired in promotion of amalgamation of several companies—Profits gained through resale of shares acquired under option are assessable for income tax—Sale of shares the essential feature of business carried on by appellant—Isolated transaction may be a trading or business one—Appeal dismissed.*—Appellant effected an amalgamation of several mining companies under one new company after having found a purchaser for an initial block of shares which the appellant contracted to take up from the new company. By successive option agreements the appellant took up further blocks of shares, in each case having previously completed arrangements for the resale thereof at a profit. The appellant was assessed for income tax on the profit made by him on the several sales of the company's stock. He appealed from such assessment to this Court. The Court found that the operations carried on by the appellant were of the same kind and carried on in the same way as those which are characteristic of transactions normally carried on by a mining promoter and underwriter. The purchase and resale of the shares was not unconnected with the business of a mine promoter but was an essential part thereof. *Held:* That the sale of the shares which gave rise to the profits now assessed to the appellant was not merely incidental to but in reality was the essential feature of the whole business carried on by the appellant; it was a gain made in an operation of business in carrying out a scheme for profit making and, therefore, properly assessable for income tax. 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. WILLIAM JOHN MCDONOUGH v. MINISTER OF NATIONAL REVENUE.... **300**

8.——*Succession duty—Dominion Succession Duty Act, 4-5 Geo. VI, C. 14, s. 3(1) (g) as amended by 6-7 Geo. VI, C. 25, s. 3—Death benefits paid by a company to widow of one of its employees under a plan set up for that purpose—Beneficial interest in death benefits not accruing nor arising in favour of widow by survivorship or otherwise—Payment to widow purely voluntary on the part of company—No contractual relationship between employee and company as to payment of death benefits—Widow has no legal right to payment of death benefits—Payment so made not of a superannuation or pension character—Such payment outside the scope of the original section 3(1) (g) of the Act and its amendment—Succession—Appeal allowed.*—When M., an employee of the Bell Telephone Company of Canada, died in 1946 the Company paid to his wife, the appellant, a sum of money under its "Plan for Employees' Pensions, Disability Benefits and Death Benefits" to which neither the deceased nor any other employee contributed any money, the Company providing for all the expenses of its operation. That payment was not included in the succession duty declaration. It was, however, incorporated into the assessment made by the respondent on the ground that the disposition of property made in that manner was a dutiable succession under the Dominion Succession Duty Act, 4-5 Geo. VI, C. 14 (1940-41), as amended. The appeal was taken from that part of the assessment only. *Held:* That no "beneficial interest" (as that term is used in subsection 3(1) *(g)* of the Act) in death benefits accrued or arose in favour of the appellant by survivorship or otherwise upon the death of her husband. *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1947) 2 A.E.R. 78; *Re Williamson, Williamson et al* v. *Treasurer of Ontario* (1942) 3 D.L.R. 736 referred to. 2. That the payment to appellant was purely voluntary on the part of the company and outside the scope of the original subsection 3(1) *(g)* of the Act. 3. That no contractual relationship existed between the deceased and the Company as to the payments of death benefits. 4. That the appellant had no right in law to compel the Company to pay her the death benefits. 5. That the payment so made to appellant is not of a superannuation or pension character and, therefore, is not brought into tax by reason of the added part of subsection 3(1) *(g)* of the Act. DOROTHY J. MCDOUGALL v. MINISTER OF NATIONAL REVENUE.... .... **314**

9. ——*Income tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48(3), 71—The Income Tax Act, S. of C. 1948, c. 52, ss. 48(1), 108—Interpretation Act, R.S.C. 1927, c. 1, 21(2), 21(3)—Words not to be read into an Act without clear need or reason—Proceedings under section 71 not prevented by pending appeal against assessment—Use of different words in amending Act not necessarily indicative of change of meaning of amended Act—Doubtful whether an Act may be construed by reference to a subsequent enactment.* The applicant applied for an order setting aside a certificate registered under sec. 71 of the Income War Tax Act and all proceedings taken thereon on the ground that his appeals against the assessments on which the certificate was based were still pending and that sec. 71 did not

