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Exchequer Court of Canada

RALPH M. SPANKIE, K.C.
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1949

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

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

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

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

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.

DEPUTY DISTRICT JUDGES:

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

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

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

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

The Honourable STUART S. GARSON, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Honourable JOSEPH JEAN, K.C.

CORRIGENDA:

P. 423 Footnote should read (1) (1946) Ex. C.R. 47.
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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA	PLAINTIFF,	1947 Nov. 13 Nov. 29
AND			
CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY	DEFENDANT.		

Revenue—Special War Revenue Act R.S.C. 1927, c. 179, s. 13(f), 14(2)—"Rebates"—"Dividends"—"Cancellation of policies"—Insurance company operating as mutual company distributing money to policyholders out of surplus and revenue derived from sources other than premiums is paying a dividend and not distributing a rebate.

The Special War Revenue Act, R.S.C. 1927, c. 179, s. 13(*f*), as in force in the year 1944, provided that "net premiums" in the case of a mutual insurance company means "the gross premiums received or receivable by the company or paid or payable by the insured, less the rebates and return premiums paid on the cancellation of policies". Defendant is a Fire and Casualty Insurance Company operating as a mutual company with no shareholders. Each policyholder, while his policy is in force, is a member. The premiums are fixed and are paid in cash It does not carry on the business of life insurance and does not carry on business on the premium deposit plan It filed its statement as required by the Special War Revenue Act, for 1944, and claimed a reduction of $19,502 82 for what it described as "less rebates to policyholders of unabsorbed premium refunds (dividends)". The Crown claims the tax on the said $19,502 82.

In 1944 the company had no operating surplus and the money paid to a policyholder was paid only after taking into consideration revenue from other sources, including income from surplus and reserves to which many of the policyholders who received the payments in 1944 contributed little, if anything. The money was not paid on the cancellation of policies.

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Held: That the money distributed by defendant to its policyholders in 1944 was not a rebate; it was a dividend and defendant was not entitled to deduct the distribution from its gross premiums.

2. That the only deductions which may be made by the defendant from its net premiums are those moneys returned to policyholders upon the cancellation of the policies, either by the insured or by the insurer, since the words "paid on the cancellation of policies" in s 13(*f*) of the Special War Revenue Act relate not only to "returned premiums", but also to "rebates", there being no material distinction between them.

Information exhibited by the Attorney General of Canada to recover from the defendant the balance of tax levied upon defendant by virtue of s. 14(2) of the Special War Revenue Act.

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

J. W. Pickup, K.C. for plaintiff.

Hon. S. A. Hayden, K.C. for defendant.

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

CAMERON J. now (November 29, 1947) delivered the following judgment:

In these proceedings the plaintiff claims from the defendant the sum of $585.08, said to be the balance due in respect of the 3 per cent tax levied by section 14 (2) of the Special War Revenue Act, R.S.C. 1927, c. 179, and amendments thereto, for the year 1944. The defendant is a Fire and Casualty Insurance Company incorporated under the laws of the State of Ohio, carrying on business in the United States and Canada. It is a Mutual Company having no shareholders but each policyholder, while his policy is in force, is a member. It does not carry on the business of life insurance, nor does it carry on its business on the premium deposit plan. Its premiums are fixed and are paid in cash.

The defendant duly filed its statement for the year 1944 (ex. 1) and paid the tax on what it deemed was its actual net premiums. In the printed statement which it was required to file (ex. 1) it inserted a special clause—2a—

claiming a reduction of $19,502.82 for what is described as "less rebates to policyholders of unabsorbed premium refunds (dividends)". It is in respect of this sum that the dispute arises between the parties.

By section 4, chapter 32, of the Statutes of 1942, a former section 13 (*f*), defining "net premiums", was repealed and for it was substituted a new section 13(*f*) as follows:

"net premiums" means, in the case of a company transacting life insurance, the gross premiums received by the company other than the consideration received for annuities, less premiums returned and less the cash value of dividends paid or credited to policyholders; and, in the case of any other company, the gross premiums received or receivable by the company or paid or payable by the insured less the rebates and return premiums paid on the cancellation of policies: Provided that in the case of a mutual company which carries on business on the premium deposit plan and in the case of an exchange "net premiums" means the actual net cost of the insurance to the insured during the taxation period together with interest on the excess of the premium deposit over such net cost at the average rate earned by the company on its funds during the said period

This section was in effect for the year 1941 and remained unchanged until it was repealed as of December 31, 1946, and another section substituted. For the year 1944, therefore, "net premiums" was defined as above. That part of the section which in 1944 was applicable to the defendant company was, therefore:

Net premiums means the gross premiums received or receivable by the company or paid or payable by the insured, less the rebates and return premiums paid on the cancellation of policies.

It is common ground that the sum of $19,502.82 was not paid on the cancellation of policies. To succeed, therefore, the defendant must establish two things: (1) that the sums so paid were "rebates" and; (2) that the words "paid on the cancellation of policies" have no application to the word "rebates"; for, if they do, it follows that not having been "rebates paid on the cancellation of policies" the defendant is not entitled to deduct them.

The evidence of Mr. Millar, Chief Agent in Canada of the defendant company, indicates the nature of the payments to policyholders. His entire examination for discovery was read into the record by counsel for the plaintiff and, with certain exhibits filed by both parties, constitutes all the evidence. It is shown that payments are made only

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to policyholders whose policies expire in the quarter for which a specific "dividend" has been declared by resolution of the directors. Those who have ceased to be policyholders, and also holders whose insurance does not expire in that quarter, receive no benefits. The "dividend" is paid out of the reserves which the company has built up over the years.

In reply to a question as to how the amount to be paid to policyholders at any particular time is arrived at, Mr. Millar said:

> Well, of course the determination by the Board of Directors of the dividend is naturally, as in any business, based upon the financial condition as of a given time. The Board of Directors some years ago set up, very much as the Life Companies, a reserve for dividends as shown in our statement here, which is the latest statement, a voluntary reserve for dividends. That is the quarterly dividend which the Board of Directors sanction, so every quarter they determine through their Statistical Department the earned dividends for a given term, either one year or three years, whichever it happens to be. They determine the amount of dividends earned and set up this voluntary reserve for dividends.

Mr. Millar further stated that the Board determines the percentage or rate which applies for any class of insurance. They know from their experience in the business the loss ratios on a given type of business and naturally the loss ratio developed by this type of business has a bearing upon the amount of the dividend rate that they would declare on that type of business. No difference is made between policies written in Canada and those written in the United States.

The following is a resolution passed by the Board on August 18, 1944, and is typical of all such resolutions in respect of the year 1944.

> RESOLVED, that on all policies expiring during the months of March, April and May, 1944, and so long as the condition of the Company shall in the judgment of the Executive Committee warrant and until further action of the Board, there shall be returned to policyholders unabsorbed premiums or dividends at the percentage of the premium paid for such policies as indicated in the schedule below, unless by reason of special, direct or reinsurance contracts or treaties entered into whereby a return of the unabsorbed premium shall be other than the indicated percentage of the premium paid for such policies shown in the schedule:

Inland Marine	15%
Automobile	20%
Lumber and Woodworking Risks	20%
All Other	25%

The following are extracted from the by-laws of the company:

Article 11. (1) Participating policyholders of this company shall participate in the earnings in such manner and to such an extent as may be determined by the Board of Directors in its absolute discretion from time to time. The action of the Board of Directors in the distribution of unabsorbed premiums shall be conclusive and binding on the members of the company.

(2) For the purpose of determining unabsorbed premiums to participating policyholders, the business of the company may be divided into classifications, and unabsorbed premiums of varying amounts may be declared on each classification, or these unabsorbed premiums may be retained by the company in cases where the policy is cancelled at the request of the policyholder.

All policies issued in Canada are said to be participating policies. But I have been unable to find anything in exhibit 9 (which is a copy of fire policies issued in 1944) which would indicate that the policyholders are entitled as of right to a return of any part of the premium. The matter is entirely discretionary with the directors. It is apparent, also, that the directors, in determining what distribution is to be made, take into consideration the earnings from all sources, including income from very substantial reserves and surplus, as well as the operating loss or profit for the year in question. Mr. Millar stated that the "dividend" was paid out of the reserve which the company had built up over the years.

In 1944 there was a very substantial operating loss on business in Canada (as also in 1943) and it does not appear whether there was an operating surplus in the business in the United States. But a "dividend" of 25 per cent in respect of fire policies was declared for the entire year. In the resolution of the Board, as quoted above, it is to be noted that "there shall be returned to policyholders unabsorbed premiums or dividends at the percentage of the premiums paid for such policies".

"Rebates" is not defined in the Act. In the Shorter Oxford English Dictionary, second edition, it is defined as:

a reduction from a sum of money to be paid—a discount, also a repayment; to deduct (a certain amount from a sum); to subtract (one quantity or number from another); to reduce or diminish (a sum or amount).

In Law Dictionary (by English) it is defined as:

reduction in amount paid; return of a portion of money paid.

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In Words and Phrases, volume 36, p. 422, it is defined as:

> The word "rebate" is defined as an allowance by way of discount or drawback; a deduction from a gross amount; deduction, abatement, remission, or payment back, as, a rebate of interest for immediate payment; a rebate of freight charges; discount; the abatement of interest in consequence of prompt payment; an allowance by way of discount or drawback; deductions from stipulated premiums allowed in pursuance of antecedent contract. (*State* v. *Loucks* 228, P. 632, 634, 32 Wyo. 26.)

And in Words and Phrases, under the sub-heading "Insurance", it is defined as:

> In insurance rebates are deductions from stipulated premiums allowed in pursuance of antecedent contract. (*State* v. *Hybernia Insurance Co.* 38, La. Ann. 465, 467.)

I am of the opinion that "rebates" means a repayment and, as used in the section 13 (*f*), it must refer to payment back of a portion of premiums, for the only payment made by the policyholder was a premium. If that which the policyholder was paid represented only that portion of his premium not needed to cover losses and expenses during the currency of his policy, and if all policyholders received the same consideration, it might well be argued that the payment so made constituted a "rebate", and more particularly so if the payments were made pursuant to a pre-existing contract. But here the facts are quite different as I have indicated above. In 1944, in Canada at least, there was no operating surplus and what was paid to the policyholder was paid only after taking into consideration revenue from other sources, including income from surplus and reserves to which many of the policyholders who received the payment in 1944 contributed little, if anything. What that policyholder received was, I think, a dividend. As pointed out by Mr. Millar, the Board set up a voluntary reserve for dividends and it was out of that fund that the payments to policyholders were made. Mr. Millar used the word dividend throughout that part of his evidence which I have quoted, and I think rightly so.

I have not been referred to any case in Canada in which the words "rebate" or "dividend", as related to insurance premiums, have been defined. The word "dividend", how-

ever, was considered in *New England Mutual Life Insurance Company* v. *Reece* (1), in the Supreme Court of Tennessee. In the headnote to that case it states:

> "Dividend" in insurance terminology does not represent a bare share of corporate profit, apportioned to a stockholder, but is a share of surplus allocated to a policyholder which represents a return of a portion of the premium not needed to meet losses and expenses and may include a distribution of earnings

There is no question but that in the year 1944 that which the policyholders received consisted to a very substantial extent of a distribution of earnings. In my view, therefore, what they received was a dividend and I find, therefore, that the sum of $19,502.82 paid by the defendant in that year was not a rebate but a dividend, and that the defendant was therefore not entitled to deduct it from its gross premiums.

Counsel for the defendant points out that from 1932 to 1943 the defendant claimed deductions under the heading, "rebates and returned premiums", in respect of the same type of payments and that no objection was taken thereto by the Superintendent of Insurance, until 1944. He contends that as the Superintendent has, by his actions, approved of such deductions, and that as (in his opinion) the section does not clearly exclude such an interpretation favourable to the defendant, that therefore the Crown is bound by such an interpretation made by one of its officers over a long period of time.

It is shown that in June, 1944, the Superintendent wrote the defendant, pointing out that Part 3 of the Act did not permit deductions from gross premiums of dividends paid or credited to policyholders for the purpose of arriving at the net premiums taxable thereunder. He stated that, doubtless through oversight on the part of the company, it had taken credit for such dividends in the years 1932 to 1943 and, through oversight on the part of the officers of the Department, such deductions had been allowed without demand for further payment. He requested payment of the arrears of $4,193.63. On December 27, 1944, however, the Superintendent notified the defendant that the arrears had been remitted by Order in

(1) (1935) 83 S.W.(2d) 238.

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Council for the years 1932 to 1943, and that the tax on such dividends would become payable for 1944 and subsequent years.

I cannot, however, find that the plaintiff is bound by the occurrences which I have outlined. There is nothing to indicate that the Superintendent had knowledge that the deductions for the period 1932 to 1943 were, in fact, dividends and not "rebates and returned premiums paid on the cancellation of policies", as provided for in the section. It may well have been the fact that the true nature of these payments was not brought to the attention of the Superintendent until 1944 and, in any event, in view of what I later find herein, namely, that the deductions are limited to payments made on cancellation of policies, it is clear that even if the Department had full knowledge of the nature of the payments in the years 1932 to 1943, the defendant was not entitled to such deductions inasmuch as they were not paid to policyholders on cancellation of policies.

I have endeavoured to deal fully with the argument advanced by counsel for the defendant as I understand that this is in the nature of a test case. The solution to the problem could be reached, I think, without the necessity of considering all the matters to which I have referred above. In my view, the meaning of this part of the section is clear. I am of the opinion that the only deductions which may be made by the company from its net premiums, as authorized by section 13 (*f*), are those monies returned to policyholders upon the cancellation of the policies, either by the insured or by the insurer, provision for which is made in the standard conditions attached to the policy. In my view the words, "paid on the cancellation of policies", relate not only to "returned premiums" but also to "rebates". For the defendant it is argued that "rebates" has a meaning quite distinct from "returned premiums", and that the payments made by it in 1944 are "rebates" which may be deducted from the gross premiums, although admittedly they are not paid on the cancellation of policies. With that contention I cannot agree. In my view there is no material distinction between the word "rebates" and

"returned premiums". Both, in the manner in which they are here used, referring to a payment back of part or all of premiums received, refer to the same thing. Excluding claims for losses, there are only two ways in which, so far as I am aware, payments could be made to policyholders: (1) by return of premiums or; (2) by way of dividends. It is to be noted that in the first part of the section relating to life insurance companies, both are allowed as deductions and that they are named separately by use of the words, "*less* premiums returned", and "*less* the cash value of dividends". If it had been the intention to permit the defendant company and other similar companies to deduct "dividends", it would have been a simple matter to include them in the same group as the life insurance companies or, alternatively, in that part of the section applicable to them to permit the deduction of "the cash value of dividends paid or credited to policyholders".

Nor could it be successfully argued, I think, that the intent of the section was in all cases to levy the tax only on the net cost of the insurance to the insured. That is the case with mutual companies carrying on the business on the premium deposit plan, and for "exchanges". To uphold the argument advanced by the defendant would be to place the defendant company and similar ones in the same category as "exchanges" and mutual companies carrying on business on the premium deposit plan, and there would have been no necessity of having a special definition of "net premiums" for companies like the defendant, falling into the category of "any other company".

It follows, therefore, that should the payments made by the defendant be, in fact, "rebates" and not dividends as I have found, as they were not paid "on the cancellation of policies" they cannot be deducted.

The plaintiff is therefore entitled to succeed. There will be judgment for the plaintiff against the defendant for the sum of $585.08 and costs to be taxed.

Judgment accordingly.

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Sept. 20
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Nov. 17

BETWEEN:

HARRY DEZURA .....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6 (2), 47, 55, 58, 66—Determination of Minister under s. 47 distinguished from exercise of particular discretionary powers—Power of Minister under s. 47 subject to the Act—Minister's determination a finding of fact and subject to review by the Court—Onus of proof of error on appellant.

Appellant, a hotel keeper, was unable to produce proper books of accounts or accounting records. The correctness of his returns for 1940 and 1941 was questioned and the Minister, acting under section 47, determined the amount of the tax to be paid by him, from which amount he appealed. Appeal allowed in part.

Held: That the Minister's power under section 47 is not of the same kind as the various discretionary powers vested in the Minister by the Act in respect of particular items but is general in nature and relates to the amount of the assessment as a whole.

2. That the Minister's power under section 47 must be exercised within the Act and subject to it.

3. That, when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, he has made a finding of fact as to the amount of the assessment which is subject to review by the Court under its appellate jurisdiction.

4. That the onus of proof of error in the amount of the determination rests on the appellant.

5. That the amounts of the assessments under appeal were incorrect and should be reduced.

APPEALS under the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Regina.

E. W. Gerrand K.C. for appellant.

J. N. Gale and *E. S. MacLatchy* for respondent.

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

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Thorson P

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

These appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, raise an important question as to the nature of the Minister's power under section 47 of the Act, which provides as follows:

47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

During 1940 and 1941 the appellant kept a 10 room hotel at Aylsham, Saskatchewan, a hamlet of from 200 to 250 persons, situate about 250 miles northeast of Regina in the Carrot River valley, a well settled agricultural area. In addition to letting the hotel rooms he also ran a dining room and a beer parlor. His income was derived solely from these sources. In his income tax returns for these years he reported a net taxable income of $135.70 for 1940 and $338.43 for 1941. The Minister took the position that the appellant had failed to produce proper books of accounts or accounting records and, acting under section 47 of the Act, determined his net taxable income to be $2,565.31 for 1940 and $1,025.98 for 1941 and, as shown by amended assessment notices, dated March 31, 1945, assessed him accordingly. Appeals from these assessments were taken to the Minister who affirmed them on the ground that in the absence of proper proof and accounting records and upon investigation and in view of all the facts the Minister had under section 47 determined the amount of tax to be paid by the appellant for the said years. Being dissatisfied with the Minister's decision the appellant now brings his appeals from the assessments to this Court.

While the amounts of net taxable income as determined by the Minister differ in a number of respects from those shown on the appellant's returns, the appeals are concerned only with the items that relate to the sale of beer in the appellant's beer parlor and the profits therefrom. He sold both draught and bottled beer, some of the latter being sold for consumption off the premises. In his returns for 1940 he showed total sales amounting to $8,710.04 with a cost of $6,631.54, making a profit of $2,078.50. The details

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of the amended assessment as determined by the Minister showed total sales of $11,044.80 with a cost of $6,631.54, making a profit of $4,413.26. In respect of 1941 the appellant's return showed total sales of $10,526.50 with a cost of $6,819.04, making a profit of $3,707.46, whereas the Minister's determination showed total sales of $10,984.10 with a cost of $6,829.09, making a profit of $4,155.01.

There can be no doubt that the Minister had the right to act under section 47 in the present case. While there was evidence at the hearing of the appeal that the appellant had kept accounts of his receipts from the beer parlor, the dining room and the hotel rooms and of his expenses in a school exercise book for each of the years 1940 and 1941 and that these accounts had been used when his returns were being made out but that the exercise books had been lost, the fact is that there were no books of account or records of receipts and expenditures available for inspection by the income tax officials. Under the circumstances, the Minister, acting through his officials, could properly question the correctness of the appellant's returns and determine the amount of the tax to be paid by him. But that is not the end of the matter.

The statement in section 47 that the Minister may determine the amount of the tax to be paid by any person is only another way of saying that he may determine the amount of any person's assessment, for when the amount of the assessment is determined the amount of the tax to be paid follows as a matter of course. It ought really to be included in the part of the Act dealing with assessments rather than in that relating to returns. When read with its context it means that the Minister is empowered to determine the amount of any assessment without being bound by any return or information and even although no return has been made. There is nothing extraordinary about the power at all. It might even be that it would exist without any mention of it in section 47 under the general power of assessment conferred upon the Minister by section 55 and that the statement in section 47 is made *ex abundanti cautela*. Indeed, it would be very strange if there were no such power and the Minister's power of

determining the amount of an assessment were limited to that shown by the taxpayer's own return or information supplied by or for him or made dependent on whether the taxpayer had made a return. The effect of the section is that when the Minister makes an assessment under the section there is a presumption of validity in its favour which is not rebuttable by proof that its amount is different from that shown on the taxpayer's return or information supplied by or for him or that no return has been made. The power is in the interests of adequate administration of the Act. It extends to the case of every taxpayer and is conferred so that there shall be no gap in the Minister's administrative power of assessment of every person and the determination of the amount of such assessment so that every one may be made subject to liability for the amount of tax he ought to pay and no one be able to confine the amount of his liability to that which he has himself stated or supplied or to escape liability by not making a return.

It was contended on behalf of the respondent that the Minister's determination was the exercise of an administrative discretionary power and as such not reviewable by the Court. I have come to the conclusion that this contention is quite untenable. In my opinion, the Minister's power under section 47 is not of the same kind as the various discretionary powers vested in the Minister by the Act such as, for example, that conferred by section 6 (2), whereby he is made the sole judge of the particular matter entrusted to his discretion so that when he has acted in the manner required by law in the exercise of his discretionary power his actual exercise of it is not subject to review by the Court. There is a difference between the exercise of discretionary powers in respect of particular items that may enter into an assessment and the assessment itself, as explained in *Pure Spring Company Limited* v. *Minister of National Revenue* (1). Such discretionary powers must be exercised before the assessment operation, which is purely an administrative function of the Minister not involving the exercise of discretion, can be performed at all. But the power under section 47 is not concerned

(1) (1946) Ex. C.R. 471 at 498.

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with any particular item. It is general in nature and relates to the amount of the assessment as a whole. In my view, a right of appeal from such amount is expressly given by section 58 of the Act which provides in part:

> 58. Any person who objects to the amount at which he is assessed, or who considers that he is not liable to taxation under this Act, may personally or by his solicitor serve a notice of appeal upon the Minister.

There may be sound reasons of policy why Parliament has entrusted particular matters that may be difficult or impossible of proof as matters of fact to the discretionary determination of the Minister and in such matters preferred the opinion of the Minister to that of the Court, but there can be no similar reasons in the case of such a general power of assessment as that conferred by section 47. The statement that the Minister may determine the amount of the tax to be paid by any person extends to the case of every taxpayer. Under the circumstances, the contention that the Minister's determination is not subject to review by the Court amounts to a total denial of the taxpayer's right of appeal against "the amount at which he is assessed" and renders the language of section 58 nugatory so far as the amount of any assessment is concerned. Moreover, if the Minister's determination under the section were to make an assessment binding, there would be no need for most of the specific provisions of the Act. A construction of the section that would lead to such astounding results ought, in the absence of clear and explicit terms, to be rejected as an unreasonable one. A more reasonable construction of the section must be sought.

While the Minister's power under section 47 is not expressly limited it is not unlimited in the sense that he may do as he pleases. It is qiute clear, I think, that the power must be exercised within the Act and subject to it. That opinion was expressed in *Trapp* v. *Minister of National Revenue* (1) where it was held that when the Act has fixed a particular basis of taxability of income section 47 does not empower the Minister to depart from such basis and fix a different one. Parliament could not have intended to confer any extraordinary or over-riding general power upon the Minister. All that he is empowered

(1) (1946) Ex. C.R. 245 at 255.

to do is to find the fact of the amount of the assessment in the case of any person regardless of the amount shown by his return or information supplied by or for him and regardless of whether he has made a return or not. When he exercises his power under the section he makes a finding of fact as to the amount of the assessment which is clearly subject to the appellate jurisdiction of the Court within the meaning of section 66 of the Act and not excluded therefrom by its opening words.

The result is that when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, the amount so determined is subject to review by the Court under its appellate jurisdiction. If on the hearing of the appeal the Court finds that the amount determined by the Minister is incorrect in fact the appeal must be allowed to the extent of the error. But if the Court is not satisfied on the evidence that there has been error in the amount then the appeal must be dismissed, in which case the assessment stands as the fixation of the amount of the taxpayer's liability. The onus of proof of error in the amount of the determination rests on the appellant.

This view of the nature of the Minister's power under section 47 is, I think, a reasonable one. It is consistent with the other provisions of the Act and complete and equitable administration of it. The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to

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prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself. A different view of the nature of the Minister's power under section 47, namely. that it is not subject to the specific provisions of the Act and that the amount of his determination is not subject to review by the Court would lead to such extraordinary results, without any need or justification for them, that they ought not to be considered as having been within the intention of Parliament.

The amount of the Minister's determination being thus subject to review by the Court the issue on these appeals is solely one of fact. The amounts of $8,710.04 and $10,526.50 shown on the appellant's returns as the amounts of his total sales in the beer parlor for 1940 and 1941 respectively are not broken up to show the receipts from draught beer, bottled beer, and the return of kegs separately. But the memoranda filed on behalf of the Minister at the hearing (Exhibits I and H) giving the details of the amended assessments do show the estimates of such receipts separately. The important details so far as these appeals are concerned are those dealing with the returns from the sale of draught beer. The memorandum for 1940 (Exhibit I) shows the sale of 208 kegs at $32.00 per keg and the one for 1941 (Exhibit H) 167½ kegs at $32.00 per keg. The information as to the number of kegs was obtained from the Saskatchewan Liquor Board and its correctness is not questioned. At the hearing counsel for the appellant confined his attack on the assessment solely to the Minister's estimate of gross receipts of $32.00 per keg. The correctness of the other items was conceded. The issue of fact is thus a narrow one.

The Court has had the advantage of evidence as to how the amount of $32.00 per keg was arrived at. Mr. J. B.

McFadyen, the chief assessor of the Saskatoon Income Tax Office, who was the person actually dealing with the appellant's returns, explained that he was familiar with the returns of about 200 beer parlor operators in Saskatchewan; that 50% of these kept good records, 25% incomplete ones and the rest practically no records; that he had arrived at the gross receipts of $32.00 per keg as a result of comparison with other returns filed in the office; that the returns from hotels that kept good records indicated that the realization from sales of draught beer amounted to $32.00 per keg or better; that he knew of cases where the return was as high as $37.00 but that he had taken $32.00 as an average. The estimate made by Mr. McFadyen must be taken to have been adopted by the Minister as his estimate. An assessment made under section 47 is often called an arbitrary assessment but it would be more nearly correct in view of Mr. McFadyen's evidence to describe the assessments under appeal as estimated assessments rather than as arbitrary ones. While I was favourably impressed with the manner in which Mr. McFadyen gave his evidence I have come to the conclusion that the estimate of gross receipts of $32.00 per keg was too high. There are a number of reasons for this conclusion. It is clear that it was intended that the estimate should not be too low but should amply protect the revenue and this is to be expected. The viewpoint of the taxing authorities is shown in a letter from the Inspector of Income Tax at Saskatoon, per Mr. McFadyen, to the appellant's accountants, dated November 19, 1943, in the following well expressed statement:

> I would point out that in the absence of specific records and where it becomes necessary to issue an arbitrary assessment, as in the case of your client, the interests of the Crown must be fully protected, and while there is no desire to estimate the taxpayer's income beyond what is a reasonable figure, it must be borne in mind that the estimated income should be sufficiently high that it is comparable with that reported by like businesses where accurate records are kept. The taxpayer who does not maintain records cannot reasonably expect his income to be estimated on a basis lower than the taxpayer who does maintain records.

No exception can be taken to this statement of the objectives to be sought in the exercise of the Minister's power under Section 47, but I think the estimate in this

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case has gone beyond them. In my opinion, the returns with which Mr. McFadyen was familiar did not warrant him in making the estimate he did. He admitted that the hotels that kept good records were mostly city hotels and he could not recall the return of any rural hotel similar to the appellant's where good records were kept and gross receipts of $32.00 per keg were realized. Furthermore, receipts from the sale of draught beer in beer parlors even where records were well kept did not always appear separately from those from the sale of bottled beer. The experience on which Mr. McFadyen based his estimate was thus much narrower than at first appears and was in respect of beer parlors not comparable with that run by the appellant. A gross return of $32.00 per keg is possible only if the beer parlor operator supplies only 6¼ ounces instead of the 8 ounces which the law prescribes. This is a mathematical calculation based upon 2,000 ounces per keg and the sale of the beer at 10 cents per glass and makes no allowance whatever for any wastage. There must always be some wastage so that in actual practice the operator of the beer parlor would have to put even less than 6¼ ounces of beer in the 8 ounce glass in order to realize a gross return of $32.00 per keg. While it appears from the evidence that this practice of cheating beer parlor patrons was widespread in the province it is clearly established that it was much more common in the large city beer parlors than in the small ones in the country. Of the complaints regarding short measure sales 75% came in respect of city beer parlors and only 25% from rural ones. Mr. McFadyen frankly admitted that a city beer parlor would make a larger gross return per keg than a country one. Moreover, there would also be less wastage in city beer parlors than in country ones because of the more efficient beer drawing equipment in the former. In the country beer parlors wastage would amount to 4% as compared with 2% in the case of those in the cities. This was the evidence of Mr. Boyle, President of the Hotels Association of Regina and Vice-President of the Saskatchewan Hotels Association, who also stated that the glasses were filled nearer the top in country beer parlors than in city ones. His experience was that any rural beer parlor

operator who put less than 7 ounces in the glass was creating trouble for himself. These statements lend strong support to the appellant's own evidence that he served full glasses to his patrons, that he had had no complaints and that his business had been growing, which without such support I would have held at some discount. Moreover, there is the evidence of Mr. Pearson that the appellant was very generous and filled up the glasses and that there had been no complaints. I find no difficulty in believing that in country beer parlors the operator would not be as likely to succeed in selling short measure beer as he would be in larger city beer parlors and that he would not be likely to realize $32.00 per keg.

While I am satisfied that the estimate of $32.00 per keg is too high, it is difficult in the absence of reliable records to find precisely how much too high it is. But since the Minister's estimate is reviewable the Court may substitute its finding even although such finding may itself have to be an estimate. On the evidence as a whole, I am of the opinion that a gross return of $28.00 per keg was more likely in the appellant's case than the amount estimated by the Minister, and I so find. This would mean approximately 7 ounces of beer per glass rather than $6\frac{1}{4}$. While I do not think the appellant is entitled to full credence in view of his initial erroneous returns I am of the opinion that he has sufficiently satisfied the onus of showing that the amounts of the assessments under appeal were incorrect and that a reduction of $4.00 per keg ought to be made. The assessment for 1940 should, therefore, be reduced by $832.00 and that for 1941 by $670.00. To the extent of such reductions the appeals will be allowed. The appellant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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Nov. 20
Dec. 8

BETWEEN:

THE BORDEN COMPANY LIMITED, APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Excess Profits Tax Act, 1940, s. 4(2)—"Taxpayer who acquired his business as a going concern after January 1, 1938"—Ownership of assets rather than stock control implied in "acquired"—Taxpayer must have commenced business after January 1, 1938, and not be one in business before that date who acquired an addition to his business thereafter—Appeal dismissed.

Appellant company, incorporated in 1912 and in business since that date, in 1937 acquired all the outstanding shares of the capital stock of three limited companies, each of which was engaged in business similar to that of appellant. On January 1, 1941, appellant purchased all the business and assets, as going concerns, of two of those companies and, on June 1, 1942, of the third company. Thereafter the business of the purchased companies was merged in that of appellant and conducted by it as part of its business.

In its return under the Excess Profits Tax Act for the tax year 1942 appellant added to its own standard profits those of the two companies acquired by it in 1941, and a proportionate part of the standard profits of the company acquired in 1942. These additions were disallowed by the respondent. Appellant appealed to this Court. Appellant is not a "component company" as defined in s. 4A(4) of the Act.

Held: That while appellant had complete control of the three companies prior to January 1, 1938, through share ownership, it did not acquire their businesses as going concerns until 1941 and 1942, prior to which time the companies were separate legal entities, and to acquire a business within the meaning of s. 4(2) of the Excess Profits Tax Act ownership of assets rather than stock control is implied.

2. That "a taxpayer who acquired his business as a going concern after January 1, 1938", as set forth in s. 4(2) of the Act refers to the commencement of business by a new taxpayer who has acquired his business as a going concern after January 1, 1938, and not to a taxpayer in business before January 1, 1938, but who acquired an addition to his business after that date.

APPEAL under the Excess Profits Tax Act.

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

H. C. F. Mockridge and *J. G. Osler* for appellant.

G. Beaudoin and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (December 8, 1947) delivered the following judgment:

This is an appeal from an assessment under the Excess Profits Tax Act for the taxation year 1942. The appellant is a company incorporated under the Dominion Companies Act, with head office at Toronto, and carries on business in Ontario and elsewhere in Canada. On May 8, 1937, it acquired all the outstanding shares of the capital stock of Laurentian Dairy Ltd., Moyneur Co-operative Creamery Ltd., and Caulfield's Dairy Ltd. As of January 1, 1941, by an exchange of letters between the appellant and Laurentian Dairy Ltd. and Moyneur Co-operative Creamery Ltd., and as of June 1, 1942, by a similar exchange of letters with Caulfield's Dairy Ltd., the appellant purchased all the business and assets, as a going concern, of each of the said three companies and thereafter the business of the said three companies was merged in the business of the appellant and conducted by it as part of its business.

For the tax year 1942, the appellant, in its return under the Excess Profits Tax Act, added to its own standard profits those of Laurentian Dairy Ltd., amounting to $1,694.75, those of Moyneur Co-operative Creamery Ltd., amounting to $552.42, and a proportionate part of the standard profits of Caulfield's Dairy Ltd., from June 1, 1942, amounting to $32,785.57. For the entire year the standard profits of Caulfield's Dairy Ltd. were $55,191.32.

The respondent disallowed these additions to the standard profits of the appellant company and notice of assessment was given on August 21, 1945. An appeal was taken and the assessment was affirmed by the Decision of the Minister. Then followed a notice of dissatisfaction and the Minister's reply was as follows:

1. Denies the allegations in the notice of appeal and notice of dissatisfaction in so far as they are incompatible with the statements contained in his decision.

2. Affirms the assessment as levied.

The appellant is not a "component company" as defined in section 4A (4).

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The appeal is based on the provisions of section 4 (2) of the Excess Profits Tax Act, as follows:

4. (2) On the application of a taxpayer who acquired his business as a going concern after January 1, 1938, if the Minister is satisfied that the business carried on by the taxpayer is not substantially different from his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer.

Several contentions are advanced by the appellant: (1) that because of the purchase of the assets of the three named companies in 1941 and 1942, as going concerns, the appellant is "a taxpayer who acquired his business as a going concern after June 1, 1938"; (2) that the evidence establishes that the business of the appellant is not substantially different from the business of its predecessors. Counsel for the respondent stated at the trial that he would not argue that the business carried on by the appellant in 1942 was substantially different from that of the three amalgamated companies; (3) that because of the foregoing, the assessment should be amended so as to take into account the standard profits of the three amalgamated companies and by "take into account" is meant, I assume, to add the standard profits of the three companies to that of the appellant company as was done in its tax return and as was requested in its notice of appeal.

The first problem, therefore, is whether under the circumstances related above the appellant "acquired its business" as a going concern after January 1, 1938. Omitting for the moment any consideration as to the meaning of the word "its", I think it is clear that while the appellant had complete control of the three companies before January 1, 1938, by reason of owning all their shares, the appellant did not "acquire" their businesses as going concerns until 1941 and 1942 when it took over all their assets and business and merged them in its own. Prior to turning over their assets to the appellant, they were separate legal entities, conducting their own businesses, having their own payrolls, bank account and Boards of Directors. Each had established its own standard profits and no doubt had paid excess profits tax in 1940 and 1941. In the sense in which the word "acquired" is here used, I think that ownership of assets, rather than stock control, is implied.

The interpretation of the words "acquire its business" is not without difficulty. So far as I am aware, the words have not been considered judicially, nor has any part of this subsection. For the Crown it is contended that the subsection has no application to a case such as this one, but that it refers solely to a new taxpayer whose operations commenced after January 1, 1938, when it took over or acquired the business of its "predecessor", which had established standard profits by being in business in the standard period as defined in section 2 (1) (*i*), and that the predecessor's business when taken over was the only business of the taxpayer.

The appellant company had been in existence for many years. It was incorporated under the Dominion Companies Act in 1912 under the name of Borden Milk Company Ltd., as a wholly owned subsidiary of an American Firm, Bordens' Condensed Milk Company (now the Borden Company). Shortly thereafter it commenced the manufacture of milk products and also carried on a fluid milk and dairy products business. In 1919 its name was changed to the Borden Company Ltd.

In 1917 it sold its fluid milk business to another subsidiary of the Borden Company and thereafter carried on a manufacturing business only until 1937. In that year, it purchased from Borden's Limited (another wholly owned subsidiary of the Borden Company) all the shares in 26 operating companies with the view of merging all the operating companies into one company. In 1937 it bought the assets and business of one of its subsidiaries, Hamilton Pure Milk Dairies Limited, thus re-entering the fluid milk business. In continuation of that policy it continued to take over the assets and businesses of other subsidiaries in 1938 and 1939. Then, in 1941, it acquired the assets of Laurentian Dairy Ltd. and Moyneur Co-operative Creamery Ltd., and on June 1, 1942, the assets of Caulfield's Dairy Ltd., as I have above mentioned.

For the year 1940, the standard profits of the appellant were $717,802.00. For that year its total sales were $13,919,000.00. In the same year, the sales of Moyneur Co-operative Creamery Ltd. amounted to $105,710.00, and of Laurentian Dairy $40,000.00. In 1941 the standard profits of the appellant were the same as in 1940, and its total

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sales $16,753,516.00. In that year the sales of Caulfield's Dairy Ltd. were $1,588,517.00. These facts, relating to the history of the appellant company and the relative sales of all companies here concerned have been outlined in some detail merely to indicate their relation to each other.

From a consideration of these facts, I do not think it can be said that the appellant company "acquired its business" after January 1, 1938. It had its business long before that date. By the purchase of the assets of these three subsidiaries it merely increased its own activities and operations to a relatively small extent. There is no question but that the appellant, as of the taxation year 1942, had acquired parts of its business after January 1, 1938. But that is quite a different thing from "acquiring its business as a going concern after January 1, 1938". In my opinion, these words, read with the subsection as a whole, refer to the commencement of business by a new taxpayer who has acquired his business as a going concern after January 1, 1938, and not to a taxpayer in business before January 1, 1938, but who acquired an addition to his business after January 1, 1938.

Reading section 4 (2) as a whole, it becomes apparent that it has to do with an application of a taxpayer to *ascertain* his standard profits. The concluding words are:

> He (i.e. the Minister) may direct that the standard profits of the said predecessor may be taken into account in *ascertaining the standard profits of said taxpayer.*

And by "direct" is meant, I think, "direct the Board of Referees", appointed under section 13 of the Act. The Board alone is authorized on the direction of the Minister to "ascertain" the standard profits of the taxpayer. In the case of taxpayers who were in business throughout the standard period, the standard profits are established under the first part of section 2 (1). Then, by section 4 (1), the Minister is given authority in his discretion to *adjust* the standard profits in certain cases. By section 4A the standard profits of certain "component" companies are *determined* as therein provided, but the appellant does not fall into this category. Section 13 authorizes the Minister to appoint a Board of Referees "and such Board shall exercise the powers conferred on the Board by the Act and other powers and duties assigned to it by the Governor-in-

Council". These powers are set out in section 5. The marginal note to this section is "ascertainment of standard profits by the Board of Referees". Throughout the section use is made of the words, "the Minister may direct that the standard profits be *ascertained* by the Board of Referees". The "ascertainment" of standard profits, as distinguished from the adjustment or determination thereof, is therefore solely the duty of the Board, upon reference to it by the Minister, but subject to approval of the Minister or the Treasury Board as provided by subsection (5), or by former subsection (4) as it was in effect in 1942.

A perusal of the powers given to the Board by section 5 indicates that it has no power to "ascertain" the standard profits of such a company as the appellant which had been in business long before and throughout the standard period; which was neither abnormally depressed itself, nor in a class of business which was depressed during the standard period; and whose class of business remained the same throughout all the relevant years. Nor is the Minister given authority under section 5 to refer the application of such a taxpayer, as the appellant here, to the Board of Referees.

In my view, the provisions of section 4 (2) are applicable only to cases where the the Board has powers to ascertain the standard profits. When such power exists, and when the conditions laid down by section 4 (2) also exist, the Minister may direct the Board to ascertain the standard profits of the taxpayer, not only in the manner laid down in section 5, but also by taking into account the standard profits of the predecessor.

The intent of section 4 (2) may be gathered from consideration of the whole Act. Section 4 (2) becomes effective only on the application of the taxpayer himself. If he commenced business on or after January 2, 1939 (the last year of the standard period) then, by section 5 (2), and whether or not he has made application, the Minister shall direct that the standard profits be ascertained by the Board in the same manner as for any taxpayer not carrying on business during the standard period—that is, as a new business. The reason for that provision is that, at the most, the taxpayer would have been carrying on his business for less than one year of the standard period and so it would not have been possible to average the yearly

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profits in the standard period (section 2 (1)). If, on the other hand, the business was commenced after the 31st day of December, 1937, but before the 1st day of January, 1939, the taxpayer could accept the standard profits as determined by the first part of section 2 (1); or, alternatively, he could apply under section 5 (2) on the grounds that the profits of the standard period were so low that it would not be just to determine his liability by reference thereto, and on such application the Minister is then required to direct that the Board ascertain the standard profits. That this is so is apparent from the statement found in the Explanatory Brochure on the Excess Profits Tax Act, issued by the Department of National Revenue in 1941, the applicable part of which is as follows:

> If he has been in business less than two years (if he has commenced business since January 1, 1938) then he is entitled to rank as a new business and apply to the Board of Referees under section 5, subsection (2), of the Act.

But in any of these cases where the taxpayer acquired his business as a going concern after January 1, 1938, and where, at the most, he would have been in operation for less than two years of the standard period of four years, and the Minister is satisfied that the business is not substantially different from that of the predecessor, the Minister may direct that the Board will ascertain the standard profits, not only on the basis provided for in section 5, but also by taking into account an additional factor—that is, the standard profits of the predecessor.

Since the Act, in my view, does not give the Minister the power to "adjust" or "vary", or the Board power to "ascertain", the standard profits of the appellant under the circumstances here disclosed, it must follow that, in my view of the intent of section 4 (2), that subsection does not apply to the appellant.

The appellant company has undoubtedly suffered a substantial loss by reason of the integration of these businesses into its own. The aggregate of their standard profits was substantial and cannot now be added to those of the appellant, although the appellant's business after the amalgamation was at least as extensive as the sum of all four businesses had previously been. But the result would have been the same had the appellant, without any increase

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in the capital employed, or by an equivalent alteration in its capital stock, purchased the same assets in the ordinary market rather than from a predecessor company.

It is to be noted also that with reference to taxpayers whose standard profits are not established by the average yearly profits in the standard period, that by section 4 (1) the Minister's power to adjust the standard profits is based on the alteration of the capital employed (except in the special cases of the operation of gold mines or oil wells); and that by section 5 the Board of Referees ascertains the standard profits by reference to the capital employed except in the special cases where a capital standard is inapplicable, and in the special cases of gold mines and oil wells which have come into operation since January 1, 1938. In the instant case, there was no change in the amount of capital employed during any of the relevant years.

Having found, therefore, that the appellant did not acquire its business after the first day of January, 1938, and that in any event subsection 4 (2) has no application to the appellant, there will be judgment dismissing the appeal and confirming the assessment for the taxation year, 1942. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

1947

Oct. 11, 18
Dec. 9

HARNEY ET AL

v.

M.V. *TERRY*

Shipping—Wages of Master and crew—Maritime lien—Lex loci contractus —Lex fori—Master's lien for disbursements—Priority of claims.

Defendant ship, enrolled and licensed at Seattle, Washington, United States of America, and owned by a citizen of the United States, was employed in carrying on the coasting trade and mackerel fishery. In the course of a proposed voyage from a port in the United States to Alaska the vessel suffered several mishaps and eventually was abandoned at Vancouver, B.C. The action concerns certain claims made at Vancouver *in rem* against the vessel.

Held: That the Master of the vessel has no maritime lien in Canada for wages since the *lex loci contractus* governs and he would have no such lien under the law of the United States.

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2. That the Master having made certain disbursements and incurred certain liabilities in circumstances of necessity as the only means of saving his ship is entitled to recover the same in the present action, since the matter is governed by the *lex fori* which recognizes a martime lien for such disbursements.

3. That the members of the crew being entitled to the enforcement of a martime lien for their wages under the law of the United States such lien will be recognized in Canada.

4. That the priority of payment of the several claims is determined according to the *lex fori*.

ACTION *in rem* by the Master and Crew, and certain intervenors against the M.V.*Terry*.

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.

Vernon R. Hill for the Master and crew.

A. Hugo Ray for the intervenor mortgagee, Seattle National Bank.

D. E. McTaggart for the intervenor B.C. Marine Engineers & Shipbuilders Limited.

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

SIDNEY SMITH D. J. A. now (December 9, 1947) delivered the following judgment:

This action concerns certain claims made at Vancouver, B.C. *in rem* against the American M.V. *Terry* enrolled and licensed at Seattle, Washington, U.S.A., Official Number 212,165, length 88·5 feet, breadth 16·1 feet, of 69·48 gross tonnage, with a crew complement of 6 men (including the Master) owned by Leslie H. Grove, a citizen of the U.S.A., and employed in carrying on the "coasting trade and mackerel fishery". The issues involved are claims for Master's wages, disbursements, subsistence and repatriation; crew's wages, subsistence and repatriation; the rights of an intervenor, claiming under a possessory lien for temporary repairs; and the claims of another intervenor

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for sums due under a duly registered mortgage. The appropriate notice of the action was given to the American Consul who intimated that he did not wish to present any submissions to the Court.

In July, 1947, the vessel, in the course of a voyage from Port Townsend, in the State of Washington, U.S.A., to Alaska, suffered many mishaps, and eventually put into the Fraser River in British Columbia in a sinking condition. There she appears to have run against a jetty at the mouth of the River and was unable to get free. The Master incurred liabilities in having her refloated and towed to Vancouver, B.C. There she was found to be so unseaworthy, principally through inherent weakness, that the voyage was ultimately abandoned. The evidence shows that her value in Canada in her then condition was approximately $7,000.00, whereas the claims against her approximate $15,000.00. In this state of affairs the owner would appear to have thrown up his hands and to have left Master and crew to whatever remedies were open to them against the vessel.

The main issue debated before me was whether the Master and crew of the *Terry* had the same right of maritime lien which would have been theirs had this been a Canadian vessel. I had the advantage of hearing evidence from an American attorney, Mr. George T. Nickell of Seattle, who gave expert testimony on the appropriate foreign law. It was clear from what he said that under American law the crew would be entitled to enforce a corresponding maritime lien in an American Court, but that it was otherwise with respect to the Master. The issue then narrowed down to this—was the Master in the circumstances here mentioned entitled to the benefit of the maritime lien given in comparable circumstances to the Master of a Canadian ship, in spite of the fact that he could claim no such benefit under American law.

In deciding this point my task has been much lightened by a consideration of The Ship *Strandhill* and Walter W. Hodder Coy. (1) This was a decision of the Supreme Court of Canada and of course binding upon me. I regard the principle there enunciated as clear guidance in the case before me. That was a claim for necessaries supplied to

(1) (1926) S.C.R. 680.

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an American ship at Boston, U.S.A. For the price of these necessaries the American law gave a maritime lien, but our own law gave only a statutory lien, and so one of much inferior value. It was held that the Court would enforce the maritime lien given by American law. In the course of their judgment their Lordships (Anglin C. J. C., Idington, Duff, Mignault, Newcombe and Rinfret J. J.) referred to and distinguished the well-known and much debated authorities of *Milford* (1); *The Tagus* (2); *The Colorado* (3); and pointed out that the issue under consideration (as is the case here) concerned only the vindication of the right claimed against the ship.

There the Court, distinguishing between the *lex loci contractus* and the *lex fori*, held that the former governed and thus recognized and applied the maritime lien for necessaries given by American law though it was unknown to Canadian law. I have no doubt that the converse must be equally true, viz., that the Court will refuse to enforce a maritime lien not given by American law though valid under Canadian law. In the course of his judgment Mr. Justice Idington said at pp. 691-2:

> It would be, I submit, intolerable to enable owners of American vessels to get advances on faith of such a maritime lien and move up to Canada and sell out.

It would, I think, be equally intolerable to enable the enforcement of maritime liens not recognized by American law in the circumstances here mentioned. That would mean that the contractual rights of Masters and owners of American ships would depend for interpretation upon the accident of a mishap in Canadian waters; or, as has been said, the rights of a party made to depend, so to speak, upon the force of wind and storm. Price on Maritime Liens (1940) p. 207.

That the American Courts give effect to the same principle of law is, I think, sufficiently shown by a passage in vol. 26 Harvard Law Review (February, 1913) at p. 358, quoted with approval by Sir Douglas Hazen, L.J.A. in *Marquis* v. *The Ship Astoria* (4) at p. 199. The passage is as follows:

> It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are

(1) (1858) Swabey 362.
(2) (1903) P. 44.
(3) (1923) P. 102.
(4) (1931) Ex. C. R. 195.

rendered (*The Scotia*). Thus if an English vessel is supplied with necessaries in an American or French port and libelled in the United States, the material man's lien is upheld. Conversely, it is submitted that for supplies furnished an English vessel in an English port no lien should be recognized even though the vessel were libelled in the United States. The creation of liens for service on the high seas, as for seamens' wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold. Thus in the recent case where a Russian ship mortgaged in England was libelled and sold in Scotland, the law of the forum was applied and the English mortagee preferred to an intervening Danish material man. In support of this is cited the case of Constant v. Klompus, 50 Scotch Law Reports 27.

See also as to this the *Hanna Nielsen* (1); the *Oconee* (2); the *Scotia* (3).

My attention was directed to p. 200 of the *Astoria* case, *supra,* where the learned Judge would appear to uphold a maritime lien for wages of the master of an American ship in that he gave priority to such claim over the claim of a mortgagee. But it is clear that this point was not contested before him, no doubt for the reason that it was there purely academic, the wages having already been paid. I therefore hold that the claim of the Master for wages must be disallowed; in the circumstances, without costs.

The Master stands on a different footing with regard to his claim for disbursements or rather for liabilities incurred by him. The mortgagee opposed this claim, but not very pressingly, upon the ground that the Master had neither disbursed the said moneys nor guaranteed payment thereof in writing or otherwise. I am unable to give effect to this view. The Master contracted these liabilities in circumstances of necessity, as the only means of saving his ship, and under conditions in which the power of communicating with his owner was not corresponding with the existing necessity. Upon payment by him of the debts involved he is entitled to recovery in this action. *The City of Windsor* (4). In reaching this conclusion I have not overlooked Sec. 213 of the Canada Shipping Act, 1934, which says that a Master shall have the same lien for disbursements or liabilities as a Master has for the recovery of his wages; and that it may be contended here that as

(1) (1921) 273 Fed. 171.
(2) (1922) 280 Fed. 927.
(3) (1888) 35 Fed. 946.
(4) (1895) 4 Ex. C. R. 362.

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he has no lien for wages (as I have found) neither can he have a lien for his disbursements or liabilities. But in the former case the *lex loci* governs; while the latter, all the incidents of which took place in Canadian waters and involved other parties, is clearly governed by the *lex fori*. And the *lex fori*, as above noted, gives such lien. The Master therefore will have judgment for the amount involved, viz., $440.15, with costs.

I hold that the members of the crew are entitled to the enforcement of a maritime lien for their wages under American law and that this will be given effect to in our Courts. The mortgagee submitted that these wage claims should be calculated to 12th July only (that being the date on which the vessel went upon the ways for survey) or, if not so, then not later than 16th July, on which date the Master received a telegram from his owner directing him to "let the crew go for time being". The first submission is untenable. With respect to the second, apart altogether from the vague nature of this direction, there was no evidence that the Master complied with it in any way. Moreover, it is the benevolent practice of Admiralty Courts to favour seamen in the recovery of their full wages in cases of special, unusual and doubtful circumstances such as are here involved. I hold, therefore, that the crew must have their wages; calculated from the dates they respectively began work on the vessel until 1st August, 1947, at the contractual rates for each member. They will therefore have judgment for the following respective amounts: Edmonds $560.00; Canniff $461.37; Dillon $250.00 and Edmonds Jr. $199.92.

With respect to the claims for subsistence of Master and crew: no proof was offered of any moneys actually expended by them in this way. And I cannot shut my eyes to the testimony that they resorted to various ways for obtaining money for their support. They obtained considerable moneys for this purpose from the mortgagee and others, which they are under no obligation to re-pay; and, less commendably, they pledged part of the vessel's equipment. The mortgagee was obliged to pay $254.40 to redeem the same. No account was given of these moneys,

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the total of which would seem to me sufficient for the subsistence of the crew for the period in question. I disallow these claims.

As to the claims for repatriation: I was again left in the dark, no sufficient evidence being adduced. But I find in 10 Federal Code Annotated Title 46, Sec. 678, a reference to certain statutory provisions requiring American Consuls to provide destitute seamen with passage to the United States. The Master and crew were in touch with the American Consul and, perhaps, I may say without presumption, they were no doubt advised as to their rights in this regard. Moreover there was nothing to show that the advances they received were insufficient to cover the small expense involved in returning to Seattle.

The claim of the intervenor, B.C. Marine Engineers & Shipbuilders Limited, which holds possession of the vessel under its possessory lien, was not contested before me. It will therefore have judgment for the sum of $260.09.

The amount due to intervenor Seattle National Bank under its mortgage for principal alone is $12,000.00. I was informed that it would be sufficient for the purposes of this action if judgment were given for this amount. There will be judgment accordingly.

I turn to the question of priority of payment which is clearly governed by the *lex fori* and about which there was no argument. The claims should be paid in the following order: Registrar's and Marshall's fees and expenses: Costs of all parties; Seamen's wages to July 12, 1947; Master's disbursements; Claim of Intervenor, B.C. Marine Engineers & Shipbuilders Ltd.; Seamen's Wages July 12 to August 1; Claim of Intervenor, Seattle First National Bank, under its mortgage.

As to costs, I have already dealt with those of the Master; the seamen will have their costs, except those of the application on 27th September, 1947, and incidental thereto; the two intervenors mentioned above will have their costs; Intervenor Sunde and d'Evers Co. will have their costs based on an unopposed application to the Court for release of their cargo.

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The foregoing conclusions may appear in some respects to work a hardship on certain of the parties. But I cannot forbear repeating the observation of my predecessor on this Bench, the late Mr. Justice Martin (afterwards C.J. B.C.) in *Ostrom* v. the *Miyako* (1) at p. 6:

> This result may seem a hardship, but the longer I sit upon this Bench the more I am convinced that the only real justice is strict justice for all concerned.

Judgment accordingly.

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Sept. 15

Oct. 28

BETWEEN:

THE ROYAL TRUST COMPANY AND DAME HELENA ADA DAWES, IN THEIR QUALITY AS EXECUTORS OF THE WILL OF THE LATE DR. GEORGE ALEXANDER FLEET, ... } APPELLANTS,

AND

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

Revenue—Succession duty—Dominion Succession Duties Act 4-5 Geo. VI, c. 14, ss. 2(m), 3(1) (a), (b), (d), (J), 6, 8(2) (a), 10, 11—Obligation created under antenuptial contract not discharged until after death of obligor—"For full consideration in money or money's worth"—Release of a possibility of future rights in non-existing estates is not one made for "full consideration in money or money's worth"—Succession—Appeal allowed.

By an antenuptial contract dated May 25, 1916, F. obligated himself *inter alia* during the existence of his intended marriage to D. to pay to her the sum of $20,000 for her own use and enjoyment. F. and D. were married on June 1, 1916. F. died on April 23, 1943, predeceasing his wife. By his will he had directed his executors to pay to his wife any indebtedness remaining unpaid under the terms of the marriage contract. The executors claimed a deduction from succession duties of the said sum of $20,000, none of which F. had paid to his wife during his lifetime. This deduction was disallowed by the respondent and the executors appealed to this Court.

Held: That any property transferred, settled or agreed to be transferred or settled in consideration of marriage, prior to April 29, 1941, is not a succession within the meaning of the Dominion Succession Duty Act.

(1) (1924) 34 B.C. R. 4.

2. That the bare possibility of future rights to community property and to dower, in non-existing estates, is not a subject of value at the date of an antenuptial contract, and the release of such a possibility is not one "for full consideration in money or money's worth" within s. 8(2) (*a*) of the Dominion Succession Duty Act.

APPEAL under the Dominion Succession Duty Act.

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

Charles A. Hale, K.C. for appellant.

Alan A. Macnaughton, K.C. and *J. G. McEntyre* for respondent.

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

CAMERON J. now (October 28, 1947) delivered the following judgment:

This is an appeal by the executors of the will of Dr. George Alexander Fleet, late of the City of Montreal, physician, from an assessment dated April 22, 1944, made under the Dominion Succession Duty Act, c. 14, Statutes of Canada, 1940-41. The facts are not in dispute and may briefly be summarized as follows:

On May 25, 1916, the late Dr. Fleet and Helena Ada Dawes, both of the City of Montreal, in the Province of Quebec, executed an antenuptial contract duly passed before a Notary Public for that province. By the contract, after reciting that the parties declared that they were about to be united in marriage, it was agreed that in view thereof the parties covenanted as follows:

FIRST. No community of property shall at any time hereafter exist between said parties by reason of their said intended marriage.

SECOND. The said parties shall be separate as to property, as permitted by the Civil Code of Lower Canada.

THIRD. The property of the said party of the second part consists at present of certain personal effects and jewellery.

And it is agreed in consideration of the premises that all goods, chattels, household furniture, moveables and effects at any time found in and garnishing the common domicile of the parties hereto, whatever may or shall be the value thereof, and however acquired, shall be held and considered as belonging to the said party of the second part exclusively, the said party of the first part hereby abandoning in her favour, she accepting thereof all right, title, interest and claim he may have thereto or therein.

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AND the said party of the first part doth hereby furthermore agree and bind himself to pay unto the said party of the second part, during the existence of said intended Marriage, the sum of Ten Thousand dollars, to be employed and expended by her the said party of the second part, for the purpose of purchasing household furniture, and moveable effects, in her own name, and on her own behalf, as her absolute property, which shall be employed in furnishing and garnishing their common domicile or dwelling.

FOURTH. There shall be no dower, the said party of the second part as well for herself as for the child or children which may be born of said intended marriage hereby expressly renouncing thereto.

FIFTH. In consideration of the stipulation that no community of property is to exist between said parties and further in consideration of the renunciation to dower hereinabove made by the said party of the second part, the said party of the first part doth hereby promise and oblige himself to pay to the said party of the second part during the existence of said intended marriage, the sum of Twenty thousand dollars, but as an obligation on the part of the said party of the first part purely and solely in favour of the said Miss Helena Ada Dawes said party of the second part.

AND PROVIDED that in the event of the said obligation not being paid or satisfied during the existence of said marriage and that the said party of the second part should survive the said party of the first part, she, the said party of the second part, shall immediately upon the decease of the said party of the first part have the right to demand, collect and receive from the estate of the said party of the first part payment of the said sum of Twenty thousand dollars, which, in such case, shall bear interest from the date of the decease of the said party of the first part at the rate of six per centum per annum.

PROVIDED ALSO, that in the event of the said party of the second part dying before the said party of the first part, and said sum of Twenty thousand dollars not having been paid or satisfied during the existence of said marriage the heirs or representatives of the said party of the second part shall have no right or claim whatever in respect thereto, or in respect to any part of the same against the said party of the first part.

The obligation on the part of the said party of the first part to pay said sum of Twenty thousand dollars, being as above stated and agreed to, purely personal to and exclusively in favour of the said party of the second part, the same shall not be or become transmissable in the event of her dying before the said party of the first part to her heirs or assigns, and the exigibility thereof shall not in such case pass to or in any way become vested in the heirs or legal representatives of the said party of the second part.

The said parties were married on June 1, 1916, and thereafter resided in Montreal until Dr. Fleet met his death by drowning on April 23, 1943.

Clause 2 of Dr. Fleet's Will, dated December 31, 1934, provides as follows:

I hereby direct my executors hereinafter named to pay out of the capital of my estate all my just debts, including such indebtedness,

if any, as may remain unpaid to my wife under the terms of our marriage contract, passed on the 25th May, 1916, before John F. Reddy, Notary, funeral expenses and succession duties, without the intervention or consent of the beneficiaries hereinafter named or their representatives.