REVENUE—*Continued*

authorize the registration of a certificate or the issue of a writ in such circumstances. In the alternative, he applied for an order staying further proceedings on the certificate and the writ of *fieri facias* issued thereunder. *Held:* That where the words of a section are clear and precise no limitation or proviso should be read into it unless there is clear need or reason for so doing. 2. That proceedings may be taken under section 71 of the Income War Tax Act, notwithstanding the fact that the taxpayer has taken an appeal or objection against the assessment and such appeal or objection is still outstanding. 3. That the unpaid amount which section 48(3) orders the taxpayer governed by it to pay forthwith after the notice of assessment is sent to him may properly be certified under section 71 after two months have elapsed from the date of mailing the notice of assessment, whether an appeal or objection against the assessment has been taken or not. 4. That it does not follow as a matter of course that in every case where Parliament has used different words in an amending Act from those used in the amended one that a difference in meaning was intended; there are many cases where the amending enactment although couched in different terms from the amended one is, without saying so, merely declaratory of its true meaning. 5. That it is doubtful in the case of a statute to which the Interpretation Act applies whether resort may be had in aid of its construction to the terms of a subsequent amendment. JACOB JOHN MORCH v. MINISTER OF NATIONAL REVENUE.............................. 327

10.——*Succession Duty—Dominion Succession Duty Act 4-5 Geo. VI, c. 114, s. 31—The Conveyancing and Law of Property Act R.S.O. 1937, c. 152, s. 24—Disclaimer of power to encroach upon capital of an estate—Liability for succession duty determined by lex domicilii of deceased—Appeal from assessment for succession duty allowed.*—Appellant was bequeathed the income from an estate and the power to use part or all of the capital of such estate. Appellant by instrument in writing disclaimed and refused to accept the portion of the legacy authorizing him to encroach upon the capital of the said estate, or in any way to exercise such power of encroachment. Appellant was assessed for succession duties on the basis that the legacy to him constituted a gift of the entire residue of the estate. He appealed to this Court from such assessment. The Court found that appellant did not exercise the power to encroach upon the capital nor did he intend to do so. Nor did he by acquiescence accept the power. *Held:* That the appellant was given a gift of the income and the power to use the capital and by virtue of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 24, he had the right to disclaim the power

REVENUE—*Continued*

to use the capital, and the effect of the execution of the disclaimer by appellant was to void *ab initio* the power of appointment and place him as regards his liabilities, burdens and rights in the same position as if no gift had been made to him. 2. That the law of the province in which the deceased was domiciled applies and the provisions of The Conveyancing and Law of Property Act of Ontario are applicable. EDWIN COMSTOCK COSSITT v. MINISTER OF NATIONAL REVENUE................. 339

11.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 3(b), 5(k)—An Act respecting the Revised Statutes of Canada, S. of C. 1924, c. 65, ss. 3, 8—"Annuities or other annual payments received under the provisions of any contract"—Ambiguity in the Revised Statutes, 1927—Enumerated paragraphs of s. 3 not statements of sources of income—Exemption granted by s. 5(k) confined to income from annuity contracts like those with Dominion Government.*—The appellant sold most of his assets to an incorporated company in consideration of one dollar and several covenants by it, one of which was to pay him an annuity during his lifetime of $1,000 per month. The income tax assessments for the years in review included the amounts of the payments thus received by the appellant in his taxable income. On his appeals from the assessments he contended that he was taxable only in respect of that part of the annuity that was truly income and, alternatively, that he was entitled to an exemption in respect thereof. *Held:* That if an ambiguity appears in the Revised Statutes of 1927 which did not exist in the Act repealed thereby it should be resolved by adopting the meaning that is consistent with that of the repealed Act. 2. That the enumerated paragraphs of section 3 are not statements of sources of income from which only the annual profit or gain is taxable; the subject matter of each is included as an item of taxable income in the definition thereof given by the section. 3. That in order to have the benefit of an exemption in respect of the income from an annuity contract entered into prior to June 25, 1940, under paragraph *(k)* of section 5 as enacted in 1940, the taxpayer claiming such exemption must show that the contract under which he received his annuity was an annuity contract like the annuity contracts with the Dominion Government. 4. That even if it were conceded that the appellant's contract was an annuity contract he has wholly failed to show that it was an annuity contract like the annuity contracts issued by the Dominion Government. 5. That the appellant's contract was not an annuity contract but a contract for the sale and purchase of his assets. JAMES E. WILDER v. MINISTER OF NATIONAL REVENUE.................. 347

REVENUE—*Continued*

12.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 5(1) (a)—Allowance for exhaustion of coal mine—Allowance made by Minister and apportionment between lessor and lessee where no agreement exists is final and conclusive—Court has no power to review such apportionment and determination — Appeals dismissed. — Held:* That where there is no agreement between a lessor and a lessee of a mine as to the apportionment between them of the allowance for exhaustion established by virtue of s. 5(1) *(a)* of the Income War Tax Act, R.S.C. 1927, c. 97, as it read for the taxation years 1939, 1940 and 1941, such lessor and lessee must accept the apportionment of such allowance as made by the Minister of National Revenue and from such apportionment there is no appeal. 2. That the Minister has *full* power to make apportionment and his determination is *conclusive* and the Court has no power to review such apportionment as he has made. JOGGINS COAL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE.............. 361

13.——*Income—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(h) and 51—Profits of non-profit company distributed as dividends on liquidation attract income tax—S. 51 of Income War Tax Act includes liquidator—Onus on taxpayer claiming exemption to bring himself within the Act—Appeal dismissed.*—Appellant, incorporated in 1928 as a non-profit company, never declared nor paid any dividends from that date until 1942 when a liquidator was appointed for the purpose of winding-up the appellant under the provisions of the Companies Winding-up Act of Saskatchewan. Appellant paid no income tax during those years. The liquidator made two distributions of the assets of the appellant, in 1943 and in 1944. These assets consisted of paid up capital and money on deposit in a bank. In 1947 the appellant was assessed for income tax for the years 1940 and 1941 and from such assessment appealed to this Court. The Court found that the objects for which the appellant was incorporated as set forth in the Memorandum of Association, were not solely for civic improvement, recreation purposes or any other of the purposes specified in s. 4*(h)* of the Income War Tax Act, and that it carried on an enterprise which was beyond the scope of the functions of a club coming under that section of the Act. *Held:* That the profits made by appellant and paid out as dividends when the club was liquidated are subject to income tax. 2. That s. 51 of the Income War Tax Act includes a liquidator as well as a trustee in bankruptcy or assignee. 3. That the onus rests on one claiming exemption from income tax under a provision of the statute to bring himself clearly within the words of such exemption. MOOSE JAW FLYING CLUB LTD. v. MINISTER OF NATIONAL REVENUE.......... 370

REVENUE—*Concluded*

14.——*Excess Profits Tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, ss. 3, 7(b)—Whether profits of a commercial traveller representing several business concerns exempt from liability to excess profits tax—"Carrying on business"—Meaning of word "profession".*—The appellant is a commercial traveller residing at London, Ontario. During the years in dispute he represented several mills or business houses and obtained orders for their merchandise. He was paid solely by commissions and paid his own expenses. He was assessed to excess profits tax under the Excess Profits Tax Act, 1940, as amended, but contended that he was not carrying on business within the meaning of the Act but was merely an employee of the commercial concerns for whom he obtained orders and, alternatively, that his profits were exempt as being those of a profession within the meaning of section 7*(b)* of the Act. *Held:* That the appellant's activities as a commercial traveller constituted the carrying on of a business within the meaning of the Excess Profits Tax Act, 1940, and that his profits therefrom were subject to excess profits tax under it. 2. That the occupation of a commercial traveller is not a profession within the meaning of section 7*(b)* of the Act. FRED JAMES BLACKWELL v. MINISTER OF NATIONAL REVENUE.......... 391

RIGHT TO COMPENSATION FOR DAMAGE BY SEVERANCE.