Dr. Fleet left an estate of a gross value of $129,985.97. In their return to the Dominion Succession Duties Department, the executors claimed as a deduction from the gross estate the sum of $20,000.00 which, by the antenuptial contract, Dr. Fleet had agreed to pay to his wife, and no part of which had been paid to her during his lifetime. The Department, in its assessment, disallowed that item as a deduction; an appeal was taken and, so far as that item was concerned, was disallowed and the assessment affirmed. Following notice of dissatisfaction and the Minister's reply affirming the assessment, the matter came before this Court.

It is admitted that at the time of the marriage the parties were without any substantial assets and that the assets of Dr. Fleet's estate were all accumulated by his own efforts since his marriage. No evidence was taken at the hearing, the parties relying on those facts admitted in the pleadings.

Counsel for the appellant argues that the claim of $20,000.00 is a debt which, by the provisions of Section 8 (1), is deductible as an allowance from the gross estate. Counsel for the respondent, while agreeing that it is a debt payable out of the estate, contends that inasmuch as it was not a debt created for full consideration in money or money's worth, wholly for the deceased's own use and benefit, it is barred as a deduction by the provisions of Section 8 (2) (*a*). The relevant parts of Section 8 are as follows:

(1) In determining the aggregate net value and dutiable value respectively, an allowance shall be made for debts and encumbrances .....

(2) Notwithstanding anything contained in the last preceding subsection, allowance shall not be made

(*a*) for any debt incurred by the deceased, or encumbrance created by a disposition made by him, unless such debt or encumbrance was created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and to be paid out of his estate.

For the appellant it is urged that the consideration for the agreement to pay the sum of $20,000.00 was: (*a*) the surrender by Mrs. Fleet to Dr. Fleet of her interest in the

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community property which her husband might have at marriage, or later acquire; (*b*) her surrender of her dower rights. It is pointed out that had no antenuptial contract been entered into then the widow's rights in the community of property would have been one-half of the aggregate value of an estate of $115,562.81, or $57,781.40, instead of the sum of $20,000.00 which by the marriage contract she was to receive. It is further pointed out that dower, although not an important factor here, is in some cases very important and that the surrender of dower rights was an added consideration which, coupled with the surrender of the wife's community rights, constituted more than full value in money or money's worth for the agreement by the deceased to pay the sum of $20,000.00.

My opinion, however, is that if this item is a debt of the estate it was not created by the deceased for full consideration in money or money's worth. In the first place, it must be remembered that at the time of the contract neither contracting party possessed any assets of any real value; and I think that in determining whether the deceased received full consideration in money or money's worth in return for the creation of an obligation to pay $20,000.00, reference must be made to the facts existing at the time of the contract and not to the facts existing twenty-seven years later. Mrs. Fleet, therefore, in surrendering her rights to community property and to dower, did not give to Dr. Fleet, nor did he receive, full consideration in money or money's worth in return for his obligation to pay the sum of $20,000.00. The obligation to pay on the part of Dr. Fleet remained whether or not he later acquired substantial assets. The bare possibility of future rights to community property, and to dower, in non-existing estates, would not have been a subject of value at the time of the antenuptial contract; and the release of such a possibility would not, I think, satisfy the words, "for full consideration in money or money's worth". See *Floyer* v. *Bankes* (1).

Under the English Act it has been held that an obligation by a husband in a marriage contract to make certain payments to his marriage contract trustees for the benefit of his wife and children, as the counterpart of similar obligations by his wife, could not be regarded on his death

(1) (1863) 3 DeG J. & S. 306.

as a debt incurred by him for full consideration in money or money's worth wholly for the deceased's own use and benefit.

Section 7 (1) (*a*) of the *Finance Act*, 1894, 57-58 Vict. Cap. 30 is as follows:

In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses, and debts, and encumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest ....; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.

In considering that section in the case of *Inland Revenue* v. *Alexander's Trustee* (1), The Lord Ordinary said at p. 370:

I should say that, to make a debt incurred or incumbrance created by the deceased himself deductible in determining the value of his estate for the purpose of estate-duty, the debt or incumbrance must be shown to have originated in something of the nature of a proper purchase, in which the deceased received, for his own use and benefit, full consideration in money or money's worth. I should say that it could not, therefore, cover any stipulation in a marriage contract, although reciprocal in character and issuing in a debt incumbrance, where the true consideration is a thing incapable of being expressed in money or money's worth—to wit, the marriage itself.

I am of the opinion, therefore, that if the obligation of the estate of Dr. Fleet to pay his widow the sum of $20,000.00 can be considered a debt, it is not such a debt as was created for full consideration in money or money's worth wholly for the deceased's own benefit.

Alternatively, the appellant says that the sum of $20,000.00 is not taxable by reason of the provisions of Section 3 (1) (*j*) of the Act which is 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:—

(*j*) property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the 29th day of April, 1941, and within three years of the death, by the deceased person, in consideration of marriage.

This section of the Act is not referred to in the Statement of Claim as forming part of the grounds of appeal,

(1) (1905) 7 F. S. C. 367.

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but it is raised in the Notice of Dissatisfaction, and in the argument counsel for both parties referred to it. Section 3 (1) as a whole has to do with certain dispositions of property which are deemed to be successions. Subsection (*j*) deals particularly with transfers or settlements of property, or agreements to transfer or settle property *in consideration of marriage*. Counsel for the respondent contended throughout that the true consideration of the antenuptial contract was the marriage itself and in his alternative argument, appellant's counsel agreed. I think that the true consideration was the marriage itself. Reference may be made to *Lord Advocate* v. *Sidgwick* (1), and *Inland Revenue* v. *Alexander's Trustees supra.*

The contract here having been made in consideration of marriage, there can be no doubt that had the sum of $20,000.00 been paid by Dr. Fleet to his wife at any time prior to April 29, 1941, it would not have been subject to duty. I think it is clear that at least completed settlements or transfers made in consideration of marriage are dutiable only if the following conditions exist: (*a*) the settlement, or transfer, was made within three years prior to the death of the deceased; and (*b*) it was made on or after April 29, 1941.

Section 3 (1) (*j*) refers not only to completed settlements or transfers of property made in consideration of marriage, but *to property agreed to be transferred or settled in consideration of marriage,* and places on such agreements precisely the same limitations as to completed settlements or transfers—namely, those agreements to transfer or settle after April 29, 1941, and within three years prior to the death of the deceased.

If it is admitted, as I think it must be, that completed transfers made in consideration of marriage, and made prior to April 29, 1941, are excluded from duty, I think that it must follow also that where agreements to transfer are put on the same basis as completed transfers, then such agreements to transfer, entered into prior to April 29, 1941, are also excluded. The agreement to transfer the sum of $20,000.00 was here made in 1916.

It is clear from the terms of Subsection 3 (1) (*j*) that, if an agreement to settle or transfer property in considera-

(1) (1877) 4 R. S.C. 815.

tion of marriage were made on or after April 29, 1941, and the person who had agreed to settle or transfer property lived more than three years after the date of the agreement, and had not, prior to his death, completed the transfer or settlement, such disposition of property would not be deemed to be a succession. I do not think that if Parliament intended to exclude such a disposition from those deemed to be successions, that it could be inferred that a similar disposition, made twenty-five years before the Act came into force and twenty-seven years before the death of the testator, could be deemed to be a succession. I am of the opinion that Parliament did not intend that any property transferred, settled or agreed to be transferred or settled in consideration of marriage prior to April 29, 1941, should be deemed a succession.

It follows, I think, that the disposition of the sum of $20,000.00, made by Dr. Fleet in 1916, is not by virtue of Section 3 (1) (*j*) deemed to be a succession.

For the respondent it is further contended that the disposition here made falls within the definition of "succession" contained in Section 2 (*m*) of the Act; or, alternatively, within the dispositions deemed to be included in a succession by Subsections (*a*), (*b*) or (*d*) of Section 3.

Section 2 (*m*) is as follows:

"Succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession.

I am of the opinion that Section 2 (*m*) does not here apply. It is clear that the sum of $20,000.00 is not payable to Mrs. Fleet by devolution by law; nor did she become beneficiary entitled thereto upon the death of Dr. Fleet. The agreement was made in 1916 and she became beneficially entitled thereto on that date or, in any event, during the lifetime of Dr. Fleet, as the contract provided. It was not by reason of his death that the money was payable to her. The disposition made by Dr. Fleet was not, therefore, a succession "as defined by Section 2 (*m*)" unless it is included in Section 3.

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Section 3 (1) (*a*), (*b*) and (*d*) as they were in effect at the death of Dr. Fleet are 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:—

(*a*) property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income;

(*b*) property taken as a *donatio mortis causa*;

(*d*) property taken under a gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;

Section 3 (1) (*a*) has here no application. No property of any sort was transferred; there was merely an agreement to pay. Nor can it be said that the agreement was entered into in general contemplation of death. Specifically, it was made in contemplation of marriage.

Nor does Section 3 (1) (*b*) apply here. To constitute an effectual *donatio mortis causa* it is essential that (1) the gift be made in contemplation of death, though not necessarily in expection of death; (2) there be delivery to the donee of the subject of the gift; (3) that the gift be made in circumstances which show that it is to take effect only if the death of the donor follows. None of these three essentials exists here.

3 (1) (*d*) deals with property taken under gifts with reservation of benefits to the donor. It has here no application.

I find, therefore, that the agreement to pay the sum of $20,000.00 is not a succession as defined by Section 2 (*m*), nor is it deemed to be a succession by reason of the provisions of Section 3. But I have also found that if it is a debt of the estate it is not deductible under the provisions of Section 8 (2). These conclusions would appear to be conflicting, for on my finding that the sum of $20,000.00, due Mrs. Fleet, is not a succession within the definition of Section 2 (*m*), which includes those deemed to be a succes-

sion, it is not subject to duty, which by Section 6, and the charging provisions of Sections 10 and 11, is payable only on successions. On the other hand, if it is not such a debt as can be deducted under Section 8, it would appear that it is not deductible. I have had some difficulty in reaching a conclusion on the matter. My decision has been finally reached on consideration of the Act as a whole. I need not repeat what I have said in regard to the provisions of Section 3 (1) (*j*). I think it is clear that in enacting this section Parliament intended to deal with the particular problem of dispositions of property in consideration of marriage.

Put in brief form, the argument of counsel for the respondent amounts to this. He admits that there was an agreement in 1916 to pay the sum of $20,000.00 in consideration of marriage; but as it was unpaid at the time of Dr. Fleet's death it was a debt of his estate, but not such a debt as is deductible by reason of the provisions of Section 8 (2) as not being one for full consideration in money or money's worth, wholly for the deceased's own use and benefit. Therefore, it forms part of his dutiable estate. If that argument is followed, precisely the same argument would apply to all agreements whenever made to settle or transfer property in consideration of marriage, unless completed by actual transfer or settlement prior to death.

The words in Section 3 (1) (*j*), "or agreed to be transferred to or settled on" would therefore become quite meaningless and of no effect, but they form part of the section and cannot be treated as superfluous or meaningless. They must have been inserted with a purpose. That purpose, in my view, was to place in one category all property transferred to or settled on any person in consideration of marriage, and all property agreed to be transferred to or settled on any person in consideration of marriage; and to declare that all in that category are deemed to be successions if the transfer or agreement to transfer was made after April 29, 1941, and within three years prior to death; and to exclude from being successions all other such transfers or agreements to transfer, made in consideration of marriage.

Moreover, the inclusion in Section 3 (1) (*j*) of "property agreed to be transferred to or settled on" following as they

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do "property transferred to or settled on", indicates that it refers to agreements not completed by transfer or settlement of the property itself and which property, therefore, remains in the possession of the "donor" at the time of his death. There could be no purpose in using these words at all if it followed that, as they were in the estate of the "donor" at his death, they were then subject to the provisions of Section 8 (2). To that extent, and in the circumstances here disclosed, the two sections are repugnant and I prefer to follow what I think was the manifest intention of the Act in dealing specifically with dispositions in consideration of marriage.

My conclusion, therefore, is that if effect is to be given to the words used in the section it must be found that this disposition by Dr. Fleet, made in 1916, is not a succession. Succession duties are levied only on successions, and therefore, in my opinion, the sum of $20,000.00, forming no part of the succession, and forming no part of the taxable estate, is not subject to duty. It does not need to be deducted as a debt as it is not part of the taxable estate.

The appeal is therefore allowed, with costs to be taxed: and the assessment appealed from is set aside.

Judgment accordingly.

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Sept 11-15, 20-21

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Dec 31

BETWEEN:

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

AND

THOMAS LAWSON & SONS LIMITED..DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 2 (d), 3 (a), 9. 23—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 19 (b), 47, 50—Right to compensation statutory—Compensation for expropriated property confined to its value—No independent claim for damages for disturbance apart from value of property—Meaning of "value to the owner"—Special adaptability—Difference between "market value" and "market price"—Where property saleable and of commercial value principle of reinstatement or replacement not applicable—Meaning of "damages" in definition of "land" in s. 2 (d) of Expropriation Act—

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Meaning of "compensation money" in s. 23 of Expropriation Act—Estimate of value under s. 47 of Exchequer Court Act must not be estimate of value plus damage—Owner's right to damages for disturbance subject to tests of value—Allowance for compulsory taking.

Plaintiff expropriated property in the City of Ottawa on which there was a foundry. The action was taken to have the amount of compensation money to which the owner was entitled determined by the Court.

Held: That evidence as to the structural value of the buildings based upon their reconstruction cost, less an allowance for depreciation, is not an independent test of their additional value to the value of the land, but is receivable only to the extent that the market value of the property as a whole is enhanced by their presence.

2. 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. *Sisters of Charity of Rockingham* v. *The King* (1922) 2 A.C. 315 followed.

3. 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. What the Court must do, when a claim for the property is made, is to estimate its value. The owner's right to compensation for loss can exist only if his loss is an element in such value; if it is not, there is no statutory authority for granting compensation for it.

4. That the special adaptability of land for a particular purpose or use is simply an element to be considered in estimating its value and is to be taken into account together with all other elements of value.

5. That the term "value to the owner", as applied to property expropriated under the Expropriation Act, 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 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", 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", or "the price which a willing vendor might reasonably expect to obtain from a willing purchaser".

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6. That if the term "market value" is used in the sense of meaning "realizable money value", then the terms "value to the owner" and "fair market value" or "market value", each meaning "realizable money value", are identical in meaning.

7. That where the expropriated property is saleable and has commercial value, the principle of reinstatement or replacement is not applicable in determining the amount of compensation to be paid.

8. That the statement of principles to be applied in determining the amount of compensation money to be paid to the owner of property taken under the Expropriation Act contained in *Federal District Commission* v. *Dagenais* (1935) Ex. C.R. 25 should not be followed.

9. That the word "damages" in the definition of "land" in section 2 (d) of the Expropriation Act never included any damages other than damage to the land and cannot cover damages for loss by disturbance claimed by the owner.

10. That section 23 of the Expropriation Act is not a declaration of equivalency between the compensation money and the land or property. It is not concerned with the amount or quantum of the compensation money or the manner or purpose of its determination, but only with its substitution for the land or property so that former claims against the land or property may attach to the substituted amount. The section is an auxiliary one concerned with the status of the compensation after it has been agreed upon or adjudicated.

11. That when land is valued on the basis of a more advantageous use than that to which it is put so that such higher value is not realizable without disturbance the owner is not entitled to receive compensation based both on the value of the land for such more advantageous use and also the loss by disturbance.

12. That in its anxiety to give effect to claims for disturbance as elements in the value of the land taken the Court must not go so far as to nullify the effect of the statutory direction in section 47 of the Exchequer Court Act, and produce an estimate that is not one of value but really one of value plus damage.

13. That there is no statutory authority for the allowance of 10% for compulsory taking and no rule of law requiring it. Where it has been allowed, it has been done as a matter of practice, and even then the making of it has been regarded as discretionary. Where loss by disturbance has been taken into account as an element of value and adequate compensation has been awarded there is no justification for granting any additional allowance for compulsory taking.

INFORMATION by the Crown to have the amount of compensation money to be paid for property on which there was a foundry determined by the Court.

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

H. A. Aylen K.C. and *W. R. Jackett* for plaintiff.

J. A. Robertson K.C. and *A. Macdonald* for defendant.

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

THE PRESIDENT now (December 31, 1947) delivered the following judgment:

The Information exhibited herein shows that the defendant's lands described in paragraph 2 were taken by His Majesty for government purposes under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by the deposit of the necessary plan and description in the office of the registrar of deeds for the City of Ottawa on July 28, 1938, pursuant to section 9 of the Act. Thereupon the lands became vested in His Majesty. The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled, and these proceedings are brought for an adjudication by the Court thereon. His Majesty offers $91,600, but the defendant claims $200,000 with interest and costs.

The expropriated property consists of Lots 1 to 9, both inclusive, on the south side of Wellington Street, in the City of Ottawa, and takes up the whole block between Lyon Street on the east and Bay Street on the west, except the corner of Wellington Street and Lyon Street. It has a frontage of 267 feet on Wellington Street and a depth of 101·3 feet which, at the westerly limit of the property, faces on Bay Street. On the easterly 66 feet there is an old building, known as the Devlin Block, consisting of two stories and a basement, the ground floor being used for stores and the upper one for apartments. On the remaining 201 feet the defendant has its foundry. A full description of the foundry buildings was given by Mr. N. B. MacRostie (Exhibit B) and Mr. A. J. Hazelgrove (Exhibit 11). For purposes of convenience the witnesses spoke of seven buildings, namely, office, machine shop, blacksmith shop and shipping room with pattern storage room, mould-

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ing shop, brass foundry, cupola and storage room, and storage warehouse, but agreed that they are to be regarded as one structure. There are also three storage yards and a fence. The buildings are substantial, mostly of brick construction with some stone, some parts of them consisting of three stories and others, such as the moulding room, of only one. They are approximately 40 years old

The principles to be applied in determining the amount of compensation money to which the owner of expropriated property is entitled 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, dealt with what I considered the two cardinal principles of expropriation law in their 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 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.

In my view, this is a correct statement of the law, provided, as will be elaborated later, that the term "fair market value" is given the meaning defined in Nichols on Eminent Domain, 2nd Edition, page 658:

> 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.

In the same case it was also held, at page 152, 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 taken as a whole, he is entitled to have such market value based upon the most advantageous use to which the property is adapted or could reasonably be applied: *The King* v. *Manuel* (2), affirmed by the Supreme Court of

(1) (1943) Ex. C.R. 140.
(2) (1915) 15 Ex. C.R. 381.

Canada. Nowhere, in my opinion, has the principle that the market value of property should be assessed upon the basis of its best or most advantageous use been better expressed than by Nichols on Eminent Domain, 2nd Edition, page 665, where he 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 test.

But it must be remembered that, while the prospective advantages of the property, sometimes called its potentialities or possibilities, may be considered in estimating its value, it is only the present value as at the date of expropriation of such future advantages that falls to be determined: *The King* v. *Elgin Realty Company Limited* (1).

There would be no difficulty in estimating the value of the expropriated property in the present case, and in determining the amount of the compensation money accordingly, were it not for the claims, later described as claims for damages for disturbance resulting from the expropriation, which the defendant makes in addition to its claim for the value of the property itself. These claims will be dealt with later. In the meantime, I shall deal with the evidence as to the value of the land with its buildings.

The experts called for the defendant were Mr. N. B. MacRostie, an engineer, and Mr. A. H. Fitzsimmons, a real estate broker; and for the plaintiff Mr. C. W. Ross, a real estate broker, Mr. W. L. Cassels, a surveyor and engineer, and Mr. A. J. Hazelgrove, an architect, all well known and experienced persons. Their evidence followed a well known pattern—first, evidence as to the value of the land by itself; next, evidence as to the value of the buildings based upon their reconstruction cost as at the date of expropriation, less an allowance for depreciation; and then, the addition of these two values as the market

(1) (1943) S.C.R. 49.

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value of the property. The danger of excessive awards involved in the adoption of this method of separate valuations of the land and the buildings and their addition together, unless used with proper regard to the value of the property as a whole, has often been pointed out. It is settled that what the Court is required to estimate is the value of the expropriated property as a whole, not the values separately of its component elements. It follows that evidence as to the structural value of the buildings based upon their reconstruction cost, less an allowance for depreciation, is not an independent test of their additional value to the value of the land, but is receivable only to the extent that the market value of the property as a whole is enhanced by their presence.

The valuation of the land will first be dealt with.

[Here the learned President reviewed the evidence as to the valuation of the land and concluded.]

It is impossible to fix values precisely but on the whole of the evidence as to land values I am of the opinion that $200 per foot for the most westerly 66 feet of the defendant's property would fairly represent its value as at the date of the expropriation and I so find. This includes a percentage for corner influence. In my view, this influence is 25 per cent as Mr. Ross suggests. This puts the value of the remaining 201 feet at $160 per foot, making the total value of the land amount to $45,360. On this basis the sum of $10,560, being 66 feet at $160 per foot, would represent the value of the land of the Devlin Block part of the property, but on an estimation of the value of such part separately a higher valuation should be put on this 66 feet than on the rest, except the corner, by reason of its being nearer Bank Street.

The valuations of the buildings are next to be considered. (Here the learned President reviewed the evidence as to the valuations of the buildings and continued).

The defendant's witnesses spoke of the foundry as a proper development of the land. I agree that the buildings, while not attractive in appearance, were in good condition, structurally sound and reasonably suitable for foundry purposes. The location is also a favourable one for the defendant's business. Mr. J. O. Lawson, the president and

general manager of the defendant, said the site was accepted as the hub of the industrial section of the City of Ottawa. Most of the heavy industry of the city, from which the defendant draws its customers, is in the near vicinity. The defendant company has been in existence for 60 years and acquired the present site in separate parcels from 1904 to 1910. I have no doubt that at that time the site was a suitable one for foundry purposes but I think it is also clear that since then the value of the land has greatly outgrown its value for such use and that the foundry is no longer an adequate development. Mr. Fitzsimmons stated, as one of the reasons for his valuation, that the future development of the north side of Wellington Street was assured and that the expropriated land could have been used for apartment houses or embassies. Either of such uses would have been more advantageous than its use for foundry purposes. Notwithstanding the convenience of the location, I think it is clear that the defendant could have found less expensive land for its foundry and carried on its foundry business on such land with reduced carrying costs and without loss of business. I shall have to deal with this matter again later.

Mr. MacRostie valued the defendant's lands and buildings, including the Devlin Block, at $102,313 and expressed the opinion that, if a man wished to go into the foundry business and could persuade the defendant to sell, the purchase price would be somewhere in the neighbourhood of his valuation. Mr. Fitzsimmons made his total valuation come to $100,351.92. He said that, if the defendant gave him the property to sell and a purchaser wanted to conduct a foundry business of the same type as that conducted by the defendant, he did not think he would have any hesitation in recommending its purchase at $100,000. Mr. Ross and Mr. Cassels on the other hand put their total valuation at $79,982. It should be noted that all these valuations left out of account the value of th e machinery that amounted to fixtures. And none of them took into account any of the factors of business disturbance that will be referred to later. In addition to hearing the evidence of the experts the Court had the benefit of taking a view of the expropriated property and its surroundings, which has assisted it in reaching its conclusions.

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For the purpose of determining the amount of the defendant's entitlement in the matter of interest, which will be dealt with later, it is necessary that the value of the Devlin Block part of the expropriated property should be estimated separately, and there is no difficulty involved in so doing, for the defendant's claims for damages for disturbance cannot have any application to or affect the value of this part of the property. Therefore, and having regard to the evidence as a whole, I estimate the value of the Devlin Block part of the property as at the date of the expropriation at $20,000 and find accordingly that this is the amount of compensation money to which the defendant is entitled for this part of its property.

For the rest of the expropriated property, which may be called the foundry part, including the foundry buildings, storage yard and fence, but not the fixtures, on the evidence I would, if no claims for damages for disturbance had to be taken into account, estimate the value of such foundry part at $75,000 and find the amount of the defendant's entitlement to compensation accordingly. This would, of course, include the value which the land had reached for all purposes at the date of the expropriation.

The defendant's claim in respect of the fixtures occasions no difficulty. Counsel for the parties were able to agree upon a list of machinery and equipment that ought to be regarded as fixtures in the sense that, although the articles were chattels, they had become so affixed to the freehold as to be part of it. It is, therefore, not necessary to consider in respect of each piece of machinery or equipment whether the manner of or reason for its being fixed to the freehold was such as to make it a fixture and part of the freehold. If it were necessary, I am satisfied from the evidence and the view taken by the Court that the articles included in the list agreed upon by counsel were such fixtures. The only question is whether their value ought to be included in the estimate of the value of the expropriated property which the law requires the Court to make. The answer is in the affirmative: *Gibson* v. *Hammersmith Railway Company* (1), *Hunter* v. *Dowling* (2). Evidence as to the value of the fixtures was given for the defendant by Mr. W. Barrie, a man of experience. He was

(1) (1863) 32 L J. (N.S.) Ch. 337. (2) (1895) 2 Ch. 223.

familiar with the machinery and equipment agreed upon as fixtures, including the cost of their purchase and installation, and gave particulars of their installed value in exhibit E. His total valuation came to $19,538.78 which he reduced by $830 for 1938 prices, leaving a valuation of $18,753.78. On cross-examination, Mr. Barrie agreed that the machinery could have been bought for 50 per cent of the price shown, and the shafting for about 60 or 70 per cent. Questions of installation cost arose in connection with the various items and Mr. Barrie was asked to prepare a further statement. His reconsidered valuation is stated in Exhibit H as amounting to $14,986.26. But counsel for the defendant contended on the evidence that in respect of certain items on Exhibit H, namely, items 7, 8, 9 and 10, the corresponding figures on Exhibit E should be accepted. I think there is much to be said for his contention and that it would be fair to make some addition to the total shown by Exhibit H. Mr. H. V. Haight, for the plaintiff, said that he had looked over the list shown in Exhibit H and considered the figures in the last column very reasonable, meaning that they were reasonably accurate. He seemed to be clear that there was no real difference between his opinion as to the value of the fixtures and that of Mr. Barrie. Then, on cross-examination, he agreed with counsel for the defendant that it was not fair to depreciate the cupolas and the brass furnaces as much as Mr. Barrie had done, but when it came to other items on the list he was not able to deal specifically with them, although he thought some of them were too high. It became apparent that he was not as familiar with the subject of the fixtures as might be desired, so that, in my opinion, the evidence as to their installed value remains approximately where Mr. Barrie left it. In connection with the fixtures Mr. MacRostie gave evidence that the cost of the footings under them amounted to $1,332.30. This sum could have been taken into account as an item of value either of the buildings or of the fixtures. I have included it in the latter. It is true of the fixtures, as it is of the buildings, that their value ought to be taken into account only to the extent that they enhance the value of the property as a whole, so that what has been said of the foundry buildings as an inadequate development of the land in view of its increased value is also applicable

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to the fixtures. On this basis and on the evidence I find no difficulty in estimating that the fixtures added a value of $17,000 to the value of $75,000 which I have found for the foundry part of the expropriated property. I think that a prospective buyer of the foundry premises would have been willing to pay such additional amount for them and that the defendant could not reasonably expect to receive more. The valuation of the foundry part of the defendant's property, including the fixtures, thus comes to $92,000, subject to the observations made.

I now turn to the defendant's other claims. In the course of the argument I requested counsel to indicate how his client's claim of $200,000 was made up and he did so, furnishing a list which is included with the other papers in the court file. The claims in respect of the land, $49,842; the buildings, $41,866 for the foundry and $10,605 for the Devlin Block; the fixtures, $19,563.78, and the footings, $1,332.30; amounting altogether to $123,209.08 have been dealt with and I have found that the amount of compensation that should be allowed if there were no other claims to be considered, would be $112,000. The remaining claims of the defendant are as follows: moving and depreciation to machines, $15,000; removal of stock in trade etc., and equipment in Devlin Block, $2,500 and $180; crating and removing patterns, $2,401 and $292.50; shelving for patterns, $200; placing and cataloguing patterns, $2,553.75; new moulding sand, $2,122.56; removing scrap, $150, pig iron, $75, coke $37.50, moulding sand in bin, $45; six month's wages, $34,332.57; loss of profits, $2,700; taxes on one of two buildings, $2,000; loss of trade, diminution to good will and incidental damages, $22,311.04; making a total additional claim of $84,900.92. For purposes of convenience these claims may be grouped together and described as the defendant's claims for damages for disturbance resulting from the expropriation. The important thing to notice is that the amount of $84,900.92 is claimed in addition to the sum of $123,209.08 representing the value of the land, buildings and fixtures as put forward by the defendant's own witnesses. I should point out that the two sums mentioned amount to a total of $208,110, which is more than the amount claimed in the Statement of Defence. The probable explanation is that there was

a mathematical error by counsel in computing the amount of the final item of $22,311.04 in order to make up the total of $200,000.

While the total of the disturbance claims amounts to $84,900.92, the amount warranted by the evidence is very much less.

[Here the learned President reviewed the evidence as to loss by disturbance and concluded.]

The total amount of the claims for damages by disturbance, proved or estimated, thus comes to $26,617.31.

The first question that arises is whether the defendant is entitled as of right to have this amount added to the sum of $92,000 already referred to. In other words, has the owner of expropriated property, taken under the Expropriation Act, an independent cause of action for damages in respect of the loss by disturbance sustained by him as the result of the expropriation in addition to his claim for the value of the property? If not, then the next question is, what effect, if any, can be given to claims for such damages? The state of the case law on the subject is chaotic. Claims have been allowed in this Court in respect of a variety of items of disturbance, including the cost of moving to new premises, the depreciation in value of machinery, equipment or other chattels through necessary removal or sale, the increased cost of doing business in the new premises, the disturbance or loss of trade or business or the chance of making profits or the loss or diminution in value of good will. The chaos exists not so much in respect of the items for which compensation has been allowed as of the basis on which the allowance has been made and its extent. The cases are numerous but I need cite only some of them, for example, *Gibbon* v. *The Queen* (1); *The King* v. *Stairs* (2); *The King* v. *Thompson* (3); *The King* v. *Condon* (4); *The King* v. *Richards* (5); *The King* v. *MacPherson* (6); *The King* v. *Courtney* (7); *Maxwell* v. *The King* (8); *The King* v. *Jalbert* (9); and *The King* v. *Goldstein* (10). These will sufficiently illustrate the conflicting views that have been expressed. There

(1) (1900) 6 Ex. C.R. 430.
(2) (1907) 11 Ex. C R. 137.
(3) (1907) 11 Ex. C.R. 161.
(4) (1909) 12 Ex. C.R. 275.
(5) (1912) 14 Ex. C.R. 365 at 372
(6) (1914) 15 Ex. C.R. 215.
(7) (1916) 16 Ex. C.R. 461.
(8) (1917) 17 Ex. C.R. 97.
(9) (1916) 18 Ex. C.R. 78.
(10) (1924) Ex. C.R. 55.

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are similar conflicts in England in the cases dealing with the Lands Clauses Consolidation Act of 1845 and in the decisions in the provincial courts under the various Acts dealing with the expropriation of property in force in such provinces. The cases cited fall into two classes, according to the opposing views indicated in them. The judgments of Burbidge J., the first judge of this Court after its creation as a separate Court, fall into the first class of cases; he justified the allowance of compensation for loss by disturbance on the ground that it is an element of the value of the expropriated land. His view is illustrated by his statements in *The King* v. *Stairs* (*supra*), at page 139:

> Now, what the defendants are entitled to in a case of this kind where the whole property is taken and there is no severance, is compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property

and also in *The King* v. *Thompson* (*supra*), where he said of a loss on the sale of machines, tools and other articles through the expropriation of foundry premises, at page 162:

> Such a loss as this is, I think, when inevitable, an element to be taken into account in determining the value of the lands and premises taken: and the amount of the compensation to which a defendant is entitled.

Then there is the second class of cases beginning with the judgments of Cassels J., who considered that the rights of the owner were not confined to the value of the land but extended to compensation for all damages resulting from the expropriation in addition to such value. His views are illustrated in *The King* v. *Condon* (*supra*), where he held that in addition to full and fair compensation for the value of the expropriated land and buildings the owner was entitled to an allowance for contingencies, moving, good will, etc., as though the owner had separate rights in respect of each, and in *The King* v. *MacPherson* (*supra*) where he said, at page 216:

> What the land-owner is entitled to receive is the market value of the lands expropriated, together with compensation for loss, such as good-will etc, as is occasioned to him by reason of having to move from the premises occupied.

and in *The King* v. *Courtney* (*supra*), where he left no doubt as to his views when he said, at page 463:

> The defendant is entitled to be compensated for the value of his premises to him and the loss of his business.

The views expressed in these two classes of cases, are not, in my opinion, reconcilable with one another. The first question to be determined, therefore, is whether the owner of expropriated property has two separate rights to compensation, one for the value of the land and the other for the damages for disturbance, as Cassels J. considered, or only one, namely, a right to compensation for the value of the land in the estimation of which loss by disturbance may be taken into account as an element of value, as indicated by Burbidge J. The difference in effect may be very great. Both views find support in the authorities, so that the problem is to ascertain on which side the weight of authority lies.

The starting point for the solution of the problem is indicated in the judgment of the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1). The decision itself related to the compensation to be paid to the owner of expropriated land for the injurious affecting of his remaining land by the anticipated use of the expropriated part together with lands owned by others and is not relevant to the present case where the whole of the defendant's land was taken and no question of the injurious affecting of remaining land arises, but some of the statements made by Lord Parmoor in the course of delivering the judgment of the Judicial Committee are of paramount importance. He pointed out that compensation claims are statutory and depend on statutory provisions. At page 322, he laid down the following principle:

> 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.

It follows that if the owner has any claim to compensation his right must be found in a Canadian statute. Moreover, if the Canadian statute prescribes the standard by which the amount of his compensation is to be measured, such standard must be used regardless of whether in any given case it provides full compensation for the loss suffered by the owner of the expropriated property as a result of the expropriation or not. The owner's right to compensation is wholly a statutory one, so that if the

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

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statute has fixed the basis for its assessment the Court has no right to substitute what it may think ought to be the basis for the one which Parliament has directed it to use. Lord Parmoor indicated that the source of the owner's statutory right is to be found in what is now section 19 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides in part as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

These provisions do more, in my view, than merely give jurisdiction to the Court. They also confer statutory rights upon the claimants. That the claimant's statutory right to compensation when his property has been expropriated or damaged by being injuriously affected is established by these sections, and not by the provisions of the Expropriation Act, can be demonstrated by reference to the legislative origin of the two enactments, as will be done later. Then section 47 of the Exchequer Court Act prescribes the standards by which the statutory rights accorded by sections 19 (*a*) and 19 (*b*) respectively must be measured. It appears in the Act under the heading, "Rules for Adjudicating upon Claims", and reads 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.

The Court is hereby given specific directions that, in determining the amount of compensation to be paid to claimants under sections 19 (*a*) and 19 (*b*), it must follow certain rules. The first direction is that where the claim is under section 19 (*a*) for any land or property taken for the purpose of any public work the Court must estimate the value thereof. This is the statutory authority for saying that the amount of compensation to which the owner is entitled is the value of the land or property as estimated by the Court. The second direction is that where the claim is for injury done to any land or property

the Court must assess the amount thereof. This must refer to a claim under section 19 (*b*) for damage to property injuriously affected by the construction of any public work. The nature and extent of such a claim was discussed recently in *The King* v. *Acadia Sugar Refinery Company Limited* (1). Since there can be a claim for damage under section 19 (*b*) only when the owner has property that is injuriously affected, it follows plainly that when the whole of his property has been taken, so that he has no property left that can be injuriously affected, he can have no right to damages under this section. And since this is the only section that authorizes any award of damages in connection with the expropriation of property, it also follows that his claim for compensation under section 19 (*a*) for the property taken from him must be limited to its value. Nowhere is he given any statutory right to damages apart from such value.

There is nothing in the Expropriation Act that runs counter to this statement. Nowhere in that Act can any provisions be found for conferring a right of compensation for property expropriated under it or prescribing any rules for the ascertainment of its amount, when it cannot be agreed upon. The explanation of this seeming lack is a simple one, namely, that since such provisions are contained in the Exchequer Court Act they are not necessary in the Expropriation Act. There are, of course, a number of sections in the Expropriation Act in which the existence of the statutory right to compensation is assumed and recognized. One of these is section 23 which reads in part 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.

It seems plain on its face that this section does not even purport to confer any right of compensation or prescribe any standard for its measurement. It is not a principal section but an auxiliary one, and is concerned only with the status of the compensation money, after it has been agreed upon or adjudicated, namely, that it shall stand in the stead of the expropriated land or property. This view of the section will be confirmed beyond dispute

(1) (1947) Ex C.R. 547; (1947) 4 D.L.R 653

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by a study of the purpose for which it was originally introduced and its place in the statutory scheme relating to the expropriation of property, originally contained in one act, but now embodied partly in the Expropriation Act and partly in the Exchequer Court Act. It is, therefore, in my opinion, a mistake to regard the word "compensation" in section 23 of the Expropriation Act as if it were the governing word in the statutory scheme and to read into it the meaning that the owner of expropriated property is entitled not only to the value of the property but also to damages for all loss consequent upon its expropriation, when the language of section 47 of the Exchequer Court Act so plainly declares that the measure of his entitlement is the value of the land. I cannot see how there can be read into the word "value" in section 47 a right to damages apart from value. For reasons that will appear later I shall have to deal further with this important matter, but, in the meantime, content myself with saying that on my reading of the statutory enactments alone, and also in the light of their legislative history, I think it is manifest that when property has been expropriated its owner is confined in his right of compensation to its value as estimated by the Court, and has no independent right to damages for loss resulting from its expropriation apart from such value. The owner has only one right to compensation, not two separate ones.

Notwithstanding a number of statements to the contrary, I think that the weight of judicial authority supports the same view. That being so, the statements suggesting otherwise cannot be accepted as correct. Possibly among such statements is one by Idington J. in *Dodge* v. *The King* (1), where he said:

> The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

Unfortunately, this statement, which is frequently cited, is equivocal in meaning; it can be read in the sense which the authorities I shall refer to warrant, but it is also capable

(1) (1906) 38 S.C.R. 149 at 155.

of being read as one of the statements mentioned, in which case exception can be taken to it in respect of its reference to damage, which was *obiter,* and to the extent that such reference suggests that the owner of expropriated land has a right of action for the damage done to his business in addition to his right to receive the value of the land to him. Other statements are contained in the text books. For example, Cripps on Compensation, 5th edition, page 106, says:

> The loss to an owner, whose lands are required or have been taken, omitting all questions of injury to adjoining lands, includes not only the actual value of such lands, but all damage directly consequent on the taking thereof under statutory powers.

And later:

> If the owner is in occupation of premises, he is entitled to compensation for damages incurred through the necessity of removal, since these are losses consequent on the taking of his property under statutory powers.

And these statements are repeated in the 8th Edition, at page 183. Cripps cites as his authority a dictum of Erle C. J. in *Rickets* v. *Metropolitan Railway Company* (1), as follows:

> As to the argument, that compensation is in practice allowed for the profits of the trade where land is taken, the distinction is obvious. The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in trespass for expulsion; and so it has been decided in *Jubb* v. *The Hull Dock Company.*

This dictum is also the authority for similar statements, one in Browne & Allan's Law of Compensation, 2nd Edition, page 102, under the heading "Damages for expulsion":

> Besides the loss of the property itself, there is not unusually a loss to the owner occasioned by his being turned out of his land or premises. Such loss is a subject of compensation, and includes loss of profit, costs of removal, loss of fixtures, and the like.

and another in Arnold on Damages and Compensation, 2nd Edition, page 247:

> The compensation, it will be observed, must cover all loss directly sustained by the compulsory process of expulsion, and is in principle analogous to that given in an action for trespass, except that, of course, nothing in the nature of vindictive damages can be awarded.

The origin of these statements is thus traceable to *Jubb* v. *The Hull Dock Company* (2). In that case a brewery

(1) (1865) 34 L.J.N.S.Q.B. 257 at 261.

(2) (1846) 9 Q.B. 443

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was taken by the defendant and the plaintiff claimed compensation for the loss of his business as a brewer as well as for the value of the land and buildings. The jury awarded the plaintiff £400 for his interest in the brewery and the further sum of £300 as compensation for the damage, loss and injury which he would sustain by reason of having to give up his business as a brewer until he could obtain suitable premises in which to carry on his business, and judgment was directed for these two sums. A rule nisi for a writ of *certiorari* having been obtained, the validity of the second part of the finding was challenged, but Lord Denman C. J. held that the words of section 117 of the Act under which the plaintiff's property was taken were large enough to include compensation to a landowner, parting with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on, and that a verdict awarding, first, a sum for purchase-money, and, secondly, a further sum as compensation for such loss, was warranted by the Act. I have no doubt that these statements influenced Cassels J. in forming the opinions he expressed in the cases referred to. But although some support can be found in them for the view that the owner of expropriated property may claim compensation not only for its value to him but also, and apart from such value, for all losses consequent on its expropriation, this view, notwithstanding *Jubb* v. *The Hull Dock Company* (*supra*) and the dictum of Erle C.J. in *Rickets* v. *Metropolitan Railway Company* (*supra*), ought not, in view of later decisions, to be now accepted. It is, I think, inconsistent with the judgment of the House of Lords in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (1). There the Railway company took certain lands under their statutory powers. The jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, found that the owners of the lands were entitled to certain sums, (1) for the value of the land, (2) for the value of the buildings, and (3) as compensation for the value of the business, and the question was whether the third named sum ought to be included as part of the consideration for the sale so as

(1) (1887) 12 A.C. 315.

to be chargeable with stamp duty. The First Division of the Court of Sessions held that it should not, but their judgment was unanimously reversed by the House of Lords. Lord Halsbury L.C. pointed out that under section 48 of the statute only two things are dealt with. At page 320, he said:

> The two things, and the only two things, which are within the ambit and contemplation of the statute, are the value of the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them.

The situation was thus identical with that under section 47 of the Exchequer Court Act. It was clear there, as it is in the present case, that since the whole of the land was taken and there was no damage to other lands the only matter to be considered was the value of the land that was taken. Lord Halsbury then went on to say, at page 321:

> It is admitted, therefore, impliedly, that the only thing which the jury had here to assess was the value of the land. My Lords, of course the word "value" is itself a relative term, and in ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the legislature itself. We, however, must be guided by what the language of the legislature is. Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the good-will" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation.

In my view, while this case recognizes that loss by disturbance may be taken into account in estimating the value of the expropriated land to the owner, it is a clear denial of the owner's right to damages for loss occasioned by the expropriation apart from such value. Lord Halsbury said that the matter seemed to him to be an exceedingly plain

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one under the section before him. In my view, the meaning of section 47 of the Exchequer Court Act is equally plain.

The same view was expressed by the Judicial Committee of the Privy Council in *Pastoral Finance Association, Limited* v. *The Minister* (1), to which further reference will be made later, where Lord Moulton, speaking of a claim in respect of prospective savings and additional profits lost to the appellants because of the expropriation, said:

> 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.

That there is no independent cause of action for damages for business disturbance apart from the value of the land is also shown by *Re Boulton and The Standard Fuel Co. and The Toronto Terminal Railway Co.* (2). There the railway company had expropriated certain lands owned by Boulton and occupied by The Standard Fuel Company as tenants in their coal business. The arbitrator under the Railway Act awarded $214,637 as compensation for the lands taken and also $102,006.69 as compensation for the value of the buildings on the land and business disturbance, of which $62,006.69 was for the buildings and $40,000 for the disturbance. All the parties appealed from the award to the Court of Appeal of Ontario. The appeals of the owner and tenant against the award in respect of the lands were dismissed. The appeal of the Railway Company was confined to the item of $102,006.69. The grounds of this appeal were stated by Middleton J.A., at page 300, as follows:

> The value attributed to the land was as a potential site for a factory or some other industry. It far exceeds any possible value as a coal yard. That factory site value cannot be realized unless and until the owner of the land is in a position to deliver it to such a purchaser as would use it for the erection of a factory building or other factory purposes This implies the demolition of all the existing buildings and structures now upon the land and reducing it to a vacant building lot. In other words the existing business and the buildings in connection with the existing business are such a detriment to the value of the lot that unless and until they are removed its full value as a potential site cannot be realized. Any purchaser for these purposes would regard the existing business and the existing buildings as a detriment, and would abate the price accordingly. To allow this increased factory site price and then to allow a price for the detrimental building and business removal is in effect to make the purchaser pay twice.

This argument is an important one to consider in all cases where the value of the land cannot be realized with-

(1) (1914) A.C. 1083 at 1088. (2) (1933) O.W.N. 298.

out removal from it as, for example, in *Horn* v. *Sunderland Corporation* (*infra*). Middleton J.A., with whom Mulock C. J. O. agreed, accepted this argument as sound and allowed the Railway Company's appeal. At page 300, he said:

> This view appears to be sound. As a coal yard this property was not worth two thirds of the price awarded. The additional sum awarded is by reason of its possible use for business or building purposes involving the removal of the business and the destruction of the buildings. Hence the award made to the tenant cannot be sustained.

Then the tenant was allowed $20,000 for forcible taking, and expense in addition to his share in the award of $214,637. From this judgment the tenant appealed to the Judicial Committee of the Privy Council. Lord Russell of Killowen, who delivered the judgment of the Board (1), after saying that the case was *sui generis* and expressing the opinion that the view taken by the majority in the Court of Appeal was correct, said, at page 659:

> The value of the land . . . has been brought out at an increased figure by having been on the footing above indicated, *i.e.*, upon a footing which presupposes that both the buildings and the business have already disappeared . . . On that footing the value of the buildings, etc., and compensation for business disturbance, can no longer properly enter into the matter, not because the value of the land has been increased by any specific figure representing actually either the value of the buildings or damages for business disturbance; but because an increased value has been attributed to the land upon a hypothesis which is inconsistent with the existence of a claim either for the value of buildings or for damages for business disturbance.

The fact that the claim for damages for business disturbance was disallowed is tantamount, in my opinion, to the denial of its existence as an independent cause of action.

Then, finally on this point, I refer to the important judgment of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (2), decided under the Acquisition of Land (Assessment of Compensation) Act, 1919, section 2, rr. 2 and 6, which provide in part as follows:

> (2) In assessing compensation, an official arbitrator shall act in accordance with the following rules:—
>
> (2) The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:
>
> (6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

(1) (1935) 3 D.L.R. 657.

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

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In that case the corporation took certain land belonging to the appellant who occupied it as farm land. He claimed £47,713 for the land on the basis that it was a building estate ripe for immediate development and should be valued as such and not as a farm, but he also made a number of other claims which may be grouped and described as claims for disturbance. The arbitrator made an award of £22,700 and in so doing said:

> The said sum of £22,700 does not include any sum as compensation for the disturbance of the claimant's business by reason of his dispossession of the land. I find that the sum so assessed could not be realized by a willing seller in the open market unless vacant possession were given to the purchaser for the purpose of building development.

The owner served a notice of motion asking that the award might be remitted to the arbitrator on the ground, *inter alia,* that "the reason given by the arbitrator for not awarding any sum by way of consequential damage is erroneous in law". Atkinson J. agreed with this contention and ordered the award to be remitted to the arbitrator to assess the loss occasioned by the disturbance of the owner's business. The corporation appealed and its appeal was allowed. For the moment, I am concerned with this judgment only with regard to the question whether the right to claim damages for disturbance is an independent cause of action. Sir Wilfred Greene M.R. was emphatically of the opinion that it was not, either under the Lands Clauses (Consolidation) Act of 1845, or under the Acquisition of Land Act of 1919. As to the former he said, at page 32:

> It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was no necessity to do this, since the price to be paid was a global sum . . . But one element which the jury was entitled to take into consideration was the damage suffered by the owner from disturbance, for example, of his business. It is important in considering the present case to remember that this was not a separate head of compensation such as for compensation for injurious affection, but merely one of the elements going to build up the purchase price to which the owner was entitled in all the circumstances of the case.

And he denied that even under the Act of 1919 there was a separate right to compensation for business disturbance. At page 35, he said:

> It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

His view was that the contention that there were two separate rights would have been incorrect if the case had been one under the Lands Clauses Act alone as being inconsistent with the decision in *Inland Revenue Commissioner* v. *Glasgow* and *South-Western Railway Co.* (*supra*) and he also held that rule 6 of section 2 of the Act of 1919 did not confer a right to claim compensation for disturbance but merely preserved an existing right. Scott L.J. was of the same view. At page 40, he said:

> It was argued before us for the respondent seller that, whatever the law had been before, the effect of r. 6 was to create a general right to compensation for "disturbance", and such other matters as are covered by the general words of that rule, over and above the price of the land taken, and that it was the statutory duty of the assessing tribunal, whatever the basis of valuation on which the price had been calculated, to add this figure to the valuation of the land to ascertain the total compensation. I do not accept that contention, for I agree with the opinion of Lord Alness (then Lord Justice Clerk) in *Venables* v. *Department of Agriculture for Scotland* (1) that r. 6 "confers no new rights although it manifestly purports to save existing rights."

And then he said of the Act of 1845, at page 42:

> The legislation recognizes only two kinds of categories of compensation to the owner from whom land is taken: (1) the fair value to him of the land taken, and (2) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection. For compulsory acquisition those are the only two kinds of statutory compensation.

This statement is the same as that of Lord Halsbury L.C. in *Inland Revenue Commissioners* v. *Glasgow* and *South-Western Railway Co.* (*supra*) cited above, and equally as applicable to section 47 of the Exchequer Court Act. There could not be a more direct denial of a separate right of action for disturbance apart from the value of the land. Then Scott L.J. after reviewing the sections of the 1845 Act said, at page 45:

> These extracts from the only relevant sections show clearly that a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the other lands of the owner, and the statute knows no *tertium quid* in the way of compensation.

Scott L.J. then dealt with the decision in *Jubb* v. *The Hull Dock Co.* (*supra*) and made the following statement with regard to it, at page 46:

> The decision has always been treated as an authority for the proposition that compensation for personal loss to the owner arising out of the

(1) (1932) S.C. 573 at 579.

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eviction by statutory title is to be regarded as recoverable, if at all, only as an element in assessing the price to be paid for the land taken.

I confess that I find it difficult to agree that the case has been so treated, for certainly the statements in the text books to which I have referred seem to suggest otherwise, but if it ever was regarded as an authority for the view that the owner of expropriated property had a separate right of action for damages for disturbance over and above his right to the value of the land, it ought no longer to be so regarded.

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. What the Court must do, when a claim for the property is made, is to estimate its value. The owner's right to compensation for loss can exist only if his loss is an element in such value; if it is not, there is no statutory authority for granting compensation for it.

It follows from what I have said that the amount of compensation money to which the defendant is entitled for the foundry part of its property cannot be determined by the simple process of adding the total amount of its claims for disturbance to the sum of $92,000. Since such claims can be taken into account only to the extent that they are for elements in the value of the property it is important to ascertain what the term "value" as used in section 47 of the Exchequer Court Act means. By itself the term is an elusive one, but when it is considered that the value which the Court is directed to estimate is the value of the property to the owner, and not to the expropriating party, a still greater difficulty presents itself

by reason of differing views as to what is meant by the term "value to the owner". It has been, I think, a source of confusion and resulting error in some of the cases. Some of the confusion has been due to the assumption that, when the expropriated property has a special adaptability for a particular purpose or a particular use by the owner, it has a special value to him in addition to its market value or what he could get for it if he tried to sell it. Another reason for the confusion has been the emphasis placed on the requirement that the compensation for the property must be on the basis of its value to the owner, and not its value to the expropriating party, and the conclusions drawn therefrom, either that the former basis must be more advantageous to the owner than the latter or, at any rate, that "value to the owner" is a term of special import to the owner and connotes a right to compensation peculiar to him and one to which he would not be entitled if his right were based only on value or market value. There has thus been read into the term "value to the owner" a special right to compensation that neither of the terms "value" or "market value" would convey. But not all of the confusion is attributable to the meanings read into the term "value to the owner". Some of it is due to use of the term "market value" without definition. It is important, therefore, to ascertain as nearly as is possible what the terms "value to the owner" and "market value" mean.

The outstanding statement of the principles to be applied in determining the amount of compensation to be paid for expropriated property is that of Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1), where he said:

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

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

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Two things are to be noticed in this statement of the need for equivalence between the expropriated land and their worth in money to the owner; one, that the term "value to the owner" does not here mean special value, but has a limitative effect and is used to restrict the owner's claim; and the other, that the compensation for the lands estimated on their value to the owner is to be based on their market value. In the *Lucas* case the land taken had peculiar natural advantages for a reservoir site when taken with other lands and the Board had statutory powers to acquire lands for such a purpose. The umpire took this special adaptability of the land into account as an element of value. Bray J. held that he was not precluded from so doing by the fact that no buyer for reservoir purposes could be found, except a buyer who had obtained parliamentary powers, and also thought that the fact that the board itself might become possible purchasers who would give a special price for the land owing to its special value ought to be considered, and upheld the award on these grounds. On appeal to the Court of Appeal it was held that the umpire had no right to consider the realized value of the land by reason of the fact that it had been taken under statutory powers for a reservoir site purpose, but should value only the possibility that the land might be required for such purpose, and that since he had not drawn any distinction between the possibility of the land being so required and the realization of such possibility he had gone on a wrong basis and the award must be remitted to him. It is clear that the owner was not entitled to any enhancement in the value of the land due to existence of the scheme for which the land had been acquired. But while there was no doubt as to what the umpire should not take into account, there were differences of opinion as to the factors that might be considered in valuing the possibility of the land being required. Vaughan Williams L.J., at page 25, agreed with the opinion of Bray J. that the fact that no buyer for reservoir purposes could be found except a buyer who had parliamentary powers did not prevent the special value being marketable, and that the fact that the board itself might become possible purchasers who would give a special price for the land ought to be considered. But Fletcher Moulton L.J., on the other hand,

expressed the opinion, at page 31, that the decided cases to his mind laid down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. Then he added that when the special value exists also for other possible purchasers, so that there is, so to speak a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration. Thirty years afterwards, this expression of opinion by Fletcher Moulton L.J. was disapproved in the *Vyricherla* case (*infra*), to which further reference will be made later.

The view that the value of 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). After stating that "special adaptability is nothing more than an element of market value" and that it is "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, at page 641:

> 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.

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 of the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2). There the appellant company had power to expropriate lands required for a water power development scheme. The respondents owned three properties that were necessary to it. The majority of the arbitrators had valued their lands purely as agricultural land, but their award had been set aside by the Superior Court of Quebec which held that the owners were entitled to share in the value of the scheme. The Judicial Committee held "that in assessing the compensation payable to the respondents it was not proper to treat the value to the owners of the lands and rights as a proportional part

(1) (1914) 3 K.B. 629. (2) (1914) A.C. 569.

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of the value of the realized undertaking which the appellants were proposing to carry out; that the proper basis for compensation was the amount for which the respondent's lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers". At page 576, Lord Dunedin said:

> The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (1) where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject exhaustively and accurately.

The latter part of this statement requires modification in view of the fact, as pointed out in the *Vyricherla* case (*infra*), that the opinion of the two Lords Justices on one important question were diametrically opposed to one another. Then Lord Dunedin stated two brief propositions:

> (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

In this case, as in the *Lucas* one (*supra*), the requirement that the value of the land should be estimated from the point of view of its value to the owner, not the value to the expropriating party, was limitative and restrictive of the owner's claim. And it is also 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 he could realize for it in money if he tried to sell it. Lord Dunedin put this important explanation of the market test of value to the owner as follows, at page 576:

> 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. 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.

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

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 acquiring powers.

That the value of land to the owner cannot exceed the maximum amount which a purchaser would be willing to give for it sooner than fail to obtain it is established beyond dispute by the decision of the Judicial Committee of the Privy Council in *Pastoral Finance Association, Limited* v. *The Minister* (1). There the land taken by the Minister had been bought by the appellants for the expansion of their business. Evidence was given at the trial as to the savings and additional profits which they would make in their business if it were transferred to the expropriated land and the trial judge directed the jury that they should consider what capital amount fairly represented those savings and profits, and should add that amount to the market value of the land. The Judicial Committee considered this direction erroneous. At page 1088, Lord Moulton said:

> Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

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

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The statutory basis of assessment of compensation, where all the land was taken and there was no claim for injurious affecting of other lands, under section 117 of the Public Works Act, 1900, of New South Wales was similar to that fixed by section 47 of the Exchequer Court Act. The *Pastoral Finance Association, Limited* case is thus as applicable in Canada as in New South Wales, and is clear authority for saying that the value of expropriated property to the owner cannot exceed the amount which a prudent person in a position similar to that of the owner would be willing to give for it sooner than fail to obtain it. The maximum amount of its worth to him in money is thus what he could sell it for.

This clarification of what was meant by "value to the owner" was the last important judicial pronouncement on the subject prior to the enactment in England of the Acquisition of Land (Assessment of Compensation) Act, 1919, when certain rules for the assessment of compensation were laid down and it was provided, as already stated, that, subject to certain provisions, the value of the land should be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize. Although there are statements in the *Horn* v. *Sunderland Corporation* case (*supra*) suggesting that this principle of valuation differed from that adopted under the Lands Clauses Acts I am unable to accept such view. I cannot see any fundamental difference between it and the principle underlying the governing decisions referred to; in my view, there was a statutory adoption and declaration of a principle already recognized in such decisions.

The process of simplification of the law was greatly advanced by the illuminating decision of the Judicial Committee of the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There a harbour was being constructed at Vizagapatam and land acquired by the harbour authorities on the south of the harbour had been allocated to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was south of this land, contained a spring which yielded good drinking water which

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

could easily be made available for the oil companies and people engaged in the harbour and was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of its potentialities as a building site but the Land Acquisition Officer disallowed such claim, and awarded compensation on a valuation of it as partly waste and partly cultivated with an allowance for buildings and trees. On appeal to the Subordinate Judge the appellant made a further claim on the footing of its potentialities as a source of water supply. The Subordinate Judge found against its potentialities as a building site but held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority, and assessed the value of such potentialities at a very substantial sum. On appeal the High Court of Madras set aside his award and restored that of the Land Acquisition Officer, but on appeal to the Judicial Committee of the Privy Council the judgment of the High Court was reversed. Lord Romer, who delivered the judgment of the Committee, dealt with a number of important matters. After setting forth the facts and referring to certain provisions of the Indian Land Acquisition Act, 1894, he said, at page 311:

> The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act". 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. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.

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The significance of this pronouncement lies in the statement that the principles specified in the Indian Land Acquisition Act, 1894, differ in no material respect from those under the Lands Clauses Act of 1845. It can, therefore, be taken as an exposition of the principles of valuation underlying such Act and, indeed, it proceeds on that basis. It consequently follows from the statement of Lord Dunedin in the *Cedars Rapids* case (*supra*) that the law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and that of Lord Parmoor in the *Sisters of Charity of Rockingham* case (*supra*) that the English decisions under the Lands Clauses Act are applicable in the construction of the Canadian statute, that this decision is as applicable in Canada as it is in India. Its importance lies in its clear cut definition of the compensation to which the owner of expropriated land is entitled, which must be equal to the value of the land to him, as "the price which a willing vendor might reasonably expect to obtain from a willing purchaser." There is no real difference between this statement and that of Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*) or that expressed in section 2, r. 2, of the Acquisition of Land Act, 1919. This supports my opinion that the statement of principle in such section, namely, that the value of the land shall be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize, far from being a reversal of the principle applicable under the Lands Clauses Act of 1845 was, on the contrary, a statutory recognition and declaration of the principle really applicable under such Act. Lord Romer then dealt with the manner in which the increase in the value of the land by reason of its potentialities or possibilities should be measured. It was argued for the respondent that before any value could be assigned to land because of a potentiality or possibility there would have to be competition between purchasers interested in the land because of such potentiality or possibility; that if there is only one possible purchaser of the land so interested the value of the potentiality or possibility to the owner is nil; and that this is particularly so where the only possible purchaser is the one who has obtained compulsory powers

of purchase. Counsel for the respondent relied chiefly upon the dictum of Fletcher Moulton L.J. in the *Lucas* case (*supra*), to which I have referred. Lord Romer could not accept this argument; he doubted the helpfulness of the suggestion that the arbitrator should put himself in the position of holding an imaginary auction and described it as an entire waste of the arbitrator's imagination: nor could he see how the requirement of competition between purchasers could be an essential condition of there being any value in a potentiality. At page 316, he said:

> The value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion . . . if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it.