See EXPROPRIATION, No. 2.

RIGHT TO COMPENSATION FOR LOSS BY SEVERANCE.

See EXPROPRIATION, No. 1.

RIGHT TO LIMITATION OF LIABILITY.

See SHIPPING, No. 1.

SALE OF SHARES THE ESSENTIAL FEATURE OF BUSINESS CARRIED ON BY APPELLANT.

See REVENUE, No. 7.

S. 51 OF INCOME WAR TAX ACT INCLUDES LIQUIDATOR.

See REVENUE, No. 13.

SHIP "AT HOME" STRUCK BY A BARGE.

See SHIPPING, No. 1.

SHIPPING.

1. CANADA SHIPPING ACT 1934, c. 44, s. 649. No. 1.
2. DAMAGE TO CARGO CAUSED BY NEGLIGENCE OF VESSEL'S OFFICERS. No. 2.
3. DAMAGES. No. 1.

SHIPPING—*Concluded*

4. Liability calculated on combined tonnage of tug and barge. No. 1.
5. "Management" of the ship. No. 2.
6. Right to limitation of liability. No. 1.
7. Ship "at home" struck by a barge. No. 1.
8. The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49. No. 2.
9. Vessel owner relieved from liability. No. 2.

SHIPPING—*Ship "at home" struck by barge — Damages — Liability calculated on combined tonnage of tug and barge—Right to limitation of liability—Canada Shipping Act 1934, c. 44, s. 649.*—Plaintiff ship while lying alongside the inner berth of the terminal dock in the harbour of Vancouver, B.C., and considered by the Court to be "at home" and entitled to assume she was in a place of safety, was struck by the corner of a barge which was being placed alongside her by defendant tug. The action is to recover compensation for the damages sustained by plaintiff ship. *Held:* That the owners of the tug and barge are entitled to limit their liability under the provisions of the Canada Shipping Act, 1934, 24-25 Geo. V, c. 44, s. 649. 2. That the liability of the owners of defendant tug should be calculated on the combined tonnage of tug and barge. The Owners of the M.S. *Pacific Express* v. The Tug *Salvage Princess* 230

2.——*Damage to cargo caused by negligence of vessel's officers—Vessel owner relieved from liability—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49—"Management" of the ship.*—In an action by plaintiffs, the cargo owners, for damages alleged to have resulted from injury by sea water done to wood pulp sulphite carried by a steamship owned by defendant Canadian Pacific Railway Company and at the time operated under the terms of an agreement with the plaintiff, Acer, McLernon Limited, the Court found that the damage to the cargo in question could have been prevented by reasonable investigation and appropriate action on the part of the vessel's officers and crew. The claim is for damage resulting after the beaching of the vessel due to proper measures not having been taken to safeguard the cargo then undamaged. *Held:* That though the failure to pump the water out of the ship efficiently with all the facilities at hand damaged further cargo it was essentially a failure in a matter that vitally affected the management of the ship. 2. That the shipowner is relieved from responsibility by virtue of Article IV, Sec. 2*(a)* of the Schedule to The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49. Kalamazoo Paper Company et al v. Canadian Pacific Railway Company et al 287

SIMILARITY OF WARES.
See Trade Mark, No. 3.

SIMILARITY OF WORD MARKS.
See Trade Mark, No. 3.

STATUTORY ACTION FOR UNFAIR COMPETITION SUBSTITUTE FOR FORMER ACTION FOR PASSING OFF.
See Trade Mark, No. 1.

SUBJECT MATTER.
See Patents, No. 2.

SUCCESSION.
See Revenue, No. 8.

SUCCESSION DUTY.
See Revenue, Nos. 8 and 10.

SUCH PAYMENT OUTSIDE THE SCOPE OF THE ORIGINAL SECTION 3 (1) (G) OF THE ACT AND ITS AMENDMENT.
See Revenue, No. 8.

SUPPLIANTS NOT ENTITLED TO SUBSIDY.
See Crown, No. 2.

TAXABLE INCOME.
See Revenue, No. 7.

TEST OF FIRST IMPRESSION IN DETERMINATION OF SIMILARITY OF TRADE MARKS.
See Trade Mark, No. 1.

TEST OF SIMILARITY IN SOUND OF WORD MARKS A MATTER OF FIRST IMPRESSION.
See Trade Mark, No. 3.

THE CONVEYANCING AND LAW OF PROPERTY ACT R.S.O. 1937, C. 152, S. 24.
See Revenue, No. 10.

THE EXCESS PROFITS TAX ACT, 1940, S. OF C. 1940, C. 32 AS AMENDED, SS. 3, 7(B).
See Revenue, No. 14.

THE EXCESS PROFITS TAX ACT, 1940, S. OF C. 1940, C. 32, S. 7(B).
See Revenue, No. 1.

THE EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, SS. 19(C), 50A.
See Crown, No. 4.

THE EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, S. 32.
See Crown, No. 3.

THE INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 48(1), 108.
See REVENUE, No. 9.

THE OPTOMETRY ACT, R.S.S. 1940, C. 221, SS. 2(1), 29(1).
See REVENUE, No. 1.

THE UNFAIR COMPETITION ACT, 1932, S. of C. 1932, C. 38, SS. 2(K), 2 (L), 2(O), 26(C), 38.
See TRADE MARK, No. 3.

THE UNFAIR COMPETITION ACT, 1932, S. OF C. 1932, C. 38, SS. 2 (K), 3(C), 6, 11(B).
See TRADE MARK, No. 1.

THE WATER CARRIAGE OF GOODS ACT, 1936, 1 ED. VIII, C. 49.
See SHIPPING, No. 2.

TRADE MARK.

1. ARTICLE OF MANUFACTURE MAY NOT BE THE SUBJECT OF A REGISTERED DESIGN. No. 2.
2. "CLEANX". No. 3.
3. "CLEAREX". No. 3.
4. "CLECO". No. 1.
5. "CLECO-COLA". No. 1.
6. "COCA-COLA". No. 1.
7. DEFINITION OF INFRINGEMENT. No. 1.
8. DISTINCTIVENESS OF WORD MARK DEPENDENT ON SOUND OR IDEA, NOT ON FORM. No. 3.
9. IMPORTANCE OF EVIDENCE OF ACTUAL CONFUSION. No. 1.
10. INDUSTRIAL DESIGN. No. 2.
11. INFRINGEMENT. NOS. 1 AND 2.
12. INFRINGEMENT OF DESIGN MARK BY WORD MARK. No. 1.
13. INTRODUCTION OF TRADE MARK VARIATIONS INTO OLD DESIGN CANNOT MAKE IT NEW OR ORIGINAL. No. 2.
14. NO PASSING-OFF UNLESS A PERSON WITH REASONABLE APPREHENSION AND PROPER EYESIGHT WOULD BE DECEIVED. No. 2.
15. NOVELTY AND ORIGINALITY REQUIRED TO RENDER VALID REGISTRATION OF A DESIGN. No. 2.
16. ONUS OF PROVING NO REASONABLE PROBABILITY OF DECEPTION ON APPLICANT FOR REGISTRATION OF TRADE MARK. No. 3.
17. PASSING-OFF. NOS. 1 AND 2.
18. REASONABLE APPREHENSION OF LIKELIHOOD OF CONFUSION A QUESTION OF FACT FOR THE COURT. No. 1.
19. SIMILARITY OF WARES. No. 3.
20. SIMILARITY OF WORD MARKS. No. 3.
21. STATUTORY ACTION FOR UNFAIR COMPETITION SUBSTITUTE FOR FORMER ACTION FOR PASSING OFF. No. 1.