Nor could Lord Romer see how the fact that the only possible purchaser of the land had statutory powers could prevent the potentiality from having value. He agreed that the fact that compulsory powers of acquiring land for a particular scheme could not be allowed to enhance the value of land acquired for it and that the valuation must be made as though no such powers had been acquired. The pressing need of the purchasers to acquire the land is never allowed to enhance its value. But he could not see why the value of the land should not be enhanced by the fact that the persons having statutory powers are possible purchasers. In these circumstances he disapproved the dictum of Fletcher Moulton L.J. in the *Lucas* case (*supra*) and preferred that of Vaughan Williams L.J. At page 323, Lord Romer returned to his basic test in the determination of value to the owner when he said:

> Even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers.

Finally, having decided that the judgment of the High Court must be reversed, Lord Romer expressed the opinion that the award of the Subordinate Judge was such that

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"the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum". Ordinarily this would have meant referring the matter back to him but the parties asked the Committee to state the amount of the award. And Lord Romer did so, fixing the value of the land at a certain price as being "the total price which the Harbour Authority would have been willing to pay".

The explanation of what "value to the owner" means, given by Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*), was cited with approval in the Supreme Court of Canada in *The King* v. *Northumberland Ferries Ltd.* (1) by Rand J., at page 504, and also by Kellock J., at page 510.

From the judicial decisions certain propositions clearly emerge. In the first place, the special adaptability of land for a particular purpose or use is simply an element to be considered in estimating its value and is to be taken into account together with all other elements of value. It is not something the value of which is to be estimated apart from the value of the land and added thereto. In the case of property of commercial value, there can be no special value over and above what a prudent purchaser would be willing to pay or a willing vendor might reasonably expect to obtain. That is the maximum amount of the owner's entitlement whatever his own conception of its value may be.

It is also a mistake to assume that the requirement that the compensation for expropriated property should be on the basis of its value to the owner, and not of its value to the expropriating party, is necessarily advantageous to the owner or insisted upon in his interest. In many cases exactly the reverse is true, as, for example, in the *Lucas* case (*supra*) and the *Cedars Rapids* case (*supra*), where the emphasis upon the requirement was for the purpose of making sure that the owner received *only* the value of the property to him and did not participate in any enhancement of value created by the expropriating party through the existence of the scheme for which the property was acquired. In such cases, the value of the property to the owner is much less than its value to the expropriating

(1) (1945) S.C.R. 458.

party, and the requirement is limitative in effect and restrictive of the owner's claim. There may even be cases where the value of the property to the owner by reason of the conditions under which he holds and the restrictions to which it is subject may, in terms of money, be nil: *Stebbing* v. *Metropolitan Board of Works* (1), as explained in the House of Lords by Lord Dunedin in *Corrie* v. *MacDermott* (2); *Township of Pickering* v. *The King* (3). This limitative and restrictive effect of the requirement is frequently lost sight of. Where it has such effect it safeguards the expropriating party from having to pay more than the value of the property to the owner. On the other hand, there are cases where the value of the property to the expropriating party may be less than its value to the owner. For example, it may have been taken for a purpose demanding the demolition of the buildings on it, so that its value to the expropriating party for such purpose is really only the value of the land, less the cost of such demolition. In such cases, it would obviously be unfair to the owner to compensate him on the basis of such value. The fact is that the statement that the compensation must be based on the value to the owner, and not on the value to the expropriating party, is really two statements in one, to be used together as counterparts of one another. It is just as important to exclude the use of the latter basis as it is to insist on the use only of the former. The statement is not concerned with whether the one basis is more favourable to the owner than the other or not; what is really meant to be emphasized is that the value of the property for the use for which the expropriating party has acquired it cannot be allowed to increase or decrease the amount of compensation that should be paid to the owner for it. He is entitled to its value apart from such use and it does not matter to him what its value to the expropriating party for such use may be, except only to the extent that such value might possibly affect the price that the expropriating party might be willing to pay, as suggested by Lord Romer in the *Vyricherla* case (*supra*). Under the circumstances, I cannot see how the requirement can result in any special right of compensation to the owner. That is clearly not its purpose.

(1) (1870) 6 Q.B. 37.
(2) (1914) A.C. 1056.
(3) (1947) Ex. C.R. 446.

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The term "value to the owner", as applied to property expropriated under the Expropriation Act, may now be defined. 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 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.

Thus stated, the 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 repeat:

> 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 there is nothing in any of the judgments referred to that could warrant the suggestion that "value to the owner" means something different or something more. If the term "fair market value" were used with this definition of it in mind and with due regard to the last part of it, there would be no confusion through its use. It has been recognized that "market value" is not an easy term to define. Each of its component words involves differences of opinion as to meaning, and when the two are joined the difficulty of definition is intensified. Some of the confusion results from the assumption that it is the same as "market price". There is, I think, in the discussions on the subject, a preponderance of opinion that "market value" does not mean the same thing as "market price". The latter assumes a condition of fact, namely, an existing, available market for property of the kind in question, similar to that which exists for various com-

modities, or for securities, capable of absorbing all that is fed into it, with a governing price at any given time readily ascertainable. There may perhaps be a similar kind of "market price" for some kinds of real estate, but it can only be of a very limited nature, as, for example, in the case of similar properties, such as lots in a subdivision that are selling steadily. But it is obvious that in the case of an individual property, not similar to others, and particularly one having special adaptability for some purpose or use, there cannot be any such "market price". Here the matter of value is not a question of fact in the same way as the value of a commodity or security for which there is a continuous market and an ascertainable price, but is basically one of assumption and opinion based upon the surrounding relevant circumstances. It has, therefore, become necessary to define what is meant by "market value" and to include in such definition a statement of the principle to be applied in its ascertainment. Some of these definitions appear in a footnote to page 661 of Nichols in his Article 217, at page 658, the whole of which deserves study. In my view, they deserve repetition by reason of the basic thought upon which they are framed. They are as follows:

Fair cash value.

and:

The highest money price which the land would bring if sold in the open market to one buying with knowledge of all the purposes to which it was adapted, allowing a reasonable time in which to find a purchaser.

and:

Value of land for any and all uses to which it might be put, in the light of present business conditions and those that might reasonably be expected in the immediate future.

and:

What probably could be obtained if a purchaser was sought, applying the ordinary business methods.

and:

Its value in view of all the purposes to which it is naturally adapted; that means that its market value, if it is unoccupied, is fixed by its value for the most valuable of those purposes.

And other definitions, not in Nichols, read:

What a buyer would be warranted in paying and a seller justified in accepting.

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and:

> The present worth of all the rights to future benefits arising from ownership.

The same governing idea runs through all these definitions as underlies the statements of Lord Dunedin, Lord Moulton and Lord Romer in their definitions of the meaning of "value to the owner" or their enunciation of the principle governing the amount of compensation to be paid. All the definitions of "market value" connote "realizable money value". It might well be that the use of some such term in the place of "market value" would result in less confusion than has existed. But if the term "market value" is used in the sense of meaning "realizable money value", or as defined by Nichols, then the terms "value to the owner" and "fair market value" or "market value", each meaning "realizable money value", are identical in meaning.

While it might be necessary to deal somewhat differently with the case of a property of an exceptional character, the nature of which need not now be determined, where the test of realizable money value might not be adequate for the proper estimation of its value, I think it may safely be said that in the case of saleable property the test of "value to the owner", as explained in the decisions, or of "fair market value", as defined, each meaning "realizable money value" is properly applicable. This is so even in the case of a property where the number of purchasers may be small or where there is only one possible purchaser, as in the *Vyricherla* case (*supra*), for, as Audette J. put it in *The King* v. *Manuel* (1), "it has nevertheless a commercial value". It would, therefore, be applicable in the case of a private residence, and would certainly be applicable in the case of an industrial property like the defendant's foundry.

It being thus established that the defendant's claim to compensation for the expropriation of its foundry property must be measured, according to section 47 of the Exchequer Court Act, by the value of the property as estimated by the Court; that it has no independent cause of action for damages for loss resulting from the expropriation apart from such value; and that, such value, although it

(1) (1915) Ex. C.R. 381.

means value to the owner, cannot exceed the amount which a prudent purchaser would be willing to pay or a willing seller reasonably expect to obtain, that is to say, realizable money value, it seems clear that the principle of reinstatement or replacement, being the cost of placing the defendant in the same position or in an equally advantageous one as that which it occupied at the date of expropriation, cannot be applicable in determining the amount of compensation to which it is entitled. It might be that no purchaser would be willing to pay a price for the property large enough to cover the cost of reinstatement or replacement and that a willing seller could not reasonably expect to obtain such a price, in which case the cost of reinstatement or replacement would exceed the realizable money value of the property. If that were so there would be no statutory authority for paying the excess over such value and the owner, as Lord Parmoor pointed out in the *Sisters of Charity of Rockingham* case (*supra*), in the absence of such statutory authority, would have no right to it.

The non-applicability of the principle of reinstatement or replacement as a measure of compensation for expropriated property, where it is saleable and has commercial value, has been stated in this Court in several cases: *The King* v. *Wilson* (1), affirmed by the Supreme Court of Canada; *The King* v. *Peters* (2) and *The King* v. *Blais* (3).

The difference between an assessment of compensation for property on the basis of its value and one based on the cost of reinstatement or replacement was dealt with in *The King* v. *Northumberland Ferries Ltd.* (4). There two vessels were appropriated by the Crown under the War Measures Act, R.S.C. 1927, chap. 206, and the Minister of Justice referred the determination of the amount of compensation payable to the owner to this Court. The statutory provision establishing the basis of the compensation was section 5 (1) of The Compensation (Defence) Act, 1940, Statutes of Canada, 1940, chap. 28, which provided in part as follows:

5. (1) The compensation payable in respect of the acquisition of any vessel . . . shall be a sum equal to the value of the vessel . . ., no account being taken of any appreciation due to the war.

(1) (1914) 15 Ex. C R. 283
(2) (1915) 15 Ex. C R. 462.
(3) (1915) 18 Ex. C.R. 67.
(4) (1944) Ex C R. 123; (1945) S C R 458.

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In this Court, Angers J. held that the doctrine of reinstatement applied to the acquisitioning of a vessel as well as to the expropriation of land and applied such doctrine in determining the amount of compensation payable in respect of one of the vessels. In respect of this part of his award his judgment was unanimously reversed by the Supreme Court of Canada. At page 477, Rinfret C.J. pointed out that what the Court must do was to find out the value of the vessel and that since the trial judge had based his award upon what it would have cost, either to build a new ship or to purchase other ships to replace the one taken, the award could not stand. At page 489, Kerwin J. said that value to the owner was far different from replacement value. At page 494, Hudson J. agreed with the Chief Justice that the trial judge had been in error in accepting the replacement value as a proper test of compensation under the Act. At page 499, Taschereau J. expressed the opinion that the words used in the Act made it impossible to apply the principles of the reinstatement or replacement value and that if the award were to be based on the value of substituted property the claimant might obtain a larger amount than Parliament had decided he should get. At page 504, Rand J., expressed a similar view. After approving the definition of value to the owner in the *Pastoral Finance Association, Limited* case (*supra*) he said:

> But re-instatement is something quite different; it is placing the owner from whom property is taken in a substantially equivalent condition by means of substituted property. The cost of furnishing that substitute might exceed by far the value, which the owner would be willing to pay as the value of the property to him.

While I do not quite see how the standard suggested in the concluding clause can be applicable, it is clear that compensation based on the cost of reinstatement or replacement may exceed the value of the property and that when the statute specifies value as the basis of compensation the cost of reinstatement or replacement must be excluded. Then at page 516, Kellock J., in a clear cut statement, dealt with the reason for excluding the principle of reinstatement as follows:

> Reinstatement is not limited to the value of the property taken, but involves the substitution of other property and a consideration of its value or cost. It is applicable in cases when the principle *restitutio in integrum* governs, but it is quite inapplicable to cases such as the case at bar, for that principle is excluded by the terms of the governing

Statute which confines the tribunal assessing compensation to a consideration of the value of particular property, without regard to other property which may be necessary to place the person whose property is taken in the same position in which he was immediately prior to the exercise of the compulsory powers.

And Estey J. agreed with the conclusions of Rand and Kellock JJ. While the decision in this case was not in respect of property taken under the Expropriation Act, I can see no reason why the statement of Kellock J. and the other expressions of opinion referred to should not be equally applicable in such a case in excluding the cost of reinstatement or replacement as a basis for measuring the amount of compensation money to which the owner of the expropriated property would be entitled. The case is also of interest by reason of the *obiter* opinions on the subject of the principles to be applied in determining the compensation payable for property expropriated under the Expropriation Act. In this connection it is, I think, worthy of note that there does not seem to have been any reference either in this Court or in the Supreme Court of Canada to section 47 of the Exchequer Court Act and its requirement that, in determining the amount of compensation to be paid to the owner of expropriated property, the Court must estimate its value. The section is not referred to in the judgment of Angers J., and it does not seem to have been dealt with by counsel in the course of the argument on the appeal to the Supreme Court. At any rate, I did not find any mention of it in either of the factums of the parties to the appeal. Nor does there seem to have been any reference to the judgments of Lord Halsbury L.C. in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (*supra*) or of Sir Wilfred Greene M.R. and Scott L.J. in *Horn* v. *Sunderland Corporation* (*supra*), which I referred to earlier, showing that in England, where land was taken under the Lands Clauses Act the basis of the compensation payable for it was the value of the land. The omission of these references may explain the assumption that seems to have been made in the case that the principles for the assessment of compensation in the case of property expropriated under the Expropriation Act were different from those applicable in the case under review. I cannot accept the correctness of such assumption. Apart from the direction that no

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account is to be taken of any appreciation due to the war, I can see no material difference between the basis of compensation for vessels acquired under the War Measures Act directed by section 5 (1) of The Compensation (Defence) Act, 1940, and that for property expropriated under the Expropriation Act fixed by section 47 of the Exchequer Court Act. In each case, the Court must determine the amount of compensation to be paid to the owner according to the value of the thing taken, and such requirement excludes the test of the cost of reinstatement or replacement.

In view of my reading of the Acts comprising the statutory scheme relating to the expropriation of property and my interpretation of the leading judicial decisions on similar legislation elsewhere, I must express my dissent from some of the opinions expressed by my learned predecessor, the late President Maclean, in the frequently cited decision of this Court in *Federal District Commission* v. *Dagenais* (1). There the owner showed that he had planned to construct an apartment house on the expropriated land; that he had paid $1,000 to an architect for the plans of the building; that his construction plans had so far advanced that he had a building survey made and had staked the bounds for the excavation for the foundation of the proposed building, at a cost of $43; and that he had moved on the property a working office and that a lot of material including a cement mixer was made ready to move preliminary to the commencement of construction, at a cost of $100; and he claimed these three amounts. In the compensation of $5,850 which Maclean P. allowed he included the sum of $1,143, the amount of the three items of expenditure mentioned because, as he put it, at page 37:

> Either the lands were that much more valuable in the hands of the defendant by reason of the expenditures made and liabilities incurred by him, in connection with the commencement of the construction of his apartment house, or, he would be entitled to be compensated in this amount as a loss or damage directly caused by the taking of his lands;

He did not decide which reason was to be adopted, saying:

> I do not think it matters how this amount enters into the calculation of the compensation allowed.

(1) (1935) Ex C.R. 25.

With respect, I think it does matter which reason is adopted: the former is consistent with the statute and the weight of judicial opinion, the latter is not. I do not think it could be said that the items of expenditure for plans and the like ought to have been excluded from consideration altogether for they might quite properly, having regard to the facts of the case, have been taken into account as an element of the value of the land taken with the construction of the apartment house about to commence, and no exception should be taken to the amount of the award solely on the ground of the inclusion of these items in it. But objection must, I think, be taken to the statement of principles made in that case. At page 32, Maclean P. said:

> It is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it.

I am unable to reconcile the last part of this statement with the statement of Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*) that the owner is entitled to that 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" or that 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." These statements are direct negations of the statement cited. But the criticism of the *Dagenais* case goes further. Counsel for the plaintiff in that case urged that "the only two things which are within the ambit and contemplation of the statute are the value of the lands taken, and such damages as may arise from other lands being injuriously affected by the construction of any public work." The contention is strikingly similar to the statement of Lord Halsbury L.C. in the House of Lords in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (*supra*), which I have already cited, but Maclean P. refused to accept it. At page 32, he said:

> The point is an important one and requires consideration. If the provisions of the Expropriation Act are to be construed in the sense suggested by Mr. Hill, then I fear some of our courts in this country have been astray in their method of arriving at the amount of compensation

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payable in such cases, and the same would be true of other jurisdictions where the legislative authorization for the compulsory taking of lands are expressed in somewhat the same terms as here.

With this statement I agree. I think there is no doubt, as I have already indicated, that in a number of cases, both in Canada and elsewhere, the Courts have gone beyond the statutory limits. Maclean P. went on to enumerate the various kinds of items in respect of which compensation has been allowed and then, at page 33, enunciated his view of the principles to be applied in determining the amount of compensation to be paid to the owner of property taken under the Expropriation Act, as follows:

> The principle seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up. The Expropriation Act, section 23, speaks of "the compensation money . . . adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money" it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken", and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss suffered by the owner, and which was incidental to, or flowed from, the taking of lands. The word "land" is definied in the Act as including ". . . easements, servitudes and damages, and all other things done in pursuance of this Act for which compensation is to be paid by His Majesty under this Act". The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

I should add that this statement was referred to with approval by Kerwin J. in the Supreme Court of Canada in *Irving Oil Company Ltd.* v. *The King* (1).

It may safely be said that it is not possible to find any statement in this Court which extends the right of an owner to compensation when his property has been expropriated under the Expropriation Act further than this

(1) (1946) S.C.R. 551 at 556.

one. But I am also of the opinion that no statement departs farther from the limits of the statutory right to compensaion that Parliament has fixed. I think that the explanation for the broad statement of Maclean P. is to be found in his desire to ensure that the owner of expropriated property should receive the fullest possible measure of compensation when his property was taken from him. But, whether this is so or not, I think that the statement is open to objection in point of law, on a number of grounds. In the first place, it seems to me that Maclean P. has adopted as a basis of compensation the principle of reinstatement or replacement, although, for the reasons already stated, such a principle is not applicable. A second reason is to be found in his seeming assumption that the whole of the statutory scheme relating to the expropriation of property is embodied in the Expropriation Act. The manner in which he dealt with the word "value", his reference to section 23 of the Expropriation Act, his statements that the "compensation money" does not appear to be limited by the statute to the value of the land taken and that the word "value" is not mentioned in the Act, and his further opinion that the compensation money is not to be ascertained only by considering the value of the land all strongly suggest that he based his opinion exclusively on a consideration of the terms of the Expropriation Act to the exclusion of other statutory enactments and that he found justification for his statement through regarding the word "compensation" in section 23 of the Expropriation Act as the governing word to which the fullest possible effect must be given. If the Expropriation Act were the only statutory enactment to be considered, and if the word "compensation" in section 23 were the governing word in the whole statutory scheme, as to which I shall have something to say later, there would be some force in the argument. But the weakness of the statement lies in the fact that the Exchequer Court Act as part of the statutory scheme was either ignored or disregarded. I do not see how Maclean P. could have made the statements he did, if he had section 47 of the Exchequer Court Act in mind with its specific direction to the Court that the amount of the owner's compensation for his expropriated property must be determined on the basis of the Court's estimate of its value. If, on the other hand,

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he did have this rule for the adjudication of the owner's claim in mind, then I must conclude that his statement is a negation of the statutory direction. To read the word "value" in section 47 as if it included not only the value of the land taken, but also damages for loss apart from such value, would simply render the mandatory language of the section nugatory. Moreover, I have no hesitation in saying that the statement is against the weight of judicial authority. Under the circumstances, with respect but without any doubt, I have come to the conclusion that the statement in the *Dagenais* case, which I have cited, is erroneous in point of law and ought not to be followed.

There are two other matters to which reference should be made. One is the effect of the inclusion of the word "damages" in the definition of "land" in section 2 (*d*) of the Expropriation Act, and the other the interpretation of the word "compensation" in section 23 of the same Act, having regard to the place of such section in the statutory scheme relating to the expropriation of property. Both matters have given rise to differences of opinion.

The definition reads as follows:

> 2. In this Act, unless the context otherwise requires,
>
> (*d*) "land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act;

I have already cited the comments of Maclean P. in the *Dagenais* case (*supra*), where he said:

> The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

The definition was also referred to in *The King* v. *Irving Oil Company Limited* (1). In this Court, O'Connor J. said, at page 231:

> While damages are included in the definition of "land" under Section 2 (*d*) of the Act, this is clearly damage for land injuriously affected set out in Section 23.

But in the Supreme Court of Canada, Kerwin J., at page 555, expressed the opinion that O'Connor J. had erred in thus limiting the meaning of the word "damages" in the definition. I shall revert to this difference of view

(1) (1945) Ex. C R 228; (1946) S C.R. 551.

later. Then Rand J. after stating that the provisions of the Expropriation Act dealing with compensation are in general language, and setting out the definition, 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 the 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 an 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.

And then he stated that there was nothing in the Exchequer Court Act which is in conflict with that view and referred to the provisions of section 47 of that Act and also to section 50. With the utmost respect and fully appreciating the importance of these statements, I find myself in disagreement with them in a number of respects. They are similar in effect to the statement of Maclean P. in the *Dagenais* case (*supra*) from which I have already expressed my dissent. Nor am I able to accept this view of the effect of the use of the word "damages" in the definition of "land" in section 2 (*d*). And I have already indicated an opinion as to the purpose of section 23 and the meaning of the word "compensation" as used in it that is divergent from that expressed by Rand J. Under the circumstances, I think it desirable to set forth the reasons which have led me to my conclusions in respect of these two matters.

I shall deal first with the definition of the word "land" in section 2(*d*) in so far as it includes "damages and all other things for which compensation is to be paid by the Crown under this Act", being primarily concerned with the inclusion of the word "damages". It is important to note that the statutory definition applies "unless the context otherwise requires", and it must follow that, where

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the context does not permit its use, it is not applicable. It is obviously inapplicable, for example, in section 3 (*a*) which empowers the Minister to enter into and upon any land and survey and take levels of the same: "land" cannot there include "damages". Nor can the definition apply in section 9 to the requirement that "land" taken by His Majesty shall be laid out by metes and bounds, or that a plan and description of the land shall be deposited in the office of the registrar of deeds: to read the word "land" as including "damages" would be absurd. In order to see what application, if any, the part of the definition referred to can have, it is essential to trace it back to its legislative source and ascertain what was intended to be covered by it when it was first included in the definition and what was the purpose of such inclusion. The definition of "land" in section 2 (*d*) of the present Expropriation Act is to be found in exactly the same terms in the Expropriation Act, R.S.C. 1906, chap. 143, section 2 (*f*), in the Expropriation Act of 1889, Statutes of Canada, 1889, 52 Vict., chap. 13, section 2 (*f*), and in The Expropriation Act R.S.C. 1886, chap. 39, section 2 (*f*). Many of the provisions of these Acts trace their origin to An Act respecting the Public Works of Canada, Statutes of Canada, 1867, 31 Vict., chap. 12, which I shall refer to as the Public Works Act of 1867. This Act, in addition to setting up a Department of Public Works, also, *inter alia,* gave its Minister power to expropriate lands and set up a Board of Arbitrators with authority to determine and award compensation. Prior to 1886 the definition appeared, in substantially the same terms as now, in The Government Railways Act, 1881, Statutes of Canada, 1881, 44 Vict., chap. 25, section 3 (6). But the part of the definition that causes the difficulty, had its origin in An Act to amend an Act respecting the Public Works of Canada, Statutes of Canada, 1874, 37 Vict., chap. 13, which I shall call the Act of 1874. Section 3 (2) of this Act provided:

> 3. (2) The expression "lands and property" includes real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown under the said Act.

The reason for the inclusion in the definition of the words in question will sufficiently appear from an examination of the Act of 1874, but in order to ascertain what the words

covered it is necessary to refer to the Public Works Act of 1867.

What was intended to be covered by the words "all other things for which compensation is to be paid by the Crown under the said Act" can, I think, be seen from section 25, which provided:

> 25. The Minister . . . may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials, . . . or may lay any materials or things upon any such land, for which compensation shall be made at the rate agreed on or appraised and awarded as herein provided; and the Minister may make and use all such temporary roads to and from such timber, stones . . . and may enter upon any lands for the purpose of making drains . . . or for keeping such drains in repair, making compensation as aforesaid.

But we are primarily concerned with what was meant to be covered by the word "damages". To ascertain this, reference must be made to the provision of the Public Works Act of 1867 relating to the Board of Arbitration and their jurisdiction. Section 31 of the Act reads as follows:

> 31. The Governor may, from time to time, constitute a Board of Arbitration and appoint any number of persons not exceeding four, who shall be arbitrator or arbitrators and appraiser or appraisers for Canada. and who shall arbitrate on, appraise, determine and award the sums which shall be paid to any person for land or property taken for any Public Work, or for loss or damage caused by such taking, . . . and with whom the said Minister has not agreed, and cannot agree;

This, I think, is the statutory authority for the payment of compensation for expropriated property with the jurisdiction to award it vested in the Board of Arbitration. At first sight, it appears that the words "loss or damage caused by such taking" would include any loss or damage caused by the taking, but further examination of the Act, shows that no such wide meaning was intended. It is plain, for example, from section 32 which sets out the Arbitrator's oath of office that he is to deal with two kinds of claims, one being for compensation for land or property taken possession of for some public use and purpose, and the other for compensation for "damages consequent upon the construction of any public work". And there is further clarification in section 34, under the heading "What Cases may be referred to Arbitration" which laid down how and in what cases claims were to be made, referring to the kind of claims as follows:

> Any claim for property taken, or for alleged, direct or consequent damage to property, arising from the construction, or connected with the execution of any public work, . . .

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The proper meaning is further indicated by section 37, with its provision for limitation of time within which the claims must be made, which provided:

> 37. No claim for land or other property alleged to have been taken for, or injured by, the construction, improvement, maintenance, or management of any Public Work, or for damages alleged to have been occasioned directly or indirectly to any such land or other property by the construction, maintenance or management of any such Public Work, . . . shall be submitted to or be ascertained by the arbitrators . . . unless such claims . . . have been filed . . . within twelve months next after the loss or injury claimed of, when such claim relates to the taking of, or damage occasioned to, land or other property,

It is plain, I think, from these provisions of the Public Works Act of 1867 that there were only two classes of claims for compensation in respect of expropriated property. One was for the taking of the land or property for any public work, and the other was for injury or damage to property, arising from the construction or connected with the execution of any public work. These were clearly the forerunners of the claims now coming under sections 19 (*a*) and 19 (*b*) of the present Exchequer Court Act. The word "damages" in the Public Works Act of 1867 did not, in my view, refer to "damages" other than those occasioned to the land or property, of the same nature and kind as those for which a claim may now be made under section 19 (*b*) of the Exchequer Court Act. It did not cover any "damages" that there were not actually damages to the land. Consequently, it was clear that where an owner's land was taken, and he had no land to which any injury or damage was done, he had no claim for damages apart from his claim for compensation for the land taken. No change in this respect was made by An Act to extend the powers of the Official Arbitrators, Statutes of Canada, 1870, 33 Vict., chap. 23, so that when the word "damages" was included in the definition of "lands and properties" by section 3 (2) of the Act of 1874, it had the same meaning as was assigned to it by the Public Works Act of 1867. The word did not cover damages for loss by disturbance, such as those under consideration in the present case.

Nor did the subsequent legislative history change the meaning of the word "damages" or enlarge its scope. In the Revised Statutes of 1886 the statutory enactments relating to the expropriation of property which were previously contained in the Public Works Act of 1867 and its

amendments were set out in two separate Acts, one, chap. 39, called "The Expropriation Act", being the first Act under that name, and the other, chap. 40, called "An Act respecting the Official Arbitrators", by which the powers entrusted to the Board of Arbitration by the Act of 1867 were vested in the Official Arbitrators. Sections 31, 32, 34 and 37 of the Public Works Act of 1867 were continued by sections 5, 3, 6 and 8 respectively of the Official Arbitrators Act without change. But the definition of "land" containing the words included by section 3 (2) of the Act of 1874 was inserted in The Expropriation Act as section 2 (*f*). It seems obvious, therefore, that when the word "damages" first appeared in the definition of "land" in the first Expropriation Act in 1886 it had no wider meaning in relation to the expropriation of property than that which was originally given to it in 1867. Then in 1887 an important legislative change was made by An Act to amend The Supreme and Exchequer Courts Act and to make better provision for the Trial of Claims against the Crown, Statutes of Canada, 1887, 50-51 Vict., chap. 16, which may be called the Exchequer Court Act of 1887. This Act constituted the Exchequer Court of Canada as a separate court distinct from the Supreme Court of Canada. By it the Official Arbitrators Act was repealed and the jurisdiction vested in the Official Arbitrators by that Act was vested in the newly constituted Exchequer Court. The provisions contained in the Public Works Act of 1867, and continued in the Official Arbitrators Act of 1886, to which I have referred, were embodied in sections 16 (*a*) and 16 (*b*) of the Exchequer Court Act of 1887, which are in exactly the same terms as sections 19 (*a*) and 19 (*b*) of the present Exchequer Court Act. Section 19 (*b*) is thus now the only statutory authority for any claim for damage in respect of the expropriation of property, reading as follows:

> Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

That being the only claim for damage in respect of the expropriation of property over which the Court has any jurisdiction, it cannot properly be contended that the inclusion of the word "damages" in the definition of "land" in the Expropriation Act can cover any "damage" other

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than that with which it is competent for the Court to deal. There has been nothing in the course of legislation since the introduction of the word "damages" into the definition in the Act of 1874 to enlarge its scope; and there can be no justification for giving it a larger meaning than the jurisdictional authority of the Court permits. The word "damages" in the definition of "land" in section 2 (*d*) of the Expropriation Act cannot, therefore, have a wider meaning than the word "damage" in section 19 (*b*) of the Exchequer Court Act. This study of the legislative origin and history of the word "damages" in the definition of "land" leads me to the conclusion that the opinion of O'Connor J. in the *Irving Oil Company* case (*supra*) was right. I think this will further appear from the examination of the purpose for which the word "damages" was first included in the definition. I am also quite unable to see how the use of the word "damages" can have the effect stated by Rand J. There is nothing in the legislative origin or history of the word to suggest that its use was "intended to cover not merely the value of the land itself, but the whole of the economic injury done which is related to the land." Indeed, in my opinion, the legislative history of the word "damages" in the definition, together with the reason for its inclusion therein, is against such a view. As I see it, the word "damages" never included any damages other than damage to the land. It cannot, therefore, cover the damages for loss by disturbance claimed by the defendant, and counsel cannot rely upon it as an escape from the rule that the sole measure of the defendant's entitlement is the value of its land, and that its claims for damages for loss by disturbance can be taken into account only as elements of such value, and have no status apart therefrom.

The reason for the inclusion of the words "and damages etc." in the definition of "lands and property" by section 3 (2) of the Act of 1874 may now be considered. It is to be found in the Act itself. In the Public Works Act of 1867 there was no machinery for dealing with the compensation after it had been agreed upon between the parties or appraised and awarded by the Official Arbitrators or for converting claims against the expropriated property into claims against the compensation money and the purpose

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of the amending Act of 1874 was to remedy such defect. This purpose is indicated by section 1, which provided:

> 1. The compensation money agreed upon or awarded by the official arbitrators for any lands or property acquired or taken by the Minister of Public Works, and which may under the said Act be taken by the said Minister without the consent of the proprietor, shall stand in the stead of such lands or property; and any claim to or incumbrance upon such lands or property shall, as respects the Crown, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects the lands or property themselves, which shall, by the fact of the taking possession thereof under the said Act, become and be absolutely vested in the Crown, as shall also any lands or property taken possession of by the Crown under the said Act, whether there be or be not any conveyance, agreement or award respecting the same, subject always, to the determination of the compensation paid and to the payment thereof when such conveyance, agreement or award shall have been made.

Then section 2 provided for the payment of compensation into Court in certain cases, notice to the parties interested, distribution of the compensation by the Court, costs, and other matters. And section 3 was the interpretation clause in subsection 2 of which the words "and damages etc." were included in the definition of "lands and property". It will be seen at once that section 1 of the Act of 1874 is the forerunner of section 23 of the present Expropriation Act and was introduced for the same purpose as that which it now serves. It will also be seen that in section 1 the only compensation money referred to is the "compensation money . . . for any lands or property acquired or taken". There is no reference to compensation money for land or property injuriously affected by the construction of any public work, as there is in section 23 of the present Expropriation Act, nor is there any reference to compensation money for damages occasioned to lands or property, within the meaning of the Public Works Act of 1867, or to any of the "other things for which compensation is to be paid by the Crown under the said Act" within the meaning, for example, of section 25 of the 1867 Act. There was no need for any such references if the words "lands or property" in section 1 of the Act of 1874 were made to include "damages and all other things for which compensation is to be paid by the Crown under the said Act", as was done by the definition in section 3 (2). The definition did not in any sense enlarge the field in respect of which compensation money could be agreed upon or

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awarded, for that had been settled by the Public Works Act of 1867, as I have indicated, but was merely descriptive of what compensation money was referred to. The only purpose it served was to declare that the compensation money agreed upon or adjudged by the arbitrators should stand in the stead of the lands or property not only when it was compensation money for lands or property acquired or taken, but also when it was compensation money for lands or property injured by the construction of any public work or for damages occasioned to lands or property, within the meaning of the Public Works Act of 1867, and also when it was compensation money for other things as, for example, things done under section 25 of the Act of 1867. The definition was definitive for such purposes of the expression "lands or property". Section 1 of the Act of 1874 remained in somewhat the same form when it was incorporated into The Expropriation Act of 1886 as section 11. It will be remembered that this Act included in the definition of "land" under section 2 (*f*) the definition of "lands and property" enacted in the Act of 1874 by section 3 (2). The definition thus served exactly the same explanatory purpose in 1886 as it had in 1874 when it was first introduced. But the need for explanation of the section disappeared with its amendment by section 22 of the Expropriation Act of 1889, which provided as follows:

22. 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 Her 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 Her Majesty.

This carried on through the 1906 revision, chap. 143, section 22, into section 23 of the present Expropriation Act. It is obvious that the purpose of the amendment made in 1889 was to bring the opening words of the section into line with sections 16 (*a*) and 16 (*b*) of the Exchequer Court Act of 1887. It will also be seen that the purpose of ensuring that the compensation money referred to in the section included compensation money for land or property injured as well as for land or property acquired

or taken, which the definition in the Act of 1874 served, was now accomplished by amendment of the section itself. For it will be noted that instead of speaking only of the "compensation money agreed upon or awarded . . . for any lands or property acquired or taken by the Minister of Public Works" as section 1 of the Act of 1874 did, section 22 of the Act of 1889 spoke of "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". While the need for explanation of what the words "compensation money" were intended to cover was thus eliminated by amendment of the section, the definition itself remained unchanged. It is no longer necessary in respect of section 23 so far as the words "land or property" in that section are concerned and the context does not now permit its application. What purpose, if any, the definition now serves need not here be determined. Consideration ought, I think, to be given to its amendment with a view to eliminating a source of possible confusion.

This study of the origin and purpose of the inclusion of the word "damages" in the definition of "land" will also help in ascertaining the proper place of section 23 of the Expropriation Act in the statutory scheme governing the expropriation of property and the interpretation to be placed upon the word "compensation" contained in it. In the first place, it is clear that section 23 is not the source of the statutory authority for the payment of compensation. Such authority existed long before its predecessor, section 1 of the Act of 1874, was even thought of. It is, as I have said one of a number of sections in the Expropriation Act which assume and recognize the existence of a statutory right to compensation. Moreover, I 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". It is necessary to look at the whole section and see what the purpose of that statement was. When section 1 of the Act of 1874 is looked at in its setting it will be seen that the compensation money was made to stand in the stead of the land or property so that a claim to or incumbrance

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upon such land or property, extinguished as regards it because of its expropriation, should be converted into a claim to such compensation money in its stead. That was, I think, a prime intendment of the section. This view is supported by the other sections of the Act of 1874. The whole Act was designed to provide machinery, whereby the rights of those who had had claims against the land or property would be preserved against the compensation money which took its place, and to deal with the compensation money after it had been agreed upon or awarded. That is what I had in mind when I said earlier that section 23 of the Expropriation Act is not a principal section but an auxiliary one. Under the circumstances, I am quite unable to read section 23 and the words "shall stand in the stead of such land or property" as Rand J. did. In my opinion, section 23 is not a declaration of equivalency between the compensation money and the land or property at all. It is not concerned with the amount or quantum of the compensation money or the manner or purpose of its determination, but only with its substitution for the land or property so that former claims against the land or property may attach to the substituted amount. The section is concerned with the status of the compensation after it has been agreed upon or adjudicated. I cannot agree, therefore, that the word "compensation" in section 23 of the Expropriation Act can possibly be regarded as the governing word in the statutory scheme. In my view, the term "compensation money" in section 23 of the Expropriation Act is merely descriptive of the status of the amount of compensation which has already been agreed upon or adjudicated, and in so far as the amount has been adjudicated the reference must be to an adjudication in accordance with the direction contained in section 47 of the Exchequer Court Act. The adjudicated compensation money referred to in section 23 of the Expropriation Act thus means the amount of compensation determined by the Court pursuant to section 47 of the Exchequer Court Act, and this means, in the case of land or property acquired or taken, the value thereof as estimated by the Court.

The practical application of the principles I have stated to the facts of the present case is not an easy matter. I

have already found that if no claims for damages for disturbance had to be taken into account I would estimate the value of the defendant's foundry property at $75,000, to which $17,000 must be added as the value of the fixtures, making a total of $92,000. I have also found that the total amount of the defendant's claims for damages for disturbance comes to $26,617.31. Then, having come to the conclusion that such claims can be taken into account only to the extent that they are elements in the value of the property, I expressed the view that the amount of compensation money to which the defendant is entitled cannot be determined by the simple process of adding the two amounts of $92,000 and $26,617.31 together.

There are a number of reasons for this view. I have already found that although the land on which the defendant's foundry is situate was a suitable site for a foundry at the time it was acquired, its value since then has greatly outgrown its value for foundry purpose use. The evidence establishes this fact. One of the reasons given by Mr. Fitzsimmons for his valuation of the land was that the future development of the north side of Wellington Street was assured so that the land could have been used for apartment houses or embassies, either of which uses, I think, would have been more advantageous than its use for foundry purposes. In view of this fact I am of the opinion that there is a portion of the amount of $26,617.30 which the defendant has no right to add to the sum of $92,000 I mentioned. For this conclusion I find support in the decision of Lord Russell of Killowen in *Re Boulton and The Standard Fuel Co. and The Toronto Terminal Railway Co.* (1)., where it was held that when property actually occupied as a coal yard was valued on the basis of most advantageous use as a site for a factory, which value could not be realized without demolition of the buildings on the property and removal of the coal business, it would be inconsistent with a valuation on the basis of such most advantageous use that there should also be a claim either for the value of the buildings or for damages for business disturbance; and also in the judgment of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (2). It will be remembered that the owner

(1) (1935) 3 D.L.R. 657. (2) (1941) 2 K.B. 26.

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of land, which he occupied as a farm, claimed a large sum on the basis of the value of his land as a building estate ripe for development, and also a substantial amount for loss by disturbance of his farming operations. It was held that he could not have both. The head note reads that the Court of Appeal held "that when land being used for agricultural purposes is ripe for building and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance shall only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land". I have some reservation of doubt in my mind as to whether the state of the law in Canada, as I see it, would permit the Court to go as far as this, but otherwise I agree with the statement of Sir Wilfred Greene M.R., at page 35:

> In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (*a*) its value as building land plus (*b*) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price.

And I wholly agree with the statement of Scott L.J., at page 42:

> The Act of 1919 being disregarded, the question falls to be considered solely under the Act of 1845. If so, I ask myself: How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm? Ex hypothesi, the building value is only realizable if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farm buildings, stock and implements, or, at

least, is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price.

These statements are, *mutatis mutandis*, applicable in the present case. Since part of the sum of $92,000 referred to is attributable to a valuation of the land on the basis of a more advantageous use than for foundry purposes, which could not become a reality without removal of the foundry business, it follows that some portion, at any rate of the amount of the claims for disturbance must be offset against the valuation on such more advantageous use basis. This may be justified on the ground, as Lord Russell of Killowen suggested, that where the valuation is on the more advantageous use basis, not possible of realization without disturbance, it is inconsistent that there should also be a claim for disturbance. There is also another way of looking at it. Since the higher value of the land can exist as realizable money value only through removal and consequent disturbance, some of the so-called loss through disturbance is, in a sense, already included in the amount of $92,000. The defendant cannot receive compensation based on value of the land for a more advantageous use than for a foundry and also for disturbance of the foundry business. To realize the former, the disturbance must be suffered, so that to allow a valuation based on a use which could not be realized without disturbance and also to allow on top of that a claim for disturbance would amount either to payment twice for the same element of value or compensation for a loss not really suffered.

If the whole amount of the claims for disturbance were less than the difference betwen the valuation of the land based on its most advantageous use and its value or the value of equally suitable land for foundry use purposes would be, then no portion of the claims for disturbance should be added to the sum of $92,000. But I do not think that can be the case here. Just how much of the total amount of $26,617.31 should be disallowed is, however, not easy to determine. The evidence bearing on the matter is limited. Mr. Fitzsimmons agreed that the land had increased in value. Mr. Lawson admitted that if the foundry were located some streets away it would not make much difference to it. But Mr. Ross gave the most helpful

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assistance when he said that there was no other vacant land for a foundry site in the immediate area "until you get down to Duke Street or Sherwood Street or Broad Street". While he did not have any definite prices for land in the Duke Street area, the land values in that area, aside from buildings, would be considerably lower than that which he and Mr. Cassels placed on the Wellington Street frontage of the defendant's property. For the foundry part of it Mr. Ross' valuation of the land was $27,060, as against my estimate of $34,800. While it is difficult to determine the amount to be disallowed, I am satisfied that it is a substantial portion.

There is another aspect of the claims for disturbance that must be looked at. In *Horn* v. *Sunderland Corporation* (*supra*) Scott L.J. pointed out that in the Lands Clauses Act of 1845 there is no express provision giving compensation for disturbance, and then said of it, 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.

But while the judicial eye may have discerned the right to compensation for loss by disturbance in the requirement that the owner is entitled to compensation for the land taken from him according to its value to him, this does not mean that the amounts of the items of the claims for disturbance that may be taken into account as elements in such value are merely to be added to the amounts of all the other elements of value. What the Court is directed to do is to estimate the value of the land. There is a difference between taking elements into account in the estimation of such value and merely adding them together. In its anxiety to give effect to claims for disturbance the Court must not go so far as to nullify the effect of the statutory direction in section 47 of the Exchequer Court Act, and produce an estimate that is not one of value but really one of value plus damage. It follows that even the balance of the defendant's claims for disturbance over and above that which it must bear must face the tests of value set by Lord Moulton and Lord Romer. It could happen in certain cases that the claims for disturbance were so

great that it would be inconceivable that a prudent purchaser would be willing to go so far as to pay them in addition to what he considered was the value of the land. In the *Pastoral Finance Association Limited,* case (*supra*) Lord Moulton pictured the prudent purchaser considering how far he would go in order to get the land he desired. Just as in that case he would not add the capitalized value of the savings and profits so it might be that the owner's total claims would exceed what he would be willing to pay. It seems to me that the tests of value put by Lord Moulton and Lord Romer assume a hypothetical negotiation between the owner and the prudent purchaser, the owner not wishing to lose the sale and the purchaser desiring to obtain the property. In such negotiation the owner by reason of disturbance might well ask a figure higher than if there were no such disturbance, and the prudent purchaser might be willing, under the circumstances, to pay more than he otherwise would. It is assumed that at some stage in the negotiations the views of the two will meet at a certain amount. It is the function of the Court to determine this amount. It is obviously not possible for the Court to find with precision what the prudent purchaser would be willing to pay or what the willing seller could reasonably expect to obtain. At best, this must be a matter of opinion. This fact is recognized in the direction in section 47 of the Exchequer Court Act that the Court shall estimate the value of the land. It must do so as best it can in the light of all the facts.

Under all the circumstances, I have come to the conclusion that if I were to award the defendant the sum of $105,000 for the foundry part of its property this would adequately cover every element of value that could properly be taken into account, and at the same time meet the tests of value I have referred to. I think that a prudent purchaser, anxious to obtain the property, might well be willing to pay that amount rather than fail to obtain it, and I am certainly of the view that a willing seller could not reasonably expect to obtain more. I, therefore, estimate the value of the foundry part of the defendant's property at the sum of $105,000, and determine the amount of compensation money to which the defendant is entitled for it accordingly.

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In addition to the claims for disturbance, counsel for the defendant also claimed an allowance of 10 per cent for compulsory taking over and above the loss suffered by disturbance. There is no justification for a claim so made, either in England or in Canada. Cripps on Compensation, 8th edition, page 213 speaks of the allowance for compulsory purchase as follows:

> The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 per cent. can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 per cent is applied to the value of lands only, and not to incidental damage; this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation.

Arnold on Damages and Compensation, 2nd edition, page 248, contains a similar statement. In Canada the practice has been similar. The 10 per cent allowance has been made in a large number of cases, for example, *Symonds* v. *The King* (1); *Dodge* v. *The King* (2); *The King* v. *MacPherson* (3); *The King* v. *Hunting* (4); *The King* v. *The Royal Nova Scotia Yacht Squadron,* et al (5). There is no statutory authority for the allowance and no rule of law requiring it. Where it has been allowed, it has been done as a matter of practice, and even then the making of it has been regarded as discretionary. In *Dodge* v. *The King* (*supra*) Idington J. said that the percentage may be added "to cover contingencies of many kinds". The leading case on the subject in Canada is *The King* v. *Hunting* (*supra*). There Fitzpatrick C.J. said that "the 10 per cent allowance does not, of course, profess to be anything but a covering charge." Idington J. agreed that there was no rule of law rendering it an invariable consequence of compulsory taking, but expressed the opinion that in the majority of cases, "it is no more than justice demands". Anglin J. spoke of it as something to cover incidental and contingent losses and inconveniences, but Brodeur J. disapproved it. The granting of the allowance has been criticized in a number of cases in Ontario, for example, in *Re Watson and City of Toronto* (6). In

(1) (1903) 8 Ex. C.R. 319 at 322.
(2) (1906) 38 Can. S.C.R. 149 at 156.
(3) (1914) Ex. C.R. 215 at 232.
(4) (1917) 32 D.L.R. 331.
(5) (1921) 21 Ex. C.R. 160
(6) (1916) 38 O.L.R. 103.

England, in cases where land is taken compulsorily by Government departments or local or public authorities, the Acquisition of Land Act, 1919, applies and section 2 of that Act specifically enacts that no additional allowance shall be made for compulsory purchase. Similar legislative action to abolish any allowance for compulsory taking might well be taken in Canada. In the present case, I think that an allowance of 10 per cent might have been made to cover loss by disturbance instead of taking the claims for disturbance into account as elements of value of the land, but where the loss by disturbance has been thus 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.

This leaves only the matter of interest to be dealt with. In respect of the foundry part of the defendant's property it has continued in undisturbed possession of it since the date of the expropriation, and is, consequently, not entitled to any allowance for interest. Indeed, it does not make any claim for it. But the matter is otherwise in respect of the Devlin Block part of the property. The defendant collected the rents from the tenants of the block until the Crown took over on September 10, 1942, and subsequently collected rent from one tenant, amounting to $100, but, otherwise, collected no rents after September 1, 1942. I have estimated the value of the Devlin Block at $20,000, so that the defendant is entitled to interest on that sum at the rate of 5 per cent per annum from September 1, 1942, to the date of judgment, less the sum of $100 referred to. And the defendant is also entitled to its costs.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from July 28, 1938; 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 $125,000 together with interest at the rate of 5 per cent per annum on $20,000 from September 1, 1942, to this date, less the sum of $100; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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Oct. 2
Dec. 8

BETWEEN:

COMMERCIAL HOTEL LIMITED,

APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE

RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 47, 54, 58(1)—Determination of Minister under s. 47—Power of Minister under s. 47 is general and relates to assessment for tax as a whole—Onus of proof of error on appellant—Failure to discharge onus—Appeal dismissed.

Appellant operates a beer parlour in connection with its hotel business carried on in Vancouver, B.C. Respondent refused to accept the returns for income tax filed by the appellant for the years in question in this appeal, and, acting under s. 47 of the Income War Tax Act, determined the amount of tax to be paid by appellant, from which it appealed to this Court.

Held: That the Minister's power under s. 47 of the Act is general in nature and relates to the assessment for tax as a whole.

2. That the onus of proof of error in the amount of the determination by the Minister rests on the appellant and since the appellant has not discharged this onus the appeal must be dismissed.

APPEAL under the Income War Tax Act.

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

J. A. MacInnes, K.C. and *C. S. Arnold* for appellant.

John L. Farris for respondent.

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

O'CONNOR J. now (December 8, 1947) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C. 1927 c. 97, from assessments for income tax for the taxation years 1939, 1940, 1941, 1942 and 1943. The appellant during these years carried on a general hotel business, including a beer parlour, in the City of Vancouver.

The appellant filed annual returns for each of the said years. The respondent under section 47 of the Act refused to be bound by these returns and determined the amount of the tax to be paid by the appellant.

These appeals are concerned only with the items that relate to the sale of beer in the beer parlour and the profits therefrom.

The appeals were argued on the basis that the Minister in determining the amount of the tax under section 47 had exercised a discretion similar to that given him by section 6(2). On that basis counsel for the appellant argued that the material, which the Minister had before him at the time he determined the amount, was insufficient in law to support such determination and that the taxpayer had not been given a fair opportunity of meeting the case against it. And that the Minister had determined the tax on a theoretical basis of the revenue a barrel of beer should produce and not on the basis of what was actually produced. The appellant tendered evidence to establish the actual revenue.

47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

After considering section 47 I have reached the conclusion that the power given the Minister to determine the amount of the tax is not a discretion similar to that in section 6(2). What the Minister does under section 47 is to make his estimate of the tax payable by the taxpayer in two cases; (1) where the Minister refuses to be bound by the return filed, and (2) where no return has been made. In those two cases he determines the amount of the tax, that is, he makes an assessment. In *Harry Dezura* v. *The Minister of National Revenue* (*ante* p. 10), Thorson P., said:—

The statement in section 47 that the Minister may determine the amount of the tax to be paid by any person is only another way of saying that he may determine the amount of any person's assessment, for when the amount of the assessment is determined the amount of the tax to be paid follows as a matter of course.

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In the English Income Tax Act, 1918, section 112 provides:—

112. If the surveyor or the assessor does not receive a statement from a person liable to be charged to tax, the assessor shall to the best of his information and judgment—

(*a*) make an assessment upon that person of the amount at which he ought to be charged under Schedules A, B, and E.

Under section 121 of the same Act, subsection (4) provides:—

121. (4). If—

(*a*) a person makes default in the delivery of a statement in respect of any tax under Schedule D with which he has not been otherwise charged; or

(*b*) the additional commissioners are not satisfied with a statement which has been delivered, or have received any information as to its insufficiency; or

(*c*).....

the additional commissioners shall make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him.

While the language is not the same as that of section 47 of the Dominion Act, the purpose and the effect is, in my opinion, the same. Under section 47 this power is given to enable the Minister "to proceed with the best available estimate". This was the language that Lord Shaw used in the House of Lords in *Attorney-General* v. *Till* (1):—

My Lords, the power of assessment and surcharge does not appear to me to assist the construction of s.55. Such powers are inserted in the Act simply because, in addition to all kinds of penalties, the Board of Inland Revenue must ingather taxation; and if the taxpayer will not furnish the information himself, some means must be provided of recovering the duty, and these powers are given to enable the Board to proceed with the best available estimate.

These words were quoted with approval by Rinfret, J., now Chief Justice of Canada, in *International Harvester Company of Canada, Ltd.*, v. *The Provincial Tax Commission et al* (2). In that case under the Income Tax Act 1932 (Saskatchewan), regulations were issued:—

covering such cases where the Minister is unable to determine or obtain information required to ascertain the income within the province of a corporation or joint stock company carrying on a trade or business within and without the province.

The Chief Justice termed the method adopted by the Commissioner of Income Tax under the provisions in the regulations, "nothing else than the adoption of the best available

(1) (1910) A.C. 50 at 72. (2) (1941) S.C.R., 325 at 352.

means to ascertain the income of the appellant arising from its business in Saskatchewan, and nothing more".

Section 54 of the Dominion Act provides:—

54. After examination of the taxpayer's return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return.

Whether the Minister has determined the *amount* of the tax under section 47 or has altered the *amount* of the tax under section 47 or has altered the *amount* of the tax estimated by the taxpayer in his return under section 54, the taxpayer has a right of appeal because section 58(1) provides:—

58 (1). Any person who *objects to the amount* at which he is assessed, ...may...serve a notice of appeal upon the Minister,

(*a*)....

The Minister in determining the amount of the tax under section 47 does not have to have material sufficient in law to support his determination, or to give the taxpayer an opportunity of meeting the case against him.

In this case, however, before the assessment was made, the Inspector of Income Tax at Vancouver wrote to the solicitors for the appellant in part as follows:—

In regard to the B.C. Hotels Association they have for years urged their members to file with the Department returns that were reasonably accurate and realizing that, acting on a ruling from Ottawa, the Department meant business they appointed a special committee from their Executive to see if satisfactory arrangements could be made whereby no prosecutions would be undertaken. The barrelage rate was such that no reasonable member could protest. It further was agreed that if any member felt his assessments to be unjust the Association would review them and make recommendation to the Department for an adjustment. This Association is both the purchasing and protective agency of the members. Needless to say Mr. Johnson did not invoke their assistance and he probably realized that his barrelage was the lowest on record. The Association was, and is motivated by the desire that no undue publicity be made of any of its members in view of public animosity then existing.

When this writer examined the company's books to enable assessments to be made for 1940 and 1941 Mr. Johnson made a suggestion that he knew the barrelage was too low but if the writer would fix the matter up at Ottawa he would see that a satisfactory arrangement would be made at this end. In other words, a bribe was offered to close the matter up. Also, the late Mr. Lee, the company's book-keeper, told the writer that the figures given him from Mr. Johnson were not correct and that his request for register tapes and readings were ignored and he was told to mind his own business. And finally, in a meeting held in this office in April, 1943, Mr. Johnson announced his barrelage had risen

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to $62.00 per barrel. This is a rather substantial increase from $45.00 to $50.00 for 1942, but merely is in line with the magical increase reported by all delinquent members. The explanation Mr. Johnson will give you as he gave me, was that he was using larger glasses. Actually the Department had taken the precaution, as it did in all cases, to take a glass which was labelled with the company's name and date. In any event the only glasses that could be procured from October, 1939, was from one source only—a reported 7½ oz. glass, but actually a 6 oz. one, containing somewhat better than 5 ozs. when an honest glass was given. Any operator who had larger glasses than the ones referred to were instructed by the Association to discard them to prevent unfair competition.

The solicitors for the appellant, under date of June 12, 1945, replied as follows:—

> We acknowledge receipt of your letter of the 5th inst., and while we disagree with many of the statements therein contained, it seems useless to enter into a discussion over matters which in all probability will come before the Minister and, later on, before the Exchequer Court of Canada.

The assessments were then made on the 9th August, 1945.

In the light of these letters the appellant cannot now be heard to say that the Minister determined the amount of the tax without giving the appellant a fair opportunity of meeting the case against it.

The Minister's decision under section 47 is not an absolute one. As Thorson, P., said in the *Dezura case* (*supra*):—

> The result is that when the Minister, acting under section 47, has determined the amount of the tax to be paid by any person, the amount so determined is subject to review by the Court under its appellate jurisdiction.

And—

> The amount of the Minister's determination being thus subject to review by the Court the issue on these appeals is solely one of fact.

If the taxpayer can establish to the satisfaction of the Court that the actual income was less than the amount determined by the Minister, then such amount will be reduced in accordance with the findings of the Court.

In this case the appellant tendered evidence to establish the actual income from the sale of the beer. In fairness to the appellant, I should state that because of the death of the manager, Mr. Johnson, and two of the three bookkeepers, who were employed by the appellant during the period in question, the appellant was greatly handicapped at the trial. But the evidence adduced by the appellant

did not prove to my satisfaction that the actual revenue was as disclosed by the books and returns filed by the appellant. In fact quite the contrary.

The evidence showed that each night the cash receipts were placed in a box and given to Mr. Johnson with a slip of paper on which was written the total of the daily sales shown by the cash register. Every day during Eckardt's employment as a bookkeeper, he received a piece of paper on which was written a sum purporting to be the total beer sales for the previous day.

Crawford, one of the bar tenders employed by the appellant, said that he worked three days a week in the mornings and the other three days in the week he worked at night. Perras worked when Crawford was off. Crawford said that he put the cash each night in the box with a slip on which the total amount taken in during the day was written by him or was stamped with the cash register. Perras stated that the only time he attended to the totalling of the cash at night was when Crawford was away.

Eckardt stated that he got the slips from Johnson and entered the books with the amount shown on the slip and—

Q. Where did you get those figures from in each case?
A. From the slips handed in to me.
Q. In whose handwriting were those slips?
A. Mostly in Perras'.
Q. Were there any in anybody else's writing?
A. At times, yes.
Q. Do you know in whose handwriting they were?
A. I wouldn't like to swear to that.
Q. Did you get any printed memos?
A. No.

While Crawford worked three nights a week and either wrote the daily total or printed it on the cash register, the bookkeeper, Eckardt, received slips "mostly in Perras' handwriting", and did not receive any printed memos, i.e., stamped in the cash register. No explanation of this was given.

Eckardt did not receive cash register tapes because there were none on the machine and he stated that Johnson never counted the cash before him. At the end of every month he showed Johnson the cash balance and asked him if he had that amount on hand and Johnson replied, "That's right".

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COMMERCIAL HOTEL LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

William Findlay, employed by the Inspector of Income Tax at Vancouver up to April, 1947, stated that the barrelage shown in the appellant's returns was $7.00 and $8.00 lower than the average of other hotels in Vancouver as shown in their returns, and that in a conversation about the 5th May, 1947, about the barrelage of the appellant, Johnson said to him, "Findlay, I know the barrelage is too low, but you get it passed by Ottawa and I will fix you". Findlay also stated that he requested them to put tapes on the cash register so these could be handed to the bookkeeper, thus permitting him to verify the total daily amount and that the appellant did not get these tapes.

Perras stated that these daily slips were destroyed because, "We didn't need them". On cross-examination, he swore that all the entries in the cash book for beer sales were correct, and—

Q. Every single one of them?

A. Yes.

Q. No doubt about that?

A. Yes, sir, they are right.

Q. You are swearing to the days you weren't there, that they are correct, are you? Are you swearing to that?

A. Well I guess I have to.

I do not accept his evidence.

The respondent tendered certain evidence to show that Mr. Johnson lived in a manner which indicated personal revenue beyond that which he obtained from the appellant, and which could not be otherwise explained than that undisclosed profits of the appellant were being diverted to his personal benefit. The evidence given did not establish this and moreover the evidence given on behalf of the appellant established that there were other sources of income or capital open to him.

The appellant further contended that the Minister had certain reports before him at the time he affirmed the assessment, and the appellant had no knowledge of these reports and had no opportunity of meeting the case against it.

The Minister when he affirms or amends the assessment may be right or he may be wrong. But when the appellant continues his appeal to the Court he then has a full opportunity of presenting all the facts, statutory provisions and

reasons in support of his appeal, so that he is not prejudiced by the decision of the Minister in affirming the assessment.

The appeal has not satisfied me that the actual revenue was less than the revenue estimated by the Minister under section 47 during the years in question, and the appeal must, therefore, be dismissed with costs.

Judgment accordingly.

BETWEEN:

ALBERT LAMARRE, in his quality as Trustee under the Bankruptcy Act of ENGINE WORKS & TRADING INC. ..... SUPPLIANT,

1945
Oct. 10
1947
Dec. 22

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of right—Action by a trustee in bankruptcy to recover money in Crown's possession as part of a bankrupt's assets—Moneys delivered to a Minister of the Crown by a third party being neither a gift nor a payment constitute a contract of voluntary deposit within Articles 1799 to 1811 of the Civil Code of the Province of Quebec—Money received by the Crown by way of voluntary deposit may be claimed by a trustee in bankruptcy as asset of the bankrupt's estate.

Suppliant, trustee of a bankrupt company, claims from the Crown certain money received by one F. from the company for services rendered prior to the bankruptcy and delivered by F., by cheque, to a Minister of the Crown because F. suspected irregularities in the management of the bankrupt company.

Held: That the remittance of the cheque by F. to the Minister of the Crown was not a gift nor a payment but merely a voluntary deposit, a civil contract to which articles 1799 to 1811 of the Civil Code of the Province of Quebec apply.

2. That the money received by F. and delivered by him to the respondent reverted into the assets of the bankrupt company and should have been remitted to the trustee for distribution among the creditors.

PETITION OF RIGHT by suppliant to recover certain money alleged as being assets of a bankrupt company.

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

John Ahern, K.C. for suppliant,

C. A. Geoffrion for respondent.

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

The case is reported on two points only.

ANGERS J. now (December 22, 1947) delivered the following judgment:

This is a Petition of Right by which Albert Lamarre, in his quality of Trustee of Engine Works & Trading Inc., a corporation formerly carrying on business in the City of Montreal, prays that it be declared that His Majesty the King, in the rights of the Dominion of Canada, is indebted to the suppliant in the cheque for the sum of $3,035.98 payable to the Minister of Finance, drawn by Elmer W. Ferguson on the Montreal City and District Savings Bank, or to the proceeds thereof should the said cheque have been cashed, and that the said cheque or the proceeds thereof be adjudged and awarded to the suppliant with interest on the said sum from the day when, and if it was cashed, to the date of payment, and that judgment be rendered accordingly.

The suppliant, in his Petition, alleges in substance:

Engine Works & Trading Inc. was a corporation doing business in the City of Montreal and is presently being wound up under the provisions of the Bankruptcy Act, and Albert Lamarre was duly appointed its Trustee and he has been authorized to make the present Petition of Right by resolution of the Inspectors;

during 1941 and 1942 one Elmer W. Ferguson received, without legal consideration, a sum of $3,035.98 from the funds belonging to the Company;

said sum was paid to the said Ferguson by the Company without authority and without approval of the Board of Directors;

on or about September 16, 1942, the said Ferguson forwarded to the Minister of Munitions and Supply, a creditor of the Company, his cheque for the said amount of $3,035.98 to the order of the Minister of Finance, as he wished to avoid being involved in an investigation of the affairs of the Company then being conducted on behalf of the Minister of Munitions and Supply;

the said Ferguson, on September 16, 1942, was not debtor of the said sum of $3,035.98 to either the Minister of Munitions and Supply or the Minister of Finance;

on March 9, 1944, the suppliant moved the Superior Court, sitting in Bankruptcy for the District of Montreal, for an Order declaring that Elmer W. Ferguson owes the Estate of the Company Debtor the sum of $3,035.98 and that the suppliant is entitled to obtain payment thereof, or to obtain delivery of the cheque for $3,035.98 forwarded by the said Ferguson to the Minister of Munitions and Supply, and notice of the said motion was given to the Minister of Justice;

the said Ferguson did not contest the said motion, consented to judgment being rendered as prayed for by the suppliant, and judgment was rendered accordingly;

the said sum of $3,035.98 forms part of the assets of the debtor company and the suppliant is entitled to obtain the same;

on May 9, 1944, judgment was rendered on the suppliant's motion in accordance with the prayer thereof, and a copy of the said judgment was forwarded to the Department of Justice on May 25, 1944, and demand was made on behalf of suppliant for delivery of the said cheque or the proceeds thereof if cashed;

the same demand was made on the Department of Finance without result, the Departments of Justice, of Finance and of Munitions and Supply refusing to deliver the said cheque or the proceeds thereof to the suppliant;

The suppliant prays that it be declared that His Majesty, in the rights of the Dominion of Canada, is indebted to suppliant in the cheque for the sum of $3,035.98 payable to the Minister of Finance drawn by Elmer W. Ferguson on the Montreal City and District Savings Bank, Montreal, or to the proceeds thereof should the said cheque have been cashed, and that the said cheque or the proceeds thereof be adjudged and awarded to suppliant, with interest on the said cheque from the date when and if it was cashed to the date of payment, and that judgment be rendered accordingly, the whole with costs.

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In his Statement of Defence, the Attorney General for Canada, on behalf of His Majesty, submits that the Petition of Right is insufficient and bad in substance and in law in that it does not allege any fact establishing a cause of action against His Majesty respecting the subject matter of the Petition or establishing any liability for which His Majesty is bound or may be adjudged to respond in so far as the suppliant is concerned, and reserving these and all other objections to the sufficiency in law of the Petition which the Attorney General submits should be heard and determined before trial of the issue of fact, pleads in substance:

it is admitted that Engine Works & Trading Inc. was a corporation formerly doing business in the City of Montreal and is presently being wound up under the provisions of the Bankruptcy Act, adding that such winding up commenced on March 16, 1943; it is also admitted that Albert Lamarre was appointed its Trustee in Bankruptcy;

it is admitted that by letter of September 16, 1942, addressed to the Honourable C. D. Howe, Minister of Munitions and Supply, Elmer W. Ferguson sent to the said Minister his cheque for $3,035.98 for the reasons set forth in the said letter, which speaks for itself;

it is admitted that there existed on September 16, 1942, no obligation legally enforceable by His Majesty against the said Ferguson for the payment of the sum of $3,035.98;

it is admitted that notice of the motion of March 9, 1944, to the Superior Court, sitting in Bankruptcy for the District of Montreal, praying for an Order declaring that Elmer W. Ferguson owes the Estate of Engine Works & Trading Inc. the sum of $3,035.98 and that the suppliant is entitled to obtain payment thereof or the delivery of the cheque for the said amount forwarded by said Ferguson to the Minister of Munitions and Supply, was given to the Minister of Justice, and it is specially alleged that such notice is null, void and of no effect as regards His Majesty;

the judgment on the said motion has no effect as regards His Majesty;

the suppliant is not entitled to obtain from His Majesty the said sum of $3,035.98;

it is admitted that on May 25, 1944, a copy of the judgment rendered by the Superior Court, sitting in Bankruptcy, was forwarded to the Department of Justice and that demand was made on behalf of suppliant for delivery of the aforesaid cheque or the proceeds thereof if cashed;

it is admitted that the Departments of Justice, of Finance and of Munitions and Supply refused the said demand and it is specially alleged that His Majesty was justified in refusing it;

the cheque which was sent to the Minister of Munitions and Supply by the said Ferguson was later returned to him and replaced by a certified cheque for the same amount;

there is no privity (of contract) or "lien de droit" between suppliant and His Majesty;

the said sum of $3,035.98 was paid by the said Ferguson to His Majesty voluntarily from his own funds and without error on his part either in fact or in law and he has no right to recover the said amount from His Majesty; the other allegations of the petition are not admitted.

In his reply the suppliant says in substance as follows:

he prays act of the admissions contained in the Statement of Defence, joins issue with the denials therein and denies the other allegations;

in October 1943, the said Ferguson requested the respondent to deliver the cheque which he had issued to the order of the Minister of Finance to the suppliant; the original of the letter is in respondent's possession;

the sum of $3,035.98 was paid by the said Ferguson to the respondent in error.

A brief summary of the evidence is apposite.

Elmer W. Ferguson, journalist and publicity agent, examined as witness on behalf of suppliant, filed as Exhibit 1 a copy of a letter from himself to the Minister of Munitions and Supply dated September 16, 1942, which contains, amongst others, the following statement:

Attached herewith, please find my cheque for $3,035 98, this representing all sums paid me by Engine Works and Trading, of Montreal, for

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publicity work, from the time of my engagement with that firm, to date, less certain amounts already paid for income and National Defence taxes, last year and this.

There follows a detail of the sum of $3,035.98, which is not material. The letter then continues:

I have taken this step, following my resignation from the Company filed immediately after recent newspaper revelations, purporting to be a resume of the evidence gleaned during a recent enquiry into the conduct of the Company, and carrying the implications that there had been irregularities in the conduct of this concern.

I was approached, a year ago, by Mr. P. T. Lynch, President of Engine Works and Trading, to undertake certain publicity which would capitalize upon his wide connection with sport, to the benefit of his firm, and as a means of creating goodwill thereto, at a salary set by himself, and not by me. I considered this a perfectly legitimate undertaking, but now that it has become apparent there were possible irregularities in the conduct of the firm, of which I, as an employee, would not be aware, I do not wish to retain a single penny of such monies. I am, therefore, returning in full the amounts paid me, in order that these may be diverted into the proper channels.

Ferguson declared that the cheque was enclosed in the letter and that it was charged to his account in the bank. He stated that he received a reply from the Deputy Minister of Justice dated October 7, 1942, marked as Exhibit 2, the second paragraph whereof reads thus:

You will readily understand that at this stage of the investigation into the affairs of the above mentioned company I am quite unable to advise what disposition should be made of any moneys representing funds heretofore distributed by the company. If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may if you please authorize me to present this cheque certified at your bank and to hold the same until it is decided what disposition should be made thereof.

The witness admitted having written the letter addressed to the Deputy Minister of Justice and dated October 7, 1943, which was filed as Exhibit 3.

I deem it convenient to quote this letter verbatim:

Re: Engine Works & Trading Inc.

On September 16, 1942 I forwarded to the Minister of Munitions and Supply my cheque payable to the Minister of Finance for the sum of $3,035.98, representing funds received by me from Engine Works & Trading Inc. There was at the time an investigation into the affairs of that corporation and public rumours to the effect that it had made illicit profits in the execution of war contracts for the Department of Munitions and Supply. As I did not wish to benefit from profits which might have been illegally made on war contracts, I forwarded the above mentioned cheque which represented payments made to me by the corporation for services rendered.

The Minister of Munitions and Supply forwarded the cheque to you.

The Trustee of Engine Works & Trading Inc., in Bankruptcy has requested you to deliver the said cheque to him to form part of the assets of the estate being liquidated.

I hereby, insofar as the same may be necessary, agree that you should deliver the said cheque to Albert Lamarre, Trustee of Engine Works & Trading Inc., to whom I will deliver a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving my rights, if any, to have the courts decide my obligation to pay the said amount to the Trustee.

Ferguson filed as Exhibit 4 a letter from the Acting Deputy Minister of Justice to him dated August 31, 1943, acknowledging receipt of his letter of August 27 with enclosures (which, by the way, was not produced), containing the following averments:

I note that the trustee in bankruptcy of the above estate proposes to institute action against you for the sum of $3,035.98, alleged to have been received by you from the bankrupt company.

I have to advise you that it is not the function of this department to advise private litigants in connection with their rights and I would suggest that you seek the advice of your own solicitor in this matter.

The decision as to the final disposition of the moneys paid by you cannot be made until title to same has been established in the courts.

W. L. Covert, accountant for Albert Lamarre, the suppliant, filed as Exhibit 5 a certified copy of a judgment of the Superior Court, sitting in Bankruptcy, dated May 9, 1944, in re: Engine Works & Trading Inc., Debtor, and Albert Lamarre, Trustee, and Elmer W. Ferguson, respondent, which granted a petition of the Trustee, declared that the respondent owes the estate of the debtor the sum of $3,035.98 and ordered the Minister of Finance or the Minister of Justice to deliver to the Trustee the respondent's cheque for the said sum of $3,035.98.

The petition in question, which is reproduced in the judgment, after relating the winding up of the company debtor and the appointment of Albert Lamarre as Trustee, declares:

2. During the years 1941 and 1942 the Respondent received, without consideration, the sum of $3,035.98 from the Company Debtor;

3. The said amount of money was paid to Respondent by the Company debtor without the required authority or approval of the Board of Directors;

4. On or about the 16th of September 1942, Respondent forwarded to the Minister of Munitions and Supply, Ottawa, a creditor of the Company Debtor, his cheque for the said amount of $3,035.98 to the order of the

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Minister of Finance, who referred it to the Minister of Justice, who agreed to hold it pending outcome of proceedings between the Debtor Company and the Minister of Munitions and Supply;

5. After a Bankruptcy Order was made against the Debtor Company the Trustee made a claim on the Respondent for the said sum of $3,035.98 and the Respondent agreed that his cheque for the said amount, which was in the possession of the Minister of Justice, be turned over to the Trustee;

6. The Trustee then made application to the Minister of Justice to obtain delivery of the said cheque and forwarded to him a letter signed by the Respondent agreeing to delivery of the said cheque to the Trustee, . . .;

7. The Deputy Minister of Justice advised the Trustee that he was not prepared to instruct that the cheque be delivered to him unless and until it is established before some Court of competent jurisdiction that the cheque in question or the proceeds thereof is rightfully the property of the estate of the Company Debtor, . . .

Shown by Counsel for respondent a letter signed "W. L. Covert, for Albert Lamarre, Trustee", dated October 20, 1943, addressed to the Deputy Minister of Justice, Covert admitted that he had written and signed it; it was marked as Exhibit A. He agreed that the letter of October 7, 1943, therein mentioned is the letter which was filed as Exhibit 3.

No other evidence was adduced on behalf of respondent.

In support of the point of law raised by respondent in his defence that the suppliant's petition does not allege any fact establishing a cause of action against His Majesty or any liability for which His Majesty is bound or may be adjudged to respond in so far as the suppliant is concerned, it was argued that, since the action is primarily one for the revendication of a cheque, there is no privity of contract between the parties because the suppliant cannot maintain that he is the owner of the cheque.

It was submitted by counsel for respondent that the cheque in question was made by Elmer W. Ferguson and sent by him to the Minister of Munitions and Supply and that consequently the owner of the cheque is either Ferguson or His Majesty the King and not the suppliant. Counsel concluded that in the circumstances the claim cannot be based on the fact that the suppliant is the owner of the cheque or of the money. He agreed that the suppliant may be a creditor of Ferguson in the sum of $3,035.98 but said that he is not the owner of the

actual funds which Ferguson turned over to the Government. He summarized his argument in stating that money is "chose fongible" and cannot be identified for purposes of ownership. He concluded that suppliant does not own the cheque nor the money and that therefore he cannot revendicate it.

I do not think that the point of law set forth by respondent in his defence is tenable. Counsel, in my opinion, misapprehended the question.

The facts are simple and need not be expounded at any great length. Ferguson, who did some publicity work for Engine Works & Trading Inc. and received $3,035.98 for his services, suspecting that there had been irregularities in the conduct of the company, decided not to keep the money and sent a cheque to the Minister of Munitions and Supply for the amounts paid to him "in order that these may be *diverted into the proper channels*" (see letter Exhibit 1).

On October 7, 1942, as we have seen, the Deputy Minister of Justice wrote Ferguson that the Minister of Munitions and Supply had forwarded to him his letter and cheque and had asked him his advice as to what disposition should be made of the cheque. After stating that, at the present stage of investigation into the affairs of the Company, he is unable to advise what disposition should be made of moneys representing funds heretofore distributed by the Company, the Deputy Minister intimated that, if it is the addressee's desire that the Crown should retain the moneys pending the outcome of proceedings, he may, if it pleases him, authorize the Deputy Minister to present the cheque at the bank and hold it *until it is decided what disposition should be made thereof.*

On August 31, 1943, in reply to a letter dated the 27th of the same month, which has not been filed, the Acting Deputy Minister of Justice wrote to Ferguson taking note that the trustee proposed to institute action against him to recover the sum of $3,035.98 alleged to have been received by him from the bankrupt Company and notifying him that it is not the function of the Department of Justice to advise private litigants in connection with

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their rights and suggesting that he should seek the advice of his own solicitor. The Acting Deputy Minister added that the decision as to the final disposition of the moneys paid by him cannot be made until title to the same has been established by the courts.

One year exactly after the letter of the Deputy Minister of Justice to him, to wit on October 7, 1943, Ferguson, as already said, wrote to the said Deputy Minister reminding him of the request of the trustee of Engine Works & Trading Inc. to deliver to him the cheque aforesaid to form part of the assets of the estate being liquidated and telling him that, in so far as it might be necessary, he agreed that the Deputy Minister should deliver the said cheque to the trustee to whom he (Ferguson) would remit a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving his rights, if any, to have the courts decide his obligation to pay the said amount to the trustee.

In his letter to the Deputy Minister of Justice (Exhibit A) W. L. Covert, writing for the trustee, enclosed Ferguson's letter to the Deputy Minister of Justice of October 7, 1943, (Exhibit 3) and made, among others, the following statements:

> You will note from the letter that Mr. Ferguson does authorize that you deliver the said cheque of $3,035.98 to me as trustee of the Engine Works & Trading Inc. in bankruptcy.
>
> Kindly, under the above mentioned circumstances, favour me by forwarding the cheque of Mr. Ferguson to this office.

The Department of Justice disregarded the letter of the trustee as well as the judgment of the Superior Court, sitting in bankruptcy, for the District of Montreal. In his statement of defence the respondent admitted that notice of the petition for an order declaring that Elmer W. Ferguson owes the estate of the company debtor the sum of $3,035.98 and that the suppliant is entitled to obtain payment thereof or delivery of the cheque for the said sum forwarded by Ferguson was given to the Minister of Munitions and Supply, but avers that the said notice is null, void and of no effect as regards His Majesty. The respondent further admitted that on May 25, 1944, a copy of the judgment rendered by the Bankruptcy Court ("Act"

by error), District of Montreal, on May 19, 1944, was forwarded to the Department of Justice and demand made on behalf of suppliant for delivery of the cheque or the proceeds thereof, if cashed, but alleges specially that the said judgment can have no effect as regards His Majesty.

It seems to me apposite to quote the conclusion of the judgment:

DOTH GRANT said petition; DOTH DECLARE that the respondent owes the estate of the Company Debtor the sum of $3,035.98; DOTH ORDER the Minister of Finance or the Minister of Justice to deliver to the trustee, Albert Lamarre, the respondent's cheque for the said sum of $3,035.98,—the whole with costs against respondent.

[The learned judge here refers to the jurisdiction of the Bankruptcy Courts and proceeds]:

After a careful perusal of the pertinent sections of the Act and rules I have reached the conclusion that instead of proceeding by way of petition to the Superior Court, "in Bankruptcy" the suppliant should have brought an action before the Superior Court carrying on its original jurisdiction as fixed by the Code of Civil Procedure.

This, however, does not settle the problem involved; it merely disposes of an incidental question, to which undue importance was perhaps attributed. What I must determine is whether the respondent is entitled to appropriate a sum which was entrusted to him conditionally. The sum of $3,035.98 was remitted by Elmer W. Ferguson to the Minister of Munitions and Supply in his letter of September 16, 1942 (Exhibit 1), for reasons set forth by the writer, with which we are not concerned, in order that it "may be diverted into the proper channels". The remittance in question was not a gift nor a payment; it was merely, as I think, a voluntary deposit. It is apparently the view which the Deputy Minister of Justice, to whom the Minister of Munitions and Supply had forwarded the cheque, took of the case when in his letter of October 7, 1942 (Exhibit 2), he said: "If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may if you please authorize me to present this cheque certified (?) at your bank and to hold the same until it is decided what disposition should be made thereof."

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In his letter of October 7, 1943 (Exhibit 3), to the Deputy Minister of Justice, Ferguson confirmed the desire expressed in his previous letter (Exhibit 1) and wrote in part, as we have seen: "I hereby . . . agree that you should deliver the said cheque to Albert Lamarre, Trustee of Engine Works & Trading Inc., to whom I will deliver a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving my rights, if any, to have the courts decide my obligation to pay the said amount to the Trustee."

The relations existing between Elmer W. Ferguson and the respondent are those resulting of a contract of voluntary deposit, to which Articles 1799 to 1811 of the Civil Code apply.

Articles 1803, 1804, 1807, 1810, which are particularly applicable in the present case, read thus:

1803 The depositary has no right to use the thing deposited without the permission of the depositor.

1804 The depositary is bound to restore the identical thing which he has received in deposit.

If the thing have been taken from him by irresistible force and something given in exchange for it, he is bound to restore whatever he has received in exchange.

1807. The depositary is bound to restore any profits received by him from the thing deposited.

He is not bound to pay interest on money deposited unless he is in default of restoring it.

1810. The depositary is obliged to restore the thing to the depositor whenever it is demanded, although the delay for its restoration may have been fixed by the contract, unless he is prevented from so doing by reason of an attachment, or opposition, or other legal hindrance, or has a right of retention of the thing, as declared in article 1812.

Article 1812 has no application in the present case.

The evidence discloses that the suppliant, to whom Ferguson had agreed that the cheque or the proceeds thereof be remitted, requested such remittance from the respondent and that his request was refused. The trustee was thus compelled to bring an action. The respondent persisted in his refusal to surrender the cheque or the proceeds thereof and contested the suppliant's action, pleading (*inter alia*) that the sum of $3,035.98 was paid by Ferguson voluntarily from his own funds and without error on his part, either in fact or in law, and that he has no right to recover the said amount from His Majesty.

Ferguson's decision not to keep the amount received from Engine Works & Trading Inc. in payment of his services but to return it so that it might "be diverted into the proper channels" had, in my view, the effect of causing it to revert into the assets of Engine Works & Trading Inc. It thereby became subject to distribution among the creditors of the company by the trustee.

It was argued on behalf of respondent that he has a privileged claim and is entitled to be paid in priority to all other creditors. I have given the matter due consideration and made a careful and elaborate review of the jurisprudence, although I do not attach as much importance to the question as counsel for respondent did, for the reason that I do not believe that a party, even be it His Majesty the King, can take the law in his own hands.

The question of priority of claims is fixed by sections 121 and following of the Bankruptcy Act.

Section 121 provides that, subject to the provisions of section 126 as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:

1. the costs and expenses of the custodian and the fees and expenses of the trustee;

2. the costs of the execution or judgment creditor coming within the provisions of subsection 1 of section 25 and subsection 3 of section 29 and subsection 2 of section 29A;

3. all indebtedness of the bankrupt or authorized assignor under any Workman's Compensation Act and all wages, salaries, commissions or compensation of any clerk, servant, etc., in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment (there follows a proviso which is not material herein);

4. claims resulting from injuries to employees of the debtor to which the provisions of any Workmen's Compensation Act do not apply, but only upon moneys paid or payable to the insolvent estate by persons or companies guaranteeing the insolvent debtor against damages resulting from such injuries.

Section 122 deals with the case of partners, with which we are not concerned.

Section 123 states that, subject to the provisions of the Act, all debts proved shall be paid *pari passu.*

Section 124 relates to interest and has no materiality herein.

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Section 125, regarding taxes, rates or assessments, reads thus:

> Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien of charge in respect of such property created by any such laws.

Section 188 in Part VIII of the Act, headed "Supplemental Provisions", enacts that "save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown".

A brief recapitulation of the precedents seems convenient.

In *re Toronto Metal and Waste Company* (1), it was held by the Supreme Court of Ontario, in bankruptcy, Orde J., that the claim of the Crown against a bankrupt for sale taxes due under The Special War Revenue Acts is not one depending upon any lien or charge but is a prerogative right of the Crown to be paid upon a distribution in bankruptcy in priority to unsecured creditors, which right is preserved by sec. 51 (6) of the Bankruptcy Act (now sec. 125); that this prerogative right apart from any writ of extent or some lien or charge in favour of the Crown is one which is subject to the trustee's right to be paid his fees and expenses of the bankruptcy and to the lien for sheriff's fees payable under sec. II of The Bankruptcy Act, on the sheriff's surrender of goods seized by him to the trustee, and is also subject to the lien of the seizing execution creditor for costs under said sec. II (now sec. 29, subsec. 3).

I deem it expedient to quote a passage from the judgment of Mr. Justice Orde which is exactly in point (p. 139):

> This motion raises directly the question upon which I touched in my judgment in *In re West & Co.* (1921) 2 C.B.R. 3, namely, whether the Crown's priority for taxes, which is preserved under subsec. 6 of sec. 51 of The Bankruptcy Act, entitles the Crown to rank ahead of the trustee's fees and expenses. I suggested there that as the collection of the taxes of which the Crown reaps the benefit must under the circumstances be

(1) (1921) 2 C.B.R. 138.

made through the medium of the bankruptcy, it would seem to be wholly unreasonable and unfair that the Crown should be entitled to take advantage of the administration of the estate by the trustee without being subject to the expense incidental to such administration.

There is no parallel between the position of the Crown under subsec. 6 of sec. 51, and that of the landlord under sec. 52. The landlord's right to priority depends upon the right of distress. a right in the nature of a lien, and as already held in *In re Auto Experts, Ltd.* (1921) 1 C.B.R. 418, 19 O.W.N. 532, 20 O.W.N. 2, that right is superior even to the trustee's fees and expenses. But the claim of the Crown does not depend upon any lien or charge upon the bankrupt estate, but is a prerogative right of the Crown to be paid upon a distribution in bankruptcy in priority to other unsecured creditors. As pointed out in the *West Case, supra,* this prerogative is quite distinct from that which, prior to the adjudication in bankruptcy or to the making of an authorized assignment, might have been exercised by the process of a writ of extent: *Commissioners of Taxation for New South Wales* v. *Palmer,* (1907) A.C. 179, 76 L.J. P.C. 41.

The prerogative is one which the Crown is entitled to assert in the bankruptcy proceedings. But in bankruptcy (whether the administration is under a receiving order, or under an authorized assignment) the property in the debtor's estate has passed to the trustee, the right to issue a writ of extent is gone, and the only prerogative left to the Crown is that already mentioned. The prerogative is, therefore, merely a right of preference in the administration of the estate.

No authority was cited for the contention that this prerogative went the length of depriving the trustee of his fees and expenses. And I see no ground whatever for holding that it does so.

The relevant observations of Mr. Justice Orde in *re West & Co.* above referred to appear on page 15 of the report.

In *re Solomons Bochner Fur Company* (1), it was held that since The Special War Revenue Amendment Act, 1922, the Crown has a claim for war revenue tax against an insolvent estate which will take priority over a landlord's claim for rent, but the trustee's fees, costs and expenses are to be first paid under that Act where there are not sufficient assets to satisfy both the war revenue tax and the trustee's remuneration.

At page 754 we find the following comments by Fisher J.:

I am of opinion that Parliament made the trustee's costs, fees and expenses, a first charge because it would be unreasonable and unfair that the Crown should take advantage of the administration of the estate without being subject to the trustee's expenses in the administration of it. In all cases where there is no claim made by the Crown for war revenue tax, the landlord's right of priority under sec. 52 remains. The amendment is a sweeping one, as it declares "notwithstanding The

(1) (1923) 3 C.B.R. 753.

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Bankruptcy Act (and this must include sec. 52 of it) or any statute or law". The priorities under secs. 51 and 52 of The Bankruptcy Act (1 C.B.R. 55-57, 577-79) stand as before this amendment where there is no claim by the Crown for war revenue tax.

In *re Davis Candy Academy* (1), the head note, fairly comprehensive, reads thus:

A landlord's preferential lien for rent in cases of bankruptcy is a first charge and payable in priority to the trustee's remuneration, except in cases where war revenue taxes have become due prior to the rent, in which case the costs, charges, and expenses of the trustee are to be paid first, the war revenue tax second and the landlord's rent third.

In *re Imperial Clothing Company Limited* (2), the Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick expressed the following opinion (p. 187):

The claim of His Majesty being one for taxes under a Dominion statute, it is not to be affected by anything in sections 121 to 124. It is claimed by the respondent that sec. 188 of The Bankruptcy Act (9 C B R 331), which is the centre around which the argument turns, destroys the Crown's prerogative priority of payment and puts it on an equality with ordinary unsecured creditors But I do not think that is so. Sec. 188 binds the Crown in regard to priorities and places it on an equal footing with ordinary creditors in all matters, "save as provided in this Act," i.e. The Bankruptcy Act; but nothing in secs. 121 to 124 (both inclusive) which fix priorities, is to interfere with the collection of any taxes (sec. 125). The prerogative right of the Crown to rank in preference to unsecured creditors, for taxes, has not, in my opinion, been destroyed by sec. 188.

The question under discussion has been agitated and adjudicated upon in several cases arising in Ontario. There it has been held that although The Special War Revenue Act contains no provision making sales taxes a lien or charge upon the property of the debtor, the Crown, in right of the Dominion is entitled to priority under sec. 125 (per Orde J., in *In re West & Co.* (1921), 2 C.B.R. 3, 50 O.L.R. 631). And the Court of Appeal for Ontario has held that notwithstanding sec. 188, the Crown's prerogative still exists, and that even in those cases where taxes, rates or assessments are not given priority by the statute creating them, the Crown is entitled to be paid in priority to ordinary creditors (*In re D. Moore & Co.* (1927), 8 C.B.R. 479, 61 O.L.R. 434). These decisions being in entire accord with my own views, I refer to them here as supporting the opinion which I have expressed.

In *re General Fireproofing Company of Canada Limited* (3), the head note preceding the judgment of the Supreme Court of Canada, which is quite accurate, contains, among others, the following statements:

On an appeal, by special leave, by the City of Toronto, the Toronto Electric Commissioners, the Attorney-General for Canada and the

(1) (1924) 4 C.B.R. 698.
(2) (1930) 13 C.B.R. 184.
(3) (1937) 18 C.B.R. 159.

Minister of National Revenue, the Ontario Workmen's Compensation Board, from the judgment of the Court of Appeal for Ontario, 17 C.B.R. 371, varying the judgment of J. A. McEvoy J., 17 C.B.R. 246, where the facts are stated in the headnote, the Supreme Court settled the respective priorities of the parties in the distribution of the debtor company's property which was insufficient to pay all in full, as follows:

(1) The Treasurer of Ontario, for taxes under The Corporations Tax Act, R.S.O. 1927, ch. 29.

(2) The City of Toronto and the Toronto Electric Commissioners for business taxes, and for charges for electric energy, respectively.

(3) The landlord, for arrears of rent and accelerated rent.

(4) The custodian and trustee, for fees and expenses.

(5) The Ontario Workmen's Compensation Board.

It was directed that the Minister of National Revenue for sales taxes under The Special War Revenue Act, R.S.O. 1927, ch. 179, should be ranked first among ordinary creditors by virtue of the Crown's prerogative.

Special directions were given as to the payment of costs.

I may note that the judgment of the Court of Appeal of Ontario is reported in 17 C.B.R. 371.

In the case of *Vandeweghe Limited, débiteurs, et Harry Lassner, gardien, et Ministre du Revenu National du Canada, requérant* (1), it was held by Mr. Justice Surveyer of the Superior Court of the Province of Quebec, on a petition of the Minister of National Revenue, that the Federal Government, according to the Bankruptcy Act, is an ordinary creditor.

It seems to me apposite to note that a different opinion was adopted in *Canadian Peerless Jewelry Co., in liquidation, and Royal Trust Company, liquidator, and His Majesty in right of the Dominion of Canada, through the Minister of Customs and Excise, contestant* (2), and in *re Kingston Auto Wreckers Limited* (3).

In the first case it was held by White J. that "the Crown, under the provisions of section 10 of the Income War Tax Act, 10-11 George V, Chapter 49, is entitled to be paid in full before any general distribution of the money derived from the sale of the assets of the company".

The learned judge, in his notes, refers to the judgment in *re Humberstore Coal Co. Ltd.* (4).

(1) (1937) 43 R. de J. 348.
(2) (1926) R.J.Q. 64 C.S. 576.
(3) (1935) 17 C.B.R. 96.
(4) (1925) 5 C.B.R. 719.

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The head note in the second case is in the following terms:

On a motion by the trustee for his discharge, the Court held that a sum due by the debtor company under The Corporations Tax Act, R.S.O. 1927, ch. 29, and a sum due for income tax under The Income War Tax Act, R.S.C. 1927, ch. 97, should have been paid in priority to all other claims against the estate including the fees and disbursements of the trustee. The Court accordingly refused to grant the discharge until the sums referred to were paid.

(*In re Canadian Peerless Jewelry Co.* (1926), 64 Que. S.C. 576, 3 Can. Abr. 939, referred to.)

It seems to me opportune to quote a passage from Duncan and Reilley's treatise on bankruptcy in Canada. At page 632 the authors, dealing with the prerogative right of the Crown, write:

3. Prerogative right of Crown.

(*a*) In common law provinces. The common law prerogative of the Crown to priority over creditors of equal degree for payment of all its claims is destroyed by section 188 in both the Dominion and the common law provinces. It is now limited in the common law provinces to a priority over ordinary creditors for taxes, including sales tax and customs duties.

(*b*) In the province of Quebec. In the province of Quebec there is but one general privilege of the Crown, namely, that upon moveable property "against persons accountable for its moneys". The effect of section 188 is to cut this privilege down to cases in which the claim of the Crown is one against a "comptable" for taxes.

(*c*) Non-existent prerogative rights. The result is that in bankruptcy the following among other prerogative rights no longer exist:

(i) the remedy by writ of extent against the Crown's debtor.

(ii) priority for payment for a commercial debt.

(iii) priority for payment of a penalty for infraction of a statute.

(*d*) Contrast rule in winding-up. The rule is not the same under The Winding-up Act, for the Crown in the right of the Dominion can under that Act rank for damages for breach of contract in priority to the unsecured creditors.

(*e*) Crown's prerogative and secured creditors. Where the claim of the Crown is based merely on the prerogative right of preference over ordinary creditors, a secured creditor will be entitled to retain the proceeds of his security against the Crown.

(*f*) Crown's prerogative and landlord. The preferential claim of the landlord ranks in priority to the prerogative claim of the Crown to taxes.

(*g*) Crown's prerogative and trustee. The prerogative right of the Crown does not depend on any lien or charge on the debtor's property, but is a right to be paid preferentially out of the fund realized in the administration. It is therefore subordinate to the claim of the trustee for his fees and expenses.

Reference may be had beneficially to the authorities relied upon by the authors and referred to in the notes at the foot of pages 631-634.

It is now well settled law that, apart from the preferential claim of the landlord for rent, the extent of the preference being naturally determined by the law of the province in which the leased premises are situate, the trustee's fees and expenses have priority over all other claims.

The amounts which Ferguson had received from Engine Works & Trading Inc. for services rendered to the company and which he did not care to keep but sent to the Minister of Munitions and Supply, "in order that they may be diverted into the proper channels" reverted, in my opinion, into the assets of the bankrupt company and should have been remitted to its trustee, the suppliant herein, for distribution.

When Ferguson's cheque was transmitted by the Minister of Munitions and Supply to the Department of Justice, the Deputy Minister of the latter wrote to Ferguson the letter Exhibit 2 stating, as we have seen: "If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may, if you please, authorize me to present this cheque certified at your bank and to hold the same until it is decided what disposition should be made thereof". Evidently the Deputy Minister had not at that time decided that the respondent had the right to withhold this money.

It was, in my opinion, the respondent's duty to remit to the trustee the cheque in question or the proceeds thereof. Under the provisions of the Bankruptcy Act the assets of the bankrupt are to be distributed by the trustee. Needless to say, the trustee, in preparing his dividend sheet, is bound to take into consideration the various preferences recognized by the Act. If a creditor is not satisfied with the rank given to him in the dividend sheet, he is free to contest it within the delay prescribed by law.

After having given the matter full consideration, perused carefully the evidence literal and verbal, listened to and read attentively the able and exhaustive argument

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of counsel, studied the law and reviewed the jurisprudence, I have reached the conclusion that the petition of right is well founded and that the suppliant is entitled to recover from the respondent the sum of $3,035.98, with costs.

No interest is allowed against the Crown unless provided for by statute or stipulated in an agreement.

Judgment accordingly.

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Oct. 1
Dec. 31

BETWEEN:

ALBERT EDWARD FARTHING.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Action against the Crown by employee of Y.M.C.A. engaged to assist in entertainment of His Majesty's Forces—Unusual danger—Invitee—Test to be applied to determine who is employer.

Pursuant to an agreement entered into between respondent and the Y.M.C.A. suppliant was employed by the Y.M.C.A. as an Auxiliary Service Officer to assist in entertainment, recreation and social welfare of the members of His Majesty's Forces during World War II. He worked under and was responsible to the Senior Administrative Officer at the R.C.A.F. station at Patricia Bay, B.C.

The suppliant assisted that officer in producing a play by members of the R.C.A.F. Lieutenant Hardwick, the officer in charge of the Special Service Branch of the Navy at Naden, B.C., arranged with suppliant and his senior officer to stage a performance of the play at Naden, a naval establishment a little distance from Patricia Bay.

The approval and consent of the Commanding Officer at Naden were obtained and the play was produced at the drill hall, the centre of all social activities at the camp.

After the performance the producing company and the suppliant were conducted from the ward room where they had had refreshments to the drill hall by an officer, detailed by Lieutenant Hardwick for that purpose. Suppliant remained in the ward room, a brief moment, then, with his wife, proceeded to join the others but found the door of the drill hall locked against him. They walked along a roadway or platform, used at night by the members of the forces and their friends at the dances and entertainments put on in the drill hall. He wished to reach his car which was parked near the drill hall. He fell off the end of the roadway and was seriously injured.

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In this action for damages the Court found that the end of the roadway constituted an unusual danger which was known to Lieutenant Hardwick and to the Commanding Officer at Naden or should have been known to him, as well as to the officer conducting the party. The Court also found that the officer conducting the party to the drill hall and to their transport was a servant of the Crown, acting within the scope of his duty or employment while so engaged.

Held: That the test to be applied to determine who is the employer of the servant is to decide in whose employment a man was at the time, when the acts complained of, were done; by the term employer is meant the person who has the right at the moment to control the doing of the act.

2. That suppliant was an invitee for he entered the premises by the permission of the respondent, permission granted in a matter in which the respondent had some material interest, namely, the entertainment of His Majesty's Forces.

PETITION OF RIGHT by suppliant to recover damages from respondent for injuries suffered by suppliant due to alleged negligence of officers or servants of the Crown acting within the scope of their duties or employment.

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

H. S. Mahon for suppliant.

E. S. Farr for respondent.

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

O'CONNOR J. now (December 31, 1947) delivered the following judgment:

The suppliant brought his Petition of Right to recover damages, suffered by him and resulting from the alleged negligence of officers or servants of the Crown while acting within the scope of their duties or employment when the suppliant, an Auxiliary Service Officer, was taking part in an entertainment in the course of his duties at H.M.C.S. Naden, a naval shore establishment at Esquimalt, B.C.

Pursuant to an agreement between respondent and the Y.M.C.A. the suppliant was employed by the Y.M.C.A. as an Auxiliary Service Officer to assist in entertainment, recreation and social welfare of the members of His Majesty's Forces. He worked under and was responsible

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to the Senior Administrative Officer at the R.C.A.F. station at Patricia Bay, B.C.: a play had been produced by the members of the R.C.A.F. under the guidance of the Senior Administrative Officer and the suppliant.

The naval establishment of H.M.C.S. Naden is about twenty miles from the R.C.A.F. station at Patricia Bay. At Naden, a naval officer, Lieutenant Hardwick, was in charge of the Special Service Branch of the Navy, assisted by an Auxiliary Service Officer, Ken Waite. Their duties included the arrangements for recreation, entertainment and social welfare of the Navy personnel.

Lieutenant Hardwick arranged with the suppliant and the Senior Administrative Officer of the R.C.A.F. at Patricia Bay to produce the above mentioned play at Naden. Lieutenant Hardwick then obtained the approval and consent of his Commanding Officer at Naden and made all the arrangements necessary. He stated that it was entered in the night orders over the signature of the executive officer which authorized the party to enter and be in the barracks. The guard at the main gate was notified and authorized to permit the entry of the party after a proper search of their transport.

Lieutenant Hardwick instructed Waite to arrange all the details. Waite did so and reported back to Lieutenant Hardwick that all arrangements were in order. On the 19th May, 1944, the party arrived at about 7.30 p.m. and were met at the main gate by Waite. That, according to Hardwick's evidence, was one of Waite's duties. Waite then conducted the party through the camp to the south side of the drill hall. The suppliant and his wife were in his own car and the remainder of the party in R.C.A.F. transport. The car and transport were parked on the south side of the drill hall and the party entered the south door of the drill hall and prepared for the play. Certain furniture and settings were required. Waite, followed by the suppliant, went out the north door of the drill hall across the roadway in question to the Y.M.C.A. hut, which lay north of the drill hall, for the settings and returned with them. They made several trips with Waite leading and the suppliant following.

After the performance of the play Lieutenant Hardwick invited the whole party to the ward room for coffee and

sandwiches. Lieutenant Hardwick stated that this was the usual practice with parties which came to entertain them and that all the necessary arrangements had been made beforehand. The party left their equipment in the drill hall. The naval officers took the party to the ward room. Refreshments were served.

Lieutenant Hardwick stated that the Officer Commanding had given instructions to get the guests out of the ward room about 11.00 p.m. on each occasion so that the barracks would be cleared and everything secured by midnight. He stated the duty officer was responsible for the closing of the drill hall after the entertainment and that normally the duty petty officer who "went around" would lock the drill hall. He stated that it would be the practice to leave the drill hall open until the party had gone with their cars.

Following the usual practice the party left the ward room around 11.00 p.m.

Lieutenant Hardwick said that after the refreshments were over the Y.M.C.A. Supervisor at H.M.C.S. Naden (Ken Waite) conducted the party from the ward room to the drill hall and that Mr. Farthing just stayed a moment thanking "us" for the hospitality in the ward room and then left.

The suppliant and his wife were "a moment" behind the rest of the party. The party conducted by Waite entered the north door of the drill hall.

When the suppliant and his wife reached the north door they found it locked.

It was around 11.00 p.m. and a very dark night. Dim-out regulations were in force and there were no lights near the north side of the drill hall.

The suppliant stated that as his car was parked on the south side of the drill hall he then proceeded west intending to go around the west end of the drill hall to his car.

The drill hall is about 150 feet in length and the north door is in the centre. Parallel to the building on the north side is a paved surface running the full length of the building and at the west end 34 feet 4 inches in width. No evidence was given as to where the east end of this roadway leads but it must be connected to some roadway because evidence was given of motor vehicles being on it.

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The west end of this roadway is higher than the north-south roadway which passes the west end of the drill hall. The south side of the west end is 8 to 9 feet and the north side is 14 feet higher than the north-south roadway. This roadway was termed in the evidence a platform. No explanation was given of this. At the west end of this roadway or platform there are 13 steps 7 feet in width leading down to the north-south road and located in the centre of the roadway. At the extreme edge of the portion of this roadway or platform north and south of the stairs is a cement curb 7½ inches in height and 10 inches in width.

Between the drill hall and the south side of the west end of the roadway a ramp leads down to Gunner Stores. There was a curb on the south edge of the roadway 7½ by 10 inches and a guard rail made of iron pipe about 3 feet in height. There was no guard rail on the curb on the west end of this roadway.

The photographs Exs. "A to F" show a railing on the west end that was erected after the accident. There is also some reference in the evidence to this railing. Evidence as to this is not admissible and I have not considered it in reaching my conclusions.

The suppliant and his wife, proceeding hand in hand, reached the western end of this roadway and at a point about 6 feet south of the south edge of the stairs the suppliant either tripped on the 7½ inch curb or walked over it and fell 8 to 10 feet to the north-south roadway below. He landed on his feet and then fell down. His wife did not fall over. The suppliant instructed her to go to the ward room for help which she did.

The remainder of the party had been conducted through the north door into the drill hall. They picked up their equipment and went out the south door and into their transport. The transport moved from the south side of the drill hall near the west end to the north-south highway. As soon as they turned north their headlights showed the suppliant lying in the roadway.

Squadron Leader Rundle-Woolcock who was in command of the R.C.A.F. party said that not more than 4 to 5 minutes elapsed from the time he entered the north door until the headlights of the transport showed the suppliant lying in the road.

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After trying the north door the suppliant and his wife had walked west approximately 75 feet to the point where he fell. The suppliant, in describing the events after he fell, said:

The first thing I knew after Mrs. Farthing had gone for help, was I saw the headlights of one of the transports coming around the corner and I was afraid that they were going to run right over me.

The west end of the road was not guarded with the exception of a curb only 7½ inches in height. The west edge was 8 feet to 14 feet above the north-south roadway.

Part of the evidence of Lieutenant Hardwick was:—

Q. Did it surprise you that Mr. Farthing should fall from the platform, as he did fall?

A. At the moment, yes.

Q. Why?

A. Well, the surprise would be that I didn't realize he had wandered, somehow or other, along that passageway.

Q. You were surprised he was there? From your knowledge of the platform, was there any other occasion for surprise?

A. Of course, I always considered that it was sort of in my mind, a sort of a hazard myself. I used to park my car up there and gingerly back up, because I was afraid I might go too far and go over the curb.

Q. You were afraid you might go too far and go over the curb.

A. Yes.

Q. You wouldn't know the height of the curb, but it is 8 inches high and I think 10 inches across. My thought is of your surprise—how it would be possible for a man in the dark to step over a curb of that sort.

A. I wouldn't be surprised at that.

Q. You think it is quite a reasonable thing.

A. I often wondered why someone didn't fall over it myself.

The roadway or platform was used at night by the members of the forces and their friends at the dances and entertainments that were put on in the drill hall. The drill hall was the centre of all the social activities of the camp.

In the daytime guests were seated there to see the displays put on in the area directly west.

I find that at night without lights the end of this roadway constituted unusual danger.

Lieutenant Hardwick's evidence shows that he knew the west end of this roadway was an unusual danger. The Officer Commanding knew or should have known that there was an unusual danger there. The evidence of Lieutenant LaRose, a witness called by the respondent, was that the Officer Commanding was responsible for taking the safety precautions with regard to buildings which

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he described as "the precautions that a prudent man should take" and he speaks of the Officer Commanding "making rounds".

The Duty Officer and the Petty Duty Officer would be quite familiar with every feature of the camp and knew or should have known this unusual danger. It was the Duty Officer's duty to inspect the camp and report daily to the Officer Commanding.

Waite acted as the guide or conductor of the party and the evidence discloses that he too must have known or should have known of this danger.

I find that all five knew or should have known of this danger.

The Officer Commanding, Lieutenant Hardwick, the Duty Officer and the Petty Duty Officer were all members of the naval forces of His Majesty in right of Canada on the 19th May, 1944, and by reason of s. 50 (*a*) of the Exchequer Court Act, are, for the purposes of determining liability in any action or other proceedings by or against His Majesty, deemed to be at that time servants of the Crown.

In the agreement between the respondent, represented by the Minister of National Defence, and the Y.M.C.A., the preamble sets out that the civilian population through the Y.M.C.A. and other organizations should be afforded an opportunity of making a contribution to the comfort and welfare of the members of the armed forces of Canada. Under the agreement the Y.M.C.A. agreed to provide the necessary personnel for such welfare projects and services at its own expense.

Under the Agreement the Minister of National Defence provided living quarters and rations and in camps, barracks and stations the Y.M.C.A. agreed, with respect to its personnel, to give effect to all orders, directions and instructions issued by the Minister or his representative.

The evidence was that the Y.M.C.A. were delegated certain responsibilities in connection with entertainment and recreation within the barracks to which they were posted. They were responsible to the Officer Commanding the station to which they were attached. They were there with his permission and if they failed to meet with his approval they would be withdrawn at his request.

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The evidence shows that an Auxiliary Service Officer was attached to the R.C.A.F. at Patricia Bay and one at Naden.

They assisted in the work of entertainment, recreation and social services under an officer who had charge of those services. In the Navy this was a Special Service Officer of the Special Service Branch of the Navy and under the air force regulation he worked under the Senior Administrative Officer in the R.C.A.F.

The question is, was Waite the servant of the Y.M.C.A. or of the Crown at the time he conducted the party from the ward room to the drill hall?

The test to be applied was stated by Viscount Simon, L.C., in *Century Insurance Co.* v. *Northern Ireland R.T.B.* (1) as:

> in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

And by Lord Wright at 515 in which he quotes the following language of Bowen L.J., in *Donovan* v. *Laing* (2):

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

And at page 516:

> There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is—he may lend them—and in that case he does not retain control over the work.

In this case Waite received his instructions as to the performance from Lieutenant Hardwick. Under his instructions he arranged all the details and reported back to Lieutenant Hardwick. He acted as guide throughout. Hardwick said it was Waite's duty to meet the party at the gate and to guide them in. It is clear that at the time when Waite guided the party from the ward room to the drill hall, he was under the control of Lieutenant Hardwick. The evidence is clear that in so far at least as this part of his work was concerned, he had been placed under the

(1) (1942) A.C. 509; 513. (2) (1893) 1 Q.B. 629; 633.

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control of the Crown,—that is the Y.M.C.A. had loaned him and they did not retain control over his work in respect to this party.

I find Waite was the servant of the Crown acting within the scope of his duty or employment while conducting the party to the drill hall and to their transport.

I find that the suppliant was an invitee. He entered the property by the permission of the respondent granted in a matter in which the respondent had some material interest, i.e., the entertainment of members of His Majesty's forces.

Did the suppliant use reasonable care for his own safety?

Counsel for the respondent contends that he did not do so in that he—

(*a*) did not leave with the others who were conducted by the guide Waite.

But Lieutenant Hardwick's evidence is that he "stayed only a moment" and this is borne out by Squadron-Leader Rundle Woolcock in his evidence as to the time that elapsed between his entry through the north door and his seeing the suppliant on the road. I accept Lieutenant Hardwick's estimate that it was "only a moment" and I find that the suppliant reached the north door just a minute or so after the rest of the party.

(*b*) Failed to return to the ward room when he found the door locked.

(*c*) Walked west on a road, with which he was not familiar, at night when he could not see.

At the north door the suppliant was about 150 feet from his car and about 400 feet from the ward room.

A return trip to the ward room meant 800 feet without lights or with lights that Lieutenant Hardwick described as "very, very limited—very limited" as against 150 feet without lights.

The suppliant had crossed and recrossed this roadway. He knew it was paved and reasonably assumed that it led to the north-south road. There was nothing to warn him that it ended 8 feet to 14 feet above the other road and he had no knowledge of the danger. He had been at Naden once before but it was at night. On the night in question he had driven south on the north-south road but he did not know where they were going and was following the

transport, guided by Waite. There would be nothing, then, that would call his attention to the end of the platform. When he crossed the roadway several times with Waite he did so at a point 75 feet from the end and again there would be nothing to attract his attention to the fact that at one end 75 feet away there was a drop up to 14 feet. He was not wandering about in an obscure place. He was walking on what obviously was a roadway and one, according to the evidence, used by all the guests who attended dances and entertainment. What he did was in my opinion quite reasonable under the circumstances.

I find that the suppliant had no knowledge of the danger which existed and received no warning of its presence, and that, in the circumstances, he used reasonable care for his own safety.

Apart from s. 19 (*c*) of the Exchequer Court Act the Crown is not liable for the tort of negligence.

S. 19 (*c*) provides:—

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

The liability under 19 (*c*) is vicarious, based as it is upon a tortious act of negligence committed by a servant while acting within the scope of his employment, and its condition is that the servant shall have drawn upon himself a personal liability to the third person. *King* v. *Anthony* (1). The suppliant to be entitled to the relief claimed must establish that a servant of the Crown has drawn upon himself a personal liability to the suppliant.

Before a liability of a servant can be established three things have to be proved:—

1. That a servant failed to exercise due care: (2) That a servant owed to the suppliant a duty to exercise due care: (3) That the servant's failure was the "cause" of the injury in the proper sense of that term. *Woods* v. *Duncan* (2).

First did any servants of the Crown owe to the suppliant a duty to exercise due care? These officers did not extend the invitation to the suppliant and the others personally as they would to their own guests. The invitation issued with the authority of the Officer Commanding

(1) (1946) S.C.R. 569 at 571. (2) (1945-6) 62 T.L.R. 283-286.

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was that of the Crown and was for the purposes of the Crown. All the acts done or omitted to be done by the Officer Commanding, Lieutenant Hardwick, Duty Officer or the Duty Petty Officer in connection with the party, were done in the course of their naval duty.

In the *Anthony* case (*supra*) it was held that the failure of the Sergeant-Major to stop the firing by those within his command was a neglect of duty only in respect of military law and did not constitute also a breach of private duty towards the suppliant and the rule of *respondeat superior* had no application.

In *Adams and Others* v. *Naylor* (1), two boys on the sand hills near a mine field strayed on to the mine field put there for defence against the enemy. A mine exploded and one boy was killed and the other seriously injured. The boys entered the enclosure at a spot where winds had caused the sand to silt up and form a hillock which covered all but the top strand of the barbed wire fence, and also buried an adjacent notice board. Following the practice that had existed over a long period of years the Government Department concerned nominated the officer who was in charge of the mine field and responsible for its maintenance. It then undertook the defence of the action, and in the defence admitted that the defendant was the person who was at all material times in control and responsible for the maintenance and safe-guarding of the mine field. The House of Lords held that there was no cause of action because it had been taken away by the Personal Injuries (Emergency Powers) Act, 1939. But, having said that, their Lordships all expressed their views on the practice of the Crown giving the name of a nominal defendant to facilitate what could be regarded in the language of Lord Justice Scott in *Royster* v. *Cavey* (2):

> From the moral, as distinct from the legal, point of view, may be regarded as in favour of justice being done, so that if the plaintiff proves that he has suffered an injury in such circumstances as would, if the defendant had been a private person or company, entitled him to recover damages he should not be deprived of that right by the accident of our law that no action of tort lies against the Crown. Their Lordships said that if, but only if, the particular name given is the name of a person who is personally liable for the accident in question, then judgment might be given against him.

(1) (1946) A.C. 543.

(2) (1945-6) 62 T.L.R. 709.

In the *Adams* case (*supra*), Lord Simmonds said at p. 553:

> Nothing could indicate more clearly than the circumstances of this case the desirability of clarifying the position, for I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer in His Majesty's army, to a member of the public in respect of acts done or omitted to be done in course of his military service.

There is no legislation in England on the subject of proceedings against the Crown and Lord Simmonds' observation was made in a discussion of that position and with reference to the facts in that case. And as Viscount Simons said, "the Crown was not in any sense a party to the action". In Canada, however, we have under s. 19 (*c*) a liability on the Crown for injuries resulting from the negligence of a servant of the Crown while acting within the scope of his duties or employment. And s. 50A provides:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

If ss. 19 (*c*) and 50A had been applicable in the *Adams* case (*supra*) and the officer who was in charge of the mine had as part of his duty invited members of the public on the premises for the purposes of the Crown, it could not be contended that he owed no duty to them to exercise due care.

In *Shaw, Savill and Albion Co. Ltd.* v. *The Commonwealth* (1), it was held (Head Note):

> An action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail: per Rich A. C. J., Dixon, McTiernan and Williams JJ., on the ground that while in the course of actual operations against the enemy the forces of the Crown are under no duty of care to avoid loss or damage to private individuals; per Starke J., on the ground that such acts are not justifiable *durante bello*. No such immunity from action attaches, however, to activities of the combatant forces in time of war other than actual operations against the enemy.

In the *Shaw, Savill* case, Dixon J. said p. 361:

> Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service.

(1) (1942-43) 66 C.L.R. 344.

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And after discussing the position during active operations against the enemy he said p. 362.

> But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in times of war. For instance, a warship proceeding to her anchorage or manoeuvering among other ships in a harbour or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances.

When combined, ss. 19 (*c*) and 50 (A) clearly contemplate a duty owed to the public by a member of the naval forces while acting within the scope of his naval duties. Because there is a liability for negligence and there would be negligence only when there was a breach of a duty owed to the members of the public by a member of the naval forces while acting within the scope of his naval duties.

Here the suppliant entered the premises by permission of the Crown granted in a matter in which the Crown had a material interest.

Under these circumstances I hold that the officers in question then owed him a duty to exercise due care. The duty owed to the suppliant under these circumstances does not differ from the duty which an officer operating a motor vehicle on a highway in the course of his military duty owes to members of the public on the highway or from that which the navigating officer of a warship proceeding to anchorage in a harbour owes to other vessels in the harbour.

I find that when the suppliant entered the premises the Officer Commanding owed a duty of care to him and, when under the division of duty, Lieutenant Hardwick was placed in command of the party he then owed a duty of care to the suppliant. Waite was delegated, and it was part of his duty, to guide the party from the ward room to the drill hall. He assumed and undertook that duty and he owed to the suppliant a duty of care. The Duty Petty Officer knew that the party would return from the ward room to the drill hall and it was his duty to lock the doors after their transport had moved. He owed a duty of care to the suppliant. Did any of these servants fail to exercise due care?

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There is no evidence that the Officer Commanding took any part in the matter other than to authorize the invitation. Under the division of duty he knew that Lieutenant Hardwick would have full charge of the party and would make all the necessary arrangements from the time the party entered the main gate until they left. The procedure that was to be followed was a regular routine which had been followed on all prior occasions. The Officer Commanding had nothing personally to do with the party. He was not, in my opinion, negligent and he is not within the rule of *respondeat superior* for the acts of those within his command.

> It is clear that an officer is not within the rule of respondeat superior for the act of one within his command, and it would be extraordinary if liability could be raised indirectly through a responsibility based not on his act but on his authority.

Per Rand J. in the *Anthony case* (*supra*).

While Lieutenant Hardwick had full charge of the party he had made all the necessary arrangements. When the time came for the party to leave the ward room he saw Waite leave for the purpose of conducting them back and he knew that the Duty Petty Officer would be waiting to lock the door. He saw that the regular routine was followed. He stated that the suppliant "stayed only a moment" and then the suppliant and his wife left. The counsel for the suppliant contends that Lieutenant Hardwick should have sent another guide with the suppliant, but if the suppliant "stayed only a moment", that would not be necessary. Lieutenant Hardwick could not reasonably be expected to foresee the accident and I find that he took, in the circumstances, reasonable care and that he was not negligent.

In *Fardon* v. *Harcourt-Rivington* (1), Lord Dunedin said:—

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

Having seen Waite leave with the party to conduct them back, the possibility of danger emerging would not be reasonably apparent, but only a mere possibility which would never occur to the mind of a reasonable man. Nor

(1) (1932) 146 L.T.R. 391-392.

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is Lieutenant Hardwick within the rule of *respondeat superior* for the acts of Waite or the Duty Petty Officer.

Waite was to conduct the party back to the drill hall. The Duty Petty Officer was to lock the door after the party entered. These were parts of their respective duties. Waite guided the party through the door of the drill hall but when the suppliant reached the north door it was locked and in attempting to go around the building he fell over the west end of the roadway or platform.

The evidence establishes that neither Waite nor the Duty Petty Officer warned the suppliant of the danger.

In the circumstances they failed to use reasonable care either by warning him or otherwise to prevent damage to the suppliant from this unusual danger of which they knew or ought to have known. And their failure to use reasonable care was the cause of the injury to the suppliant.

It is only fair to them to point out that I reach that conclusion without having heard their evidence.

I assess the suppliant's damages as follows:—

General damages.

The evidence showed that the suppliant was in good health prior to the accident. He had been examined by Dr. Coy at the time of his appointment as an auxiliary war services officer on the 2nd April, 1942, and Exhibit 2 shows that at that time Dr. Coy had certified that he could successfully perform the duties of an auxiliary officer.