TRADE MARK—*Continued*

22. TEST OF FIRST IMPRESSION IN DETERMINATION OF SIMILARITY OF TRADE MARK. No. 1.
23. TEST OF SIMILARITY IN SOUND OF WORK MARKS A MATTER OF FIRST IMPRESSION. No. 3.
24. THE UNFAIR COMPETITION ACT, 1932, S. OF C. 1932, c. 38, ss. 2 *(k)*, 2 *(l)*, 2 *(o)*, 26 *(c)*, 38. No. 3.
25. THE UNFAIR COMPETITION ACT, 1932, S. OF C. 1932, c. 38, ss. 2 *(k)*, 3 *(c)*, 6, 11 *(b)*. No. 1.
26. TRADE MARK AND DESIGN ACT, R.S.C. 1927, c. 71, ss. 38, 34, 35 AND 39.
27. UNFAIR COMPETITION. No. 1.
28. USE OF MARK AS A TRADE MARK AND SIMILARITY OF MARK ESSENTIAL CONDITIONS OF INFRINGEMENT. No. 1.

TRADE MARK—*"Coca-Cola"—"Cleco"—"Cleco Cola"—Infringement—Unfair competition—Passing off—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 3(c), 6, 11(b)—Use of mark as a trade mark and similarity of mark essential conditions of infringement—Definition of infringement—Test of first impression in determination of similarity of trade marks—Importance of evidence of actual confusion—Infringement of design mark by word mark—Statutory action for unfair competition substitute for former action for passing off—Reasonable apprehension of likelihood of confusion a question of fact for the Court.*—The plaintiff complained that the defendant had infringed its trade mark "Coca-Cola" by using the words "Cleco Cola" as a trade mark in association with one of its beverages and that the defendant had directed public attention to its wares in such a way that it might be reasonably apprehended that its course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff. *Held:* That the use of words or a mark cannot constitute infringement of a registered trade mark unless there has been a trade mark use of the said words or mark. Only use as a trade mark can infringe. 2. That if a person has used words or a mark in the way in which a trade mark is ordinarily used it is not a defence in an infringement action brought against him to say that he did not intend the use of the words or mark as a trade mark. 3. That the words "Cleco Cola" were used by the defendant as a trade mark to distinguish the beverage to which they were applied as its product. 4. That it is not permissible to break up trade marks into so-called distinctive and so-called common parts with a view to emphasizing the difference in the distinctive ones and thus demonstrating that the marks are not similar. A trade mark must be looked at in its totality, rather than with reference to its component parts. *The British Drug Houses Ltd.* v. *Battle Pharmaceuticals* (1944) Ex. C.R.

TRADE MARK—*Continued*
239, (1946) S.C.R. 56 followed. 5. That the answer to the question whether trade marks are similar must nearly always depend on first impression. *Aristoc Ld.* v. *Rysta Ld.* (1945) A.C. 68 at 86 followed. 6. That while evidence of actual confusion may not be necessary to the determination of the likelihood of confusion through the use of similar marks, and is not conclusive of such likelihood, it is clearly helpful to such determination. 7. That where a design mark consists of words written in a particular form it can be infringed by the use of a word mark containing a word or words similar to the words in the design mark. 8. That the cause of action under section 11 of The Unfair Competition Act, 1932, is the statutory substitute for the former cause of action for passing-off. Everything that would amount to a passing-off in England would fall within the prohibitions of the section. It may even be wider in scope. 9. That it is for the Court to decide whether there is reasonable apprehension that the defendant's course of conduct was likely to create confusion in Canada between its wares and those of the plaintiff. The question is really a jury question. THE COCA-COLA COMPANY OF CANADA, LIMITED, v. BERNARD BEVERAGES LIMITED 119