His injuries were described by Dr. Burke who specializes in orthopedic surgery as a fractured left tibia and fibia and both oscalsis (heel bones). Dr. Burke stated that as a result of these injuries he has arthritis in both ankles and in the joints below the ankle and in the joints across the middle of the foot. Dr. Burke stated that the left foot is limited in execution of angulation and other motions to about 10 per cent of normal and the right foot to about 50 per cent. His left leg is wasted and is one inch smaller than the right below the knee. Dr. Burke also stated that the suppliant will not be able to carry on business as a manufacturer's agent because this involves walking and the suppliant would be limited to work that does not involve either standing or walking. Dr. Burke stated that the injuries which he described could definitely have been

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caused by a fall of some eight feet from a wall to a hard surface. After receiving these injuries he was taken to the naval hospital at Naden, remained there from the 19th May, 1944 to the 24th December, 1944. When he was taken to hospital on the night in question, an emergency operation was performed and there was another operation at nine o'clock the next morning and another operation the next afternoon. He was taken on the 24th December, 1944, by ambulance to the Patricia Bay hospital of the R.C.A.F. He remained there for approximately two months and then was taken back to Naden hospital for another operation. While in Naden hospital on this occasion he developed pleura pneumonia, pleurisy and pulmonary thrombosis. He is 57 years of age and following his discharge as an auxiliary service officer he became a leathercraft supervisor under the Department of Veterans Affairs, but due to his inability to walk he had to resign from that position.

He has undoubtedly received serious physical injuries, suffered great pain and is partially permanently disabled.

The suppliant stated that before becoming an auxiliary service officer he had been a manufacturer's agent and had been making about $2,000 per year and that he was unable to continue this work due to his inability to stand and walk.

Hospitalization and medical services were supplied by the Department of National Defence.

I assess his general damages at $9,000.

Special damages:

There is no claim for loss of salary.

Special shoes	38.00
Extra medicine	10.00
Damage to clothing	5.00
Watch repair	3.00
	$56.00

I award the suppliant damages of $9,056.00.

The suppliant is also entitled to the costs of the action.

Judgment accordingly.

1947
Sept. 29, 30
Oct. 1
—
Dec. 31

BETWEEN:

MORTON B. FEINGOLD, ABE AUERBACH, ISSIE AUERBACH and NATHAN WALFISH (Junior Mademoiselle Frocks) ..... } PLAINTIFFS;

AND

DEMOISELLE JUNIORS LIMITED.... DEFENDANT.

Trade Mark—Trade name—Word mark—Motion to expunge—Unfair Competition Act, 1932, 22-23 Geo. V. c. 38, s. 2 (h), 2 (k), 4 (1) (2) (3) (4), 10, 11 (c), 52—Mark likely to cause confusion—"Similar"—"Person interested"—"A Junior for Mademoiselle"—"Junior Mademoiselle Frocks"—"Demoiselle Junior"—Prior registration of mark by one who is not first to use or make known such in Canada does not confer registrability in absence of good faith.

Plaintiffs, members of a partnership registered as Junior Mademoiselle Frocks, in 1941 applied for registration of their word mark "A Junior for Mademoiselle" in connection with *inter alia* "ladies and misses dresses", giving as the date of first user, July, 1940. The application was not granted but is still pending.

Defendant Company was incorporated on January 10, 1946; it applied for registration of the word mark "Demoiselle Junior" for use in connection with wears described as "ladies' dresses", giving as date of first user, February 1, 1946. The application was granted.

Plaintiffs now bring this action, asking that the word mark "Demoiselle Junior" be expunged.

Held: That in their component parts and in their totality the two word marks are similar and likely to cause confusion to the ultimate user who buys at retail.

2. That the plaintiffs are "persons interested" within s. 2 (*h*) of the Unfair Competition Act since they are engaged in the same business and in the same area as the defendant, and possess a trade name and a word mark similar to that of the defendant's word mark, and may very reasonably apprehend that the goodwill of their business may be adversely affected by the continuance on the Register of the defendant's word mark; the authority of any "person interested" to institute proceedings under s. 52 (1) of the Unfair Competition Act is not limited by s. 4 (2) and (3) of the Act.

3. That one who is not the first to use or make known his mark in Canada cannot by prior registration of such mark acquire registrability therefor and maintain it unless such later user can bring himself within the provisions of s. 10 of the Unfair Competition Act.

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MOTION under s. 52 of the Unfair Competition Act to expunge from the Register the word mark "Demoiselle Junior".

The motion was heard before the Honourable Mr. Justice Cameron at Montreal.

H. Gerin-Lajoie, K.C. and *A. L. Stein* for plaintiffs.

C. E. Schwisberg and *Samuel Greenblat* for defendant.

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

CAMERON J. now (December 31, 1947) delivered the following judgment:

This is a motion, under section 52 of the Unfair Competition Act, 1932, to expunge from the Register the word mark "DEMOISELLE JUNIOR" on the ground that it does not accurately express or define the existing rights of the defendant.

On October 29, 1940, the four individual plaintiffs executed and registered a declaration of partnership in which it is stated that on that date they were carrying on, and intended to carry on, business as manufacturers of ladies' dresses in Montreal under the name and style of "Junior Mademoiselle Frocks". The place of business was given as 1193 Phillips Place, Montreal. On March 26, 1941, they applied for registration of their word mark "A JUNIOR FOR MADEMOISELLE" for use in connection with wares described as "all types of styles of ladies' and misses' dresses, gowns, ensembles, sportswear, beach clothes, play clothes, blouses, vestees, and odd and separate skirts, whether of a unit or of more than one component part. The date of first user was given as July, 1940. The application was not immediately disposed of by the Registrar as it came under section 4 (3) of the Act and the plaintiffs were advised that it would be reached for consideration on September 30, 1941. On March 21, 1942, the plaintiffs were notified that the word mark, "A JUNIOR FOR MADEMOISELLE", appeared to be confusingly similar to the word "MISS JUNIOR" which had been

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registered on March 7, 1931, for the same wares. The concluding part of the letter was as follows:

> In view of the provisions of Section 26 of the Unfair Competition Act, 1932, your client's application, copy enclosed, does not appear to be registrable.

No further proceedings in respect of the application were then taken by the plaintiffs.

The defendant company was incorporated under the laws of the Province of Quebec as of January 10, 1946, with its head office at Montreal. On February 26, 1946, it applied for registration of the word mark "DEMOISELLE JUNIOR" for use in connection with wares described as "ladies' dresses", giving the date of first user as February 1, 1946. This application was granted, Register 87/N.S. 22739.

For the plaintiffs it is alleged that the registered word mark, "DEMOISELLE JUNIOR", is similar to its trade name, "JUNIOR MADEMOISELLE FROCKS"; and also to its word mark, "A JUNIOR FOR MADEMOISELLE", and that as the plaintiffs' word mark is admittedly used on wares similar to those manufactured and sold by the defendant, confusion is likely to arise by their contemporaneous use in the same area.

"Similar" is defined in section 2 (*k*) of the Unfair Competition Act, 1932, as follows:

> "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.

I do not think it necessary in this case to refer at any great length to the decided cases where the tests to be used and the principles to be followed in matters of this sort have been applied. Reference may be made to the judgment of the President of this Court in *British Drug Houses Ltd.* v. *Battle Pharmaceuticals* (1); *Aristoc Ld.* v. *Rysta Ld.* (2); in re *Pianotist Company's Ld.'s Application* (3). In the last mentioned case Parker J. said at p. 777:

> You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which

(1) (1944) Ex. C.R. 239 and affirmed in (1946) S.C.R. 50.

(2) (1945) A.C. 68.

(3) (1906) 23 R.P.C. 774.

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they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

Using the tests and applying the principles laid down in these cases there can be no doubt, I think, that the defendant's word mark, "DEMOISELLE JUNIOR", is similar to "JUNIOR MADEMOISELLE FROCKS", the trade name of the plaintiffs, and to "A JUNIOR FOR MADEMOISELLE", the latter's word mark. As applied to ladies' dresses the two word marks convey the same idea, namely a dress for a young lady or mademoiselle. The meaning of "DEMOISELLE" and "MADEMOISELLE" is identical, namely, a young lady, and the former is merely a short form of the latter. The word "JUNIOR" appears in each. Both in their component parts and in their totality the two word marks are similar. While dealers in ladies' dresses might not be confused by their contemporaneous use, because of their greater experience and knowledge of dress manufacturers, the ultimate user who buys at retail would be most likely to infer that the goods bearing the two word marks were put out by the same manufacturers. The ordinary shopper with a somewhat imperfect recollection, who desired to purchase "A Junior For Mademoiselle" frock, would, I think, be quite readily confused upon being referred verbally to, or shown, a "Mademoiselle Junior". The fact that the plaintiffs' word mark has the indefinite article and the word "for" which are not found in the respondent's word mark is not, I think, of any importance whatever in distinguishing the marks. Eliminating these from consideration, and bearing in mind that the words "DEMOISELLE" and "MADEMOISELLE" are both used to express the same meaning, the word mark of the defendant is merely that of the plaintiffs with the order of the two main words reversed. The result is not, I think, a new coined word. The meaning remains precisely the same. And for the same reason

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I must find that the mark "DEMOISELLE JUNIOR" is similar to the trade name of the plaintiffs, "JUNIOR MADEMOISELLE FROCKS", the last word of which is not sufficient, in my opinion, to distinguish the two in any manner.

It is contended for the defendant that the plaintiffs are not entitled to invoke proceedings under section 52 on the ground that they are not "a person interested". Section 2 (*h*) defines "person interested" as follows:

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

The question is merely one of *locus standi,* and to answer the question it must be assumed that the word mark "DEMOISELLE JUNIOR" is wrongly on the Register. Can the plaintiffs, carrying on the same type of business in the same area as the defendant, having a trade name and a word mark similar (as I have found) to the defendant's word mark, reasonably apprehend that the goodwill of its business may be adversely affected if the defendant's mark remains on the Register?

In Kerly on Trade Marks, 6th ed., pp. 324 to 331, the author reviews the decisions in the English Courts as to who are persons aggrieved or interested. He refers to the case of *Apollinaris Co's. Trade Marks* (1) where Fry J., in delivering judgment in the Court of Appeal, said:

> Further, we are of opinion that, wherever one trader, by means of his wrongly registered trade mark, narrows the area of business open to his rivals, and thereby either immediately excludes or with reasonable probability will in the future exclude a rival from a portion of that trade into which he desires to enter that rival is an "aggrieved person".

Reference is also made in Kerly on Trade Marks to the case of *Powell's Trade Mark* (2). In that case Lord Herschell J., in giving judgment, said:

(1) (1891) 2 Ch. 186. (2) (1893) 2 Ch. 388; (1894) A.C. 8.

Wherever it can be shown, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the register, would or might limit the legal rights of the applicant, so that by reason of the existence of the entry on the register he could not lawfully do that which, but for the existence of the mark upon the register he could lawfully do, it appears to me he has a *locus standi* to be heard as a person aggrieved.

Applying the principles of these cases, I find that the plaintiffs engaged in the same line of business and in the same area as the defendant, and possessing a trade name and a word mark similar to that of the defendant's word mark, may very reasonably apprehend that the goodwill of their business may be adversely affected by the continuance on the Register of the defendant's word mark; and that, therefore, the plaintiffs are "persons interested" and entitled to take these proceedings.

Counsel for the defendant submits further that the provisions of section 4 (2) (3) of the Unfair Competition Act, 1932, and the decided cases thereunder, constitute a bar to the success of the plaintiff's motion. Section 4 is as follows:

4. (1) The person who, in association with wares, first uses or makes known in Canada, as provided in the last preceding section, a trade mark or a distinguishing guise capable of constituting a trade mark, shall be entitled to the exclusive use in Canada of such trade mark or distinguishing guise in association with such wares, provided, that such trade mark is recorded in the register existing under the *Trade Mark and Design Act* at the date of the coming into force of this Act, or provided that in compliance with the provisions of this Act he makes application for the registration of such trade mark within six months of the date on which this Act comes into force, or of the date of his first use thereof in Canada, or of the date upon which the trade mark or distinguishing guise was first made known in Canada, as provided in the last preceding section, and thereafter obtains and maintains registration thereof under the provisions of this Act.

(2) The use of a trade mark or a distinguishing guise capable of constituting a trade mark by a person who is not registered as the owner thereof pursuant to the provisions of this Act shall not confer upon such person any right, title or interest therein as against the person who is registered as the owner of the same or a similar trade mark or distinguishing guise.

(3) Notwithstanding the provisions of subsection one of this section, the person who first uses or makes known in Canada, in association with wares a trade mark or a distinguising guise capable of constituting a trade mark, may apply for and secure registration thereof after the expiration of any of the periods of six months specified by subsection one, provided the same or a similar trade mark or distinguishing guise has not been registered by another for use in association with the same or similar

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wares, but such application shall not be allowed or the registration of such trade mark made before the expiration of a period of six months from the date of such application.

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

I have been referred to three cases decided in this Court; *Canada Crayon Company Limited* v. *Peacock Products Limited* (1); *Burshtein* v. *Disston* (2); and *C. Fairall Fisher* v. *B.C. Packers Limited* (3). All of these I have carefully considered.

In my view, the problem is simplified if it is kept clearly in mind that in proceedings under section 52 of the Unfair Competition Act consideration must be directed primarily to the rights of the registered owner—not to those of the applicants. It is the existing rights of the regisered owner as they are defined or expressed in the register that may be challenged and not the merits or demerits of the party moving under section 52. The registrar may move to challenge the validity of the registered mark and so also may any person interested, as defined in section 2 (*h*). The person interested does not need to have been himself the user of any mark similar to that of the registered owner. He has the necessary status if by reason of the nature of the business, carried on by him, and the ordinary mode of carrying on such business, he may reasonably apprehend that the goodwill of his business may be adversely affected by any entry in the Register of Trade Marks. The authority of any "person interested" to institute proceedings under section 52 (1) is not, I think, to be cut down by the somewhat obscurely expressed provisions of section 4 (2) (3).

It is to be kept in mind that the tenor of the whole Act is to prevent unfair competition. Section 3 forbids the deliberate adoption of a mark similar to any trade mark in use, or in use and known as therein described. Section 4 (1) gives exclusive use to one who first uses or makes known his mark in Canada, if registered. I can find no section of the Act which in clear terms gives any rights to one who was not the first to use or make known his mark in Canada. Section 4 (3) does not, in my view, confer

(1) (1936) Ex. C.R. 178.
(2) (1940) Ex. C.R. 79.
(3) (1945) Ex. C.R. 128.

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any rights on a later user who has registered his mark, but is a mere direction to the Registrar to take into account the condition of the Register at the time an application is made under section 4 (3), and to act accordingly.

The Act does recognize the possibility that registrations may take place in contravention of the Act itself, and for that reason section 52 confers power on the Court to amend or expunge such marks. Section 10 (*b*) places the onus on one who adopts a trade mark identical with, or similar to, one already in use, or in use and known, to establish affirmatively that at the time of its adoption he was ignorant of the other mark, that he acted in good faith and believed himself entitled to adopt and use it. The very wide authority under section 52 to challenge the validity of a registered mark cannot, therefore, in my view, be narrowed down by inferences from the provisions of section 4 (2) (3). I can find no provision in the Act which would indicate that one who is not the first to use or to make known his mark in Canada, (and which mark, therefore, lacks registrability) can, by getting to the Registry Office first and registering his mark, acquire registrability and maintain it, unless such later user can bring himself within the provisions of section 10. To hold otherwise would be to uphold a claim which in its origin, at least, was "contrary to honest industrial and commercial usage" (section 11 (*c*)).

I prefer the views expressed by the late President of this Court in *Fine Foods of Canada Limited* v. *Metcalf Foods Limited* (1). In that case McLean J. held that section 4 (2) would be a bar to the success of the petitioner unless that subsection was materially qualified by some other section of the Act. He then considered sections 3 and 10, and, having found that the respondent had brought itself within the provisions of section 10, in that it adopted its mark without knowledge of the petitioner's mark, and had acted in good faith, he decided that the petition should be dismissed. I think it is clear, however, that had the respondent there not been able to establish its good faith, the petition to expunge would have been granted.

Section 4 (2), read in the light of other sections of the Act, is very difficult to construe. It might well be argued

(1) (1942) Ex. C.R. 22.

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that, from its position in section 4, the expressions it contains are intended to operate only in favour of the first user who registered under subsection (1), or possibly under subsection (3). I do not, however, find it necessary to reach a final conclusion on that point.

I adopt the views expressed by McLean J. in the case of *Fine Foods of Canada Limited* v. *Metcalf Foods Limited* (*supra*), and having found that the marks of the plaintiffs and defendant are "similar", and that the plaintiffs are "persons interested", that therefore the burden of establishing good faith is on the defendant pursuant to section 10 (*b*).

It is conceded that the plaintiffs have been carrying on business under the name of "Junior Mademoiselle Frocks" at 1193 Phillips Place, Montreal, since 1940. It is also proven that the defendant company is owned and operated by the same persons as the firm of Sternthal Brothers Limited, which has been in business in the same building at 1193 Phillips Place for many years. The business of the plaintiffs is substantial and its goods have been advertised under the trade mark "A Junior for Mademoiselle" throughout Canada since 1940, partly in association with its trade name, "Junior Mademoiselle Frocks", and partly in association with the names of its local distributors throughout Canada. The mark has been used on its labels, bills, invoices, stationery and envelopes. The amount directly expended for advertising has not been very great—about $400 per year; but by arrangement with its dealers the latter carried extensive local advertising, bearing the plaintiffs' mark.

A part of the direct advertising of the plaintiffs was in trade magazines such as "Fashion News", some being full page advertisements. Exhibits 21, 22 and 23 are copies of "Fashion News" for the months of February, July and October, 1945, and in each one there appears also an advertisement by Sternthal Brothers.

The plaintiffs' trade name, "Junior Mademoiselle Frocks", appeared on the door of its office on the third floor of 1193 Phillips Place, and also on the directory in the entrance to the building where the defendant's name also appeared.

It is established not only that letters and parcels addressed to the defendant were in error delivered to the plaintiffs,

but that similar articles addressed to the plaintiffs, "Junior Mademoiselle Frocks", were, in error, delivered to the defendant, opened by the defendant, and later brought to the plaintiffs' office. The traveller who represented Sternthal Brothers Limited, and the defendant company, had knowledge of the plaintiffs' goods, of its trade name and the trade mark under which the goods were sold.

For the defendant it is alleged that they had no knowledge of the firm "Junior Mademoiselle Frocks", or its trade name, until after the defendant's own mark had been registered. It is alleged that it chose the name "Demoiselle" from American publications and added the mark "Junior", as it was the intention to manufacture goods for young girls.

Benjamin Sternthal is president of Sternthal Brothers and secretary-treasurer of the defendant company. He was in full charge of the operations of Sternthal Brothers Limited during most of the war when his brother Julius was on active service. He states that he was the designer for both Sternthal Brothers and "Demoiselle Juniors" and that he interested himself but little in advertising, leaving that to his subordinates. He admits that he did know "The Little Queen Dress Company", another business operated by the plaintiffs from the same office, but had never heard of "Junior Mademoiselle Frocks" until after the formation of the defendant company and the adoption of its mark, "Demoiselle Junior". He admits that the magazine, "Fashion News", containing advertisements of the plaintiffs, came to his office in 1945. I was not satisfied with his evidence as to whether he had or had not seen the advertisements of the plaintiffs contained in "Fashion News". At various times he said: "I don't think I saw it before"; "I may or may not have seen it"; "I am not sure"; "I can't remember"; "I didn't see it"; "I might have seen them or might not have seen the magazine". This witness was, in my opinion, evasive, and at the trial I reached the conclusion that he had more knowledge of the plaintiffs' name and mark than he was willing to admit.

Reviewing the evidence as a whole, I have reached the conclusion that the defendant has not established that at the time it adopted its trade mark it was in ignorance

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of the trade mark or trade name of the plaintiffs, or that it acted in good faith. To a certain extent this is borne out by what later occurred.

The first user of the defendant's mark is given as February 1, 1946. On February 5, 1946, the solicitor for the plaintiffs wrote the defendant company asking it to desist from the use of the name, "Demoiselle Junior". That letter contains several errors in that it referred to the writer's client as "Little Queen Dress Company", indicated that its mark was "Mademoiselle Juniors" (rather than "A Junior for Mademoiselle") and that the mark was registered. The defendant consulted its solicitors and a search was made by the Ottawa agent of the latter in the Register of Trade Marks. Following a report by the agent, the solicitors for the defendant wrote the plaintiffs' solicitor on February 5, 1946, (Exhibit 25) alleging that his clients had no knowledge of the mark "Mademoiselle Juniors", and contending that in any event, his client's mark was not in conflict and that the latter would not desist from using the firm name "Demoiselle Juniors Limited". It is admitted that, in the meantime, the solicitor for the plaintiffs had had several interviews with the defendant's solicitor. The former asserts that he approached the latter with the idea of settling the matter without litigation and that he then corrected the errors noted above. The defendant's solicitor admits the interviews but denies that the errors were in any way corrected. I am satisfied that the solicitor for the plaintiffs did correct such errors and that in any event the defendant's solicitor received full information as to the position of the plaintiffs' mark as a result of a search of the Register. An examination of Exhibit 2 discloses that in an undated letter the Ottawa agent of the solicitor for the defendant gave him full information as to the application of the plaintiffs for registration of their mark. Notwithstanding these interviews, the defendant, on February 15, 1946, signed the application to register its mark with full knowledge that there was another mark which at least might be confusingly similar to its own.

Finding as I do that the defendant has not satisfied the onus cast on it by the provisions of section 10 (*b*), the motion by the plaintiffs to expunge the defendant's word

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mark "Demoiselle Junior", Register 87/N.S. 22739, will be granted; the plaintiffs are also entitled to their costs to be taxed.

As stated above, I am not required to consider the registrability of the plaintiffs' trade mark. But it may be noted that the action of the Registrar in pointing out to the plaintiffs that its mark in 1941 did not appear to be registrable on account of a prior registration, "Miss Junior", was not a final action. The evidence of the present Registrar shows that the plaintiffs' application was not finally rejected and that it is still considered as a pending application. The mark "Miss Junior", to which reference has been made, was expunged in 1943, but another identical mark was thereafter recorded in the name of another owner in 1943, and is still on the Register. Neither it nor the plaintiffs' pending application were cited by the Registrar in 1946 when the defendant applied for its registration, although it would appear that both "Miss Junior" and "Junior for Mademoiselle" might both be considered as marks similar to "Demoiselle Junior".

Judgment accordingly.

BETWEEN:

MARGARET LIEBMAN, carrying on business under the name or style of MILLS MUSIC MERCHANTS } CLAIMANT;

1945

Feb. 5

1948

Jan. 29

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Forfeiture—The War Exchange Conservation Act, 1940, S.C. 1940-41, c. 2, ss. 3(1), 5—Customs Act, R.S.C. 1927, c. 42, ss. 174, 176—Strict construction of penal statutes—Construction of prohibitory statutes to prevent evasion—Application of prohibition of an Act to a thing essentially or substantially the thing prohibited.

The War Exchange Conservation Act, 1940, prohibited the importation of coin-operated amusement devices from a non sterling area without a permit. Claimant imported from the United States all the parts of the devices, except the wooden frames or cabinets which he purchased in Canada, and assembled the machines in Canada. These machines were seized by the Customs officers on the ground that the importa-

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tions of the parts were prohibited and their forfeiture was ordered by the Minister of National Revenue. The claim for the return of the machines was dismissed.

Held: That if a thing is essentially or substantially that which is prohibited by an Act it is within the prohibition of the Act. *Philpott* v. *St. George's Hospital* (1857) 6 H.L. Cas. 338 followed.

2. That whether the thing done is essentially or substantially that which is prohibited is a question of fact.

3. That the importations of parts by the claimant were substantially importations of coin-operated amusement devices contrary to the prohibitions of The War Exchange Conservation Act, 1940, and that the seizure and forfeiture of the machines were lawfully made.

Claim for the return of goods seized and forfeited under the Customs Act on the ground that they had been imported contrary to the prohibitions of The War Exchange Conservation Act, 1940, referred to the court by the Minister of National Revenue.

The claim was heard before the Honourable Mr. Justice Thorson, President of the Court, at Hamilton.

W. Schreiber for claimant.

J. P. O'Reilly K.C. for respondent.

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

The President now (January 29, 1948) delivered the following judgment:

This claim has been referred to this Court by the Minister of National Revenue under section 176 of the Customs Act, R.S.C. 1927, chap. 42. It is for the return of 38 slot machines seized by the Customs and Excise division of the Department of National Revenue at Hamilton and declared forfeited by the Assistant Deputy Minister of National Revenue (Customs) under section 174 of the Customs Act. The grounds for the seizure and forfeiture were that the importations of the goods had been prohibited by section 3 (1) of The War Exchange Conservation Act, 1940, Statutes of Canada, 1940-41, Chap. 2, and that they were subject to forfeiture accordingly under section 5 thereof. Section 3 (1) of the said Act provides:

3. (1) The importation into Canada of any goods enumerated and described in Schedule One to this Act is prohibited except in such cases

as the Minister in his discretion deems desirable and under and in accordance with the terms of a permit granted by him: Provided however that this section shall not apply to:—

(*a*) any goods imported from, and being of the growth, produce or manufacture of, any country within the sterling area or Newfoundland, except, at the discretion of the Minister, goods composed wholly or in part of silk;

(*b*) any goods which on or before the second day of December, 1940, were in transit to Canada.

and section 5 reads:

5. Any goods, the importation of which into Canada is by this Part prohibited shall, unless a permit for their importation has been obtained or such goods have been exempted by the Minister as hereinbefore provided, be deemed to be goods the importation whereof is prohibited by section thirteen of the *Customs Tariff* and any such goods imported shall thereby become forfeited to the Crown and shall be destroyed or otherwise dealt with as the Minister directs; and any person importing any such prohibited goods or causing or permitting them to be imported shall, in addition to any other penalties under the *Customs Act* or the *Customs Tariff*, be liable on summary conviction or on indictment to a fine not exceeding two thousand dollars or to imprisonment for not more than one year, or to both fine and imprisonment.

The relevant tariff item number in Schedule One is ex 466a reading as follows:

Punch boards and pin-ball games; vending machines, games, amusement devices, phonographs, radios, musical instruments, scales, parking meters, locks and lockers, coin-, disc- or token-operated;

The machines are coin-operated amusement devices within the meaning of this tariff item and it is admitted that the importations were subsequent to December 2, 1940, and that no permit was granted.

There is very little dispute as to the facts. The claimant is the owner of a business in Hamilton carried on under the name of Mills Music Merchants and also of Coin Craft Canada. It was transferred to her in 1940 by her husband, Eric Liebman, who was its former owner and continued to be its manager. There were two importations. The first one was under Customs entry number 1426 A, dated April 17, 1941, consisting of 30 boxes of goods described as "parts for coin-operated machines". The imported goods included all the parts, supports, top assemblies, bolts, nuts and screws necessary for the complete assembly of 25 coin-operated machines known as "Chrome Bells" except the wooden frames or cabinets. On this importation the claimant paid $1,510.07 by way of customs duty, war exchange tax and sales tax. The second importation was

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under Customs entry number 5773 A, dated June 6, 1941, consisting of 26 boxes of goods described as "(service parts for Canadian shipments)". These goods also included all the parts, levers, hand assemblies, screws, bolts, nuts and nails necessary for the assembly of 25 coin-operated machines known as "Mills Hand Load Jackpot Bells" except the wooden frames or cabinets. On this importation the claimant paid $1,198.64 for customs duty, war exchange tax and sales tax. Liebman had also arranged with the Canadian Fixture Company of Hamilton for the purchase of wooden cabinets for the machines, each consisting of a wooden base and two wooden uprights, and these were delivered about June 13, 1941. Liebman then proceeded to assemble the parts and on June 20, 1941, after an inspection of the claimant's premises by a Customs officer, applied for and obtained a sales tax and manufacturer's licence and later, after an audit, paid $509.26 by way of sales tax and $3,475.09 as excise tax. On July 15, 1941, Inspector C. H. Tyers of the Customs and Excise division at Hamilton seized 38 of the machines, 16 Chrome Bells and 22 Hand Loads, in the claimant's shop on the ground that their importation had been prohibited by The War Exchange Conservation Act, 1940. On November 9, 1942, both Liebman and the claimant were charged with unlawfully importing the goods. Magistrate Burbidge of Hamilton found each of them guilty in respect of one of the importations and fined the claimant $100 and costs and Liebman $200. A *nolle prosequi* was entered in respect of the charges in connection with the other importation. Appeals from these convictions were taken to His Honour Judge Schwenger, the Junior County Court Judge of Wentworth County, who allowed the appeals and quashed the convictions. Notwithstanding this fact, the Assistant Deputy Minister of National Revenue (Customs) on January 21, 1944, decided, under section 174 of the Customs Act, "that the goods be and remain forfeited and be dealt with accordingly." The claimant's solicitor notified the Department of National Revenue, Customs Division, that she would not accept the decision as final and on June 27, 1944, the Minister, under section 176 of the Customs Act, referred the claim against the decision to this Court for adjudication.

The evidence clearly establishes what Liebman intended to do. Shortly after the Act came into effect he consulted Mr. Williams, the local Appraiser at Hamilton, and Mr. Leask, the chief clerk in the Long Room. He said that he told Mr. Williams that he intended to import everything but the wooden parts for the machines and asked him whether it would be permissible to do so and that Mr. Williams, after consulting the Act, thought that such parts could be imported. Mr. Williams denied this and said that Liebman had merely inquired about the importation of parts and that he had suggested to him that he should communicate with Ottawa. I accept Mr. Williams' statement. Liebman also said that he told Mr. Leask the same thing but on cross-examination modified this statement and said that he had told him that he intended to bring in parts for new machines. Mr. Leask said that Liebman had merely asked about parts and that he had told him the matter came under the Appraiser. These conversations took place early in January, 1941. On January 6, 1941, Liebman wrote to Mr. P. F. Jackson, a Customs practitioner in Ottawa, asking him to get a ruling from the Customs Department on the subject of the importation of parts "for replacement or for original equipment purposes". Mr. Jackson obtained a written ruling from Mr. L. R. Younger, writing for the Commissioner of Customs, dated January 15, 1941, to the effect that parts of coin-operated amusement devices and vending machines were not prohibited from importation, but that a complete set of parts imported in an unassembled condition would not be considered as parts and that if all the parts required to make the device were purchased outside the sterling area the importation of such parts would be prohibited. Subsequently, on January 31, 1941, Liebman showed this letter to Mr. Ballantyne, the Collector of Customs and Excise at Hamilton, who cautioned him to remember the concluding part of the ruling. It is obvious that Liebman then decided upon his course of action, namely, that he would import as much in the way of parts as possible short of importing all the parts. Early in February, 1941, he gave instructions to the Mills Novelty Company of Chicago to ship him all the parts needed in building "25 Chrome Venders" except the wooden cabinets. Liebman paid the

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same price for these parts as he would have paid for the assembled machines or devices less the cabinets, namely, $121.50 United States funds "per complete and assembled device less an allowance of $6.00 per wooden frame or cabinet not shipped". Having successfully imported these parts, by the importation of April 17, 1941, Liebman then ordered parts for a different kind of machine, called the Mills Hand Load Jackpot Bell. The Mills Novelty Company had not been in the habit of selling these machines in parts, but Liebman went to Chicago and gave them personal instructions as to how he wanted the shipments made. He admitted that he had done so and also that he had gone to the exporter's school for some weeks to learn how to assemble the machines. The second lot of parts was shipped in due course. The price paid for these parts was the same as would have been charged if they had been assembled namely, "$101.50 per complete and assembled device, less an allowance of $6.00 per wooden frame or cabinet not shipped". The price of the second lot of parts was less than that of the first because certain "vending parts" were not included. In each case, when the goods were shipped the invoice described them as parts, and it would not have been possible for the Customs officers, without investigation, to determine whether the imported parts were all the parts necessary for the complete assembly of the prohibited machines or not. From the evidence it seems quite clear to me that Liebman had carefully planned his course with a view to importing as much of the slot machines in the form of parts as he thought he could safely do without importing the complete machines or all the parts. He thought that he had worked out a scheme, within Mr. Younger's ruling, whereby he could safely and lawfully import all the metal and working parts that no one but the exporter could make and buy in Canada the wooden frames or cabinets that almost anyone could make and thereby circumvent the prohibitions of the Act without coming within its express terms or becoming subject to its sanctions. That his mind was not entirely free from doubt is shown by the careful precautions he took, including a special trip to the exporters in Chicago, to have the machines, less the wooden frames or cabinets, shipped in the form of parts rather than in an assembled condition.

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But the issue is not what Liebman intended or thought, but only whether what he did was prohibited. The rules for the interpretation of such an Act as The War Exchange Conservation Act, 1940, help to answer the question. It is a prohibitory Act designed to conserve dollar exchange by prohibiting, except as permitted, the importation of specified goods from other than sterling areas. It is a penal Act in the sense that it attaches penal consequences to breach of its prohibitions. It is said that penal statutes must be construed strictly, but this really means no more than the statement in Maxwell on the Interpretation of Statutes, 8th edition, at page 231:

> But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

But while this is so, the Act is primarily a prohibitory one and it has been said that a prohibitory statute should be construed with a view to preventing evasion of it. This use of the word "evasion" was criticized by Lord Cranworth L.C. in *Edwards* v. *Hall* (1), where he said:

> I never understood what is meant by an evasion of an Act of Parliament: either you are within the act of parliament or not within the act of parliament. If you are not within it, you have a right to avoid it, to keep out of the prohibition; if you are within it, say so, and then the course is clear; and I do not think you can be said not to be within it because the very words have not been violated.

But, as Maxwell points out, at page 101, the word "evasion" is sometimes used to mean "avoidance". Indeed, the word is used in two senses, one meaning a course of conduct designed to circumvent the objects of the Act and really amounting to a breach of it, and the other merely an avoidance of coming within its terms. There is nothing unlawful about the latter, but the Courts seek to prevent the former. At page 101, Maxwell makes a number of statements that show the state of the law on the subject from very early times:

> The office of the Judge is, to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited

(1) (1856) 25 L.J. Ch. 84.

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or enjoined. *Contra legem facit, qui id facit quod lex prohibet. In fraudem vero legis facit, qui salvis verbis legis sententiam ejus circumvenit;* and a statute is understood as extending to all such circumventions, and rendering them unavailing. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

All these statements are of long standing and great authority. Then follow two leading statements in the House of Lords. In *Philpott* v. *St. George's Hospital* (1) the head note states:

> Prohibitory statutes must not be interpreted on a principle of tendency; if any thing done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is within the true construction of the statute, the thing prohibited.

And Lord Cranworth L.C. said, at page 348:

> Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that it is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things, actually prohibited.

There were similar expressions in *Jeffries* v. *Alexander* (2) by Blackburn J., at page 623:

> The principle, as I understand it, is that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly, and endeavoured to conceal that they have done so.

And by Byles., at page 628:

> what the statute forbids must not be done either directly or indirectly,

These principles are applicable to the present case. While it is not permissible that the Court should extend the prohibitions of the Act beyond its express terms to things not covered by them, it is imperative that the terms should be read as applying to things that are essentially or substantially within the prohibitions. For example, the fact that the parts of coin-operated amusement devices are not expressly prohibited does not warrant the assumption that all the parts of such devices may be lawfully imported. Indeed, if all the parts, including the wooden cabinets, had been imported I think there can be no doubt that such an importation would have been a prohibited one. It was similarly held in *R.* v. *Greene* (3) that sets of complete

(1) (1857) 6 H.L. Cas. 338.
(2) (1860) 8 H.L. Cas. 594.
(3) (1941) 81 C.C.C. 346.

parts for drums which were imported in Canada unassembled, but which might be assembled into completed drums without additional material, were "brass band instruments" within the meaning of The War Exchange Conservation Act, 1940, and that their importation into Canada without a permit was unlawful. To have held otherwise would, in my judgment, have wholly defeated the declared object of the Act.

In the present case all the parts of the coin-operated amusement devices were imported except the wooden cabinets. Can the fact that the cabinets were not imported have the effect of taking the importations of all the other parts out of the prohibitions of the Act? The answer, according to the principles referred to, depends on whether the imported parts were essentially or substantially goods whose importation was prohibited by the Act. If they were, then the forfeiture must stand. The question can also be put otherwise. Were the imported goods essentially or substantially things other than those which could not lawfully be imported? In whichever form the question is put it is one of fact. On this point, the evidence is conflicting but some of it is merely a matter of difference of opinion. Liebman said that the machines were not sold for use in private homes but for use by the public, that the machine was a commercial amusement device designed for making money for its owner, and that for such purpose it had no value without the base and the two sides. He gave as his reasons for this conclusion that the wooden base and sides enclosed the mechanism, including the cash box, and supported all the working parts, that a number of the parts were attached to the cabinet, that it was the only support for the main operating lever, that the whole front, top and back of the machine were attached to the cabinet, that the cash box slide was attached to the base and that the metal back could not be attached securely to the machine without the base and sides. He stated further that he would not think of putting one of the machines on location if the wooden frame was not there, that no one would buy the machine without the base and sides and that it could not be used commercially without them. Liebman insisted that the wooden cabinet was a necessary part of the machine and that it could not be

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operated without it. Counsel for the respondent, on the other hand, contended that the base and sides served only the purpose of giving support to the machine for handling it and moving it from place to place or to set it up for show purposes and make it more attractive in appearance, but was not necessary for use of the device. It is clear that the machine would work without the cabinet. It appears that counsel operated it in the Police Court in Hamilton, that a coin was inserted, the lever pulled and the works put into motion, but Liebman contended that this operation of the machine could not be regarded as a commercial one. He admitted that the lever and the wheels worked and the discs went around but insisted that it did not work commercially.

In my view, the importations of the parts without the cabinets must be regarded as if the machines had been imported in an assembled condition without the cabinets. How would the imported goods have then been described? There can be no doubt that their proper description would have been "coin-operated amusement devices" even although there were no cabinets with them. If an attempt had been made to import them in that state there is no doubt as to what would have happened. Their entry would have been refused and, in my opinion, properly so for their proper description would have brought them within the express prohibitions of the Act. If they could not have been called coin-operated amusement devices what else could they have been called? The answer is that they could not have been properly described otherwise. The fact that the addition of the wooden cabinets would be required for their sale does not determine the matter. If we were to suppose that the importation of motor cars was prohibited could it be said that motor cars less the tires or less the bumpers could lawfully be imported? Without such parts the articles would still be motor cars, although not saleable as such. I can see no basic difference in the present case. The goods imported by Liebman were substantially coin-operated amusement devices within the meaning of tariff item ex 466a, even although they were imported in the form of parts without the wooden cabinets. That the cabinets were not also imported did not so change the character of the imported goods as to make them

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something other than coin-operated amusement devices and so take them out of the ambit of the prohibitions.

Nor can the claimant draw any comfort from the pretention that work and labour were required to assemble the parts. Liebman said that the cost of this was from $30 to $40 for the first few machines but from $10 to $12 for the later ones. There is no evidence apart from his own word to substantiate this statement but there is an estimate of a much smaller amount on the departmental file which by section 177 of the Customs Act is made part of the record. Whatever the cost of assembly was it is clear that all of it except that of putting the base and sides on, which was a simple matter, could have been saved by the claimant if the machines less the wooden cabinets had been imported in their assembled condition, for he paid as much for the parts as he would have paid for the assembled machines—but to do this would have been to invite certain rejection of the machines, which Liebman sought to avoid. He thought he had carefully worked out a scheme for the avoidance of the prohibitions of the Act, but what he did was really an evasion of the terms of the Act amounting to breach of them. His importations of the parts were substantially importations of coin-operated amusement devices contrary to the prohibitions of the Act. It follows that the seizure and forfeiture of the machines were lawfully made and that the claim for their return must be dismissed with costs.

Judgment accordingly.

BETWEEN:

1945

GEORGES ALLAIRE.....DEMANDEUR;

Dec. 17, 18

1948

ET

Jan. 23

HOBBS GLASS LTD.....DÉFENDERESSE.

Trade Mark—Action for infringement of industrial designs—Trade Mark and Design Act, R.S.C. 1927, c. 201—Failure to mark a manufactured article to which the design applies, in accordance with the requirements of section 37 of the Act, invalidates the registration of the design and renders the latter null and void—Action is prescribed if brought after the delay enacted by section 41 of the said Act—Action dismissed.

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The action is one for the infringement of two industrial designs which were registered in plaintiff's name in 1939. The manufactured articles were sold with a label attached thereto and thus worded, *Regina Protective Plate Reg'd., Quebec, Canada. "Patents pending Canada and U.S.A. 1939"*. The alleged infringement came to the plaintiff's knowledge some time in 1941 and the present action was brought in 1944.

The Court found that the plaintiff's designs were innovations in plates for light-switches; that they were registered within the delay enacted by section 37 of the Trade Mark and Design Act; that there had been an infringement of the designs by the defendant and dismissed the action.

Held: That a label attached to a manufactured article to which a design applies and which is not marked in accordance with section 37 of the Trade Mark and Design Act, invalidates the registration of the design and renders the latter null and void.

2. That an action for infringement of an industrial design brought more than twelve months from the plaintiff's knowledge thereof is prescribed in virtue of section 41 of the said Act.

ACTION for infringement of two industrial designs.

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

G. Lacroix, K.C. and *R. Legendre* for plaintiff.

L. Galipeault, K.C. and *A. Labrecque* for defendant.

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

ANGERS J. now (January 23, 1948) delivered the following judgment:

Le demandeur, un employé civil demeurant en la cité de Québec, poursuit la défenderesse pour violation de deux marques de commerce (devrait être "dessins de fabrique") et pour dommages en résultant. Le demandeur, dans sa déclaration, allègue en substance ce qui suit:

il est propriétaire des marques de commerce suivantes:

a) D. 4547, marque de commerce consistant en une 'Device for Covering a wall in the vicinity of a switch' daté du 25 mai 1939 et enregistré au Register of Industrial Design, No. 59, folio 12397, conformément aux dispositions de la 'Loi concernant la concurrence déloyale dans l'industrie et le commerce—1932'.

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b) D. 4548, marque de commerce consistant en une 'Device for Covering a wall in the vicinity of a switch' daté du 25 mai 1939 et enregistré au Register of Industrial Design, No. 59, folio 12398, conformément aux dispositions de la 'Loi concernant la concurrence déloyale dans l'industrie et le commerce—1932';

la défenderesse a violé les droits exclusifs appartenant au demandeur en vertu des marques de commerce ci-dessus mentionnées en fabriquant à Québec des plaques murales désignées sous ces marques de commerce;

la défenderesse, en violation des droits du demandeur, a aussi vendu et offert en vente ces articles depuis le 25 mai 1939 jusqu'à ce jour et plus spécialement le 3 mai 1941;

le demandeur ignore le nombre des ventes faites par la défenderesse en violation de ses droits; néanmoins, il réclame entière compensation pour les dommages à lui causés par la défenderesse, lesquels il évalue à $5,000;

il réclame de la défenderesse cette somme de $5,000 pour dommages résultant de la violation de ses droits ainsi que pour les pertes réelles que la défenderesse lui a fait subir;

le demandeur conclut:

qu'il soit déclaré seul et véritable propriétaire des marques de commerce susmentionnées;

qu'il soit déclaré que la défenderesse a violé les droits conférés au demandeur en vertu desdites marques de commerce;

qu'il soit déclaré (ordonné) que la défenderesse s'abstienne de continuer à violer les droits du demandeur, sous toute peine imposée par la loi;

que la défenderesse soit condamnée à payer au demandeur une somme de $5,000 ou toute autre somme que la cour fixera;

qu'il soit ordonné à la défenderesse de remettre au demandeur tous les articles qu'elle a en sa possession, qui ont été fabriqués et qu'elle détient en violation des droits du demandeur.

Pour défense à l'action la défenderesse plaide en substance ce qui suit:

elle admet l'inscription sur le registre des dessins de fabrique en vertu de la Loi des marques de commerce et

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dessins de fabrique (non pas la Loi sur la concurrence déloyale, 1932, tel que mentionné dans la déclaration) des enregistrements numéros 59/12397 et 59/12398, tous deux datés le 25 mai 1939, et renouvelés jusqu'au 25 mai 1949, desdits dessins de fabrique (non pas "marques de commerce", tel que mentionné dans la déclaration), décrits respectivement comme "A device For Covering a Wall In The Vicinity of A Switch, composed of a flat plate of elliptical configuration having a central aperture disposed to register with the front plate of an electrical switch, and A Device For Covering a Wall in the Vicinity of a Switch, consisting of a flat plate of octagonal form having a central opening adapted to be disposed in registration with the front of a switch casing", lesdits enregistrements ayant été faits et demeurant inscrits au nom de Georges Allaire, Québec, Province de Québec;

elle n'admet pas que le demandeur est l'inscrivant ou le propriétaire desdits dessins de fabrique;

elle admet qu'elle fabrique et vend au Canada depuis au moins vingt ans des plaques de verre substantiellement plates, de forme elliptique, octogonale, rectangulaire ou autre, destinées à être appliquées sur les murs à l'endroit des commutateurs ou ailleurs, mais elle nie que ces plaques renferment les dessins de fabrique susdits;

lesdits dessins de fabrique sont et ont toujours été invalides pour les raisons suivantes:

a) ils n'ont aucun rapport avec la caractéristique d'un dessin au sens de la Loi des marques de commerce et dessins de fabrique parce que l'adoption d'une surface plate et d'un contour elliptique ou octogonal est simplement une question de choix du fabricant et ne requiert aucune ingéniosité;

b) ils n'étaient pas nouveaux quand le demandeur les a adoptés, et, dans le sens de l'article 37 de la Loi des marques de commerce et dessins de fabrique, ils avaient été publiés pour plus d'une année avant leur enregistrement, tel qu'il appert des faits suivants:

1° des plaques plates, de contour elliptique, octogonal, rectangulaire ou autre, avaient été depuis plusieurs

années faites, vendues et utilisées au Canada et ailleurs pour application sur les murs comme décorations, miroirs et autrement;

2° des plaques plates, de contour elliptique, octogonal, rectangulaire ou autre, avaient été faites, vendues et utilisées au Canada et ailleurs pour application sur les murs à l'endroit des commutateurs électriques;

3° la défenderesse avait, depuis au moins vingt ans avant 1939, fait publiquement et vendu au Canada des plaques de verre plates, de contour elleptique, octogonal, rectangulaire ou autre, pour application sur les murs à l'endroit des commutateurs électriques et ailleurs.

c) le demandeur n'a pas inventé lesdits dessins de fabrique; quand il les a adoptés il était au courant de l'usage antérieur de plaques plates de formes différentes, comprenant des plaques elliptiques et octogonales, pour application sur les murs à l'endroit des commutateurs électriques et ailleurs; il avait en particulier été renseigné au sujet de ces plaques par la défenderesse, de qui il avait obtenu des échantillons en ou vers 1938;

d) le demandeur a manqué de se conformer aux exigences de l'article 37 de la Loi des marques de commerce et dessins de fabrique, en ne mettant pas sur les objets par lui produits les marques requises par ledit article;

le demandeur n'a subi aucun dommage; depuis lesdits enregistrements il n'a fait aucune affaire dans la production ou la vente d'appareils pour application sur les murs à l'endroit des commutateurs ou ailleurs;

à tout événement, le demandeur n'a droit à aucune réparation parce que, pendant la durée des dits enregistrements, il était au courant de la production et de la vente par la défenderesse d'articles de la nature de ceux dont il se plaint, et que jusqu'à sa déclaration dans la présente action il ne s'est jamais plaint à la défenderesse, mais a acquiescé à sa conduite; la défenderesse n'était pas au courant desdits enregistrements et ne savait pas que le demandeur prétendait

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être le propriétaire desdits dessins de fabrique avant que la déclaration lui ait été signifiée; en tout cas, conformément à l'article 41 de la Loi des marques de commerce et dessins de fabrique, le demandeur n'a droit à aucune réparation quant à ce qui concerne les articles faits ou vendus par la défenderesse avant le 11 octobre 1943.

Dans sa réponse à la défense, le demandeur déclare en substance ce qui suit:

il admet qu'il a fait erreur dans sa déclaration et que les certificats d'enregistrement ont été accordés pour des dessins de fabrique et non pour des marques de commerce;

il admet que ces certificats ont été inscrits au registre des dessins de fabrique conformément aux dispositions de la Loi des marques de commerce et dessins de fabrique et non de la Loi sur la concurrence déloyale, 1932;

il est l'unique propriétaire des dessins de fabrique enregistrés sous l'empire de la Loi des marques de commerce et dessins de fabrique et il a seul le droit de fabriquer et vendre les plaques murales protégées par ces enregistrements;

il nie que la défenderesse ait fabriqué et vendu au Canada des plaques murales dans le genre de celles couvertes par les certificats d'enregistrement mentionnés avant que le demandeur obtienne lesdits certificats et il déclare que personne ne faisait usage de ces dessins à sa connaissance quand il en a fait le choix;

il nie toutes les autres allégations de la défense.

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

Le cas qui nous occupe est régi par la Partie II de la Loi des marques de commerce et dessins de fabrique (S.R.C. 1927, chap. 201), intitulée "Dessins de fabrique".

L'article 27 exige le dépôt par le propriétaire, qui demande l'enregistrement d'un dessin, d'une esquisse et d'une description de ce dessin en double, avec une déclaration portant que personne autre que lui ne faisait usage de ce dessin, à sa connaissance, quand il en a fait le choix.

L'article 29 décrète que, si le ministre trouve que le dessin n'est identique à aucun autre déjà enregistré ou qu'il n'y ressemble pas au point qu'il puisse y avoir confusion,

il le fait enregistrer et remet au propriétaire un double de l'esquisse et de la description en même temps que le certificat prescrit par la loi (article 30).

L'article 30, invoqué par les deux parties, se lit ainsi:

30. Sur le double de l'esquisse et de la description, rendu à la personne qui fait enregistrer, est donné un certificat, signé par le ministre ou par le commissaire des brevets, énonçant que ce dessin a été régulièrement enregistré conformément aux dispositions de la présente loi.

2. Ce certificat doit indiquer la date de l'enregistrement, y compris le jour, le mois et l'année de son inscription sur le registre approprié, le nom et l'adresse du propriétaire enregistré, le numéro du dessin, et le numéro ou la lettre qui a servi pour coter l'enregistrement ou pour y correspondre.

3. En l'absence de preuve contraire, ledit certificat est une attestation suffisante du dessin, de l'originalité du dessin, du nom du propriétaire, du fait que la personne dite propriétaire est propriétaire, de la date et de la fin de l'enregistrement, et de l'accomplissement des dispositions de la présente loi.

L'article 32 porte que le droit exclusif à la propriété d'un dessin peut être acquis par son enregistrement conformément à la loi.

L'article 33 décrète que ce droit exclusif est valable durant cinq ans et qu'il peut être renouvelé à ou avant l'expiration de cette période pour une autre période de cinq ans ou moins, sur paiement du droit prescrit par la loi. L'article décrète toutefois que la durée totale de ce droit exclusif ne doit pas excéder dix ans.

L'article 34, qui me paraît important en l'espèce, contient les dispositions suivantes:

34. Pendant l'existence du droit exclusif, qu'il s'agisse de l'usage entier ou partiel du dessin, personne, sans la permission par écrit du propriétaire enregistré, ou de son cessionnaire, selon le cas, ne peut appliquer, pour des fins commerciales, ce dessin, ou une imitation frauduleuse de ce dessin, à l'ornementatoin d'un article fabriqué, ou d'un article auquel un dessin de fabrique peut être appliqué ou attaché; et personne ne peut publier, ni vendre ni exposer en vente, ni employer cet article ci-dessus mentionné, auquel ce dessin ou cette imitation frauduleuse a été appliquée.

L'article 35 stipule que l'auteur d'un dessin en est considéré le propriétaire à moins que, pour bonne et valable considération, il ne l'ait exécuté pour une autre personne, auquel cas celle-ci en est considérée le propriétaire.

L'article 37 détermine les conditions de l'enregistrement et la façon dont le nom du propriétaire doit être apposé sur

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l'objet auquel est appliqué le dessin. Certaines dispositions de cet article me paraissent essentielles et j'estime avantageux de les reproduire verbatim:

> 37. Pour garantir tout dessin, il faut l'enregistrer dans l'année qui suit sa publication au Canada et, l'enregistrement fait, le nom du propriétaire est apposé sur l'objet auquel est appliqué son dessin, si c'est un tissu, en le marquant sur une des extrémités de la pièce, ainsi que les lettres 'Etré', et, si le produit est d'une autre substance, les lettres 'Etré' sont marquées sur le bord ou sur tout autre endroit convenable de l'objet avec l'indication de l'année de l'enregistrement.

L'article prévoit que la marque peut être faite sur le produit même ou en y attachant une étiquette portant les marques voulues.

En vertu de cet article deux conditions sont nécessaires à la validité du dessin de fabrique:

1° son enregistrement dans l'année suivant sa publication au Canada;

2° une fois l'enregistrement fait, l'apposition sur l'objet auquel est appliqué le dessin du nom du propriétaire et des lettres 'Etré' avec indication de l'année de l'enregistrement.

L'article 38 décrète que si, pour des fins commerciales, une personne applique ou imite un dessin, sachant que le propriétaire de ce dessin n'a pas consenti à cette application ou imitation, le propriétaire peut intenter une action contre cette personne pour les dommages qu'il a soufferts par suite de cette application ou imitation.

L'article 41 ordonne que toutes les actions et procédures intentées sous l'empire de la Partie II, relative aux dessins de fabrique, doivent l'être "dans les douze mois à compter du motif de l'action ou de la commission de l'infraction".

[Here the learned judge makes a summary of the evidence and proceeds]:

Après avoir examiné, pesé et comparé avec soin ces divers témoignages, j'en suis venu à la conclusion que le demandeur est bien celui qui a inspiré la fabrication des plaques protectrices représentées dans les dessins de fabrique pièces 2 et 3.

Godbout, Comtois, Lefrançois, Thiboutot et Labrecque sont tous des témoins indépendants et vraisemblablement désintéressés.

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On n'en peut dire autant de Demontigny, Jenkins, Corbeil et Laliberté qui sont ou ont été, selon le cas, des employés de la défenderesse et qui sont ainsi naturellement portés à soutenir, même inconsciemment, la cause de leur employeur.

Quant à L'Hérault, propriétaire de La Vitrerie Moderne de Québec, il dit bien qu'il a fait une plaque en verre pour couvrir les commutateurs et qu'il n'avait pas encore rencontré le demandeur quand il l'a faite. Il ajoute qu'il a dû la faire en 1939, mais qu'il avait fait un dessin l'année précédente, lequel a été mis au panier. Ce témoignage, rendu en toute apparence de bonne foi, est malheureusement vague et imprécis.

Les témoignages relatifs à la conception et la production des plaques protectrices offerts par le demandeur l'emportent, à mon avis, sur ceux présentés par la défenderesse.

Ceci ne résout pas le problème entièrement. Il s'agit de décider en outre si les plaques protectrices fabriquées par le demandeur, en métal ou en verre peu importe, constituent une innovation dans l'art justifiant l'émission de dessins de fabrique.

Pour qu'un dessin de fabrique soit susceptible d'être enregistré il doit représenter quelque chose d'original et de différent. Cette doctrine a été exposée dans le jugement de la Cour Suprême, rendu par l'honorable juge Lamont, dans la cause de *Clatworthy & Son Limited* v. *Dale Display Fixtures Limited,* (1) confirmant le jugement de la Cour de l'Echiquier (Maclean, J.) (2) qui avait rejeté l'action de la demanderesse.

Après avoir exposé ce à quoi se rapporte le dessin que la demanderesse prétend avoir été contrefait, le juge Lamont fait les observations suivantes (p. 431):

No definition of a "design" is given in the Act. The word must, therefore, be taken in its ordinary signification which Lindley, L.J., in In re Clarke's Design, (1896) 2 Ch. 38, at p. 43, stated means: "Something marked out—a plan or representation of something". A "design" is, therefore, a pattern or representation which the eye can see and which can be applied to a manufactured article. To be entitled to registration the "design" must be original. The Act does not expressly call for novelty, but s. 27 (3) provides that the Minister's certificate of registration shall, in the absence of proof to the contrary, be sufficient evidence of the originality of the design. Just what is contemplated by "originality" the Act does not make clear. Under the English Act a design, to be registrable, must be "new or original". As that Act uses both words it has, in a number of cases, been sought to draw a distinction in meaning

(1) (1929) S.C.R. 429. (2) (1928) Ex. C.R. 159.

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between them, and it has been held that "every design which is original is new, but every design which is new is not necessarily original". In re Rollason's Design, (1897) 14 R.P.C. 909.

Le juge Lamont se réfère alors à la décision de la Chancery Division de la Supreme Court of Judicature, en appel, dans la cause de *Dover Limited* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff,* (1) où Buckley L.J. a défini le mot "original" ainsi (p. 29):

> The word "original" contemplates that the person has originated something, that by the exercise of intellectual activity he has started an idea which had not occurred to any one before, that a particular pattern or shape or ornament may be rendered applicable to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design will be original although the actual picture or shape or whatever it is which is being considered is old in the sense that it has existed with reference to another article before.

Après avoir relaté deux faits à titre d'exemples Buckley L.J. ajoute (ibid.):

> The words "new or original" involve the idea of novelty either in the pattern, shape, or ornament itself or in the way in which an old pattern, shape, or ornament is to be applied to some special subject-matter. 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 any one before as to applying by some manual, mechanical, or chemical means some pattern, shape, or ornament to some special subject-matter to which it had not been applied before.

Il y a lieu de se reporter aussi au jugement de Kennedy L.J. qui exprime l'opinion suivante (p. 32):

> If we must find a distinction, I should be inclined to interpret "original" as referring to a design which no previous designer had created for any purpose, and "new" as referring to a design which was not in this sense original, but was newly and for the first time applied to the particular kind of article, with reference, not to the classification in the Third Schedule of the Designs Rules, 1908, but to the kind of article having regard to its general character and use, according to the view expressed by Lindley L J., in reference to the Act of 1883, in In re Clarke's Design (1896) 2 Ch. 45., where he aptly illustrates his meaning by saying "a design may be new for a coal-scuttle, but not for a bonnet."

Dans la cause de *Kaufman Rubber Company Limited* v. *Miner Rubber Company Limited* (2), l'ex-président de la cour, le juge Maclean, définissant le dessin de fabrique, a fait des observations intéressantes que je crois utile de reproduire en partie (p. 28):

> In dealing with designs, the legislature had, I think, primarily before it, the idea of shape or ornamentation involving artistic considerations. Clearly a design cannot be an article of manufacture, but something to be applied to an article of manufacture, or other article to which an industrial design may be applied, and capable of existence outside the

(1) (1910) 2 Ch. 25. (2) (1926) Ex. C.R. 26.

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article itself, nor do I think that the registration of a design would afford any protection for any mechanical principle or contrivance, process or method of manufacture, or principle of construction. Then there must be something original in a registered design, and it must be substantially novel or original, having regard to the nature and character of the subject matter to which it is applied.

A design to be registrable must therefore be some conception or suggestion as to shape, pattern or ornament applied to any article, and is judged solely by the eye, and does not include any mode or principle of construction. What would constitute a registrable design, is, I think, admirably and comprehensively expressed in Pugh *v.* Riley, (1912) 29 R.P.C. 196, by Parker L.J., at p. 202, and is I think quite applicable to the provisions of our statute. There he said:

A design to be registrable under the Act must be some conception or suggestion as to shape, configuration, pattern or ornament. It must be capable of being applied to an article in such a way that the article to which it has been applied, will show to the eye the particular shape, configuration, pattern, or ornament, the conception or suggestion of which constitutes design. In general any application for registration must be accompanied by a representation of the design; that is, something in the nature of a drawing or tracing, by means of which the conception or suggestion constituting the design may be imparted to others. In fact, persons looking at the drawing ought to be able to form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied.

Dans la cause de *Canadian Wm. Rogers Limited* v. *International Silver Company of Canada Limited* (1), il s'agissait d'un dessin de fabrique décrit dans la demande d'enregistrement comme suit:

The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown.

Le sommaire du jugement, suffisamment exact, est ainsi conçu (p. 64):

Held that the registration in question being only for an outline of a table knife, distinguished by having the length of the handle and blade in the proportions mentioned, such design does not constitute a registrable design under the provisions of The Trade Mark and Design Act.

Dans ses notes, le juge Maclean, se reportant au jugement par lui rendu dans la cause de *Kaufman Rubber Company Limited* v. *Miner Rubber Company Limited précitée,* déclare, entre autres, ceci (p. 65):

I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and . . . 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

(1) (1932) Ex. C.R. 63.

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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. Even if the statute did not confine the registration of designs to ornamental designs applied to an article of manufacture, I would be of the opinion that the dimensions of the handle and blade of a table knife does not constitute subject matter for a design, and is not properly registrable as a design.

Un peu plus loin (p. 66), le savant juge ajoute les commentaires suivants:

I do not think the shape or conformation of the knife is claimed as the design, it is only a knife in which the handle is one-fifth longer than the blade, that is claimed as the design; any reference to "shape" in the application was merely to indicate this fact. It is true that a knife constructed in this fashion produces an effect, but an effect is not a design. The words "shape or configuration", as employed in the present English Design Act does not in my opinion relate to the shape or configuration produced by the dimensions of the different members constituting an article of manufacture; these words however are not found in our statute and English decisions based upon these words are not applicable here.

Les dessins conçus par le demandeur, enregistrés le 25 mai 1939 et renouvelés le 17 mai 1944 pour une période de cinq ans à compter du 25 mai 1944, qui, au dire du demandeur et apparemment de l'avis du ministre qui a consenti à leur enregistrement, ne sont pas identiques à quelque autre dessin enregistré ou ne lui ressemblent pas au point qu'il puisse y avoir confusion, constituent, à mon sens, une innovation dans les plaques à commutateurs électriques; ils ont pour but et comme résultat de protéger les murs contre la saleté due au contact des doigts. Je suis d'opinion que ces dessins méritent la protection accordée par la Loi des marques de commerce et dessins de fabrique.

Trois autres griefs ont été plaidés de la part de la défenderesse, lesquels peuvent être résumés ainsi:

1° la publication des dessins dont il s'agit a eu lieu au delà d'un an avant leur enregistrement, contrairement aux dispositions de l'article 37;

2° les enregistrements obtenus par le demandeur sont invalides parce qu'il n'a pas apposé sur les objets

auxquels sont appliqués l'un ou l'autre de ses dessins son nom, les lettres "Etré" et l'année de l'enregistrement;

3° l'action est prescrite en vertu de l'article 41.

Relativement au premier grief, l'article 37, comme nous l'avons vu, décrète que, pour garantir un dessin, il faut l'enregistrer dans l'année qui suit sa publication.

La preuve démontre que les dessins, pièces 2 et 3, ont été enregistrés le 25 mai 1939. Le procureur de la défenderesse prétend qu'ils ont été publiés vers la fin de 1937 ou le commencement de 1938. Il appuie sa prétention sur les témoignages de Labrecque, Demontigny, Jenkins, Corbeil et Laliberté.

Comme nous l'avons vu, Labrecque déclare qu'il a travaillé chez la défenderesse, à Québec, de 1928 à 1944, qu'il y a vu le demandeur vers la fin de 1937 ou le commencement de 1938, qu'il a fait, pour lui, à sa demande expresse et selon son modèle, des plaques protectrices semblables aux pièces G-1, G-2, 7 et 8 et qu'il est allé en porter chez le demandeur à la même époque.

De son côté, Demontigny, contremaître de la défenderesse à Québec, dit qu'il y a vu faire en 1937 et 1938 des plaques en verre semblables aux pièces 7 et D et qu'il y a travaillé lui-même. Il n'indique pas pour qui ces plaques ont été faites; peut-être l'ignorait-il, ce qui toutefois me paraîtrait étrange. Il relate que des plaques semblables ont été posées vers la même époque dans le bureau de la défenderesse. Il aurait lui-même fait les plaques G-1 et G-2 lors de la rénovation des bureaux de la compagnie à Québec et il en aurait fabriqué une couple de douzaines pour des clients. Ces plaques me semblent bien avoir été faites selon les modèles fournis par le demandeur.

Jenkins, lui, qui est entré à l'atelier de la défenderesse à Québec le 25 novembre 1937, déclare qu'il y a remarqué les plaques G-1 et G-2 installées dans le magasin, qu'elles y sont toujours demeurées et qu'elles ont été enlevées seulement pour les réparations. Il ignore quand ces plaques ont été posées la première fois. Ce témoignage n'ajoute rien aux précédents.

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Corbeil, qui a travaillé pour la défenderesse à Québec de novembre 1932 à septembre 1938, déclare qu'elle a fait environ dix douzaines de plaques semblables aux pièces D et G-2, mais qu'il ignore si elles ont été mises sur le marché. D'après lui, ces plaques auraient été faites avant le départ de Demontigny pour Montréal. La date de ce départ n'est guère précise.

Laliberté, surintendant à l'atelier de la défenderesse à Québec, dit que des plaques semblables aux pièces G-1 et G-2 ont été installées dans le magasin de la défenderesse en 1937, qu'elles y sont restées constamment et qu'elles ont été enlevées pour être apportées à la cour.

Je ne crois pas que la fabrication par la défenderesse de plaques protectrices sur les instructions du demandeur soit une publication au sens de l'article 37, même si la défenderesse a jugé à propos d'en fabriquer pour elle-même et d'en poser sur les murs de son magasin ou de son bureau: *voir* Fox, The Canadian Law of Trade Marks and Industrial Designs, p. 468 et la note (*g*) au bas de la page. Le premier grief allégué par la défenderesse me paraît mal fondé.

Le deuxième grief reproché au demandeur, savoir que celui-ci n'aurait pas apposé sur les objets auxquels sont appliqués l'un ou l'autre de ses dessins son nom, les lettres "Etré" et l'année de l'enregistrement, me paraît mieux fondé. L'article 37 exige qu'une fois l'enregistrement du dessin exécuté le nom du propriétaire soit apposé sur l'objet auquel est appliqué le dessin, avec les lettres "Etré" et l'indication de l'année de l'enregistrement. Or la preuve démontre que le demandeur ou son représentant a collé sur le dos des plaques vendues une étiquette portant le nom de la venderesse, Regina Protective Plate, Reg'd., son adresse, Québec, Canada, et les mots "Patents pending Canada and U.S.A. 1939".

Je ne crois pas que cette étiquette soit conforme aux dispositions de l'article 37.

Dans une cause *d'Epstein* v. *O-Pee-Chee Company Ltd.* (1), dans laquelle le demandeur demandait la radiation d'un dessin de fabrique, le juge Audette a maintenu l'action et ordonné la radiation de ce dessin principalement parce que

(1) (1927) Ex. C R. 156.

le sujet en avait été publié au delà d'un an avant l'enregistrement, mais aussi pour le motif additionnel suivant (p. 157):

Moreover the Maple Crispette Company did not protect the design, as required by sec. 34 (now 37) of The Trade-Mark and Design Act, by placing the letters Rd. and the year of registration at the edge or upon any convenient part of the design.

Fox, dans l'ouvrage précité, exprime l'opinion suivante, qui me paraît bien fondée (p. 470):

Under the English Act the marking is to be placed upon the goods before delivery on sale. Although these words do not appear in Sec. 37 of the Canadian statute, it is assumed that the meaning is the same, and that a design will be invalidated if goods are sold without being marked in accordance with the section.

L'article 51 du Statut anglais, Patents, Designs and Trade Marks Act, 1883, 46-47 Vict., Chap. 57, se lit ainsi:

51. Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words of figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article.

Fox appuie son opinion sur les décisions suivantes: *Woolley* v. *Broad* (1); *Wedekind* v. *The General Electric Co. Ltd.* (2); *in the matter of Rollason's Registered Design* (3).

Voir aussi *Heinrichs* v. *Bastendorff*, (4).

Je crois convenable de citer un extrait du jugement de Lindley, M.R., de la Cour d'Appel, in the matter of Rollason's Registered Design, qui expose clairement la doctrine sur le point qui nous occupe (p. 913):

Then there is the other point about the 51st section, which I had forgotten for a moment. It turns upon a mistake which was made by the die-sinker in putting a 5 for a 3. The 51st section runs thus, and it is rather important: "Before delivery on sale of any articles to which a registered design has been applied the proprietor of the design shall cause each such article to be marked with the prescribed mark or with the prescribed word or words or figures denoting that the design is registered." That, as applied to this case, means "Registered" or "Rd." with the number "232,908". That is according to the rules what he ought to have had on; but in one plate made for a child's coffin inadvertently the die-sinker put a 5 for a 3, and it was not found out. Now, if the section stopped where I have stopped, it appears to me it would have rendered this design a bad design. It would have had to be expunged. But, of course, the Legislature saw that that would be a very serious

(1) (1892) 9 R.P.C. 429.
(2) (1897) 14 R.P.C. 190.
(3) (1897) 14 R.P.C. 893, 909.
(4) (1893) 10 R.P.C. 161.

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consequence of what might be a very trifling and venial slip; so the section goes on to qualify what I read in this way: "If he fails to do so"—which in that particular instance Mr. Rollason did—"the copyright in the design shall cease unless the "proprietor shows that he took all proper steps to ensure the marking of the article".

The learned Judge in the Court below thought Mr. Rollason brought himself within the last part of that section. I think so too, and I think so for this reason. It is not as if the error was one which would catch the eye even of a casual observer; the error here was a mistake in putting a 5 for a 3, and when you look at the impression on the plate it is very difficult to find out whether there has been a mistake or not, and, in point of fact, this mistake was not found out for a long time—I think a year or two—and as soon as it was pointed out it was rectified.

L'opinion du juge Kekewich de la Chancery Division de la High Court of Justice, qu'approuve Lindley, M.R., se trouve à la page 898 du rapport.

Après une étude approfondie de la question, j'en suis venu à la conclusion que le second grief invoqué par la défenderesse est fatal à la validité des dessins de fabrique du demandeur et que ceux-ci doivent être en conséquence déclarés caducs, nuls et invalides. Il va sans dire que, dans les circonstances, le demandeur ne peut recouvrer de dommages de la défenderesse, obtenir contre elles une injonction lui interdisant de fabriquer et vendre des plaques protectrices semblables à celles qui font l'objet des dessins de fabrique du demandeur ni réclamer la livraison des plaques qu'elle a fabriquées.

Je dois dire que, si j'avais trouvé les dessins valides, je n'aurais pas hésité à déclarer que la défenderesse les a enfreints et violés et qu'elle s'en est servi illégalement pour fins de vente. Il me paraît évident que la défenderesse a utilisé pour son propre bénéfice les dessins du demandeur à l'insu de celui-ci.

Reste le troisième grief invoqué par la défenderesse, savoir la prescription de l'action. L'article 41, comme nous l'avons vu, décrète que les actions intentées sous l'empire de la Partie II de la Loi, relative aux dessins de fabrique, doivent l'être dans les douze mois à compter du motif de l'action ou de la commission de l'infraction. L'infraction reprochée à la défenderesse est venue à la connaissance du demandeur au début de mai 1941 et l'action n'a été intentée que le 6 septembre 1944. A cette date l'action était prescrite.

Pour ces raisons je n'ai pas d'autre alternative que de rejeter l'action du demandeur. Etant donné la violation

manifeste et délibérée par la défenderesse de son mandat et la fabrication et l'usage illicites pour son propre bénéfice de plaques protectrices semblables à celles du demandeur, dont celui-ci lui avait apporté des échantillons pour s'en faire faire pour son usage personnel, je ne crois pas à propos d'accorder de dépens contre le demandeur.

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Judgment accordingly.

BETWEEN:

GENERAL MOTORS CORPORATION...APPLICANT,

AND

NORMAN WILLIAM BELLOWS.....RESPONDENT;

1947

June 18 & 19

1948

Jan. 22

AND BETWEEN:

NORMAN WILLIAM BELLOWS.....APPLICANT,

AND

GENERAL MOTORS CORPORATION..RESPONDENT.

(No. 2)

Trade Mark—The Trade Mark and Design Act, R.S.C. 1927, c. 201—The Unfair Competition Act, 1932, 22-23 Geo. V., c. 38, ss. 52 (1) 29, 26 (1) (c), 23 (1)—Exchequer Court Rule 35—"Frigidaire"—Motion to expunge—Mark lacking distinctiveness—Acquisition of a secondary meaning subsequent to registration does not give validity to an invalid registration—Prior registration no bar to application under s. 29 of Unfair Competition Act.

Held: That the word "Frigidaire" is not *per se* a distinctive word and at the time of registration was merely a descriptive word lacking that distinctiveness which is necessary to constitute a trade mark properly speaking and should not have been registered under the general provisions of the Trade Mark and Design Act, R.S.C. 1927, c. 201, s. 11.

2. That the acquisition of a secondary meaning subsequent to registration cannot give validity to a registration which is invalid when it was made. *J. H. Munro Lmited* v. *Neaman Fur Company Limited* (1947) Ex. C.R. 1.

3. That previous registration of a mark does not constitute a bar to an application under s. 29 (1) of The Unfair Competition Act which gives the Court jurisdiction to make the declaration therein mentioned in any action or proceeding

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4. That Rule 35 of the General Rules and Orders of the Exchequer Court requiring advertising in the Canada Gazette of notice of filing petitions for registration refers only to proceedings for registration by way of petition.

5. That the word "Frozenaire" has acquired a secondary and distinctive meaning and is entitled to the declaration provided for in s. 29 (1) of the Unfair Competition Act.

MOTION by Norman William Bellows for an order expunging the trade mark "Frigidaire" from Register of Trade Marks and MOTION by General Motors Corporation for a declaration under s. 29 of the Unfair Competition Act.

The motions were heard before the Honourable Mr. Justice Cameron at Ottawa.

Christopher Robinson for General Motors Corporation;

Dr. Harold S. Fox, K.C. and *Gordon Henderson* for Norman William Bellows.

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

CAMERON J. now (January 22, 1948) delivered the following judgment:

In these consolidated proceedings General Motors Corporation, the owner of the word mark "FRIGIDAIRE," moved to expunge the registration of the word mark "FROZENAIRE," registered by Norman William Bellows, on the ground that the two marks were confusingly similar. On August 20, 1947, I gave judgment dismissing that motion. At the request of counsel for both parties, I adjourned *sine die* the cross motion to expunge the trade mark "FRIGIDAIRE," registered by General Motors Corporation. An appeal has now been taken by General Motors Corporation from the judgment of August 30, 1947, (1) and at the request of counsel I shall now deal with the cross motion.

The Frigidaire Corporation applied for registration of the word "FRIGIDAIRE" in Canada under The Trade Mark and Design Act on September 18, 1929, as a specific trade mark to be applied to the sale of refrigeration apparatus. It had continuously used the word since September 21, 1918. The application was granted on January 24, 1933.

(1) (1947) Ex. C.R. 568.

Under date of November 30, 1936, Frigidaire Corporation assigned all its interests in the trade mark registered in Canada to General Motors Corporation.

General Motors Corporation will hereinafter, in this motion, be referred to as the respondent and Norman William Bellows as the applicant. The latter is the owner of the trade mark "FROZENAIRE," registered in Canada on April 23, 1940, for use on electric refrigerators and refrigeration.

The application to expunge the registration of the trade mark "FRIGIDAIRE" is made under section 52 (1) of the Unfair Competition Act, 1932, which is as follows:

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

The registration of the trade mark "FRIGIDAIRE" is attacked on two grounds: (1) the trade mark "FRIGIDAIRE" is, and always has been, clearly descriptive of the character or quality of the wares in association with which the trade mark has been used and registered; (2) the trade mark "FRIGIDAIRE" is not a symbol adapted to distinguish wares.

Briefly, it is alleged that the word "FRIGIDAIRE" is descriptive of the wares in connection with which it is used, that it lacks distinctiveness and therefore should not have been registered. For the respondent two submissions are advanced: (1) that the word "FRIGIDAIRE" *per se* was distinctive at the time of its registration; and (2) alternatively, if it were not then distinctive as of the date of the motion to expunge, it had since acquired a secondary and distinctive meaning and the respondent was therefore entitled to retain its registration. If the first submission is valid, the second one needs no consideration.

The first question is not whether at the time of its registration the word "FRIGIDAIRE" came within the prohibition of section 26 (1) (*c*) of the Unfair Competition Act, 1932; but whether it then had the distinctiveness that under the Trade Mark and Design Act was "one of the essentials necessary to constitute a trade mark properly speaking". (Section 11 (*e*)). By section 23 (1) of the

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Unfair Competition Act it is provided that a registration properly made under the Trade Mark and Design Act shall not be subject to be expunged or amended only because it might not properly have been registered under the Unfair Competition Act.

The Trade Mark and Design Act does not define what are "the essentials necessary to constitute a trade mark properly speaking", but it was settled by the Judicial Committee of the Privy Council in *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1) that "distinctiveness is the very essence of a trade mark". Lord MacNaghten, in delivering the judgment of the Privy Council, said at p. 84 of the word "Standard" which had been registered as a trade mark under the Trade Mark and Design Act, 1879:

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

It is to be noted that "FRIGIDAIRE" was registered in Canada under the general provisions of the Trade Mark and Design Act. It was not registered under the special provisions of Rule X under that Act, which read as follows:

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

"FRIGIDAIRE" is the combination of two words—"frigid" and "aire". "Frigid" is an ordinary English word

(1) (1911) A.C. 78.

that has been in common use for a great many years to denote cool or cooled. "Air" (or "aire", which is merely an old form of "air") has also been in everyday use in the English language for a very long time. It is suggested by the respondent that "FRIGIDAIRE" is an invented word. As pointed out by Astbury J. in the application by *Yalding Manufacturing Company Ltd.* (1), it is frequently a difficult matter to determine whether or not a word is an invented word, as it is a matter on which different minds may reach different conclusions. He pointed out that there were several well-decided matters to which regard must be had in questions of this sort. At p. 289 he said:

In the first place, it is made quite clear in the Solio Case in the House of Lords that, if a word is an invented word within the meaning of the Act, it is none the less registrable because it may have reference to the character or quality of the goods to which it is proposed to be applied. The second rule, to which I wish to refer, is that the mere fact that a new word, or a word which has not been included in the dictionaries, is produced is not sufficient to make it an invented word within the meaning of the Statute. Lord Halsbury said in the Solio Case:—"I can quite understand suggesting other words—compound words or foreign words—as to which it would be impossible to say that they were invented words, although, perhaps, never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word "Cheapandgood," or even, without taking so gross an example, using a word so slightly differing from an ordinary and recognized word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. Lord Herschell said:—"I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." Lord Macnaghten said:—"The word must be really an invented word; nothing short of invention will do. On the other hand, nothing more seems to be required. If it is an invented word—if it is "new and freshly coined" (to adapt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods." And Lord Shand said:—"There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required, but the words I think should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an "invented" word; and a word would not be "invented" which, with some trifling addition or very

(1) (1916) 33 R.P.C. 285.

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trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word.

Those passages show clearly that the mere fact that a word is previously unknown, or that it has not got into any technical Dictionary, is not sufficient to make it an invented word within the meaning of the Act.

Reference may also be made to *Farbenfabriken Vormals Fried. Bayer and Co.'s Application* (1) where, in the Court of Appeal, Smith L.J. said at p. 92:

> Suppose a trader to go to a dictionary, and to find a word wholly unused, and to propose to register the word, would that be an invented word within the section? I say it would not, because the word so found would not be a word coined for the first time; and it therefore might be capable of having reference to the character or quality of goods. Suppose the trader therein to find two words equally unused, and to join them together, will that suffice? I think not; and for the same reason, namely, that the two which were joined together not being words coined for the first time, might, when joined, have reference to the character and quality of goods, whereas I think that the essence of an invented word within the meaning of the section is that it is a word which of necessity is incapable of having any reference to goods, inasmuch as it is incapable of conveying anything.

On the principles established in these cases, "FRIGIDAIRE" is clearly not an invented word, but a combination of two well-known English words long in use. To the eye and ear the same idea is conveyed by the composite word "FRIGIDAIRE" as by its two component parts—"frigid" and "aire(e)".

The respondent manufactures refrigerators and refrigeration apparatus, articles which by their nature are intended to produce frigid or cooled air to preserve perishable articles placed within the apparatus. I think that the word "FRIGIDAIRE", used in connection with such goods, was used originally to describe and did, in fact, describe that character or quality of the respondent's goods and the purpose to which such goods were to be applied. It was, therefore, not a registrable mark under the general provision of the Act.

I find, therefore, that the word "FRIGIDAIRE" was not *per se* a distinctive word; that, on the contrary, it was at the time of registration merely a descriptive word, lacking that distinctiveness which is necessary to constitute a trade mark properly speaking, and that it should not have been registered under the general provisions of the Act.

(1) (1894) 11 R.P.C. 84.

It is of interest to note that the respondent's predecessor in title had applied for registration of the mark in the United States under the Act of 1905, but the application was refused, it is said on the ground that the word was descriptive. Subsequently it was registered under the Act of 1920 which forbids registration of any mark that could have been registered under the Act of 1905.

As I understand the argument of counsel for the respondent on the second point, it is not suggested that at the time of the application for registration in Canada the word "FRIGIDAIRE" had then, through use, acquired a secondary meaning. But it was argued that, as the proceedings here are taken under section 52 (1) of the Unfair Competition Act, 1932 (*supra*) consideration must be given to the rights of the respondent as of the date of the applicant's motion to expunge—March 10, 1947. The respondent contends that as of that date the trade mark "FRIGIDAIRE" had acquired a secondary meaning as indicating that the respondent assumed responsibility for the character or quality of the class of wares in association with which it was used or for their place of origin. It is pointed out that section 52 (1) of the Unfair Competition Act, 1932, is materially different from section 45 of the Trade Mark and Design Act under which consideration had to be given to the date of the entry in the register. It is contended, and I think rightly so, that under section 52 (1) consideration has to be given to the rights of the registered owner as existing at the time of the application to expunge. For example, a trade mark validly registered can now be attacked on the ground that it has expired by effluxion of time and has not been renewed; or that the registrant has not used its mark and has no intention of using the mark in connection with the goods for which it has been registered. The problem here is whether an invalid registration can become valid by reason of the acquisition of a secondary meaning after registration, thus becoming distinctive, and retain its registration.

For the applicant it is urged that the matter is concluded by the judgment of the President of this Court in *J. H. Munro Limited* v. *Neaman Fur Company Limited* (1). That was an infringement action in which the defendant

(1) (1947) Ex. C.R. 1.

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attacked the validity of the plaintiff's registration. No application was there made under section 52 (1) to expunge the plaintiff's mark. The finding in that case was limited to infringement proceedings.

I have not found it easy to determine the precise meaning of the phrase in section 52 (1), "on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark".

By the Act, registration of the trade mark confers certain important rights on the registered owner. But that those rights are not absolute and unchallengeable is indicated by the provisions of section 52 (1) and by the use of the words, "at the date of the application", and "the existing rights". The rights conferred by registration may be entirely lost, in which case the word may be expunged; or they may be reduced and the register amended, all in the light of the evidence adduced at the hearing to establish that the mark should not have been registered in that it lacked registrability, or that by reason of circumstances which have occurred since registration, the registration should be expunged or amended. The section does not, in my view, confer any rights on the registered owner. It merely indicates that the registration may be attacked if, for example, it be established that at the time of the application the registered owner had no right to retain all or any of the benefits conferred on him by the entry in the register and under the Act itself. The section varied the law as declared in the case of *The Bayer Company* v. *American Druggists Syndicate* (1), in which it was held that the authority to expunge (under the then section 42 of the Trade Mark and Design Act) "any entry made without sufficient cause" meant "without sufficient cause at the time of registration".

I cannot find anything in the Act which would indicate that a registered trade mark which was invalid at the time of registration by reason of lack of distinctiveness could be held to have been validly registered by reason of the acquisition of a secondary and distinctive meaning after the date of registration. If it originally lacked registrability, it did

(1) (1924) S.C.R. 558.

not become registrable until a secondary and distinctive meaning had been acquired and a successful application had been made under section 29 (1) of the Unfair Competition Act, 1932, or under the former Rule X of the Trade Mark and Design Act.

Nor have I been referred to any case which would support such a conclusion. I was referred to the application by *J. & P. Coats Limited* for the registration of its mark "Sheen", (1), in which Lord Justice Romer said at p. 384:

> There are words which have a direct relation to the character and quality of goods which nevertheless may lose their primary meaning and acquire in a particular trade a secondary meaning as indicating to people interested, whether as trader or as the public in the trade, the goods of a particular manufacturer. When that does occur and the evidence shows that the word has obtained a secondary meaning, then, in my opinion, the word is registrable as a trade mark. It does not mean, of course, that it necessarily should be registered.

Registration was allowed in that case but it is to be noted that it was an application to register, not an expungement proceeding.

It would seem also that under the English Trade Marks Acts wider latitude is given in cases such as this by reason of part of section 9, as follows:

> For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.
>
> In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

In my opinion, no evidence that a secondary meaning had been acquired subsequent to registration can affect the question as to whether or not the mark, at the time of registration, was distinctive. If the registration was invalid, it remains invalid. The entry as it appears on the register speaks as of the date of registration. It says nothing as to the existing rights of the registered owner at any later date unless, of course, there has been a previous amendment to the register. Insofar, therefore, as the question of registrability arises, the inquiry must be directed to the time of the application for registration. In my view, therefore, there is no reason to distinguish this case from

(1) (1936) 53 R.P.C. 355.

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that of *J. H. Munro Limited* v. *Neaman Fur Company Limited* (*supra*) on the ground that the latter case was one of infringement and the present one is under section 52 (1).

The application to expunge the trade mark "FRIGIDAIRE"—No. 262-56218—will therefore be granted, with costs to be taxed.

There is a further motion by General Motors Corporation which I must now consider. On June 12, 1947, it served notice of motion in these consolidated proceedings that if, upon the return of the notice of motion to expunge the registration of the word mark "FRIGIDAIRE", the Court was of opinion that the said word mark was not registrable under any provisions of the Unfair Competition Act, it would apply to the Court for a declaration under section 29 of the said Act that the said word mark "FRIGIDAIRE" has been so used by it and its predecessor in title as to become generally recognized by dealers in and/or users of the class of wares in association with which the said mark has been used, as indicating that the said General Motors Corporation assumes responsibility for their character or quality throughout Canada, and that the said or a fresh registration should extend to the whole of Canada aforesaid, subject to the condition defined by subsection (3) of the said section 29.

Section 29 of the Unfair Competition Act, 1932, is as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes reponsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

(3) No declaration under this section shall authorize the registration pursuant thereto of any mark identical with or similar to a mark already registered for use in association with similar wares by any person who was not a party to the action or proceeding in which the declaration was made.

Objection to the motion is taken by Norman William Bellows, owner of the trade mark "FROZENAIRE" who, in order to avoid confusion, will in this motion be referred to as the respondent, and General Motors Corporation will be referred to as the applicant. It is alleged by counsel for the respondent that the existing registration of the mark "FRIGIDAIRE" is a bar to the success of this application, and I am referred to *Canadian Shredded Wheat Company Ltd.* v. *Kellogg Company of Canada Ltd.* (1) in which it was held, *inter alia,* that the existence upon the register of the petitioner's mark was a bar to the petition; and that the declaration provided for in section 29 (1) of The Unfair Competition Act is not to be made in the case of a registered mark.

It is suggested that that case may be distinguished from the present one inasmuch as the applicant there requested the cancellation of its previously registered mark, only when the new application under section 29 (1) was granted; in the present case the application is made in the alternative and only to be considered as, if and when, the former registered mark has been expunged.

With respect, I have reached a different conclusion than that of the late President in the *Shredded Wheat Case* (*supra*). Section 29 (1) provides that when a trade mark lacks registrability, registration may be effected if the Court makes the declaration therein mentioned. The Court does not direct registration of the trade mark, but merely makes a declaratory order of registrability. The applicant must thereafter apply for registration under the provisions of section 33. I think that there can be no question that, in a proper case, the owner of a registered trade mark which has been expunged from the register on the ground that his mark was invalidly registered, could thereafter make a successful application under section 29. The mere fact that his mark had at one time been registered would not be a bar to later proceedings under that section. It provides that the declaration may be made in *"any action or proceeding in the Court,"* and applies to any trade mark which, under any other provision of the Act, lacks registrability. There is nothing in the section itself which in clear terms bars such an application as the present one. Nor

(1) (1939) Ex. C.R. 58.

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am I aware of any principle under which the owner of a trade mark already registered should be barred from making an application under section 29.

In essence, section 29 (1) provides that if a mark lacks registrability the Court may, in the circumstances therein mentioned, declare registrability *in any action or proceeding in the Exchequer Court.* The words, "in any action or proceeding," seem to me to be broad enough to cover not only cases where a petition is launched to secure a declaration of registrability of an unregistered mark, but also cases where in an action or proceeding the validity of a registered mark is challenged. Section 29 is in aid of the user of a mark which lacks registrability under the other sections of the Act but which, by user, is shown to have acquired a secondary and distinctive meaning. I see no necessity of confining its provisions to a mark which is unregistered. The owner of a mark which is registered, but which lacks registrability, should be in no worse position than the owner of a mark which is unregistered. He should not be penalized by the mere fact that he had registered his mark. And if the user of an unregistered mark can "in any action or proceeding" ask the Court for a declaration of registrability, the owner of a registered mark should have the same right.

In any event, in this case at least, the application is contingent on the Court having found that the mark "FRIGIDAIRE" should be expunged. An order to that effect has already been made in these consolidated proceedings, so that when the applicant proceeds under section 33, it will not then have its mark on the register.

I find, therefore, that the applicant is not barred from making its application under section 29 (1) by the fact that it had previously registered its mark under the general provisions of The Trade Mark and Design Act.

An objection is also taken by the respondent on the ground that there has been no compliance with Rule 35 of the Exchequer Court Rules, which is as follows:

Notice of filing Petition for Registration in Canada Gazette

In the case of any proceeding for the registration of any copyright, trade mark or industrial design, a notice of the filing of *the petition,* giving the object of the application and stating that any person desiring to oppose it must, within fourteen days after the last insertion of the notice in the *Canada Gazette,* file a statement of his objections with the Registrar of the Court and serve a copy thereof upon the petitioner, shall

be published in four successive issues of the *Canada Gazette*. The notice of the filing of the petition in the case of any proceeding for the registration of any copyright, trade mark or industrial design, may be in the terms of Form 8 in the Appendix to these Rules.

In the case of any proceeding to have any entry in any register of copyrights, trade marks or industrial designs, expunged, varied or rectified, it shall not be necessary to publish any notice of the filing of the *petition*.

In the instant case no notice was inserted in the Canada Gazette. But in my view, Rule 35 refers only to proceedings for registration by way of petition. Form 8 in the appendix of the Rules, and which is referred to in Rule 35, would also so indicate. But section 29 (1) gives jurisdiction to the Court to make the declaration therein mentioned in *any* action or proceeding. Here the proceedings are not by way of petition. This objection cannot, therefore, be sustained.

There is substantial evidence, which I accept, that the word "FRIGIDAIRE" has acquired a secondary meaning and, as used at the time of the application, was generally recognized by dealers in refrigeration apparatus as indicating that the applicant assumed responsibility for their character or quality and for their place of origin. In support of this contention the applicant filed three affidavits by officials of three competing firms. D. Robertson of Brantford, Ontario, states that for eighteen years he was in the employ of Universal Cooler Company of Canada, Ltd., as its president, which company, throughout the whole period of eighteen years, distributed refrigerators and refrigerating apparatus throughout Canada in competition with those bearing the trade mark "FRIGIDAIRE." He states:

> The said mark has always been known to me as indicating apparatus associated with General Motors Corporation, or its predecessor, Frigidaire Corporation, and I have been familiar with the advertisements of the said refrigerators and refrigerating apparatus under the said mark. I have never myself considered, and have never heard it suggested by anyone concerned in the business of distributing refrigerators and refrigerating apparatus, or by purchasers of the said wares, that the word "FRIGIDAIRE" was descriptive of refrigerating apparatus generally.

Ernest Lowden, of Toronto, from 1918 to 1925 was associated with the Frigidaire Corporation in Canada as a salesman and in 1925 became its manager for Canada, continuing in that position until the year 1932. From 1932 to 1944 he was Manager of the Appliance Division of Canadian Westinghouse Limited, from which position he

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retired in 1944. He is not now associated in any way with the Frigidaire Corporation or General Motors Corporation, or any other company engaged in selling electric refrigeration. He gives evidence to the same effect as that given by Mr. Robertson.

Harold B. Shipley, of Toronto, was for eight years in the employ of Canadian Ice Machine Company Ltd. as Managing Director and President, and during all that time his company was in competition with the applicant in the sale of refrigerators and refrigerating apparatus. His evidence is to the same effect as that given by Mr. Robertson.

It is also clear from the evidence of Lewis Clyde Shannon, the Manager of the Canadian and Export Department of the Frigidaire Division, General Motors Corporation of Dayton, Ohio, that for many years the sales by the applicant in Canada of wares bearing the mark "FRIGIDAIRE" have been very extensive. He states that between the years 1926 and 1936 the total dollar value of the apparatus distributed in Canada, and bearing the said mark, was in excess of $20,000,000, and that since 1936 the dollar value of like wares was in excess of $24,000,000. It is also established that, as of December 31, 1946, such wares were distributed throughout all of Canada by a total of 1,270 dealers. Between the years 1926 and 1942, the total dollar value of sales in Canada exceeded $35,000,000, and more than $720,000 was expended in Canada alone on advertisement of the wares in publications. During the same period, the sales in the United States were many times as great as in Canada, and a substantial part of the total expenditure of more than $40,000,000 for like advertising of similar wares, under the same mark in the United States, was paid to periodicals in the United States which had a substantial circulation in Canada.

For the respondent it is contended, however, that the said word has at no time acquired a secondary meaning, but the only evidence in support of that is in the affidavit of the respondent himself in which he states, "that the applicant's registration No. 262-56218, registered by the applicant or its predecessor in business, is, and always has been, unregistrable under the Unfair Competition Act on the grounds of its lack of distinctiveness."

It is also alleged by the respondent that the mark "FRIGIDAIRE" is now in the public domain, and is used by members of the public as a word descriptive of refrigerators and refrigerating equipment generally. In support of this latter contention, the respondent exhibits a series of advertisements clipped at random from the daily press, showing the use by members of the public of the word "FRIG", or "FRIGIDAIRE". These are exhibits G1 to G6 to the respondent's affidavit of January 14, 1947. Exhibits G1 and G2 show the word "FRIG" in advertisements, but in my opinion this may well be an abbreviation of the word "REFRIGERATOR" rather than a short form of the word "FRIGIDAIRE". Exhibits G3, G4 and G6 are advertisements of articles for sale, and refer respectively to "Westinghouse Frigidaire", "Leonard Frigidaire", and one "Crosley Shelvidor Frigidaire". These three advertisements are apparently advertisements of persons *not* in the trade. Exhibit G5 is under the heading "Motors", and states, "Frigidaire and Washing Motors repaired, stock on hand; keys made."

The test to be applied in determining whether a mark has become *publici juris* is referred to in Kerly, Sixth Edition, p. 423, in which he quotes from the judgment of Mellish, L.J. in *Ford* v. *Foster* (1), as follows:

"There is no doubt, I think," said Mellish, L.J., in *Ford* v. *Foster*, (1872) L.R. 7 Ch. 628, "that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of *Harvey's Sauce*, (*Lazenby* v. *White* (1871), 41 L. J. Ch. 354, n.). I think the test must be whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use *that nobody can be deceived by it*, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of his trade mark, the right to the trade mark must be gone."

At p. 424 Kerly states:

Where common user is alleged of a trade mark that has been long used and registered, in order to establish this, the use by other persons should be substantial. Thus where it was alleged that a cat and barrel were common to the trade in gin at the date of the plaintiff's registration in 1879, it was held not to be sufficient to have proved nothing more than

(1) (1872) L.R. 7 Ch. 628.

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"a very sporadic use of the labels with a cat and barrel on them." It was found that there had been in the case of none of the users of such labels, other than the plaintiffs, any trade that would associate their goods with a cat and barrel. Boord & Son *v.* Thom and Cameron, Ltd. (1907), 24 R. P. C. 697, at p. 721, Court of Session.

The instances of user of the word "FRIGIDAIRE" as shown by exhibits G3, G4 and G6 are, in my opinion, merely sporadic, and not in any case by any person in the trade. In none of these cases was the word used as a label or mark. There is evidence, which I accept, that the applicant has been alert in protecting its mark, and in preventing others in the trade from adopting marks which might be considered confusingly similar.

I prefer the evidence adduced by the applicant and in my view there can be no doubt that the word "FRIGIDAIRE" has acquired a secondary and distinctive meaning, and is entitled to the declaration provided for in section 29 (1) of the Act.

There will therefore be a declaration, pursuant to the provisions of section 29 (1) of The Unfair Competition Act, 1932, that it has been proven to the satisfaction of this Court that the trade mark "FRIGIDAIRE" has been so used by General Motors Corporation, and its predecessor in title, as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used (that is to say, refrigeration apparatus, namely, refrigerators, including electric refrigerators, electrical refrigerating machinery, ice-making machinery, refrigerating cabinets, air conditioning systems, apparatus and devices for cooling foods by refrigeration of all kinds, parts of the above goods and accessories thereto), as indicating that General Motors Corporation assumes responsibility for their character or quality or for their place of origin; and having regard to the evidence adduced that the registration thereof should extend to the whole of Canada—the whole subject to the provisions of section 29 (3) of the said Act.

The motion of the applicant is granted, with costs to be taxed.

Judgment accordingly.

ENTRE:

LA TRAVERSE DE LÉVIS LIMITÉE
PÉTITIONNAIRE;

ET

SA MAJESTÉ LE ROI
INTIMÉ.

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Apr. 26
1948
Feb. 19

Crown—Petition of right—Action for reimbursement of money deducted by the Crown pursuant to a contract of mail carriage—Weather and navigation conditions equivalent to a case of force majeure *release suppliant from its contractual responsibility—Suppliant is not bound to carry its contract differently than as provided therein.*

Suppliant contracted with the Crown to carry His Majesty's mail between the cities of Quebec and Lévis, on its regular boats or other vehicles approved by the Postmaster General, via direct route the length of which was not to exceed one mile. The suppliant on some occasions failed to carry its contract, putting the Crown to expenses in carrying mail via another and longer route. The costs incurred by the Crown were deducted from the amount established by the contract pursuant to a clause thereof to that effect. The suppliant brings the present action for reimbursement of the sum thus deducted, alleging as causes of its failure circumstances outside of its control.

Held: That the weather and navigation conditions at the time constituted a case of *force majeure* releasing the suppliant from its contractual responsibility.

2. That under the circumstances the suppliant was not bound to carry its contract differently than as provided therein.

PETITION OF RIGHT by suppliant for the reimbursement of certain money deducted by the Crown pursuant to a contract of mail carriage.

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

Stanislas Germain, K.C. for suppliant.

Jean-Paul Lessard, K.C. for respondent.

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

ANGERS J. now (February 19, 1948) delivered the following judgment:

La pétitionnaire réclame de l'intimé la somme de $125.92 que celui-ci aurait sans droit déduite du montant payable

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à la pétitionnaire en vertu d'un contrat intervenu entre elle et l'intimé le 24 avril 1930 pour le transport du courrier entre Québec et Lévis et vice versa sur ses bateaux réguliers. Dans sa pétition la pétitionnaire allègue en substance:

par contrat sous seing privé fait le 24 avril 1930 la pétitionnaire s'est engagée à transporter la malle sur ses bateaux réguliers entre Québec et Lévis et vice versa moyennant la somme de $5,000 par année, payable mensuellement dans les dix jours suivant l'expiration de chaque mois, lequel contrat a été renouvelé le 22 décembre 1941 jusqu'au 31 mars 1946;

la pétitionnaire a fidèlement exécuté ses obligations en vertu dudit contrat;

comme il appert d'une lettre adressée à la pétitionnaire au nom de l'intimé par le directeur de district du service postal en date du 26 juin 1945, une déduction de $125.92 a été faite sur le paiement mensuel échu le 10 juin 1945 pour le transport effectué au cours du mois de mai;

comme il appert des lettres antérieures adressées à la pétitionnaire par le directeur de district du service postal, ladite déduction a été faite pour défrayer le coût du transport de dépêches que les représentants de l'intimé ont, à l'insu de la pétitionnaire, fait effectuer en diverses occasions entre le 15 et le 19 janvier 1945 via le pont de Québec;

comme il appert de ladite correspondance, l'intimé se fonde, pour faire ladite déduction, sur la clause 18 du contrat, qui se lit comme suit:—

18. Et il est en outre convenu et entendu que si l'entrepreneur manquait en aucun temps de pourvoir au transport desdites dépêches, le Ministre des Postes pourra aux frais et dépens dudit entrepreneur louer les voitures et tout ce qui sera nécessaire pour le transport desdites dépêches, et les dépenses ainsi encourues seront déduites de la somme d'argent ci-après spécifiée et qu'il est ci-après convenu de payer audit entrepreneur.

comme la pétitionnaire en a informé l'intimé par des lettres, elle n'a jamais manqué de pourvoir au transport des dépêches, elle a maintenu ses navires continuellement sous vapeur et effectué les traversées aussi rapidement que possible et les retards dans les traversées proviennent de causes sur lesquelles la pétitionnaire n'a aucun contrôle, savoir, la force majeure ou l'intervention de l'intimé par le moyen de brise-glace;

la clause du contrat en vertu de laquelle l'intimé a fait la déduction n'est applicable qu'au cas de négligence et il n'y a eu aucune négligence de la pétitionanire et il n'en a été invoqué aucune contre elle.

Dans sa défense, l'intimé plaide ce qui suit:

les contrats allégués font foi de leur contenu;

la lettre adressée à la pétitionnaire par le directeur de district du service postal le 26 juin 1945 fait foi de son contenu;

il admet qu'une déduction de $125.92 a été faite;

il demande acte de l'admission que la déduction a été faite pour défrayer le coût du transport de dépêches que les représentants de l'intimé ont fait effectuer en diverses occasions entre le 15 et le 19 janvier 1945 via le pont de Québec;

il demande acte de l'admission qu'il y eut des retards dans les traversées;

il nie les autres allégations de la pétition;

l'intimé, par le Ministre des Postes, ses employés et préposés, opère, à la connaissance de la pétitionnaire, un service public de nature urgente et nécessaire, qui ne peut souffrir aucun retard, savoir le transport du courrier;

aux termes des contrats le Ministre des Postes, advenant le défaut de la pétitionnaire de remplir ses obligations, avait le droit d'assurer, par le louage de moyens de transport adéquats aux frais de la pétitionnaire, le transport dudit courrier de Québec à Lévis et vice versa et de déduire toutes dépenses encourues à cette fin du prix convenu;

du 15 au 19 janvier 1945 la pétitionnaire, sans avis à l'intimé ou ses représentants, n'a pas effectué, bien que requise de le faire, le transport du courrier de Québec à Lévis et vice versa;

de plus, la pétitionnaire n'a jamais avisé l'intimé, le Ministre des Postes et ses préposés, qu'elle ne pouvait pas aux dates susdites effectuer le transport dudit courrier pas plus qu'elle n'a offert à l'intimé, au Ministre des Postes et à ses préposés, d'exécuter par d'autres moyens, à sa propre charge, le transport dudit courrier ainsi qu'elle y était obligée par son contrat et ainsi qu'elle l'a reconnu dans une lettre adressée au directeur de district du service postal de Québec en date du 12 avril 1945;

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par suite de ces faits et tel que prévu aux contrats intervenus entre les parties, le Ministre des Postes, par l'entremise de ses employés et préposés, a dû assumer les obligations de la pétitionnaire et faire exécuter par d'autres entrepreneurs le transport du courrier par camion via le pont de Québec;

aucune faute ou négligence ne peut être imputée aux vaisseaux brise-glace de l'intimé dans l'exercice de leur travail;

la pétitionnaire a manqué de pourvoir au transport des dépêches aux dates ci-après mentionnées et l'intimé a payé pour le transport par camion desdites dépêches aux entrepreneurs de transport Eugène Dupont et La Compagnie de Tramways de Lévis la somme de $125.92 comme suit:

a) à Eugène Dupont—

16 janvier 1945	15 milles extra	
16 janvier 1945	15 milles extra	
17 janvier 1945	15 milles extra	
17 janvier 1945	15 milles extra	Voyages effectués via le pont de Québec
17 janvier 1945	15 milles extra	
18 janvier 1945	15 milles extra	
18 janvier 1945	15 milles extra	
19 janvier 1945	15 milles extra	
	120 milles extra à $0.316 du mille: $37.92	

b) à La Compagnie de Tramways de Lévis—

15 janvier 1945	1 camion de malle de Québec à Lévis	
16 janvier 1945	1 camion de malle de Québec à Lévis	
16 janvier 1945	1 camion de malle de Lévis à Québec	
17 janvier 1945	1 camion de malle de Québec à Lévis	
17 janvier 1945	1 camion de malle de Québec à Lévis	
17 janvier 1945	1 camion de malle de Lévis à Québec	
18 janvier 1945	1 camion de malle de Québec à Lévis	
18 janvier 1945	1 camion de malle de Québec à Lévis	
18 janvier 1945	1 camion de malle de Lévis à Québec	
19 janvier 1945	1 camion de malle de Québec à Lévis	
19 janvier 1945	1 camion de malle de Lévis à Québec	
	11 voyages	88.00
		$ 125.92

conformément aux contrats l'intimé a déduit, comme il avait le droit de le faire, de tout montant payable à la pétitionnaire, la somme de $125.92, laquelle représente la valeur de services de transport de dépêches à la charge de la pétitionnaire;

en agissant comme ils l'ont fait, l'intimé, le Ministre des Postes, ses préposés et employés ont agi selon les termes du contrat et dans l'intérêt public, alors qu'il était nécessaire que le courrier parvînt à Québec ou à Lévis pour être mis à bord des trains en partance;

l'intimé ne doit rien à la pétitionnaire et la pétition de droit est mal fondée.

Pour réponse à la défense, la pétitionnaire allègue en substance:

elle admet que l'intimé opère à sa connaissance un service public, savoir le transport du courrier, lequel exige célérité; la pétitionnaire exploite une entreprise de navigation et l'intimé en contractant avec elle pour le transport des dépêches connaissait les retards inévitables dans ce genre de transport et les acceptait implicitement;

elle nie ou déclare ignorer les autres allégations de la défense.

Dans sa réplique, l'intimé demande acte de l'admission qu'il opère à la connaissance de la pétitionnaire un service public, savoir le transport du courrier, lequel exige célérité, et il admet que la pétitionnaire exploite une entreprise de navigation; il nie qu'en contractant avec la pétitionnaire il connaissait les retards inévitables dans le genre de transport qu'effectuait la pétitionnaire et les acceptait implicitement.

Le contrat intervenu entre la pétitionnaire et l'intimé, agissant et représenté par le Ministre des Postes, le 24 avril 1930, a été produit comme pièce 1. Le contrat certifie qu'en considération de la somme y mentionnée ($5,000 par année) l'entrepreneur, savoir la pétitionnaire, "s'engage à commencer le 1er avril 1930, à transporter ou faire transporter les dépêches de Sa Majesté entre Lévis et Québec tel que requis de fois par jour aller et retour, en la manière et aux conditions ci-après stipulées. . . ."

La clause 2 du contrat stipule que l'itinéraire à suivre en transportant les dépêches sera direct; la clause 3, que la distance évaluée, "acceptée par l'entrepreneur comme la base du contrat" est d'un mille; la clause 4, que le transport sera fait "sur les bateaux réguliers de la Compagnie ou autres véhicules approuvés par le Ministre des Postes".

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A la suite de la clause 5, qui détermine que le Ministre des Postes se réserve le droit de fixer les heures de l'arrivée et du départ, a été ajoutée une clause qui me paraît importante et que je crois utile de reproduire; c'est vraisemblablement une addition à la clause 4, quoique rien ne l'indique:

> Transporter les malles sur les bateaux réguliers de la Compagnie ou autres véhicules approuvés par le Ministre des Postes, autant de fois par jour que le Ministre des Postes pourra l'exiger, sur le fleuve S.-Laurent, entre le débarcadère des bateaux de la Compagnie "La Traverse de Lévis Ltée", du côté de la ville de Québec et celui de la même Compagnie du côté de la ville de Lévis et vice versa, que les sacs de malle soient accompagnés ou non d'un commis de malle ou d'un employé des Postes.
>
> Il est entendu que ce service comprend le transport des dépêches échangés entre le bureau de poste de Québec, les différents sous-bureaux de la ville de Québec, si requis et les trains utilisés pour le transport des malles, désignés sous les noms de "Campbellton & Lévis", "Lévis & Deschaillons", "Lévis & Montréal", "Lévis & Rivière du Loup", "Ste-Sabine, Vallée Jonction & Lévis" ou autres appellations des convois postaux circulant sur les réseaux des Chemins de Fer Nationaux, Quebec Central, ou de tous les autres Chemins de Fer qui pourraient être mis en opération sur la rive sud du fleuve S.-Laurent, ainsi que les malles échangées entre les bureaux de poste de Québec et Lévis, et les dépêches devant être transportées par les tramways de la Compagnie de "Lévis County Railway" ou autrement.
>
> L'entrepreneur s'engage aussi à pourvoir à ses frais au transport des dépêches entre le débarcadère de Lévis et les gares des différents chemins de fer plus haut mentionnés à Lévis, et vice versa.

Viennent ensuite plusieurs clauses qui n'ont aucun rapport avec la question en litige et auxquelles il est en conséquence inutile de faire allusion.

La clause 18, sur laquelle l'intimé s'appuie pour déduire la somme de $125.92 du montant payable à la pétitionnaire, insérée dans la pétition de droit, est reproduite littéralement ci-dessus dans le résumé de la pétition et il est inutile de la répéter. J'aurai l'occasion d'y revenir étant donné que la défense de l'intimé est basée sur cette clause.

La clause 19 spécifie qu'il est convenu que toute déduction sera retenue par le Ministre des Postes sur les premiers montants qui deviendront dus à l'entrepreneur en vertu du contrat.

La clause 21 décrète que le contrat restera en vigueur jusqu'au 31 mars 1934 pourvu que dans les cas où les dépêches ne seraient pas délivrées dans le temps convenu le

Ministre des Postes ait le pouvoir de mettre fin au contrat et d'agir suivant qu'il jugera convenable quant à l'avis à donner à l'entrepreneur de la discontinuation du service.

La clause 23 dit que les obligations stipulées dans le contrat seront remplies par l'entrepreneur en considération de la somme de $5,000 par année, "les paiements devant être faits mensuellement dans les dix jours après l'expiration de chaque mois".

Ce contrat, expirant le 31 mars 1934, a apparemment été renouvelé à diverses reprises. Un renouvellement daté le 22 décembre 1941, à commencer le 1er avril 1942, a été produit comme pièce 2; il mentionne que le contrat original, commençant le 1er avril 1930, est renouvelé et expirera le 31 mars 1946. Il est stipulé que tous les termes et conditions contenus dans le contrat original demeurent en vigueur et doivent être observés durant la période de ce renouvellement.

Il me semble opportun d'analyser la preuve brièvement.

[Here the learned judge reviews the evidence and proceeds]:

Il ressort de la preuve qu'à diverses reprises les 15, 16, 17, 18 et 19 janvier 1945, les bateaux de la pétitionnaire n'ont pu faire la traversée entre Québec et Lévis à cause de l'amoncellement de glace dans le fleuve provenant d'un vent nord-est fort et persistant. Quelques traversées ont été effectuées ces jours-là avec l'aide d'un brise-glace; d'autres n'ont pu l'être. Les versions de trois témoins, indiscutablement de bonne foi et véridiques, Charles-Antoine Caron, Alcide Caron et Robert Marchand, tous à l'emploi de l'intimé, sont unanimes à déclarer que, durant la période du 15 au 19 janvier, un fort vent nord-est a soufflé continuellement, qu'il s'est produit de très hautes marées et qu'il y a eu dans le fleuve un amoncellement de glace, tel que l'on n'en avait jamais vu dans le passé. La réunion de ces trois conditions: vent nord-est persistant, hautes marées et accumulation de blocs de glace, a constitué, à maintes reprises durant les cinq jours en question, un obstacle insurmontable aux traversées des bateaux de la pétitionnaire. Le fait que certaines d'entre elles n'ont pu être faites ne me paraît pas imputable à la négligence de la pétitionnaire ou de ses employés. Les bateaux sont restés sous vapeur

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constamment, prêts à faire le service que l'on attendait d'eux. Ils ont effectué, avec l'aide de brise-glace, toutes les traversées qu'il était possible de faire dans les circonstances. Seule l'existence simultanée des trois conditions susdites les a empêchés d'accomplir toutes les traversées prévues par l'horaire. Si la pétitionnaire ne disposait pas, à ce moment, d'autres moyens de transport qu'il lui incombait d'utiliser, il s'agissait, à mon avis, d'un cas de force majeure, libérant la pétitionnaire de sa responsabilité. La doctrine et les arrêts décrètent que pour qu'un événement constitue un cas fortuit ou de force majeure il faut non seulement qu'on n'ait pu l'empêcher mais qu'on n'ait pu le prévoir; voir entre autres: article 17 CC., cédule n° 24; *Nordheimer* v. *Alexander* (1); *Lemieux* v. *Ruèl* (2); *Dupuis* v. *La Corporation du Village de Ste-Marie* (3); *Valcourt* v. *Nolin* (4); Proudhon, Traité des droits d'usufruit, tome 3, n° 1538; Aubry & Rau, Droit civil français, tome 4, 103; Demolombe, Cours de code civil, tome 24, n° 560; Laurent, Principes de droit civil français, tome 20, n^{os} 450 et s.; Sourdat, Traité général de la responsabilité, 4e édition, tome 1, n° 675 quater; Baudry-Lacantinerie, Traité théorique et pratique de droit civil, tome XII, n° 455; Demogue, Traité des obligations, tome 6, n^{os} 536 et s.; article de Demogue intitulé "De la force majeure", publié dans tome 16 de la Revue du droit, p. 69; Planiol & Ripert, Traité pratique de droit civil, tome 6, n° 568. Je crois que l'on peut déduire de la preuve que l'existence prolongée du vent nord-est, la grande hauteur des marées et l'amoncellement considérable de blocs de glace dans le fleuve entre Québec et Lévis pendant les cinq jours qui nous concernent ont été anormaux et imprévisibles.

L'autre question qui se présente est de savoir si la pétitionnaire, ne pouvant traverser le courrier entre Québec et Lévis et vice versa par ses bateaux à cause de l'amoncellement des blocs de glace dans le fleuve, à diverses périodes durant les cinq jours en question, devait le faire, comme le prétend l'intimé, au moyen de voitures, par le pont de Québec.

La formule de contrat utilisée dans le cas qui nous occupe est une formule générale, destinée au transport, par terre ou

(1) (1891) 19 S.C.R. 248.
(2) (1913) R.J.Q. 45 C.S. 390.
(3) (1925) 32 R. de J. 53 et 53 R. de J. 285.
(4) (1940) 46 R.L. n s. 85, 89.

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par eau, des "dépêches" de Sa Majesté, desservant les bureaux de poste établis sur l'itinéraire prévu au contrat ou qui pourront l'être pendant sa durée. Ceci n'est pas l'objet du contrat en cause; son objet est simplement la traversée du courrier de Québec à Lévis ou vice versa. L'on a dû faire au contrat quelques additions; plusieurs clauses d'icelui n'ont aucune portée quelconque sur le sujet en litige.

Comme nous l'avons vu, la clause 2 du contrat stipule que l'itinéraire à suivre en transportant les dépêches de l'intimé sera direct et la clause 3 déclare que la distance évaluée, acceptée par l'entrepreneur comme base du contrat, est d'un mille.

Cet itinéraire et cette distance me paraissent écarter l'hypothèse du transport du courrier par le pont de Québec. Cet itinéraire ne serait pas direct et la distance d'un mille prévue par la clause 3 serait multipliée par 15, le chiffre adopté par l'intimé dans sa défense. Je puis dire incidemment que ce chiffre me paraît assez exact. Je ne crois pas que les parties aient envisagé cette éventualité; à tout événement le contrat est silencieux sur le point. Dois-je en conclure qu'elle n'était pas fréquente? L'affirmative me semble plausible, étant donné que ni l'une ni l'autre des parties, censément familières avec les conditions de la navigation entre Québec et Lévis durant l'hiver, n'ont pas cru devoir insérer dans le contrat une clause réglant le cas.

Le procureur de l'intimé a voulu voir dans les mots "ou autres véhicules approuvés par le Ministre des Postes" après les mots "sur les bateaux réguliers de la Compagnie", que l'on trouve dans la clause 4 du contrat, l'expression d'une entente qu'à défaut des bateaux de la pétitionnaire, pour une cause ou une autre, celle-ci devrait utiliser quelque voiture et effectuer ainsi la traversée du courrier par le pont de Québec. Le terme est vague et les "autres véhicules autorisés par le Gouvernement" ne sont pas déterminés. Est-ce que les mots "autres véhicules" doivent s'appliquer à des véhicules automobiles? Le contrat ne précise point. Il s'agirait en ce cas, va sans dire, d'un mode de transport inutilisable pour traverser une rivière. Je crois que, si l'intimé eût voulu imposer à la pétitionnaire un mode de transport inusité, il aurait dû le stipuler clairement dans le contrat. Les mots doivent être interprétés dans leur sens

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littéral. Le mot "véhicule" est défini dans le dictionnaire Quillet: "Ce qui sert à conduire d'un lieu dans un autre, à transmettre. Se dit de toute espèce de moyen de transport (voiture, brouette, chariot, train, navire même)"; dans le Larousse du XXe siècle: "Moyen de transport par terre, par eau ou par air". L'on ne peut insérer dans un contrat une clause, voire un mot, qui ne s'y trouve pas: Maxwell, The Interpretation of Statutes, 9e édition, p. 14; Craies, Treatise on Statute Law, 4e édition, p. 68; Beal's Cardinal Rules of Legal Interpretation, 3e édition, p. 343; *Everett* v. *Wells* (1); *Thompson* v. *Goold & Company* (2); *Vickers Son, & Maxim* v. *Evans* (3).

Le procureur de l'intimé a plaidé que le service postal est un service public, prévu par la Loi des Postes (S.R.C. 1927, chap. 161) et qu'il doit être régulier et expéditif. Cette prétention est incontestable, mais c'est à l'intimé à prendre les moyens nécessaires pour obtenir ce résultat.

Il n'y a pas eu négligence de la part de la pétitionnaire. Elle a fait tout en son possible pour maintenir la régularité des traversées. Elle ne l'a pu à cause de conditions climatériques incontrôlables, équivalant, à mon avis, à force majeure. Je ne crois pas dans les circonstances que l'intimé avait droit en vertu de la clause 18 du contrat de déduire de la somme payable à la pétitionnaire le coût de la location de voitures pour le transport du courrier par le pont de Québec.

Après une analyse soigneuse de la preuve orale et écrite et, en particulier, une étude attentive du contrat, j'en suis venu à la conclusion que la réclamation de la pétitionnaire est juste et bien fondée et que celle-ci a droit au remède demandé dans sa pétition.

Il y aura jugement contre l'intimé pour la somme de $125.92 et les dépens.

Judgment accordingly.

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(1) (1941) 2 M. & Gr. 269, 277.
(2) (1910) 79 L.J.K.B. 905, 911.
(3) (1910) 79 L.J.K.B. 954.

BETWEEN:

THE ROYAL TRUST COMPANY and EMMA LOUISE STEVENSON, Executors of the will of RUSSELL S. SMART .. . . . . APPELLANTS;

1947
Nov. 3 & 4
1948
Jan. 24

AND

THE MINISTER OF NATIONAL REVENUE . RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (1) (a) (b) and 30—Partnership—Purchase of partner's interest—Money not "wholly, exclusively and necessarily laid out in earning the income"—Payments on account of capital—No estoppel by reason of prior assessments—Appeal dismissed.