2.——*Industrial designs—Trade Mark and Design Act, R.S.C. 1927, c. 71, ss. 31, 34, 35 and 39 — Infringement — Passing-off — Article of manufacture may not be the subject of a registered design—Novelty and originality required to render valid registration of a design—Introduction of trade variations into old design cannot make it new or original—No passing-off unless a person with reasonable apprehension and proper eyesight would be deceived.*—The action is one for infringement by defendant Reliable Plastics Company Limited, of plaintiff's registered industrial designs covering children's toys and kitchen utility houseware. Plaintiff alleges that defendant has manufactured and sold in Canada toys for which plaintiff holds registered industrial designs and has passed off these goods as the goods of the plaintiff. Denying infringement and passing-off the defendant also attacks the validity of plaintiff's industrial designs and asks that they be expunged from the register. The Court found that each of the registrations and applications therefor was for the article of manufacture itself and not for the ornamenting of such articles; and that the designs in question lacked novelty in that they were not new or original. The Court also found that in shape, form or get-up, the various articles of the defendant are not imitations of the plaintiff's toys, nor do they closely resemble them. *Held:* That an industrial design under the Trade Mark and Design Act was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. 2. That since the registered designs of plaintiff lacked novelty they were not registrable. 3. That the introduction of trade variations into an old design cannot make it new or original. 4. That in a passing-off action it is necessary for the plaintiff to establish that he has selected a novel design as a distinguishing feature of his goods and that such goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that the defendant's articles are like his and in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived. RENWAL MANUFACTURING COMPANY, INC. v. RELIABLE TOY COMPANY, LIMITED ET AL.. 188

3.——*"Cleanx"—"Clearex"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38 ss. 2(k), 2(l), 2 (o), 26(c), 38—Similarity of word marks—Distinctiveness of word work dependent on sound or idea, not on form—Test of similarity in sound of word marks a matter of first impression—Similarity of wares—Onus of proving no reasonable probability of deception on applicant for registration of trade mark.*—Appellant applied to register "Clearex" as a word mark for use as applied to "liquid glass cleaners". Objection to the proposed registration was taken by the respondent which had obtained the registration of "Cleanx" as a specific trade mark for use as applied to "cleaning compounds and polishing compounds for floors, metals and the like of all descriptions" and the Registrar refused the application under section 38 of The Unfair Competition Act, 1932. From such refusal the appellant appealed. *Held:* That the appeal which the form of a word or a combination of words may make to the eye must be excluded from consideration in determining whether such word or combination has the essential quality of distinctiveness, without which it cannot be a trade mark at all. The distinctiveness, if there is any, must be in the idea or sound suggested by the sequence of the letters and/or numerals in the mark and their separation into groups, and not in their form. The distinctiveness must thus be one of sound or idea and not one of form. The appeal which the form may make to the eye cannot be a test. 2. That if two work marks are to be held similar within the meaning of section 2 *(k)* of the Act it can only be by reason of the similarity of their sound or the idea suggested by them, since their form can have no bearing on the question. 3. That the answer to the question whether two word marks are confusingly similar in sound must nearly always depend on first impression. *Aristoc Ld.* v. *Rysta Ld.* (1945) A.C. 68 at 86 followed. 4. That "Clearex" and "Cleanx"

TRADE MARK—*Concluded*
are confusingly similar in sound and idea within the meaning of section 2*(k)* of the Act. 5. That the wares for which the registration of "Clearex" was sought are similar to those for which "Cleanx" was registered within the meaning of section 2*(l)* of the Act. 6. That the onus of proving that there is no reasonable probability of deception is on the applicant for registration of a trade mark. UNION OIL COMPANY OF CALIFORNIA v. THE REGISTRAR OF TRADE MARKS ET AL.......... 397

TRADE MARK AND DESIGN ACT, R.S.C. 1927, C. 71, SS. 31, 34, 35 AND 39.
See TRADE MARK, No. 2.

UNFAIR COMPETITION.
See TRADE MARK, No. 1.

UNWILLINGNESS OF OWNER TO SELL IRRELEVANT.
See EXPROPRIATION, No. 1.

USE OF DIFFERENT WORDS IN AMENDING ACT NOT NECESSARILY INDICATIVE OF CHANGE OF MEANING OF AMENDED ACT.
See REVENUE, No. 9.