S. an active member of the firm of S. & B., was also a member of the partnership of F. & Company which carried on business in Ottawa and elsewhere in Canada and in the United States. He was in personal charge of the Ottawa office of that company. The agreement between S. & B. provided that in calculating their respective shares in the partnership the net share of S. in F. & Company should be included. By an agreement dated December 3, 1928, J.F., one of the partners in F. & Company, assigned all his interest therein, other than that of the New York office, to S. The third member of the firm, F.B.F., joined in to approve of the assignment. By the terms of the assignment S. was to pay to J.F. certain annual payments during his lifetime as consideration for the assignment of J.F.'s interest. The agreement provided for the return of J.F. to the partnership in the event that the receipts of S. from the business of any one year did not equal the annual amount to be paid to J.F. S. thereby became entitled to the share of profits to which J.F. had been previously entitled, and during his lifetime S. paid to J.F. the annual sum provided for by the assignment. Later, by terms of a court judgment, S. acquired the interest of F.B.F. in the partnership of F. & Company, undertaking to pay to him during his lifetime the same share of profits in F. & Company which he had been receiving.

The profits of the Ottawa branch of F. & Company were divided between S. and F.B.F. in the proportions agreed upon and the share of S. and all his profits from the other branches of F. & Company were paid into the bank account of S. & B. S. then made the annual payments referred to above to J.F. and the balance of the agreed share to F.B.F. out of the bank account of S. & B. S. did not include the sums represented by these payments or any part thereof as part of his income. S. died in 1944 and in 1946 the respondent assessed his estate for income tax for the years 1939 to 1943 inclusive, including the profits from the firm of S. & B. and the money paid to J.F. and F.B.F. Appellants are the executors of the will of S.

Held: That the agreement, dated December 3, 1928, was a sale by J.F. and a purchase by S. of the former's interest in the business of F. & Company and J.F. thereupon ceased to be a partner in F. & Company;

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the payments to J.F. were not paid by F. & Company out of its profits but by S. out of his augmented share of the profits from F. & Company and were not wholly, exclusively and necessarily laid out for the purpose of earning the income of F. & Company as S. expended these amounts not in the process of earning the income but after the income had been fully earned and in fulfillment of the terms on which he purchased the share of J.F. Nor were they wholly, exclusively and necessarily laid out in the process of earning the income of S. & B. since they were laid out to satisfy an antecedent liability of one of the partners of that firm.

2. That the payments to J.F. were payments on account of capital and not deductible from income.

3. That the settlement between S. and F.B F. in substance effected a sale of F.B.F.'s share in the business of F. & Company and the annual payments to F.B.F. were payments on account of capital and not deductible from income.

4. That the respondent is not estopped by reason of any original assessments.

APPEAL under the provisions of the Income War Tax Act.

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

C. C. Robinson, K.C. and *J. C. Osborne* for appellants;

J. Ross Tolmie and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (January 24, 1948) delivered the following judgment:

This is an appeal by the executors of the will of the late Russell S. Smart, K.C., from assessment to income tax for the years 1939 to 1943, inclusive. Smart died on May 18, 1944, and in his lifetime had paid all income tax to which he had then been assessed. The present appeal is from final or amended assessments for the years in question.

In his lifetime, Smart was a partner in the firm of Fetherstonhaugh and Company, Patent Attorneys, carrying on business in Ottawa and elsewhere in Canada and the United States. He was also a partner in the legal firm of Smart and Biggar, of Ottawa. The amended assessments and the present appeals have to do with certain

payments made out of the profits of Fetherstonhaugh and Company to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh, each of whom was at one time a partner with Smart in Fetherstonhaugh and Company.

The only oral evidence at the hearing of the appeal was that of J. E. M. Fetherstonhaugh. A large number of documents was referred to, and for the sake of brevity these documents will, after identification, be referred to by the numbers given them in the record filed.

By agreement dated October 1, 1925, (2) Smart, who had been the Ottawa manager of Fetherstonhaugh and Company for twenty years, and J. E. M. Fetherstonhaugh, a son of F. B. Fetherstonhaugh who was the founder of Fetherstonhaugh and Company, entered into a partnership agreement with F. B. Fetherstonhaugh to carry on the business of Fetherstonhaugh and Company.

By agreement dated November 1, 1926, (3) Smart entered into a partnership agreement with Mr. O. M. Biggar, K.C. That agreement contains the following clauses:

(1) That Smart and Biggar agree to become partners in the practice of law, their relative interests as hereinafter defined extending to the earnings of Smart and Biggar in the practice of law after the date of commencing of the partnership, and to the then and prospective interests of Smart in the business of Fetherstonhaugh and Company.

(3) The respective shares of Smart and Biggar shall be calculated by reference to the sum of the gross fees received by them severally or jointly from the practice of law, and Smart's net share from time to time in the profits of Fetherstonhaugh and Company, subject only to the deduction of such additional office expenses as, by reason of the association of Biggar with Smart in the practice of law, are not payable by Fetherstonhaugh and Company under the terms of the agreement dated 1st of October, 1925, the net amount thus ascertained being hereafter referred to as the income of the partnership.

(12) The benefit of any additional interest in Fetherstonhaugh and Company which may be acquired, or which may fall in to Smart under the agreement dated the 1st of October, 1925, shall accrue to the partnership hereby constituted.

By an agreement dated December 3, 1928, (4) J E. M. Fetherstonhaugh assigned all his interest in Fetherstonhaugh and Company to Smart, F. B. Fetherstonhaugh joining therein to approve of the same. In part, that agreement is as follows:

AND WHEREAS it has been agreed between the parties that the Assignor should assign to the Assignee all his interest in the partnership under the terms hereinafter set out.

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NOW THIS AGREEMENT WITNESSETH that:

1. The Assignor, as of October 1, 1928, hereby assigns to the Assignee all his interest in the business carried on by Fetherstonhaugh & Co., and after that date all his rights in relation to the said firm and the business carried on by it except as hereinafter provided.

The Assignor, as of October 1, 1928, with the consent of the Assignee and the Party of the Third Part, assumes all the assets and liabilities of the New York Office of Fetherstonhaugh & Co., and after such date the profits and assets of New York Office shall belong solely to him.

2. The ASSIGNEE, in consideration of the assignment to him of the interest provided in clause 1, covenants and agrees out of his receipts from the business of said firm to pay to the Assignor during the latter's life the sum of . . . . . Dollars ($ . . . . .) annually, by quarterly installments on the first days of January, April, July and October in each and every year, commencing January 1, 1928, said annual sum to be the first charge on any receipts from the business of the firm which the Assignee may receive during each and every year. If any annual payment balance is outstanding at the end of any year it shall be carried forward to the succeeding year or years.

3. In the event of the Assignee's share of receipts from the business for any one year not equalling . . . . Dollars ($ . . . .), and consequently the Assignor receiving less than the agreed upon annual sum, then, the Assignor shall have the privilege and right, upon his election, *to come back into the partnership* on the same terms as existed prior to this assignment without affecting the assets and profits of the Assignor as to his New York Office as heremabefore provided in clause 1, upon such Assignor paying back to the Assignee any difference between the total sum paid to such Assignor and the total amount he would have received as his share of the profits from the partnership had this assignment not been made, such repayment to include simple interest at the rate of five per cent (5%) per annum. The repayment shall only apply when the total amount paid by the Assignee to the Assignor shall be greater than the total amount such Assignor would have received as his share of the profits of the firm had he continued in the partnership.

Pursuant to the terms of this agreement, Smart became entitled to the share of profits to which J. E. M. Fetherstonhaugh had been previously entitled, as well as his own; and during his lifetime the said Smart paid to J. E. M. Fetherstonhaugh the said annual sum of $. , save for two or three years when there was a dispute which resulted in a compromise settlement. All of Smart's profits in Fetherstonhaugh and Company (save as hereinafter mentioned) were paid into the bank account of Smart and Biggar, and all payments to J. E. M. Fetherstonhaugh were paid by cheque on that account.

On June 19, 1940, Smart learned of breaches by F. B. Fetherstonhaugh of the partnership agreement of October 1, 1925. On June 25, 1940, he instituted an action in the Supreme Court of Ontario asking for a declaration in

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accordance with clause 19 of the partnership agreement of 1925 (2), that F. B. Fetherstonhaugh had forfeited all his rights in and to the assets and goodwill and firm name of Fetherstonhaugh and Company, and that the share thereof formerly held by F. B. Fetherstonhaugh had become vested in Smart and was his property. After some weeks of negotiation, the litigation was finally settled in September, 1940, on the terms that F. B. Fetherstonhaugh should not defend but should allow judgment to go as prayed and that *Smart* should pay him during his lifetime the same share of profits of Fetherstonhaugh and Company, after judgment, as before. The judgment of September 16, 1940 (7) was given accordingly in default of defence, as prayed.

Paragraphs 18 and 19 of the Statement of Claim in this appeal are:

18 In accordance with this settlement the profits of Fetherstonhaugh & Co. continued to be divided as between Smart and F. B. Fetherstonhaugh in the same proportions as before; and from the date of the said judgment until Smart's death Smart made the appropriate payments to F. B. Fetherstonhaugh whenever such profits were divided. When profits of the Ottawa office were so divided, Smart, as before, paid F. B. Fetherstonhaugh's share by a cheque of Fetherstonhaugh & Co. on that firm's local Ottawa account, and deposited his own share, paid by a similar cheque, in the account of Smart & Biggar. The other offices of Fetherstonhaugh & Co. all now remitted their profits to Smart instead of to F. B. Fetherstonhaugh, and Smart continued to deposit all that he so received in the bank account of Smart & Biggar, paying F. B. Fetherstonhaugh his share by a cheque on that account, and leaving the remainder in that account as his own net share of these profits.

19. The only exception to the practice described in paragraph 18 arose from an advance made by Smart to Fetherstonhaugh, on the conclusion of the settlement, of $ . . . . . on account of Fetherstonhaugh's share of future profits; Smart paid this by a cheque on the Account of Smart & Biggar; he recouped himself, and repaid Smart & Biggar, at first by depositing in Smart & Biggar's account the whole of any profits from the Ottawa office of Fetherstonhaugh & Co., and paying no part to F. B. Fetherstonhaugh of any profits from the other offices, and later, at Fetherstonhaugh's request, by paying Fetherstonhaugh, out of the appropriate account at each division of profits, only half Fetherstonhaugh's share of such profits. In this way the advance was finally wiped out, and Smart & Biggar were fully repaid, in March, 1942. A list (No. 10) of the cheques to F. B. Fetherstonhaugh, from September 1940 to May 1, 1944, shows by which firm each was drawn.

The Statement of Defence admits the facts set out in these two paragraphs.

It is in respect of these payments to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh that the assessments now in question charge Smart and the appellants, as

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executors, in proportion to Smart's share in the partnership profits of Smart and Biggar. Each of the other partners in Smart and Biggar is similarly charged in proportion to his share in those profits.

In his income tax returns for the years in question, Smart had not included these payments, or any part thereof, as part of his income.

The assessments, as to the matters in question, are made under section 30 of The Income War Tax Act as follows:

> Sec. 30. *Partnerships*—Where two or more persons are carrying on business in partnership the partnership as such shall not be liable to taxation but the shares of the partners in the income of the partnership, whether withdrawn or not during the taxation year shall, in addition to all other income, be income of the partners and taxed accordingly.

I shall first consider the liability of the appellants in regard to the payments made to J. E. M. Fetherstonhaugh. It is to be kept in mind that the payments were made pursuant to the agreement (4) between J. E. M. Fetherstonhaugh and Smart, and were to be paid out of Smart's receipts or profits from the business of Fetherstonhaugh and Company. Neither the firm of Smart and Biggar or the individual members thereof, as such, were parties to the agreement. The obligation to pay was the obligation of Smart as a partner of Fetherstonhaugh and Company. Smart's assessment to tax was a personal assessment and he was liable to tax in respect of income from all sources, including the income to which he was entitled from Fetherstonhaugh and Company, qualified as to amount, possibly, by his agreement with his partners in Smart and Biggar.

To ascertain whether these payments are properly deductible, or whether on the other hand they are barred by the provisions of section 6 (1) (*a*) of The Income War Tax Act as not being wholly, exclusively and necessarily laid out for the purpose of earning the income, it is necessary to attend to the true nature of the expenditure and to consider why the payments were made. Were they laid out as part of the process of profit earning? It was submitted in the Notice of Appeal that in substance that agreement was:

> (*a*) a change in the agency relations of the three members of the firm, whereby J E. M. Fetherstonhaugh became temporarily disentitled to bind the firm, and

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(*b*) a re-arrangement as between two of the members (Smart and J. E. M. Fetherstonhaugh) of their then present and contingent shares in the firm's profits. By this re-arrangement, J. E. M. Fetherstonhaugh, in return for a fixed share of the profits, gave up the fluctuating proportional share to which, in certain events, he might become entitled under clause 12 of the agreement of October 1, 1925.

With neither of these submissions can I agree. There is no evidence to support either of them.

In my opinion this agreement (4) was a sale by J. E. M. Fetherstonhaugh and a purchase by Smart of the former's interest in the business of Fetherstonhaugh and Company, the consideration therefor being the annual payment by Smart to J. E. M. Fetherstonhaugh of the profits of Smart in Fetherstonhaugh and Company up to a maximum amount of $ Upon the execution of that agreement J. E. M. Fetherstonhaugh ceased to be a partner in Fetherstonhaugh and Company, and thereafter was never regarded as such. The partnership accounts, at least for the years in question, show that J. E. M. Fetherstonhaugh was no longer a partner, and the latter's evidence confirms that. And it is also well established that the consideration for such sale was the annual payment of $ by Smart. If it was not paid as consideration for the sale, why else was it paid? Thereafter, J. E. M. Fetherstonhaugh rendered no service to the partnership in respect of these payments and the partnership as such derived no advantage from the payments. It is to be noted also that J. E. M. Fetherstonhaugh's agreement (4) was not with the partnership of Fetherstonhaugh and Company, but with Smart—the other partner, F. B. Fetherstonhaugh, joining therein only to approve of the same. The payments to J. E. M. Fetherstonhaugh were not paid by Fetherstonhaugh and Company out of its profits, but by Smart out of his augmented share of the profits therefrom.

It cannot be successfully contended that these payments to J. E. M. Fetherstonhaugh were, so far as Fetherstonhaugh and Company was concerned wholly, exclusively and necessarily laid out for the purpose of earning the income of Fetherstonhaugh and Company. They were not laid out at all by, or on behalf of, Fetherstonhaugh and Company, and once it was established that they were part of the profits accruing to Smart from his partnership in

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Fetherstonhaugh and Company (and there is no question that such was the case) it is clear that such profits of Smart attracted tax at that point. By the provisions of section 30, under which Smart was assessed, he was liable to be taxed not only on the income he received from Smart and Biggar, but *on all other income*. Unless, therefore, it be established that by reason of the payment of these profits into the account of Smart and Biggar, and the later disposition thereof, that they were no longer taxable, they must remain subject to tax.

It may be advisable to note at this point that, as to Smart, the sum represented by the annual payment to J. E. M. Fetherstonhaugh was not wholly, exclusively and necessarily laid out for the purpose of earning the income. That clause has been interpreted as meaning "expenses incurred in the process of earning the income", *Minister of National Revenue* v. *Dominion Natural Gas Company Ltd.* (1); and reference thereto in *Imperial Oil Limited* v. *Minister of National Revenue* (2). Smart expended these amounts not in the process of earning the income, but after the income had been fully earned, and in fulfillment of the terms on which he purchased the share of J. E. M. Fetherstonhaugh. Reference also may be made to *Minister of National Revenue* v. *Saskatchewan Co-operative Wheat Producers Limited* (3), where Lamont J. stated:

> It is also well established that once the sum assessed has been ascertained to be profits of a trade or business, neither the motive which brought these profits into existence nor their application when made is material.

In *Pondicherry Railway Co.* v. *Income Tax Commissioners* (4), Lord MacMillan, in delivering judgment in the House of Lords, said:

> English authorities can only be utilized with caution in the consideration of Indian income tax cases owing to the differences in the relative legislation, but the principle laid down by Lord Chancellor Halsbury in *Gresham Life Assurance Society* v. *Styles* (1892) A.C. 309 at 315, is of general application unaffected by the specialties of the English Tax System. "The thing to be taxed", said his Lordship, "is the amount of profits or gains." The word "profits" I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits or the charge which has been made on

(1) (1941) S.C.R. 17.
(2) (1947) Ex. C.R. 527 at 540.
(3) (1930) S.C.R. 410.
(4) (1931) 58 Indian Appeals 239.

those profits by previous agreement or otherwise is perfectly immaterial. The tax is payable on the profits realized, and the meaning to my mind is rendered plain by the words "payable out of profits".

Nor can it be said Smart did not "receive" these sums. They were unquestionably under his control at all times. By paragraph 11 of the Statement of Claim it is alleged that he deposited all the profits from Fetherstonhaugh and Company in the bank account of Smart and Biggar, thus indicating that even if he did not directly receive the income he did have such control over it as to come within the words "directly or indirectly received" in section 3 of the Act. And by section 30 it is provided that the shares of the partners in the income of the partnership, whether withdrawn or not during the taxation year, shall, in addition to all other income, be income of the partners and taxed accordingly.

It is now necessary to consider what actually did take place with regard to the payments and the effects thereof.

Smart, throughout the years in question, was in personal charge of the Ottawa office of Fetherstonhaugh and Company. He was also an active partner in Smart and Biggar. The profits from the Ottawa branch of Fetherstonhaugh and Company were divided between Smart and F. B. Fetherstonhaugh in the proportions agreed upon and Smart's share thereof, together with all his profits from the other branches of Fetherstonhaugh and Company, was paid into the bank account of Smart and Biggar. Smart—not the other partners in Smart and Biggar—then paid these annual payments to J. E. M. Fetherstonhaugh, as well as the agreed share to F. B. Fetherstonhaugh, from the profits of the other branches of Fetherstonhaugh and Company out of the bank account of Smart and Biggar.

For each of the years in question there is attached to Smart's income tax return a copy of the auditor's reports for both Smart and Biggar and Fetherstonhaugh and Company. The 1942 return is a fair sample of all these reports and indicates how these payments to J. E. M. Fetherstonhaugh were considered by the accountant, and no doubt accepted as correct by the partners of Smart and Biggar. In the report of the accountant to Smart and Biggar in 1942 (dated June 18, 1943), the income of that firm is shown under three headings, one of which is "share

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of net profit—Fetherstonhaugh & Company—$. "

It shows that this amount was arrived at by deducting from the sum of Smart's profits in each of the branches of Fetherstonhaugh and Company the payment of $. to J. E. M. Fetherstonhaugh (as well as another payment with which we are not concerned).

Undoubtedly, the chartered accountant who audited the accounts of Smart and Biggar (he was also the auditor for Fetherstonhaugh and Company—Ottawa Branch) considered that "Smart's net share from time to time in the profits of Fetherstonhaugh and Company," to which the firm of Smart and Biggar was entitled under agreement (3), did not include that annual payment of $ to J. E. M. Fetherstonhaugh. There is no doubt whatever —on the evidence before me—that the partners of Smart and Biggar considered that interpretation of agreement (3) to be correct. A similar set-up appears in each of the years in question and from comments made in the reports it is apparent that the accountant had seen all relevant agreements. There is no evidence that the other partners in Smart and Biggar objected to the payments being made to J. E. M. Fetherstonhaugh, or that they ever made any claim to a personal interest therein as being part of Smart's profits in Fetherstonhaugh and Company to which they were entitled. It is admitted that throughout they accepted Smart's computation as to what was his net share of the profits in Fetherstonhaugh and Company.

And no objection can be taken, I think, to such an interpretation of their rights by the other partners in Smart and Biggar. The partners in that firm were quite entitled to place their own interpretation on their own agreement. They considered Smart's "net share from time to time in Fetherstonhaugh and Company" as being reduced by the payments he was required to make to J. E. M. Fetherstonhaugh. There was nothing in the agreement (3) which in clear terms required Smart to pay to Smart and Biggar all his withdrawals from Fetherstonhaugh and Company, or even all of what might be considered as his share in the taxable profits in Fetherstonhaugh and Company.

Nor do I think that Smart, in turning in his own profits from Fetherstonhaugh and Company to Smart and Biggar,

intended that they should all remain there as being profits divisible between the partners of Smart and Biggar. In each year he (Smart) issued the cheques totalling $ to J. E. M. Fetherstonhaugh. No part of that sum was ever distributed to Smart's partners in Smart and Biggar.

In effect, therefore, Smart, as to the annual payments made to J. E. M. Fetherstonhaugh, retained control thereof until he issued the cheques therefor to J. E. M. Fetherstonhaugh; and those payments were made in each year in satisfaction of Smart's own liability to J. E. M. Fetherstonhaugh. Smart and Biggar were not liable to pay any part of it and there is no evidence to indicate that they derived any benefit from such payments. I think that it must be inferred from these facts that the other partners of Smart and Biggar never beneficially became entitled to these annual sums of $ . .. . or any part thereof. The payment thereof by Smart into the account of Smart and Biggar was nothing more than a convenient way for Smart to handle the matter.

It follows from these conclusions that the payments to J. E. M. Fetherstonhaugh in each year were paid by Smart for his own personal benefit out of his profits arising from the business of Fetherstonhaugh and Company; that they were at no time beneficially received by the firm of Smart and Biggar, and no part thereof was distributed at any time to the other partners in Smart and Biggar. These disbursements, while made out of the bank account of Smart and Biggar, were not wholly, exclusively and necessarily laid out in the process of earning the income of Smart and Biggar. They were paid out to satisfy an antecedent liability of one of the partners.

In the result, therefore, I find that Smart's share in the profits of Fetherstonhaugh and Company to the extent of the payments made therefrom annually to J. E. M. Fetherstonhaugh remained throughout as taxable income in his hands, unaffected as to tax liability by its passing through the bank account of Smart and Biggar. Under the provisions of section 6 (1) (*a*) of the Act, Smart was not entitled to deduct these sums from his annual income. The Department has seen fit to assess him in regard thereto for only his proportionate share thereof in the profits of

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Smart and Biggar—and that is all I am concerned with. On these grounds alone that branch of the appeal must be disallowed.

It is also contended for the respondent that the payments to J. E. M. Fetherstonhaugh were payments on account of capital and were, therefore, barred as deductions under the provisions of section 6 (1) (*b*). I was referred by counsel for both parties to a number of cases in the English Courts, but after considering them all I have come to the conclusion that most of them established no principle which can be applied to an interpretation of section 6 (1) (*b*). Some of them have to do with taxability of payments in the hands of the payee and with that I am not here concerned. Others relate to deductions in the computation of income for Sur-tax purposes based on special provisions in the English Income Tax Act.

My findings have been that the annual payments made to J. E. M. Fetherstonhaugh were made as part of the consideration for the purchase of his share in the business of Fetherstonhaugh and Company. If the consideration or purchase money had been paid in one lump sum, no question would have arisen as it would clearly have been a capital payment.

In the case of *Royal Insurance Company* v. *Watson* (1), it was held that the agreement to pay the commutation money was, in fact, part of the consideration for the transfer of the business, and that the payment was therefore a "sum employed as capital" and could not be deducted. In that case Lord Halsbury, L.C. said at pp. 6 and 7:

> It is often a very difficult question to ascertain, in dealing with a commercial account, what is capital and what is income; but if it is established as a fact that the expenditure is capital, the language of the statute itself determines that that expenditure cannot be deducted from the profits, and that the profits are to be ascertained without reference to the capital expenditure. That appears to me to be decisive of this case, because if I look at the whole circumstances of this transaction and observe that the transfer from the one company to the other is to be upon certain terms . . . . . I can entertain no doubt whatever that the money to be paid, which was the consideration for the transfer of the business from the one company to the other, was capital expenditure of the new company which had received the business, the goodwill, the staff, and all other accessories which made it possible to continue the business; and one of the items was the particular matter which arises here . . . . .

(1) (1897) A.C. 1.

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. . . . . but this is clear: the bargain between the two companies involved a liability which was discharged by the payment of this sum; and as a matter of fact I come to the conclusion that this was a part of the purchase-money, and when I use the compendious phrase "purchase-money," of course I include the arrangement made in respect of shares, because it matters not whether it was paid in money or in money's worth. The result is that one of the companies sells to the other, and part of the consideration which was contemplated by both parties, and in respect of which the bargain was made, and without which it would not have been made, was the manager, and all that was incident to the manager, in respect of the payments to be made to him, whether made at once or made in this form of commutation.

My Lords, under these circumstances, it appears to me that this comes within the express language of the statute; it is capital expenditure —it is part of the purchase-money for the concern. It is perfectly immaterial whether it was entirely so or partly so, because if it was partly so it is enough to establish the proposition which I am maintaining.

Konstam, in the 10th edition of The Law of Income Tax, says at p. 114:

Money spent in acquiring a business is no more to be deducted than any other kind of capital expenditure; if a firm of contractors is converted into a company, the company cannot deduct from the profits made out of the contracts acquired from the firm the price paid for acquiring them . . . . . Money paid for acquiring a business or business rights is not the less capital expenditure if it is paid in a series of annual payments.

It is a fact that no fixed sum was ever established as the sale price of J. E. M. Fetherstonhaugh's share in the partnership. But if, as indicated in the *Royal Insurance Case supra,* consideration for the transfer of an interest in the business is a capital expenditure, I can see no reason why an annual payment, in each case representing a part of the consideration, should not also be considered as a payment on account of capital. Smart, by the purchase, had acquired a further share in the business of Fetherstonhaugh and Company—a capital asset—and each annual payment made to the vendor was in partial settlement of the consideration due to him. I can see no advantage in considering the matter from the point of view of the payee, for there are cases in which a payment might be an income payment but a capital receipt, and vice versa. So far as the payments to J. E. M. Fetherstonhaugh are concerned they were, in my view, payments on account of capital and could not therefore be deducted.

Reference may also be made to a decision in the New Zealand Courts which in many ways is similar to the

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instant case—*Commissioner of Taxes* v. *F;* and *E.* v. *Commissioner of Taxes,* (1). That was a sale of a solicitor's business which provided for the payment of the purchase price out of the profits of the business, but subject to certain conditions protecting the purchaser, the effect of which was to make the payments dependent upon the prosperity of the business and the life of the purchaser. It was held that the payments made to the vendor did not constitute an annuity derived from a charge on property, but were payments made for a capital asset out of the purchaser's own profits and could not be regarded as expenditure exclusively incurred by him in the production of assessable income within section 80 (2) of the Land and Income Tax Act, 1923, and consequently that the purchaser had been properly assessed to income tax on all profits made before paying part of them over to the vendor on account of his purchase.

In considering whether the payments were capital or income payments, Smith J., in that case, referred to many of the English cases to which I have also been referred and then stated (p. 142):

> But even if the £1,000 is not to be regarded as such a primary purchase price, I think that both in form and substance the transaction between W E. and the respondent (vendor and purchaser respectively) must be regarded as the realization of a capital asset by the executrix of a deceased estate. The payments which she receives are made in the fulfilment of that purchase. They are not made in the process of earning profits and do not arise out of any of the transactions of a solicitor's business which produce those profits. I think it manifest that those payments cannot be said to be exclusively incurred for the purpose of earning the profits . . . . . In my opinion, then, the respondent is paying for a capital asset out of his own profits and he is properly assessable to income tax upon all the profits which he makes before he pays some of them over in settlement of his purchase. Accordingly, I think that the Commissioner's appeal must be allowed.

It is of interest to note also that in an appeal by the vendor as to her liability to tax it was found that the payments in her hands were capital, and her appeal was allowed.

Most of the essential facts in regard to the payments made to F. B. Fetherstonhaugh have already been set out. No written agreement was entered into between Smart and F. B. Fetherstonhaugh when their differences were

(1) (1941) Vol. 6, A.T.D. 135.

settled in September, 1940. Both are now deceased, and in arriving at a conclusion as to the taxability of Smart in regard to these payments it is necessary to consider what actually took place as shown by the documents filed and also as indicated by the evidence of J. E. M. Fetherstonhaugh.

The settlement between Smart and F. B. Fetherstonhaugh was, I think, in the nature of a compromise. It is probable that owing to F. B. Fetherstonhaugh's inattention to business the goodwill of the business of Fetherstonhaugh and Company was being adversely affected. This is indicated by the evidence of J. E. M. Fetherstonhaugh, but the forfeiture proceedings instituted by Smart were based entirely on the alleged breach of the partnership agreement as set out in Statement of Claim. F. B. Fetherstonhaugh was without doubt unwilling to lose, not only his share in the partnership, but also his income therefrom. What he desired most to retain was an income for his remaining years. He could not transfer or sell his interest in the business as he was precluded from doing so by an agreement with his estranged wife (5) to do nothing which would affect her rights to be paid a proportion of the profits in Fetherstonhaugh and Company after his death. In the result, therefore, a compromise was arrived at, each party securing what he mainly desired. F. B. Fetherstonhaugh was to have an income for life and Smart got rid of a partner whose neglect and inattention were harmful to the business. But that was not all that resulted from the compromise, for Smart became the owner of a very substantial asset, namely F. B. Fetherstonhaugh's share in the partnership, freed, presumably, from any liability to pay to F. B. Fetherstonhaugh's wife any portion of the profits after the death of F. B. Fetherstonhaugh.

It might be argued that the payments to F. B. Fetherstonhaugh were made *ex gratia*. In the correspondence, prior to settlement, Smart intimated that the payments would be so considered. If the payments were, in fact, made *ex gratia*, then they are not permissible deductions under section 6 (1) (*a*). But in paragraph 16 of the Statement of Claim, it is stated that one of the terms of the settlement was that Smart should pay F. B. Fetherston-

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haugh during his lifetime. In my view, this indicates a binding agreement to pay and so the payments made pursuant thereto cannot be considered as made *ex gratia*. It is submitted, however, that the payments can be considered from another angle, namely, that they were made in order to get rid of a partner whose conduct was injurious to the business and that, therefore, the annual disbursements to F. B. Fetherstonhaugh were permissible deductions. Reference was made to the case of *Mitchell* v. *B. W. Noble Limited* (1), where it was held:

that inasmuch as the Commissioners had found that the directors were satisfied that in order to save the company from scandal it was necessary to get rid of the director and to pay him the sum in question, that sum must be regarded as money "wholly and exclusively laid out and expended for the purposes of the trade" of the company within the meaning of r. 3 of the Rules applicable to Cases I and II of Sch. D.

But that case, I think, is readily distinguishable from the present one. In that case the payee was a life director of the firm claiming the deduction. It is apparent that the payment made to him was considered as a payment to get rid of an undesirable *servant* in the course of the business. The principles laid down in that case have been followed in certain cases in Canada, but I have not been referred to any case, nor do I know of one, where a payment made to get rid of an undesirable *partner* has been considered as a deductible expense under section 6 (1) (*a*). As far as I am aware, the principle has been confined to disbursements made to get rid of an undesirable employee or officer, or to secure release from an onerous contract. In the *Mitchell* v. *Noble* Case also, the company secured no asset by reason of the payments, but merely got rid of an undesirable officer or servant. In the instant case, however, Smart acquired an asset of very substantial value. It cannot therefore be said, in any event, that the disbursements, even if made with the object of getting rid of an undesirable partner, were made wholly or exclusively for the purpose of earning the income. It was, in my view, paid out in part, at least, for the acquisition of F. B. Fetherstonhaugh's share in the business.

It is further to be noted that in the case of *Mitchell* v. *Noble supra* the payment was made by the company in which the payee had been the director. In the instant

(1) (1927) 1 K.B. 719.

case the agreement was that Smart—and not Fetherstonhaugh and Company—should make the payment.

I have not overlooked the fact that after September, 1940, the auditors of Fetherstonhaugh and Company continued to regard F. B. Fetherstonhaugh as a partner in that firm. There is no evidence that he had any knowledge of the judgment vesting F. B. Fetherstonhaugh's share in Smart. But that judgment is, I think, conclusive of the fact that, in law, F. B. Fetherstonhaugh thereafter was no longer a partner. Smart, in fact, was the sole owner of the business from September, 1940.

Nor can these payments to F. B. Fetherstonhaugh be regarded as a deductible expense of Smart and Biggar. I need not here repeat in regard to these payments what I have previously said with reference to the payments to J. E. M. Fetherstonhaugh. The only essential difference is that two-thirds of the payments to F. B. Fetherstonhaugh were paid to him by Smart direct from the bank account of Fetherstonhaugh and Company, and never reached the firm of Smart and Biggar. The remaining one-third was paid by Smart into the bank account of Smart and Biggar and was disposed of by him in exactly the same way as the payments made to J. E. M. Fetherstonhaugh. The other members of Smart and Biggar, so far as the evidence before me would indicate, had full knowledge of, and approved of, these payments, accepting Smart's computation of what constituted his net share in the profits of Fetherstonhaugh and Company to which they were entitled. And, as I have already indicated, they were quite entitled to do so. These payments were made, not in the process of earning the income of Smart and Biggar, but in satisfaction of an obligation of one of the partners. They were paid out of Smart's profits in Fetherstonhaugh and Company, and as his profits they remained taxable in his hands. The fact that, in part, they passed through the bank account of Smart and Biggar did not in any way affect the matter.

After consideration of the whole matter, I have reached the conclusion that in substance and effect the settlement between Smart and F. B. Fetherstonhaugh amounted to a sale of F. B. Fetherstonhaugh's share in the business of Fetherstonhaugh and Company, the consideration therefor

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being the receipt annually thereafter by F. B. Fetherstonhaugh of the same income for life as he would have had, had he remained a partner. It is not certain that Smart could have succeeded in his action for forfeiture; certainly, he could not have succeeded without further litigation, for F. B. Fetherstonhaugh was prepared to contest the matter unless he acquired assurance as to future income for his life. It is true that there was no document by which F. B. Fetherstonhaugh sold to Smart, and Smart purchased from F. B. Fetherstonhaugh; and that it was by a judgment that F. B. Fetherstonhaugh lost, and Smart acquired, the former's share of F. B. Fetherstonhaugh. But this was accomplished only by the consent of F. B. Fetherstonhaugh. No fixed sum was agreed upon as a consideration, but it is clear that the consideration for allowing the judgment to go was Smart's agreement to make the annual payment of profits to F. B. Fetherstonhaugh. Because of the agreement relating to the wife of F. B. Fetherstonhaugh, to which I have previously referred, it was not open to the parties to enter into a formal agreement of sale, and for that reason it was necessary to have a court order declaring forfeiture of F. B. Fetherstonhaugh's interest and the vesting thereof in Smart. But in substance, all the essential elements of the sale were here.

My conclusion is that the settlement arrived at in September, 1940, between Smart and F. B. Fetherstonhaugh was, in substance, a sale. For the same reasons, therefore, as I have stated regarding the payments to J. E. M. Fetherstonhaugh, the annual payments to F. B. Fetherstonhaugh were payments on account of capital, and therefore were not permissible deductions under section 6 (1) (*b*).

It is now necessary to refer to another argument advanced by the appellant. Paragraphs 2, 22, 24, and 26 of the Statement of Claim herein are as follows:

21. Before April, 1939, Smart had furnished the Department of National Revenue with copies of the agreements between him and F. B. Fetherstonhaugh and J. E. M. Fetherstonhaugh (Nos. 2 and 4) and between him and O. M. Biggar (No. 3), and with all the information available to him which the Department requested about the payments to J. E. M. Fetherstonhaugh referred to above. On April 26, 1939, the Ottawa Taxation Division prepared notices of reassessment and assessment for the years 1928 to 1937, including, for the years 1928 to 1936, only the taxes in respect of the payments to J. E. M. Fetherstonhaugh in

those years, and for 1937 some other unpaid items as well. No payments were made under these assessments and there were no further proceedings on them.

22. On January 9, 1940, the Ottawa Taxation Division sent Smart notices of assessment and re-assessment for the years 1928 to 1938 including no taxes in respect of the payments to J. E. M. Fetherstonhaugh. These notices showed no unpaid taxes for any of these years except an amount for 1937 which was paid on February 2, 1940.

24. Smart made income tax returns for the years 1939 to 1943, and paid the full amount of tax calculated upon the income so returned. No notice of assessment for any of these years was sent to Smart or to the Appellants until February 15, 1946. Between 1939 and February 15, 1946, the Department neither requested nor obtained from Smart or the Appellant any further information about the payments to J E. M. Fetherstonhaugh.

26 On February 15, 1946, nearly two years after Smart's death, the Ottawa Taxation Division sent to Smart in care of the Appellant, Royal Trust Company as his executors, with the covering explanatory letter (No. 1), revised notices of assessment for the years 1928 to 1938, and "final" notices of assessment for the years 1939 to 1943, assessing Smart for a proportion of the amount paid by him in the said years to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh, the proportion assessed against Smart for each year being calculated upon Smart's share in that year in the partnership profits of Smart & Biggar.

The allegations in these paragraphs are all admitted by the respondent.

It is submitted on behalf of the appellant that, inasmuch as the respondent in 1940 had full knowledge of all the relevant facts, and had in that year made assessments and re-assessments for the years 1928 to 1938, including therein no taxes in respect to the payments to J. E. M. Fetherstonhaugh, that the respondent had made a finding that such payments were not part of Smart's taxable income and that he should not now be permitted to take a different view.

In the case of *Gilhooly* v. *The Minister of National Revenue* (1), I said:

> After giving careful consideration to all the cases referred to by counsel, I have reached the conclusion that when the words of an act clearly permit the interpretation placed on them by a government department and that practice has long continued (in this case it continued from the time the act first came into effect in 1917 until 1938) a Court should hesitate to adopt a construction of the statute which would lead to the destruction of a method long followed. See *Steamship Glensloy Company, Limited* v. *Lethem*—Surveyor of Taxes, (1914) 6 T C. 453 at 462.

My decision in that case was founded on my view that the words of the Act clearly permitted the interpretation

(1) (1945) Ex. C.R. 141 at 159.

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placed on them by the officers of the department. In the present case, and on the facts as I have found them, I am quite unable to find any legal basis on which the sums paid to J. E. M. Fetherstonhaugh could ever have been allowed as deductions from Smart's income. By reason of the somewhat complicated nature of the problem, it was no doubt difficult to reach a speedy conclusion, and it is probably the case that, inasmuch as the payee had paid income tax on these payments from 1928 to 1937 without objection, there was some moral ground for omitting these sums from Smart's taxable income in those years. In any event, when the matter was finally and fully considered in 1946, it was not possible to re-assess Smart in respect of the year 1938, and previous years, by reason of the provisions of section 55 (*b*). The appeal, therefore, in respect of those years, was allowed by the Minister. It may here be noted that J. E. M. Fetherstonhaugh has an appeal pending in respect of his income from Smart for the year 1938, and pending the hearing of that appeal, no assessment has been made for any subsequent year.

It is to be noted, also, that the respondent is not estopped by reason of any original assessments. Section 55 provides for a continuing liability to tax and that, notwithstanding any prior assessment, the Minister may, within six years from the day of the original assessment (in cases where there is no fraud), re-assess or make additional assessments upon any person for tax, interest and penalty.

It is also alleged by the appellant that the assessments, as computed by the respondent, include interest at a rate not authorized by the Act. I assume that interest has been and will be computed in accordance with subsections (3) and (4) of section 16, chap. 38, Statutes of Canada, 1936, which were in effect for all the relevant years. These subsections remained unchanged until subsection (3) was amended by section 14 of chap. 43, Statutes of Canada, 1944-45, applicable only to income of the taxation year 1944 and subsequent years. Should any adjustment be necessary, and the parties be unable to agree thereon, the matter may be spoken to.

The appeals will therefore be dismissed, with costs to be taxed.

Judgment accordingly.

BETWEEN:

OLIVER MOWAT BIGGAR . APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE } RESPONDENT.

1947
Nov. 3 & 4
1948
Jan. 24

Revenue—Income—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 30—"Income of the partnership"—Partner not beneficially interested —Appeal allowed.

The appellant is a member of the legal firm of S. & B. and was assessed for income tax for the years 1939 to 1943 inclusive. S. was also a member of the firm of F. & Company and in charge of the Ottawa branch of that company for each of the years in question and divided the profits of that branch between F.B.F. and himself forwarding the former's share to him direct and by cheque on the bank account of F. & Company and paying his own share thereof, together with his share in the profits of all other branches of F. & Company into the bank account of S. & B. Thereafter, from that account S. paid to J.F. annual payments as consideration for the purchase of J.F.'s interest in F. & Company, and also to F.B.F. the latter's share in the profits from all branches of F. and Company other than the Ottawa branch. The respondent assessed appellant as though the full amount of the payments to F.B.F. had become the shares of the partners in the income of the partnership of S. & B. and on the basis of the appellant's interest in the firm of S. & B. Appellant was never a partner of F. & Company. He was entitled as a member of the firm of S. & B. to have the net profit of S. from time to time in the profits of F. & Company become part of the income of the firm of S. & B. He appealed from the assessment by respondent.

It was admitted by counsel at the hearing that appellant always accepted as correct the statement of S., verified by the auditor, setting out the profits of S. & B. and the money received from the firm of F. & Company in which appellant had never had any interest and from which he never received any money.

APPEAL under the provisions of the Income War Tax Act.

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

C. C. Robinson, K.C. for appellant.

J. R. Tolmie and *E. S. MacLatchy* for respondent.

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

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CAMERON J. now (January 24, 1948) delivered the following judgment:

This is an appeal from assessments to income tax dated February 15, 1946, for the taxation years 1939 to 1943, inclusive. The appellant is a member of the legal firm of Smart and Biggar, and for each of the years in question had made income tax returns and paid the full amount of tax calculated upon the income so returned. The assessments now in appeal include certain amounts which were not included by the appellant in making his annual returns.

This appeal was heard at the same time as another appeal by the executors of the will of the late Russell S. Smart, K.C., in regard to the latter's income for the same taxation years. The only oral evidence at the hearing was that of J. E. M. Fetherstonhaugh. A large number of documents were referred to, and for the sake of brevity, they will, after identification, be referred to by the numbers given them in the record filed.

By agreement dated November 1, 1926, (3) the appellant entered into a partnership agreement with the said Smart. That agreement contains the following clauses:

1. That Smart and Biggar agree to become partners in the practice of law, their relative interests as hereinafter defined extending to the earnings of Smart and Biggar in the practice of law after the date of the commencement of the partnership and to the then and prospective interest of Smart in the business of Fetherstonhaugh and Company.

3. The respective shares of Smart and Biggar shall be calculated by reference to the sum of the gross fees received by them severally or jointly from the practice of law, and Smart's net share from time to time in the profits of Fetherstonhaugh and Company, subject only to the deduction of such additional office expenses as, by reason of the association of Biggar with Smart in the practice of law, are not payable by Fetherstonhaugh and Company under the terms of the agreement dated the 1st of October, 1925, the net amount thus ascertained being hereafter referred to as the income of the partnership.

12. The benefit of any additional interest in Fetherstonhaugh and Company which may be acquired, or which may fall in to Smart under the agreement dated the 1st of October, 1925, shall accrue to the partnership hereby constituted.

Smart's then interest in Fetherstonhaugh and Company was derived under an agreement dated October 1, 1925, (2) by which he became a partner in that firm, the other partners being the founder, F. B. Fetherstonhaugh, and the latter's son, J. E. M. Fetherstonhaugh.

By an agreement dated December 3, 1928, (4) J. E. M. Fetherstonhaugh assigned all his interest in Fetherstonhaugh and Company to Smart, F. B. Fetherstonhaugh joining therein to approve of the same. In part, that agreement is as follows:

AND WHEREAS it has been agreed between the parties that the Assignor should assign to the Assignee all his interest in the partnership under the terms hereinafter set out.

NOW THIS AGREEMENT WITNESSETH that:

1. The Assignor, as of October 1st, 1928, hereby assigns to the Assignee all his interest in the business carried on by FETHERSTONHAUGH & CO., and after that date all his rights in relation to the said firm and the business carried on by it except as hereinafter provided.

The Assignor, as of October 1, 1928, with the consent of the Assignee and the Party of the Third Part, assumes all the assets and liabilities of the New York Office of Fetherstonhaugh & Co., and after such date the profits and assets of New York Office shall belong solely to him.

2. The ASSIGNEE, in consideration of the assignment to him of the interest provided in clause 1, covenants and agrees out of his receipts from the business of said firm to pay to the Assignor during the latter's life the sum of . . . . . annually, by quarterly installments on the first days of January, April, July and October in each and every year, commencing January 1, 1928, said annual sum to be the first charge on any receipts from the business of the firm which the Assignee may receive during each and every year. If any annual payment balance is outstanding at the end of any year it shall be carried forward to the succeeding year or years.

3. In the event of the Assignee's share of receipts from the business for any one year not equalling . . . . . and consequently the Assignor receiving less than the agreed upon annual sum, then, the Assignor shall have the privilege and right, upon his election, to come back into the partnership on the same terms as existed prior to this assignment without affecting the assets and profits of the Assignor as to his New York Office as hereinbefore provided in clause 1, upon such Assignor paying back to the Assignee any difference between the total sum paid to such Assignor and the total amount he would have received as his share of the profits from the partnership had this assignment not been made, such repayment to include simple interest at the rate of five per cent (5%) per annum. The repayment shall only apply when the total amount paid by the Assignee to the Assignor shall be greater than the total amount such Assignor would have received as his share of the profits of the firm had he continued in the partnership.

Pursuant to the terms of this agreement, Smart became entitled to the share of profits to which J. E. M. Fetherstonhaugh had been previously entitled, as well as his own; and during his lifetime the said Smart paid to J. E. M. Fetherstonhaugh the said annual sum of $. , save for two or three years when there was a dispute which resulted in a compromise settlement. All of Smart's profits in Fetherstonhaugh and Company (save as hereinafter

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mentioned) were paid into the bank account of Smart and Biggar, and all payments to J. E. M. Fetherstonhaugh were paid by cheque on that account.

On June 19, 1940, Smart learned of breaches by F. B. Fetherstonhaugh of the partnership agreement of October 1, 1925. On June 25, 1940, he instituted an action in the Supreme Court of Ontario, asking for a declaration in accordance with clause 19 of the partnership agreement of 1925 (2) that F. B. Fetherstonhaugh had forfeited all his rights in and to the assets and goodwill and firm name of Fetherstonhaugh and Company, and that the share thereof formerly held by F. B. Fetherstonhaugh had become vested in Smart and was his property. After some weeks of negotiation, the litigation was finally settled in September, 1940, on the terms that F. B. Fetherstonhaugh should not defend but should allow judgment to go as prayed, and that *Smart* should pay him during his lifetime the same share of profits of Fetherstonhaugh and Company after judgment, as before. The judgment of September 16, 1940, (7) was given accordingly in default of defence, as prayed.

Paragraphs 18 and 19 of the Statement of Claim in this appeal are:

18. In accordance with this settlement the profits of Fetherstonhaugh & Co. continued to be divided as between Smart and F. B. Fetherstonhaugh in the same proportions as before; and from the date of the said judgment until Smart's death Smart made the appropriate payments to F. B. Fetherstonhaugh whenever such profits were divided. When profits of the Ottawa office were so divided, Smart, as before, paid F. B. Fetherstonhaugh's share by a cheque of Fetherstonhaugh & Co. on that firm's local Ottawa account, and deposited his own share, paid by a similar cheque, in the account of Smart & Biggar. The other offices of Fetherstonhaugh & Co. all now remitted their profits to Smart instead of to F. B. Fetherstonhaugh, and Smart continued to deposit all that he so received in the bank account of Smart & Biggar, paying F. B. Fetherstonhaugh his share by a cheque on that account, and leaving the remainder in that account as his own net share of these profits.

19. The only exception to the practice described in paragraph 18 arose from an advance made by Smart to Fetherstonhaugh, on the conclusion of the settlement, of $ . . . . . on account of Fetherstonhaugh's share of future profits, which Smart paid by a cheque on the account of Smart & Biggar. Smart recouped himself, and repaid Smart & Biggar, at first by depositing in Smart & Biggar's account the whole of any profits from the Ottawa office of Fetherstonhaugh & Co., and paying no part to F. B. Fetherstonhaugh of any profits from the other offices, and later, at Fetherstonhaugh's request, by paying Fetherstonhaugh, out of the appropriate account, at each division of profits, only half Fetherstonhaugh's

share of such profits. In this way the advance was finally wiped out, and Smart & Biggar were fully repaid in March, 1942. A list (No. 10) of the cheques to F. B. Fetherstonhaugh from September, 1940 to May 1, 1944, shows by which firm each was drawn.

The Statement of Defence admits the facts set out in these two paragraphs.

It is in respect of these payments by Smart to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh that the assessments now in question charge the appellant in proportion to his share in the partnership profits of Smart and Biggar. Each of the other partners in Smart and Biggar has been similarly charged in proportion to his share in those profits.

The assessments as to the matters in question are made under section 30 of the Income War Tax Act, as follows:

Sec. 30. *Partnerships*—Where two or more persons are carrying on business in partnership the partnership as such shall not be liable to taxation but the share of the partners in the income of the partnership, whether withdrawn or not during the taxation year shall, in addition to all other income, be income of the partners and taxed accordingly.

I have today given judgment dismissing the appeal of the executors of the will of the late R. S. Smart, K.C. In that judgment I considered in detail all the evidence in regard to the payments made to both J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh. The evidence is the same in that case as in the present appeal. I do not consider it necessary to here repeat all that I said in that judgment. In the present case I have reached the same conclusions as to the facts and the law (other than the assessability of the appellant) as I did in the Smart Estate Appeal, and reference may be made to my judgment in that case as forming part of my reasons for judgment in the present case. I shall, however, briefly summarize those findings in reference to the special features of the present appeal.

Smart, who was in charge of the Ottawa branch of Fetherstonhaugh and Company for each of the years in question, divided the profits of that branch between F. B. Fetherstonhaugh and himself, forwarding the former's share to him direct, and by cheque on the bank account of Fetherstonhaugh and Company, and paying his own share thereof, together with his share in the profits of all

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the other branches of Fetherstonhaugh and Company, into the bank account of Smart and Biggar. Thereafter, from that account, he (Smart) paid to J. E. M. Fetherstonhaugh the annual payment of $, and to F. B. Fetherstonhaugh the latter's share in the profits from all branches of Fetherstonhaugh and Company other than the Ottawa branch. Approximately two-thirds of the amounts paid to F. B. Fetherstonhaugh were made direct from Fetherstonhaugh and Company and never reached the bank account of Smart and Biggar. The respondent, however, has assessed the appellant as though the full amount of the payments to F. B. Fetherstonhaugh had become the shares of the partners in the income of the partnership of Smart and Biggar, and on the basis of the appellant's interest in the firm of Smart and Biggar.

As regards the payments made to J. E. M. Fetherstonhaugh, I found in the Smart Estate Appeal that they were paid by Smart in consideration of the sale by J. E. M. Fetherstonhaugh to Smart of the former's share in the business of Fetherstonhaugh and Company—a capital asset; that, as profits of Fetherstonhaugh and Company accruing to Smart out of that business, they attracted tax in the hands of Smart at that point, and that the mere fact that they were paid into, and later out of, the bank account of Smart and Biggar, did not affect the situation in any way, the procedure followed being only a convenient way for Smart to handle the matter. I reached the same conclusion in regard to the payments made to F. B. Fetherstonhaugh. I found also that all the members of the firm of Smart and Biggar had accepted Smart's computation as to what he was required to bring into the firm of Smart and Biggar from his profits in Fetherstonhaugh and Company, pursuant to agreement (3); that they concurred in his deduction therefrom of the payments made to both J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh, and that the appellant and the third partner in Smart and Biggar at no time considered that they were beneficially entitled to any part of the said sums, and in fact did not withdraw any part of them for their own use.

It is important to state that at no time was the appellant a member of the firm of Fetherstonhaugh and Company,

and that the payments to both J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh were made out of profits accruing to Smart from Fetherstonhaugh and Company, and paid by Smart in pursuance of agreements made by Smart, and not by the appellant.

The appellant is assessed as a member of Smart and Biggar under section 30 of The Income War Tax Act *supra*. The respondent, therefore, must show that these amounts, said to be assessable in the hands of the appellant, are part of his share as a partner in the "income of the partnership" of Smart and Biggar. Did the payments at any time become "income of the partnership" of Smart and Biggar? The only suggestions that can be made to establish that they were "income of that partnership" are (*a*) that by agreement (3) Smart's net share from time to time in the profits of Fetherstonhaugh and Company was to become part of the income of the firm of Smart and Biggar; and (*b*) that all the payments made to J. E. M. Fetherstonhaugh, and approximately one-third of the payments made to F. B. Fetherstonhaugh for the years in question, were paid out of the bank account of Smart and Biggar from monies paid into that account by Smart out of the profits of Fetherstonhaugh and Company.

Not all money in the bank account of a partnership is "income of the partnership." Many deductions may be made before the income of the partnership is ascertained. In the case of a firm of solicitors, substantial amounts of trust monies may pass through the firm's accounts, but such trust funds could not be considered as "income of the partnership." The mere fact that all of the monies paid to J. E. M. Fetherstonhaugh, and part of the monies paid to F. B. Fetherstonhaugh, passed through the bank account of Smart and Biggar does not by itself establish that the sums represented by these payments were "income of the partnership." It would be necessary, I think, to establish that under the agreement (3) they were sums which represented Smart's "net share from time to time" in the partnership of Fetherstonhaugh and Company, and to which the firm of Smart and Biggar was entitled, and which had been received by that firm.

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If Smart had been a partner in Fetherstonhaugh and Company, and in no other partnership, there could be no question, I think, that all the payments to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh would have been taxable income in his hands as having been profits derived from that business. But there is nothing in agreement (3) which in clear terms required Smart to bring into Smart and Biggar all the profits he was entitled to in Fetherstonhaugh and Company. The relevant part of the agreement between the partners of Smart and Biggar was: "The respective shares of Smart and Biggar shall be calculated by reference to the sum of the gross fees received by them severally or jointly from the practice of law, and Smart's *net share* from time to time in the profits of Fetherstonhaugh and Company . . . . ."

It was open to the parties of agreement (3) to agree as to what was meant by "net share." It was their own agreement and, provided they all concurred in the interpretation to be placed on any part of it, no one else could raise any objection. And, so far as the evidence before me is concerned, there is no doubt whatever that they all agreed that what should be brought into the firm of Smart and Biggar for distribution amongst the partners thereof by Smart, was the net amount that Smart got after paying out all his obligations in respect of his former partners in Fetherstonhaugh and Company. In the minds of the partners of Smart and Biggar that constituted Smart's "net share from time to time in the profits of Fetherstonhaugh and Company." It is alleged by the appellant and admitted by the respondent, that the appellant, in computing his share in the income of Smart and Biggar for the purpose of his income tax returns, accepted Smart's computation of Smart's "net share from time to time in the profits of Fetherstonhaugh and Company," and made his own return accordingly. The auditor's reports to Smart and Biggar indicate very clearly that, in arriving at the amount they were entitled to receive from Smart's share in the profits of Fetherstonhaugh and Company, the net profits earned at the various branch offices of Fetherstonhaugh and Company had been first divided between F. B. Fetherstonhaugh and R. S. Smart, as provided in the

agreement of December 3, 1928; and that from that share of Smart was also deducted the annual payment of $ .. .. to J. E. M. Fetherstonhaugh. The appellant, no doubt, approved of this computation as correct. It would have been more to his financial advantage had he insisted that all the profits be paid into Smart and Biggar, the shares of the partners then ascertained, and Smart required to meet his personal obligation to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh out of his own share in the profits of Smart and Biggar. I have no hesitation, therefore, in finding that the appellant's interpretation of agreement (3) was made in good faith.

As I have stated above, there is no evidence to indicate that the appellant benefited in any way by the payments to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh. At no time did he consider that he was entitled personally to any part of such payments. So far as the evidence goes, the only person who benefited by the payment was Smart, who thereby acquired the ownership of the shares of his former partners in Fetherstonhaugh and Company.

My conclusion, therefore, is that the amounts paid into the bank account of Smart and Biggar, and later disbursed by Smart to J. E. M. Fetherstonhaugh and F. B. Fetherstonhaugh, were at no time part of the "income of the partnership" of Smart and Biggar in which the appellant had any beneficial interest. The bank account of Smart and Biggar was no more than a conduit pipe through which the monies passed. The beneficial ownership thereof remained in Smart until the sums were paid out in satisfaction of his own personal obligations. No part of these sums was taxable income of the appellant.

Approximately two-thirds of the total payments made to F. B. Fetherstonhaugh over the years in question were paid to him by Smart on the bank account of Fetherstonhaugh and Company, Ottawa Branch. These sums were never in the bank account of Smart and Biggar and did not appear in their books in any way. To be "income of the partnership" of Smart and Biggar under section 30, they would have to be part of the annual net profit or gain received directly or indirectly by Smart and Biggar. They were never so received and the firm of Smart and Biggar

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never had any control over them. Even had the partners in Smart and Biggar interpreted their agreement (3) to mean that Smart was required to bring into Smart and Biggar all his profits and receipts from Fetherstonhaugh and Company, without any deduction of the amounts paid to F. B. Fetherstonhaugh, the mere fact that these sums were "receivable" by Smart and Biggar would not, under the circumstances here discussed, make them income of the partnership of Smart and Biggar until they were directly or indirectly received.

In *Dewar* v. *Commissioners of Inland Revenue* (1), Lord Hanworth, M.R., in delivering judgment in the Court of Appeal, said at p. 576:

> In the *St. Lucia* case, (1924) A.C. 508, Lord Wrenbury applied a test, and says this at page 512: "The words 'Income arising or accruing'"—words which we have not got in the present case—"are not equivalent to the words 'debts arising or accruing.'" To give them that meaning is to ignore the word "income". The words mean "money arising or accruing by way of income". There must be a coming in to satisfy the word "income". Again those words must be taken in their true sense, because that is not an exhaustive definition of what is taxable under an Income Tax Act. Profits and gains are taxable although they do not in the true sense come in . . . . . But all those observations tend in this direction, that you must find something which is in the enjoyment of the subject. He could make use of the money which lies abroad to his use. It is in that sense in his enjoyment. At the present time, upon the present facts, there is no enjoyment by Mr. Dewar, there is no gain by him, he has derived no profit and there is nothing in his hands which will answer the test of what you mean by "income".
>
> Then I come to (1928) 1 K.B. 73, the case of *Leigh* v. *Commissioners of Inland Revenue,* in which Mr. Justice Rowlatt, whose experience and knowledge of the Income Tax Acts is quite unrivalled, says this at page 77: "It is to be remembered that for Income Tax purposes 'receivability' without receipt is nothing. Before a good debt is paid there is no such thing as 'Income Tax upon it'." I agree with those words . . . . . I think Mr. Justice Rowlatt was right in saying that for Income Tax purposes receivability without receipt is nothing.

That was a case in which the appellant was entitled under his uncle's will, of which he was an executor and trustee, to a pecuniary legacy and also to a share of the residuary estate. As from 11th April, 1931 (one year from the date of the testator's death), the pecuniary legacy in law carried interest at 4 per cent per annum on such part of it as was for the time being unpaid. The first of several payments on account of that legacy was made to the appellant on 14th April, 1932, at or about which date he decided

(1) (1935) 19 Tax Cases 561.

to allow the question of interest to stand over. At the date of the hearing of the appeal he had received no interest and had made no election as to whether or not he would claim the interest from the estate, which was at all material times sufficient to enable the interest to be paid.

The appellant appealed against the inclusion in an assessment to Sur-tax made on him for the year 1932-33 of a sum representing interest at 4 per cent on the legacy. The Special Commissioners decided that the voluntary forgoing by the appellant of the interest which he had a right to receive ought to be regarded simply as being an application of the interest, which had accordingly been correctly included in the assessment.

On appeal, it was held that, as the respondent had not received any interest in respect of the legacy, no amount could be included for such interest in computing his total income for the purposes of the assessments in question.