USE OF MARK AS A TRADE MARK AND SIMILARITY OF MARK ESSENTIAL CONDITIONS OF INFRINGEMENT.
See TRADE MARK, No. 1.

UTILITY. *See* PATENTS, No. 2.

VALUE OF PROPERTY IN USE NOT A TEST OF VALUE.
See EXPROPRIATION, No. 1.

VALUE OF PROPERTY TO OWNER MEANS REALIZABLE MONEY VALUE.
See EXPROPRIATION, No. 1.

VESSEL OWNER RELIEVED FROM LIABILITY.
See SHIPPING, No. 2.

WHETHER PROFITS OF A COMMERCIAL TRAVELLER REPRESENTING SEVERAL BUSINESS CONCERNS EXEMPT FROM LIABILITY TO EXCESS PROFITS TAX.
See REVENUE, No. 14.

WHETHER PROFITS OF A PROFESSION DEPENDENT ON PERSONAL QUALIFICATIONS A QUESTION OF FACT.
See REVENUE, No. 1.

WHETHER PROFITS OF OPTOMETRIST EXEMPT FROM LIABILITY TO EXCESS PROFITS TAX.
See REVENUE, No. 1.

WIDOW HAS NO LEGAL RIGHT TO PAYMENT OF DEATH BENEFITS.
See REVENUE, No. 8.

WORDS NOT TO BE READ INTO AN ACT WITHOUT CLEAR NEED OR REASON.
See REVENUE, No. 9.

WORDS AND PHRASES.
"Annuities or other annual payments received under the provisions of any contract". *See* JAMES E. WILDER v. THE MINISTER OF NATIONAL REVENUE.................. 347
"At home". *See* THE OWNERS OF THE M.S. *Pacific Express* v. THE TUG *Salvage Princess*.......................... 230
"Authorized field representative". *See* ELPHINSTONE MATHER RUSSELL v. THE MINISTER OF NATIONAL REVENUE.... 91
"Carrying on business". *See* BLACKWELL v. THE MINISTER OF NATIONAL REVENUE 391
"Cleanx". *See* UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS........................... 397
"Clearex". *See* UNION OIL COMPANY OF CALIFORNIA v. REGISTRAR OF TRADE MARKS........................... 397
"Cleco". *See* THE COCA-COLA COMPANY OF CANADA LIMITED v. BERNARD BEVERAGES LIMITED.......................... 119
"Cleco-Cola". *See* THE COCA-COLA COMPANY OF CANADA LIMITED v. BERNARD BEVERAGES LIMITED................ 119
"Coca-Cola". *See* THE COCA-COLA COMPANY OF CANADA LIMITED v. BERNARD BEVERAGES LIMITED................ 119
"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". *See* JOSEPH A. COOPER v. THE MINISTER OF NATIONAL REVENUE.... 275
"Income". *See* JOSEPH A. COOPER v. THE MINISTER OF NATIONAL REVENUE.... 275
"Losses incurred". *See* LUSCAR COALS LIMITED v. THE MINISTER OF NATIONAL REVENUE......................... 83
"Losses sustained". *See* LUSCAR COALS LIMITED v. THE MINISTER OF NATIONAL REVENUE......................... 83
"Management". *See* KALAMAZOO PAPER COMPANY ET AL v. CANADIAN PACIFIC RAILWAY COMPANY................. 287
"Manufacturer or producer". *See* HIS MAJESTY THE KING v. REUBEN SHORE 225
"Net". *See* JOSEPH A. COOPER v. THE MINISTER OF NATIONAL REVENUE.... 275
"Personnel". *See* ELPHINSTONE MATHER RUSSELL v. THE MINISTER OF NATIONAL REVENUE......................... 91
"Place". *See* JOY OIL COMPANY LIMITED AND JOY OIL LIMITED v. HIS MAJESTY THE KING............................. 136
"Profession". *See* FRANK C. BOWER v. THE MINISTER OF NATIONAL REVENUE 61
"Profession". *See* FRED JAMES BLACKWELL v. THE MINISTER OF NATIONAL REVENUE 391