In the same case, Romer, L.J., said at p. 579, after expressing approval of the decision in the *St. Lucia* case (*supra*):

> Now it is said, and said truly, that it has not been received by Mr. Dewar or placed at his disposal owing to his voluntary act or omission; that is to say the interest has not been paid, not because the debtor cannot pay it, but because Mr. Dewar has not thought fit to ask for payment, and further has intimated the possibility of his releasing the debtor altogether from payment of that interest. But for the purposes of Income Tax, one does not take an account of an impossible income on the footing of wilful default. The question is what income the man has received, and not what income he has received or but for his wilful default might have received. The truth of the matter here is that no one owes a duty to the State to maintain his assessment for Sur-tax at the highest possible figure. If a subject thinks proper so to do he assuredly may get rid of an income-bearing security for the purposes of avoiding the addition of the income from that security to his assessment for Sur-tax purposes. That is admitted. A tenant for life, if he thinks fit, may surrender his life interest. If he does so, most assuredly he does not remain liable to be assessed to Income Tax in respect of the income which he has surrendered, and I for myself can see no reason why a man should not, if he thinks fit, retain the corpus of an income-bearing fund and release his right to receive the income, either for one year or two years or altogether. If he does so in my opinion he does not receive the interest. For that reason that interest cannot be assessed for Sur-tax.

Maughan, L.J., after considering the *St. Lucia* case, *Lambe* v. *Commissioners of Inland Revenue* (1), and *Leigh* v. *Commissioners of Inland Revenue* (2), said, at p. 580:

> For the reasons given, in particular by the Master of the Rolls, who has dealt with those cases in some detail, I am of opinion that the cases

(1) (1934) 1 K.B. 178. (2) (1928) 1 K B. 73.

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were correctly decided and that they do not depend or relate solely to cases where there has been a default in payment by a debtor. I think they have a wider range than that and include cases where the debtor (if there is a debtor) for some reason other than default, and without any act on behalf of the creditor which might be alleged to amount to an exercise of dominion over the debt, has not in fact paid the sum of interest in question during the year of assessment.

Reference may also be made to *Woodhouse* v. *Commissioners of Inland Revenue* (1), in which it was held, following the decision in *Dewar* v. *Commissioners of Inland Revenue* (*supra*), that only the amounts received should have been included in the assessments.

As to the payments made to F. B. Fetherstonhaugh by Smart out of the account of Fetherstonhaugh and Company, my conclusion is that they were not part of the income of the partners of Smart and Biggar, and therefore formed no part of the taxable income of the appellant herein, for the years in question.

The appeals will therefore be allowed, with costs to be taxed.

Judgment accordingly.

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Dec. 4

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Feb. 18

BETWEEN:

CARDEN S. BAGG .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 15, 16 —Undistributed income of company—Reorganization of corporation and readjustment of capital stock—Capitalization of undistributed income—Receive "an amount by virtue of the reduction" of capital stock—Exchange of shares does not constitute a receipt of "an amount" within meaning s. 16 (1) of the Income War Tax Act—"Class of stock"—Appeal dismissed.

A company, admittedly had undistributed income on hand on June 3, 1938. At that time by Supplementary Letters Patent it reduced its capital by cancelling certain unissued shares of a par value of $100 each and by reducing the par value of 1800 issued shares from $100 each to $44 each. These were then converted into 1800 preferred shares of par value of $40 each and 1800 common shares of a par value of $4 each. Appellant held 518 shares in the company and

(1) (1936) 20 Tax Cases 673.

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in accordance with the provisions of the Supplementary Letters Patent converted those shares into 518 preferred shares and 518 common shares of the company. Respondent added to appellant's net income for 1938 an amount calculated at $21.15 per share on 518 shares. Appellant appealed from this assessment.

Held: That s. 16 (1) of the Act contemplates a reduction in capital and a distribution among the shareholders of the capital no longer required, and the receipt of new shares in exchange for his old shares by the appellant was not "an amount" received within the meaning of s. 16 (1).

2. That use of undistributed income for the purpose of writing off goodwill does not capitalize the undistributed income.

3. That the readjustment of capital stock of the company resulted in the whole of its undistributed income being capitalized within the meaning of s. 15 of the Act.

APPEAL under the provisions of the Income War Tax Act.

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

Hazen Hansard, K.C. and *J. Porteous* for appellant.

J. G. Ahern, K.C. and *T. Z. Boles* for respondent.

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

O'CONNOR J. now (February 18, 1948) delivered the following judgment:

This is an appeal under The Income War Tax Act, R.S.C. 1927, chap. 97 from the assessment for income tax for the taxation year 1938.

The appellant on the 3rd of June, 1938, and for some time prior thereto was the owner of 518 shares (of the par value of $100 each) of the capital stock of Domestic Gas Appliances, Limited, a corporation duly incorporated by Letters Patent of the Dominion of Canada.

The authorized capital of the Company was $200,000 divided into 2,000 shares of a par value of $100 each, of which, as of the 3rd June, 1938, 1,800 had been issued as fully paid up.

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Included in the capital assets was an item of goodwill of $140,000. Between 1921 and 1937 there were several write-offs of goodwill, totalling $140,000, and each in turn was charged to surplus.

This resulted in a reduction of capital from $180,000 to $40,000 and changed a surplus of $38,091.61 into a deficit of $101,908.39.

These write-offs of goodwill were disallowed by the Department, I assume in each of the years in which they were made.

These disallowances resulted from a taxation view point in the Company having undistributed income of $38,091.61.

It is admitted by the appellant that for the purposes of this appeal, the Company had on hand undistributed income on the 3rd of June, 1938, of $38,091.61.

By Supplementary Letters Patent, dated 3rd of June, 1938, granted to the Company under the Dominion Companies Act:—

1. The authorized capital was decreased from $200,000 to $79,200, such decrease being effected—

(*a*) By cancelling the 200 unissued shares of a par value of $100 each and

(*b*) by cancelling paid-up capital to the extent of $56 per share upon each of the said 1800 issued shares and thereby reducing the par value of the said 1800 issued shares from $100 per share to $44 per share.

2. The said 1,800 issued shares of the par value of $44 each were converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value of $4 each.

The preferred shares carried and were subject to the following terms and conditions *inter alia*:—That the Company may redeem all or any of the preferred shares outstanding upon notice, on payment of $40 plus a premium of 1 per cent and an amount equal to dividends declared and unpaid prior to redemption.

In accordance with the Supplementary Letters Patent, the 518 shares owned by the appellant were converted into 518 preferred shares of a par value of $40 each and 518 common shares of a par value of $4 each.

The respondent in determining the appellant's net income for the said year added a sum of $10,955.70, being

$21.15 in respect of each of the 518 shares of the capital stock of Domestic Gas Appliances, Limited, held by the appellant.

The then relevant sections of the Act were as follows:—

15. When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected.

16. Where a corporation having undistributed income on hand reduces or redeems any class of the capital stock or shares thereof, the amount received by any shareholders by virtue of the reduction shall, to the extent to which such shareholder would be entitled to participate in such undistributed income on a total distribution thereof at the time of such reduction, be deemed to be a dividend and to be income received by such shareholder.

16 (2). The provisions of this section shall not apply to any class of stock which, by the instrument authorizing the issue of such class, is not entitled on being reduced or redeemed to participate in the assets of the corporation beyond the amount paid up thereon plus any fixed premium and a defined rate of dividend nor to a reduction of capital effected before the sixteenth day of April, one thousand nine hundred and twenty-six.

The position of the respondent as disclosed by the Statement of Defence is this:—

(*a*) That upon the 3rd day of June, 1938, being the date upon which Supplementary Letters Patent were granted to Domestic Gas Appliances Limited, and in accordance with which the 518 shares of the said Company owned by the Appellant herein were reduced or redeemed and the Appellant received 518 preferred shares of the par value of $40 each and 518 common shares of the par value of $4 each in place thereof, the said Company had on hand undistributed income in the amount of $38,091.61 or $21 15 for each of the original common shares, which undistributed income as a result of such reduction or redemption was deemed to be received by the shareholders of the said Company, including the Appellant herein, and became properly taxable pursuant to subsection 1 of section 16 of the Income War Tax Act.

(*b*) That, in the alternative, if the shares of the said Company were not reduced or redeemed as aforesaid within the meaning of subsection 1 of section 16 of the Income War Tax Act, which the Respondent does not admit but denies, in any case, as a result of the readjustment of the capital stock of the said Domestic Gas Appliances, Limited in accordance with the above mentioned Supplementary Letters Patent, the whole of the said undistributed income in the hands of the said Company at the date of such readjustment was capitalized and is therefore properly taxable in the hands of the shareholders of the said Company pursuant to section 15 of the Income War Tax Act.

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A copy of the Supplementary Letters Patent, and the audited statement of the corporation as of December 31, 1937, (Exhibit 1), and the audited statement for the year ending December 31, 1938, (Exhibit 2), were filed.

Mr. Hoult, the auditor for the Company, stated that the undistributed income did not appear in either of the annual statements. He stated that nothing was done with the undistributed income on the reduction and conversion. That the net assets behind the stock of the Company as disclosed by the audited statement as of December 31, 1937, amounted to $75,000, and that there was no material change in the net assets behind the stock of the Company after the reduction and conversion of the 3rd of June, 1938, and prior to the redemption which took place on 30th July, 1938. That there was no reduction in the number of shares, but there was a reduction in the face value of $100,800. And that all the shareholders received on the 3rd day of June, 1938, was a certificate for one preferred share of the par value of $40, and a certificate for one common share of the par value of $4 in exchange for a certificate of one common share of the par value of $100. That the new shares were issued as fully paid up.

Mr. Johnson stated that he had been the accountant and had custody of the books of the Company and that on the reduction and conversion, no amount (money) had been paid to or received by the shareholders. And that when the capital had been reduced from $180,000 to $79,200 he assumed that the undistributed income of $38,091.61 formed part of the $79,200. He stated that the preferred shares were redeemed on the 31st July, 1938, and that the Company was wound up in 1941.

The Minute Books of the Company and the books of account were not placed in evidence.

Mr. Gregory, Assistant Chief Auditor, Corporation Assessor in the Montreal office of the respondent, said that the Company wrote off goodwill in the amount of $140,000 between 1922 and 1937, leaving $40,000 out of the original capital of $180,000 and the write-off of goodwill from a taxation standpoint reduced the surplus in the books of the Company. The write-offs were disallowed and that resulted in an undistributed income of $38,000. The share

capital, reduced to $79,200, consists in his opinion of $40,000—the balance left of the original capital of $180,000, plus the undistributed income of $38,000.

The sole date and transaction in issue is that of 3rd of June, 1938, and the questions are:—

1. Did the appellant receive "an amount by virtue of the reduction" which took place on the 3rd of June, 1938, within the meaning of Section 16 (1)?

While Section 16 (1) provides that "where a corporation having undistributed income on hand reduces or redeems any class of the capital stock or shares thereof", here only a reduction (and conversion) took place on the 3rd of June, 1938. What the respondent contends is that "amount" in Section 16 (1) means "consideration" and the consideration which the appellant received on the reduction and conversion was one share of preferred and one share of common.

But in my opinion Section 16 (1) contemplates a reduction in capital and a distribution among the shareholders of the capital no longer required. The "amount" mentioned in the section refers to a payment to a shareholder of his proportion of the capital not required. The receipt of the new shares in exchange for his old share by the appellant was not "an amount" received within the meaning of Section 16 (1).

The question of whether on the redemption, which took place on 31st July, 1938, the appellant received an amount within Section 16 (1), is not an issue raised in the pleadings. But as counsel dealt with the matter in argument, I should perhaps express my opinion. If there were an undistributed income on hand on 31st July, 1938, when the corporation redeemed the preferred shares, undoubtedly the appellant received an amount by virtue of the reduction which took place on the redemption.

But the shares which were redeemed on 31st July, 1938, were, pursuant to the conditions set out in the Supplementary Letters Patent, redeemable on payment of $40, the amount paid up thereon, plus a fixed premium of 1 per cent. And, as they then come within the class defined in subsection 2 of Section 16, the provisions of subsection 1 of Section 16 do not apply.

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Counsel for the respondent contended that the "class of stock", mentioned in Section 16 (2) refers to the original shares of the corporation and not the shares issued on the conversion. While I think that is a very ingenious argument, I am of the opinion that subsection 2 refers to the shares issued on conversion and not to the original shares.

2. The second question is was the undistributed income capitalized as a result of the reduction and conversion of June 3, 1938, within the meaning of Section 15?

The appellant does not contend that the disallowances were improperly made. The appellant admits for the purpose of this case that on the 3rd of June, 1938, the company had an undistributed income in the amount of $38,091.61.

The appellant contends first that if the undistributed income was capitalized, it was capitalized between 1922 and 1937. That is, that it was capitalized when the earned surplus was used for the purpose of writing off the capital asset of goodwill.

The difficulty that arises is due to the word "capitalize" which is most inapt. This was pointed out by Lord Dunedin in *Inland Revenue Commissioners* v. *Blott* (1):—

> I confess I am shy of the word "capitalize". It seems to me to leave one in a hazy state of mind as to what is the legal operation which is so described.

While profit may be capitalized in a number of ways the question here is how can undistributed income be capitalized in accordance with the provisions of the Dominion Companies Act, 1934 Statutes of Canada, chap. 33. As Lord Sumner said in the *Blott* case at pages 207-8:—

> To call it "capitalization" is neither here nor there, for, apart from the Companies Act, profits may be capitalized in more ways than one. What has to be asked and answered in this case is how could they be "capitalized" in accordance with those Acts, without either leaving the holder of the new shares liable to pay them up with new money or sharing out, the profits to the allottees, whether in cash or in account, so that the share-out of the money should be used to pay up the shares.

In my opinion a company may add undistributed income to capital so as to (*a*) issue shares to the extent to which it still has shares authorized but unissued or (*b*) increase the authorized capital and issue new additional shares or

(1) (1921) 2 A.C. 171 at 203.

increase the paid-up capital in each share thereby increasing the par value of each share.

In my opinion using the undistributed income for the purpose of writing off goodwill did not capitalize it.

The second contention is that the reduction and conversion did not capitalize the undistributed income.

It is correct that on the reduction the unissued shares were cancelled and no new additional shares were issued and the paid-up-capital in each share was in part cancelled and not increased.

But, in my opinion, the reduction did result in the capitalization of the undistributed income.

By the Letters Patent of 3rd of June, 1938, the capital stock was decreased from $200,000 to $79,200 by (*a*) cancelling 200 unissued shares of a par value of $100 each ($20,000) and (*b*) by cancelling paid-up capital to the extent of $56 per share upon each of the 1,800 issued shares and thereby reducing the par value from $100 per share to $44 per share, viz., $100,800, and the Letters Patent state:—

. . . . . **which amount viz., one hundred thousand eight hundred ($100,800) dollars, has been lost or is unrepresented by available assets.**

That is, that the capital that had been lost or was unrepresented by available assets was $100,800. But in fact the goodwill had been written off in the sum of $140,000. And the capital stock was to be decreased to $79,200 on the basis that this sum had not been lost, but on the contrary was represented by assets. That arose from the fact that the Company regarded the sum of $38,091.61 as capital and "used" it as capital and represented it to be capital in the Petition to the Secretary of State. And that position is quite in accordance with the first contention of the appellant that it was capitalized when it was used for the purpose of writing off the good will.

But on the admission of the appellant for the purpose of this case, this sum, on the 3rd of June, 1938, was undistributed income.

If the Petition had disclosed that $140,000 had been lost or was unrepresented by assets and the capital remaining was only $40,000, although the company had in addition undistributed income of $38,091.61, the capital

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stock would have been decreased to $40,000 not $79,200. This would have been accomplished by cancelling the 200 unissued shares and by cancelling paid-up capital of $77.15 per share of the 1,800 issued shares, thereby reducing the par value of each from $100 to approximately $22.85.

If the company then desired to convert the undistributed income into capital, the capital stock would then have been increased from $40,000 to $79,200 by increasing the paid-up capital to the extent of $21.15 per share upon each of the 1,800 shares, thereby increasing the par value from $22.85 to $44 per share of the said 1,800 shares.

That procedure did not take place because the company represented that the loss was only $100,800 and not $140,000, and that $79,200 was represented by available assets, whereas only $40,000 was represented by available assets. As a result, it is clear that precisely the same position was reached as if the capital stock had first been decreased to $40,000 and then increased to $79,200 by first, cancelling the paid-up capital in each of the issued 1,800 shares of $77.15 and then, increasing the paid up capital in each share by $21.15.

What the appellant contends is that the $38,091.61 was undistributed income before the reduction and was undistributed income after the reduction and conversion. That it was not converted into capital by the reduction.

If that is so then after the reduction the paid-up capital in each share was only $22.85 and not $44 and the company still had undistributed income of $38,091.61.

But under the Letters Patent the paid-up capital upon each share was $44. It was reduced from $100 to $44 by cancelling paid up capital to the extent of $56 upon each share.

Therefore, after the reduction the paid-up capital in each share was $44 and not $22.85. And the difference of $21.15 per share is the undistributed income of $38,091.61 that was capitalized on the reduction.

For these reasons I find that as a result of the reorganization of the company or the readjustment of its capital stock, the whole of its undistributed income was capitalized within the meaning of section 15 of the Income Tax Act.

The appeal will be dismissed with costs.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1948
Feb. 21
Mar. 1

BETWEEN:

SARNIA STEAMSHIPS LIMITED PLAINTIFF;

AND

DOMINION FOUNDRIES AND STEEL LIMITED DEFENDANT.

Shipping—Canada Shipping Act, 24-25 Geo. V, c. 34, s. 647—Rule 200, Exchequer Court Rules and Orders in Admiralty—Prescription—Motion to set aside order granting leave to commence action and writ of summons issued pursuant to such order.

Pursuant to s. 647 of the Canada Shipping Act, 24-25 Geo. V, c. 44, plaintiff obtained an *ex parte* order on January 26, 1948, granting leave to commence an action against defendant for damages occasioned by a collision between plaintiff's ship and one owned by defendant on October 29, 1945.

Defendant now moves to have the *ex parte* order and writ of summons issued pursuant to leave granted by that order, set aside.

Held: That in the absence of good and sufficient cause, or special circumstances for the exercise of the Court's discretion, the defendant should not be deprived of its defence of the statutory limitation of two years.

2. That rule 200 of the General Rules and Orders of the Exchequer Court in Admiralty refers only to the enlarging or abridging of times prescribed by the rules or by orders made under the rules; the order here in question was not made pursuant to rule 200 but to s. 647 of the Canada Shipping Act.

MOTION by defendant to set aside an *ex parte* order granted pursuant to s. 647 of the Canada Shipping Act.

The motion was heard before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

F. J. Hughes, K.C. for the motion.

W. T. Cook contra.

BARLOW D. J. A. now (March 1, 1948) delivered the following judgment:

An application by the defendant to set aside an *ex parte* order dated the 26th day of January, 1948, granting leave to the plaintiff to commence an action against the defendant for damages occasioned by a collision between the *SS.*

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Frank Wilkinson owned by the plaintiff and *Corvette K-133* owned by the defendant, which collision occurred on the 29th day of October, 1945, in the Cornwall Canal, and to set aside the writ of summons issued pursuant to leave granted by the said order.

The motion quite properly was argued as a substantive motion.

The application for the *ex parte* order was made pursuant to sec. 647 of The Canada Shipping Act, 24-25 Geo. V, (1934) cap. 44, which section is as follows:

647. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or for damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused, and an action shall not be maintainable under this Part of this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:—

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent, and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs, or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

The action would be barred by the above limitation on the 29th day of October, 1947, unless leave were granted pursuant to the said section.

The material shows that prompt notice was given by the plaintiff to the defendant as owner of the *Corvette K-133* of the claim to be made and that certain letters were exchanged by the solicitors for the plaintiff and for the defendant in March, 1947, when the defendant's solicitors wrote to the plaintiff's solicitor repudiating liability.

On the 11th August, 1947, the plaintiff's solicitors wrote the defendant's solicitors suggesting a discussion as to settlement. In reply on the 13th August, 1947, the defendant's solicitors wrote the plaintiff's solicitors as follows:

August 13, 1947.

Messrs. McMillan, Binch, Wilkinson & Co.,
Barristers etc.,
38 King Street West,
Toronto, Ontario.

Quesnell v. *Frank Wilkinson*

Dear Sirs:

We acknowledge receipt of your letter of August 11.

I have gone over this file carefully on several occasions. I find nothing in it. We are always glad to see your firm, but there is no use having a conference in this matter.

Yours very truly,
HUGHES AGAR THOMPSON & AMYS,
Per: (F. J. Hughes).

This clearly indicated to the plaintiff's solicitors that they must proceed by action.

The two-year limitation period expired on the 29th October, 1947, without any proceedings having been taken. On the 26th of January, 1948, the plaintiff obtained the *ex parte* order for leave to proceed. This is not a case where the plaintiff did not know whom to sue and could not find *Corvette K-133*. The said *Corvette* was at the dock of the defendant at Hamilton from the 5th November, 1945 until the 16th May, 1946. Furthermore the plaintiff knew that the defendant was the owner of the *Corvette* and could have commenced action *in personam* as it has now done, because, as set out above, the plaintiff shows in the material filed that it gave prompt notice to the defendant of the collision and of its claim.

The defendant should not be deprived of its defence of the statutory limitation of two years unless good and sufficient cause is shown. The plaintiff contends that the words of sec. 647 "in accordance with the rules of court" refer to rule 200 of the Admiralty Court Rules. This rule is as follows:—

200. The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed.

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This rule, in my opinion, does not assist the plaintiff. It only refers to the enlarging or abridging of times prescribed by the rules or by orders made under the rules. The order here in question was not made pursuant to this rule, but pursuant to sec. 647 of The Canada Shipping Act quoted above.

There do not appear to be any cases in our Court on this particular section of The Canada Shipping Act, but there are some English cases based on the English section, which has an identical wording with sec. 647. *The Llandovery Castle,* (1) is almost identical with the case at bar. See page 125 where Hill, J. says, with respect to an application similar to the one at bar, and under a like section of the English Act, " . . . the discretion can only be used in favour of a plaintiff if there are special circumstances which create a real reason why the statutory limitation should not take effect."

After having carefully considered the facts above set out, I am unable to find in the case at bar such special circumstances as would be a valid basis for the exercise of my discretion in favour of the plaintiff. The plaintiff, at all times, knew the owner of the *Corvette* and could have brought an action *in personam* as it has now done. The *Corvette* in question was at the defendant's dock in Hamilton until May, 1946.

The plaintiff knew finally and definitely in August, 1947, that the defendant repudiated all liability. This was over two months before the limitation period expired. Furthermore, the onus is upon the plaintiff to show that it is entitled to the exercise of the Court's discretion.

I am unable to find in the material, any sufficient circumstance which would justify me in depriving the defendant of the statutory limitation. See also *H.M.S. Archer* (2); *The P.L.M. 8* (3); *The Kashmir* (4).

The motion must succeed. The *ex parte* order and the writ of summons issued pursuant thereto will be set aside, with costs.

Judgment accordingly.

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(1) (1920) P. 119.
(2) (1919) P. 1.
(3) (1920) P. 236.
(4) (1923) P. 85.

1948

Jan. 20

Mar. 9

ENTRE:

GÉRARD BUREAU,..... RÉCLAMANT,

ET

SA MAJESTÉ LE ROI,..... INTIMÉ.

Revenue—Seizure—Forfeiture—Customs Act, R.S.C. 1927, c. 42, ss. 18, 171-179, 217 (3), 262—Civil Code of Quebec, s. 1241—Chose jugée (res judicata)—Effect of acquittal of claimant on civil action for return of seized goods—Statutory right of claimant to know grounds of seizure—Validity of decision of forfeiture dependent on validity of seizure.

The Customs officers at Armstrong, Quebec, seized the claimant's automobile and 159,600 American cigarettes on the ground that he had smuggled the cigarettes into Canada and had used the automobile for such unlawful importation. The claimant was then tried before a jury on a charge of having unlawfully imported goods in his possession but was acquitted. Notwithstanding such acquittal the Minister of National Revenue decided that the cigarettes and the automobile should be forfeited and, on being advised by the claimant that his decision was not accepted, referred the matter to this Court.

Held: That the acquittal of the claimant by the jury on the charge that he had been in possession of unlawfully imported goods was not *res judicata* in his favour of the fact that the goods had not been illegally imported and can have no effect in this action.

2. That the burden of proof that he had not smuggled the cigarettes into Canada and that he had not used the automobile for such importation lay on the claimant.

3. That the evidence shows that the claimant did not smuggle the cigarettes into Canada or use his automobile for such importation.

4. That the right of the Minister to decide the forfeiture is a statutory power and all the conditions for its proper exercise must be fully complied with.

5. That the owner or claimant of the seized goods has a statutory right to know the grounds of the seizure.

6. That the validity of the Minister's decision of forfeiture depends on the validity of the seizure and that he could not decide a forfeiture on grounds other than those given for the seizure, and that if the facts do not justify the grounds of the seizure a seizure based on such grounds is not valid and a decision of forfeiture based on such seizure is not authorized.

7. That the Court cannot justify a decision of forfeiture on grounds other than those given for the seizure.

Decision of the Minister of National Revenue that the claimant's goods be forfeited referred to the Court by the Minister under section 176 of the Customs Act.

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The reference was heard by the Honourable Mr. Justice Thorson, President of the Court, at Quebec.

Rosaire Beaudoin K.C. for claimant.

C. Thibaudeau for respondent.

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

THE PRESIDENT now (March 9, 1948) delivered the following judgment:

Il s'agit dans cette cause d'une réclamation que le Ministre du Revenu National a déférée à cette Cour en vertu de l'article 176 de la Loi des douanes, S.R.C. 1927, chap. 42, et ses amendements. Le réclamant nie le bien-fondé de la décision de confiscation que le Ministre a rendue en vertu de l'article 174 de ladite Loi dans l'affaire concernant la saisie de ses cigarettes et de son automobile, et les revendique.

Le 20 novembre 1945, à Armstrong, province de Québec, district de Beauce, les officiers de la douane du Canada ont saisi, au retour du réclamant des Etats-Unis, 159,600 cigarettes américaines qu'il y avait achetées et qu'il transportait dans son automobile et, quelques jours plus tard, un officier de la Gendarmerie royale du Canada, stationné à St-Georges de Beauce, a aussi saisi son automobile. Le 4 décembre le Sous-ministre du Revenu National pour les douanes et l'accise a notifié le réclamant, selon l'article 172 de la Loi des douanes, que les accusations suivantes d'avoir enfreint les lois relatives aux douanes avaient été portées contre lui, à savoir:

...que lesdites cigarettes ont été passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale.

et l'a prévenu que si cette saisie était maintenue les cigarettes et l'automobile deviendraient passibles de confiscation, et l'a aussi averti que toutes preuves en réfutation desdites accusations qu'il pourrait soumettre dans un délai de trente jours, sous forme de déclaration solennelle ou d'attestation, seraient examinées avec soin, et qu'à l'expiration du délai, il soumettrait un rapport sur les motifs de la saisie et les preuves ainsi produites au Ministre du Revenu National pour sa décision. Le 26 janvier 1946, le

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réclamant a soumis ses preuves sous forme d'une attestation, mais le 4 juillet le Sous-ministre a notifié le réclamant que sous l'empire des dispositions de l'article 174 de la Loi des douanes la décision suivante avait été rendue dans cette affaire:

...que les cigarettes et l'automobile soient confisquées.

Le réclamant a avisé le Ministre du Revenu National que cette décision n'était pas acceptée et le Ministre en vertu de l'article 176 a déféré la question à cette Cour.

Après la saisie une poursuite a été prise contre le réclamant devant la Cour de Magistrat du district de Beauce sur la plainte suivante:

Que Gérard Bureau, ci-dessus décrit, a, à Armstrong, dans le district de Beauce, le ou vers le 20 novembre 1945, sans excuse légitime, eu en sa possession des effets illégalement importés au Canada, à savoir 159,600 cigarettes américaines, d'une valeur imposable de $2,636.20 (amendée afin de lire—plus de $200), sur lesquelles les droits légitimes exigibles n'ont pas été acquittés, contrairement à l'article 217 (3) de la Loi des Douanes du Canada et ses amendements.

Le réclamant a choisi une enquête préliminaire à la suite de laquelle il a été condamné à subir son procès aux assises criminelles à St-Joseph de Beauce. La cause criminelle a été entendue le 24 octobre 1946, devant la Cour du Banc du Roi, juridiction criminelle, présidée par M. le juge Cannon, et un jury et le réclamant a été acquitté.

Le réclamant revendique son automobile et aussi les cigarettes à la condition de payer dans ce dernier cas les droits de douane ou de les retourner aux Etats-Unis.

A l'enquête devant moi les procureurs des parties ont versé au dossier le consentement écrit suivant:

Pour remplacer l'enquête et constituer le dossier les parties font les admissions suivantes:

1o Produisent copie de la plainte et de la sommation pour tenir lieu d'original,

2o Les notes sténographiques des témoignages devant les Assises Criminelles de Beauce pour tenir lieu de preuve,

3o Gérard Bureau a été déclaré non coupable par les jurés et il n'y a pas eu d'appel.

Ce consentement a constitué toute la preuve à l'enquête. Ni le réclamant ni l'intimé ont fait entendre de témoins.

La Cour est tenue de suivre les prescriptions de l'article 177 de la Loi des douanes qui se lit comme suit:

177. Dès que le ministre a déféré pareille question à la cour, cette dernière entend et examine d'après les papiers et témoignages soumis, et

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d'après toute autre preuve que le propriétaire ou réclamant de la chose saisie ou détenue, ou la personne censée avoir encouru l'amende, ou la Couronne produisent sur les ordres de la cour, et décide suivant le droit et la justice.

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Il n'y a qu'une question devant la Cour, à savoir, si la décision de confiscation du Ministre est bien fondée en droit et en fait. La Cour doit décider cette question selon les dispositions de la loi relatives à un tel sujet.

Il faut d'abord considérer la prétention du procureur du réclamant que son acquittement par les jurés de l'accusation qu'il avait eu en sa possession des effets illégalement importés au Canada a l'autorité de la chose jugée en sa faveur du fait qu'il n'avait pas illégalement importé lesdits effets et, par conséquent, que l'on ne pouvait pas les saisir pour ce motif et qu'une saisie ou une confiscation basée sur un tel motif est mal fondée.

L'article 1241 du Code Civil de la province de Québec se lit comme suit:

1241. 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.

Cet article correspond exactement à l'article 1351 du Code Napoléon.

Le procureur du réclamant pourrait peut-être invoquer à l'appui de sa prétention les opinions de certains écrivains français au sujet de l'influence de la chose jugée au criminel sur le civil. Ainsi, Glasson et Tissier, Précis de Procédure Civile, 3e édition, disent, à la page 108, n° 777:

Il est depuis longtemps admis, dans notre droit, que les décisions des tribunaux répressifs ont une autorité absolue pour ou contre toute personne, sans exception. On en conclut que ces décisions s'imposent aux juges civils saisis d'une action en dommages-intérêts ou de toute autre action civile fondée sur les faits qui ont donné lieu à la poursuite criminelle.

Et Lacoste, De la Chose Jugée, 3e éditon, est de la même opinion. Après avoir indiqué qu'il y a une controverse entre les écrivains français à ce sujet, il écrit, à la page 416, n° 1068:

dans l'ancien droit, le juge de l'action civile était lié par la décision du tribunal criminel.

et n° 1069:

Au reste, plusieurs articles tirés soit du Code civil, soit du Code d'instruction criminelle, . . . nous font voir l'influence du criminel sur le civil s'exerçant même au delà des limites de l'action civile: c'est une raison de plus pour décider que le jugement sur l'action civile est subordonné à la décision du tribunal de répression.

et n° 1070:

Cette opinion est celle de la jurisprudence et de la plupart des auteurs.

Lacoste explique qu'un des arguments pour soutenir cette doctrine est que l'ordre public l'exige.

Mais il faut signaler que les auteurs français distinguent les sentences de condamnation et celles d'acquittement. Lacoste parle de l'influence d'une sentence de condamnation d'un individu sur l'action civile, à la page 417, n^{os} 1073-1076:

1073. Il résulte d'abord de la sentence que tel fait a été commis, et, en second lieu, que l'individu poursuivi est l'auteur de ce fait.

1074. Il en résulte aussi que ce fait constitue une infraction à la loi, de telle sorte que, si l'acte a causé un préjudice, ce sera un préjudice injuste.

1075. Il en résulte que l'individu est coupable: il n'est pas seulement coupable au point de vue pénal, il est coupable civilement; car, la culpabilité civile résultant de la faute la plus légère, l'individu coupable pénalement est à plus forte raison coupable civilement.

1076. Il en résulte enfin que l'individu a commis telle infraction déterminée, ce qui peut influer soit sur la gravité de la faute, soit sur l'existence ou l'étendue du préjudice.

1077. Sur tous ces points, en vertu de la règle que nous avons posée, le juge de l'action civile est lié par la décision du tribunal criminel.

Mais une sentence d'acquittement d'une cour criminelle devant un jury n'a pas une telle influence sur l'action civile. Lacoste explique ainsi la distinction, à la page 420, n° 1089:

Quand une personne est acquittée sur une accusation portée devant le jury, d'ordinaire on se trouve dans l'impossibilité légale de déterminer la raison pour laquelle l'acquisition a été écartée. Le président ne pose pas au jury des questions séparées sur les divers points que nous venons d'indiquer; il demande seulement si l'accusé est coupable d'avoir commis tel ou tel fait. Le jury, de son côté, répondant simplement par Oui ou par Non, et n'expliquant pas sa pensée, on ne sait pas et l'on n'a légalement aucun moyen de savoir sur quoi est fondé l'acquittement. Rien ne dit que l'accusé n'a pas été acquitté uniquement parce que, dans l'espèce, la culpabilité pénale faisait défaut. Le juge de l'action civile peut donc, sans contredire la sentence d'acquittement, déclarer que l'individu acquitté a commis le fait pour lequel il a été poursuivi. Il ne la contredit même pas en déclarant que l'individu s'est rendu coupable d'une faute; car la culpabilité civile étant déterminée par la faute la plus légère, peut exister là ou n'existe pas la culpabilité pénale. En définitive, après une ordonnance d'acquittement, le juge de l'action civile

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jouira d'une grande latitude pour condamner l'accusé à des dommages-intérêts. Il ne faut pas qu'il ressorte de son jugement que l'accusé est pénalement coupable, mais cet écueil évité, sa liberté est entière.

Glasson et Tissier admettent aussi, à la page 111:

Il faut réserver toutefois le cas où l'acquittement est la conséquence d'une déclaration de non culpabilité émanant du jury ou d'un conseil de guerre; suivant la formule de la Cour de Cassation, le verdict du jury ou la décision du conseil de guerre "n'emporte chose jugée que sur la question de culpabilité", c'est-à-dire sur une question complexe, relative à l'élément moral ou intentionnel aussi bien qu'au fait matériel de l'infraction; or, faute de pouvoir déterminer auquel de ces points de vue le jury ou la juridiction militaire s'est placé, sa décision reste nécessairement dénuée d'influence sur les intérêts civils.

On peut donc conclure, l'article 1351 du Code Napoléon étant écarté, que même selon les opinions des juristes français l'acquittement du réclamant par un jury de l'accusation portée contre lui ne peut pas avoir l'autorité de la chose jugée dans cette cause, qui est une action civile.

Le procureur du réclamant ne peut invoquer l'article 1241 du Code Civil à l'appui de sa prétention que l'acquittement du réclamant par les jurés aux assises criminelles a l'autorité de la chose jugée sur le fait qu'il n'a pas illégalement importé les cigarettes. En France, il est généralement admis que l'article 1351 du Code Napoléon, auquel l'article 1241 du Code Civil de la province de Québec correspond, reste plutôt étranger à la question de l'influence de la chose jugée au criminel sur l'action civile. Ainsi, Glasson et Tissier, à la page 108, disent que l'article 1351 du Code Civil "paraît bien étranger à la question". Et Planiol et Ripert, Traité Pratique de Droit Civil Français, vol. 7, n° 1555, remarquent que l'on a reconnu "que l'article 1351 est étranger à la question et ne s'occupe de l'autorité de chose jugée qu'entre deux jugements civils successifs". De plus, il est bien établi que la doctrine "que les décisions des tribunaux répressifs ont une autorité absolue pour ou contre toute personne, sans exception" se rattache, en France, au système judiciaire établi, et dépend d'autres éléments de la loi française que de l'article 1351 du Code Napoléon. S'il n'y avait que cet article à considérer on ne pourrait pas s'appuyer sur la doctrine. Lacoste admet ce fait, à la page 414, n° 1063:

1063. Si donc pour trancher la controverse relative à l'influence du criminel sur l'action civile on n'avait comme élément de décisions que l'art. 1351, C. civ., il faudrait dire que le juge de l'action civile n'est aucunement lié par ce qui a été jugé au criminel.

Dans la jurisprudence de la province de Québec on trouve des divergences d'opinion à ce sujet. Il y a plusieurs décisions rendues par la Cour Supérieure et par la Cour du Banc du Roi, par exemple: *La Cité de Montréal* v. *Lacroix* (1); *Miller* v. *Rosensweig* (2); *Deslandes* v. *Compagnie d'Assurance Mutuelle du Commerce contre l'Incendie* (3); *Ménard* v. *Regem* (4); *Bourdon* v. *Hudson Bay Insurance Company* (5); *Desmarais* v. *Barbeau* (6); *Goluwaty* v. *Yurkevitch* (7). De ces décisions je préfère celle rendue dans la cause de *Deslandes* v. *Compagnie d'Assurance Mutuelle du Commerce contre L'Incendie* (*supra*), où il fut jugé dans une action civile, basée sur une police d'assurance, pour dommages résultant d'un incendie que l'acquittement du demandeur par un jury d'une accusation du crime d'incendie n'était pas chose jugée en sa faveur dans l'action civile. M. le juge Guerin en parlant du fait de l'acquittement du demandeur, a dit, à la page 237:

> This, however. in my opinion, does not affect the issue before the civil courts. The trial before the criminal court was instituted in the name of the Sovereign and the evidence made in the criminal court is not evidence before the civil courts. Whether the plaintiff did or did not set fire to his premises, the case must be decided by the ordinary rules of the civil law and the verdict of acquittal is not *res judicata* in favor of the plaintiff in his action under the insurance policy for the damages caused by the fire.

Et les autres juges de la Cour étaient de la même opinion. Je m'accorde avec l'exposé de M. le juge Létourneau sur la théorie que l'acquittement du demandeur devait avoir pour la cour civile l'autorité de *chose jugée*. Après avoir discuté la doctrine française, il a conclu, à la page 239:

> Et puis, si même l'on était tenté de s'en tenir à cette théorie que nous a soumise l'appelant et que je crois particulière à la France, il faudrait encore reconnaître, qu'elle cesse de jouer, d'avoir effet au civil, lorsque comme dans le cas qui nous occupe, il y a eu *acquittement* ou *absolution*.
>
> L'acquittement de l'appelant aux assises est donc ici sans portée aucune à l'encontre du plaidoyer de la compagnie intimée.

Enfin, nous avons la décision de la Cour Suprême du Canada dans la cause de *La Foncière Compagnie d'Assurance de France* v. *Perras et al and Daoust* (8). Les faits de cette cause étaient les suivants:

(1) (1910) R.Q. 19 B.R. 385,
(2) (1926) R.Q. 64 C.S. 513,
(3) (1932) R.Q. 52 B.R. 235,
(4) (1933) R.Q. 55 B.R. 98,
(5) (1934) R.Q. 72 C.S. 146,
(6) (1940) R.Q. 69 B.R. 21,
(7) (1943) R.Q. C.S. 414.
(8) (1943) R.C.S. 165.

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Les demandeurs ayant obtenu contre le défendeur Daoust un jugement le condamnant à payer la somme de $5,000 avec intérêts et dépens ont fait émettre un bref de saisie-arrêt après jugement entre les mains de la compagnie d'assurance. Le jugement contre le défendeur fut rendu à la suite d'un accident d'automobile dont le défendeur, qui conduisait la voiture, fut trouvé responsable. Les demandeurs étaient des passagers dans cette voiture. La saisie-arrêt après jugement était basée sur le fait que la compagnie d'assurance avait émis en faveur des propriétaires de l'automobile une police d'assurance les garantissant contre toute "responsabilité légale à l'occasion de blessures corporelles" causées à autrui par suite de l'usage de l'automobile. La compagnie s'était aussi engagée à garantir "toute personne transportée dans l'automobile ou la conduisant légitimement, ainsi que toute personne responsable de la conduite de cette automobile". Après l'accident le défendeur a été arrêté, et trouvé coupable par un magistrat d'une offense couverte par l'article 284 du Code Criminel du Canada. La compagnie d'assurance comme tierce-saisie a prétendu que l'accident a résulté d'une offense criminelle et, par conséquent, qu'elle n'était pas responsable. Les demandeurs ont contesté cette prétention et ont allégué que l'accident n'a pas résulté de la commission d'une offense criminelle mais, au contraire, qu'il s'agissait d'un cas de faute ordinaire couverte par la police. Le juge de première instance a refusé d'accepter la prétention de la compagnie et il a maintenu la saisie-arrêt après jugement, et la Cour du Banc du Roi siégeant en appel a unanimement confirmé le dispositif de ce jugement sans en adopter tous les motifs. Devant la Cour Suprême du Canada la compagnie a soutenu que la condamnation par le magistrat constituait chose jugée du fait que le défendeur avait commis une offense criminelle à l'encontre de l'article 284 du Code Criminel et qu'il en résultait qu'il ne pouvait se réclamer de la garantie qui lui était assurée par la police, vu que le maintien de sa réclamation serait contraire à l'ordre public. Cette prétention ne fut pas acceptée par la Cour. M. le juge Rinfret, maintenant le juge en chef du Canada, parlant pour lui-même et aussi au nom de MM. les juges Kerwin et Taschereau, après avoir cité l'article 1241 du Code Civil de la province de Québec,

a exprimé l'opinion qu'il ne paraîtrait possible d'arriver à la conclusion que le jugement de la cour de magistrat rencontrait les exigences de l'article 1241 pour constituer la présomption *juris et de jure* que cet article attache à l'autorité de la chose jugée. Il a dit qu'il ne voyait pas comment l'on pouvait décider que la demande était "entre les mêmes parties agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée" et il a confirmé la décision du juge de première instance "qu'un jugement rendu par une cour de juridiction criminelle n'a pas l'effet de la chose jugée devant nos tribunaux civils". M. le juge Rinfret a discuté les opinions des auteurs français et il a signalé que certaines dispositions, telles que les articles 3 et 463 du Code d'Instruction Criminelle, qui n'existent pas au Canada, expliquent la doctrine française dont nous avons parlé et il a dit, à la page 171, qu'il partageait l'avis de M. le juge Galipeault de la Cour du Banc du Roi:

> La loi étant entièrement différente de la nôtre, il y a donc là peu à retenir de ce qu'écrivent les auteurs français, admettant comme chose jugée les décisions des cours criminelles en France.

M. le juge Rinfret a aussi signalé que la jurisprudence anglaise est la même. Ainsi, dans la cause de *Castrique* v. *Imrie* (1) Lord Blackburn, à la page 434, s'exprime comme suit:

> a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged.

Et M. le juge Rinfret est arrivé à la conclusion que la décision rendue par le magistrat ne constituait pas chose jugée entre les intimés et l'appelante dans la cause devant la Cour. D'ailleurs, il a exprimé l'opinion que la preuve de la condamnation du conducteur de l'automobile par le tribunal criminel n'était pas admissible dans l'action civile.

Voir aussi la décision de la Cour Suprême du Canada dans la cause de *McLean* v. *Pettigrew* (2), où MM. les juges Taschereau et Kellock ont suivi l'arrêt dans la cause *La Foncière Compagnie d'Assurance de France* (*supra*) et ont dit que l'acquittement de l'appelant d'une accusation de "careless driving" en vertu de l'article 27 du Highway Traffic Act de la province d'Ontario n'avait pas l'autorité de la

(1) (1870) L.R. 4 H.L. 414.
(2) (1945) R.C.S. 62.

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"chose jugée" et ne pouvait pas lier les tribunaux civils. Malgré l'acquittement le tribunal civil pouvait arriver à la conclusion que l'appelant n'avait pas conduit sa voiture avec le "due care and attention" que requiert l'article 27.

Il faut donc conclure dans cette action que l'acquittement du réclamant par les jurés devant la Cour Criminelle siégeant à St-Joseph de Beauce, n'a pas l'autorité de la chose jugée en sa faveur du fait qu'il n'a pas illégalement importé les cigarettes. Strictement, la preuve de l'acquittement du réclamant n'était pas proprement admissible. Ce qui est arrivé devant la Cour Criminelle ne peut avoir aucun effet dans cette action. Malgré tel acquittement la décision de cette Cour dépend seulement de la preuve admissible devant elle à l'enquête et des papiers soumis par le Ministre en vertu de l'article 177 de la Loi des douanes.

Selon l'article 262 de ladite Loi, le fardeau de la preuve qu'il n'a pas passé les cigarettes en contrebande au Canada et qu'il ne s'est pas servi de son automobile à une telle importation incombe, à mon sens, au réclamant.

La preuve révèle les faits suivants. Le 19 novembre 1945, le réclamant, avec sa femme et son frère, est allé à Lewiston aux Etats-Unis où il a acheté 159,600 cigarettes américaines qu'il apportait dans son automobile à son retour au Canada le 20 novembre. Il est arrivé au bureau de douane à Armstrong, qui est à dix milles de la frontière, vers une heure du matin, et il a arrêté son automobile tout près du bureau. Ensuite, il est entré dans le bureau en disant à M. Gosselin, un des officiers de la douane, qu'il connaissait, qu'il revenait d'un voyage aux Etats-Unis et qu'il apportait dans son automobile un petit fusil 22 qu'il y avait acheté. Quand M. Gosselin, et aussi M. Poulin, un autre officier de la douane, lui ont demandé s'il avait quelque marchandise à déclarer, il a répondu qu'il n'avait rien autre chose. L'officier Poulin, qui était en devoir ce soir-là, est sorti du bureau pour faire une inspection de l'automobile et, quelques minutes plus tard, il est revenu au bureau en disant à Gosselin que l'automobile était pleine de cigarettes américaines et qu'il s'en allait chercher une lumière de poche. Gosselin est immédiatement sorti du bureau et le réclamant l'a suivi. Gosselin a vu par la porte ouverte de l'automobile une pile de cartons de cigarettes. Gosselin dit que le réclamant et son frère lui

ont offert $100 s'il les laissait passer, mais les deux frères et aussi la femme du réclamant nient aucune telle promesse et Poulin dit qu'il ne l'a pas entendue. Quand Poulin est sorti la première fois il a vu trois cartons de cigarettes sur le siège avant et quand il a fait son inspection plus complète il a trouvé que la valise de l'automobile, aussi bien que la partie arrière, étaient remplies de cigarettes. Ensuite, Poulin a demandé au réclamant d'amener son automobile près du perron du bureau afin de décharger les cigarettes et les compter dans le bureau, ce qui a été fait. Le réclamant a demandé combien ça coûterait de payer les droits sur les cigarettes et Gosselin, après avoir fait le calcul, lui a dit que ça coûterait à peu près $2,600. Le réclamant a dit que ce montant était trop élevé et qu'il ne pouvait pas le payer, et il a demandé la permission de reprendre les cigarettes et de les retourner au magasin aux Etats-Unis où il les avait achetées, mais on lui a refusé cette permission. Enfin, les officiers ont détenu les cigarettes. Mais, parce qu'il faisait nuit et qu'il pleuvait, ils ont laissé le réclamant continuer son voyage jusqu'à St-Georges de Beauce avec sa femme et son frère à la condition de revenir au bureau le lendemain pour livrer son automobile. Quand il n'est pas revenu, les officiers l'ont fait saisir.

Quoiqu'il y a du conflit entre les témoignages il me semble que la preuve établit clairement que le réclamant n'a pas passé les cigarettes en contrebande au Canada. A son retour des Etats-Unis il s'est rendu, comme le requiert l'article 18 de la Loi des douanes, au bureau de douane à Armstrong qui était le bureau le plus rapproché de l'endroit où il avait traversé la frontière. Il admet qu'il a répondu à Gosselin et à Poulin qu'il n'avait rien à déclarer, ce qu'il explique en disant qu'il y avait trop de monde au bureau pour déclarer les cigarettes en-dedans et, d'ailleurs, qu'il savait que Poulin allait voir les cigarettes. Il est certain qu'il n'était pas possible d'inspecter l'automobile sans les voir. Gosselin a vu par la porte ouverte de l'automobile une pile de cartons de cigarettes et il admet qu'il n'a pas eu de la misère à voir qu'il y avait des cigarettes dans l'automobile. Et Poulin dit aussi que l'on ne pouvait pas dérober autant de cigarettes, qu'il y avait une couverture mais que "ça paraissait quand on approchait". A sa première sortie

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il a vu les cartons sur le siège avant. Le réclamant prétend qu'il a demandé à Gosselin, une quinzaine de jours avant son voyage aux Etats-Unis le 19 novembre, combien ça coûtait de douane pour descendre des marchandises des Etats-Unis, et qu'il a répondu que ça coûtait 35 p. 100, qu'il a acheté les cigarettes dans cette supposition pour les revendre, et qu'il ne les aurait pas achetées s'il avait su que le montant des droits était si élevé. D'ailleurs, il faut signaler qu'il pleuvait, qu'il n'y avait pas d'officier dehors, et que le réclamant aurait pu passer le bureau sans s'arrêter et sans que les officiers de la douane en eussent eu connaissance, s'il l'avait voulu.

Dans les circonstances je suis d'opinion que le réclamant a satisfait à l'obligation que lui imposait la loi concernant le fardeau de la preuve et j'en suis venu à la conclusion qu'il n'a pas passé les cigarettes en contrebande au Canada. Il s'en suit qu'il faut aussi conclure qu'il ne s'est pas servi de son automobile à aucune telle importation. Le motif de la saisie de son automobile et de ses cigarettes, qu'on lui a notifié le 4 décembre 1945, suivant l'article 172 de la Loi des douanes, est donc mal fondé.

Mais le procureur de l'intimé a soutenu qu'il n'était pas nécessaire pour justifier la décision de confiscation de prouver que le réclamant avait passé les cigarettes en contrebande au Canada et qu'il s'était servi de son automobile à telle importation illégale, pourvu que l'on pût montrer qu'il avait commis quelqu'autre infraction à la Loi des douanes en vertu de laquelle ses biens deviendraient passibles de confiscation. Il a plaidé que la réclamation était réellement un appel de la décision du Ministre, qu'une cour d'appel peut confirmer le jugement *a quo* sans adopter les motifs du juge de première instance, et que cette Cour peut justifier la décision de confiscation des cigarettes et de l'automobile du réclamant sur des motifs tout autres que ceux de la saisie actuelle. Il a alors cité plusieurs articles de la Loi des douanes que, selon lui, le réclamant avait enfreints. Par exemple, il a soumis que le réclamant avait fait une déclaration fausse quand il a répondu aux officiers à Armstrong qu'il n'avait qu'un fusil à déclarer et qu'il a tenté de frauder le revenu en évitant de payer les droits sur les cigarettes. Et il a plaidé que l'on a pu saisir les cigarettes et l'automobile

en vertu de ces articles de la Loi que le réclamant avait enfreints et que, par conséquent, la Cour devait confirmer la décision de confiscation et renvoyer la réclamation.

Cette prétention soulève une question d'importance. Mais je suis arrivé à la conclusion qu'elle ne doit pas être acceptée. Le droit de décider que les cigarettes et l'automobile devraient être confisquées est un pouvoir extraordinaire que la Loi des douanes a conféré au Ministre du Revenu National. C'est un pouvoir statutaire et la validité d'une confiscation faite sous l'empire du statut requiert que toutes les conditions de l'exercice propre du pouvoir soient complètement remplies. Les conditions statutaires se trouvent dans les articles 171-179 de la Loi des douanes. Ces articles sous le titre "Procédure sur saisie, ou pour une prétendue amende ou confiscation encourue" constituent les règles qui gouvernent la saisie et la confiscation des marchandises ou choses et il faut satisfaire à chaque condition de ces articles. L'article 171 se lit comme suit:

171. Lorsqu'un navire, une voiture, des effets ou choses ont été saisis ou détenus en vertu de quelqu'une des dispositions de la présente loi ou de toute loi relative aux douanes, ou lorsqu'on allègue qu'une amende ou confiscation a été encourue sous l'autorité des dispositions de la présente loi ou de toute loi relative aux douanes, le percepteur ou le préposé qu'il appartient doit rapporter immédiatement les circonstances du cas au sous-ministre du Revenu national pour les douanes et l'accise.

Cet article a en vue que lorsque des marchandises ou choses ont été saisies ou détenues toutes les circonstances du cas seront rapportées au Sous-ministre du Revenu National pour les douanes et l'accise. Il aura alors le temps de considérer avec soin si une accusation doit être portée contre le propriétaire ou réclamant des choses saisies et de déterminer quels motifs de la saisie doivent être notifiés audit propriétaire ou réclamant suivant l'article 172, qui indique la prochaine phase de la procédure. Cet article se lit:

172. Sur ce, le sous-ministre du Revenu national pour les douanes et l'accise peut notifier au propriétaire ou au réclamant de la chose saisie ou détenue, ou à son agent, ou à l'individu censé avoir encouru l'amende ou la confiscation, ou à son agent, les motifs de cette saisie, détention, amende ou confiscation, et exiger de lui qu'il fournisse, dans les trente jours de la date de l'avis, telle preuve qu'il désire apporter dans l'affaire.

Il faut signaler que selon cet article le propriétaire ou réclamant des choses saisies a le droit statutaire de savoir les motifs de la saisie. En outre, on exige qu'il fournisse telle

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preuve qu'il désire apporter dans l'affaire. L'affaire dont parle l'article est la saisie basée sur les motifs que le Sous-ministre a déterminés et notifiés au propriétaire ou réclamant. Il ne lui faut répondre qu'à ces motifs. Il n'y a pas d'autres motifs qui le concernent. Ensuite, l'article 173 se lit comme suit:

173. A l'expiration desdits trente jours, ou plus tôt, si la personne ainsi appelée à fournir des preuves le désire, le sous-ministre du Revenu national pour les douanes et l'accise ou le sous-ministre adjoint des douanes peut examiner et peser les circonstances du cas, et soumettre au ministre son opinion et sa recommandation à ce sujet.

Le cas dont l'article parle veut dire la saisie basée sur les motifs donnés. Le Sous-ministre n'a pas d'autorité de soumettre au Ministre son opinion à aucun autre sujet. Alors, l'article 174 autorise la décision de confiscation comme suit:

174. Sur ce, le ministre peut rendre sa décision dans l'affaire concernant la saisie, la détention, l'amende ou la confiscation, et s'il y a lieu, prescrire les conditions auxquelles la chose saisie ou détenue peut être restituée, ou l'amende ou la chose confisquée remise, ou il peut déférer la question à la décision de la cour.

2. Le ministre peut, par règlement, autoriser le sous-ministre du revenu national pour les douanes et l'accise ou le sous-ministre adjoint des douanes à exercer les pouvoirs que le présent article confère au ministre.

Il n'y a qu'une affaire concernant laquelle le Ministre peut rendre sa décision, à savoir, la saisie dont on a fait allusion dans les articles précités. Alors, si le Ministre a décidé la confiscation des marchandises ou choses saisies, il est pourvu par l'article 175 que cette décision sera péremptoire à défaut d'avis écrit qu'elle ne sera pas acceptée et par l'article 176 que si un tel avis écrit est donné au Ministre il peut déférer la question à la Cour.

Il n'y a qu'une question devant la Cour, c'est-à-dire, le bien-fondé en droit et en fait de la décision de confiscation que le Ministre a rendue, lequel, à son tour, dépend du bien-fondé de la saisie. J'ai déjà dit qu'avant que le Ministre puisse exercer son pouvoir statutaire de décider la confiscation d'une chose saisie en vertu de quelqu'une des dispositions de la Loi relative aux douanes il faut que toutes les conditions statutaires préliminaires à l'exercice de son pouvoir soient complètement remplies. Ainsi, il faut que les motifs de la saisie soient notifiés au propriétaire ou réclamant de la chose saisie et que l'opportunité de fournir ses preuves en réfutation desdites accusations lui soit accordée.

La seule saisie concernant laquelle le Ministre peut rendre sa décision sous l'empire de l'article 174 est celle dont les motifs ont été notifiés selon l'article 172. Il n'y a pas d'autre saisie devant lui. Il me semble clair qu'il ne pouvait pas rendre sa décision de confiscation d'une chose saisie pour des motifs tout autres que ceux pour lesquels la chose a été saisie. Si, par exemple, comme dans le cas présent, les cigarettes du réclamant ont été saisies pour le motif que le réclamant les avait passées en contrebande au Canada, le Ministre ne pourrait pas les confisquer pour le motif que le réclamant avait fait une déclaration fausse ou avait autrement enfreint la Loi des douanes. Si le Ministre avait un tel pouvoir général la condition requise par l'article 172 qu'il faut notifier au propriétaire ou réclamant de la chose saisie les motifs de la saisie n'aurait pas de sens et ne vaudrait rien. Le bien-fondé donc de la décision du Ministre dépend du bien-fondé de la saisie, et si les faits tels que prouvés ne justifient pas les motifs de la saisie il faut déclarer qu'une saisie basée sur de tels motifs n'est pas bien fondée et qu'une décision de confiscation basée sur une telle saisie n'est pas autorisée.

Cela étant, la Cour n'a pas le pouvoir de faire ce qui n'est pas permis au Ministre. La Cour n'a pas de juridiction de décider une confiscation. La Loi des douanes a conféré ce pouvoir, pas à la Cour, mais au Ministre et il lui appartient exclusivement. La question que le Ministre peut déférer à la Cour est sa décision de confiscation et la seule question sur laquelle la Cour est appelée à se prononcer est le bien-fondé de ladite décision. S'il n'est pas permis au Ministre de décider la confiscation pour d'autres motifs que ceux de la saisie la Cour ne peut pas justifier sa décision pour d'autres motifs que ceux de la saisie. Il faut donc rejeter la prétention du procureur de l'intimé sur ce point.

Puisque la preuve établit que le réclamant n'a pas passé les cigarettes en contrebande au Canada et ne s'est pas servi de son automobile à une telle importation, il s'ensuit que les motifs de la saisie des cigarettes et de l'automobile tombent et que la décision de confiscation, étant basée sur ladite saisie, est mal fondée et doit être cassée.

Je n'exprime aucune opinion sur les questions si le réclamant a fait une déclaration fausse ou a commis aucune autre

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infraction à la Loi des douanes pour laquelle on a pu saisir ou confisquer ses cigarettes ou son automobile. Dans mon opinion, ces questions ne sont pas devant la Cour dans cette cause.

Je ne crois pas que la Cour puisse donner au réclamant la permission de reprendre ses cigarettes et les retourner aux Etats-Unis.

Je conclus donc en déclarant que l'automobile du réclamant lui doit être rendu, que celui-ci a droit de reprendre les cigarettes saisies sur paiement des droits de douane, et qu'il a droit à ses dépens.

Judgment accordingly.

1946

June 11

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April 27

BETWEEN:

EDWARD V. FLINN.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE..RESPONDENT

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 (1), 12 (1), 58—Income—Taxable income—Dividends are taxable income of the taxpayer in the year in which they are paid—Dividend notes issued by a company in December 1944 for the amount of a dividend and payable in December 1964 are not taxable income until they are paid as they constitute a mere acknowledgment of debt by the company and a claim in favour of the holder of the dividend note—Appeal allowed.

In December 1944 U.S. Corp. Ltd. declared a dividend but postponed payment thereof for a period of 20 years and, as evidence of the right to receive such dividend, issued dividend notes for the amount thereof payable on December 15, 1964, or on such earlier date as in the note provided.

Appellant, a shareholder who received one dividend note for the sum of $47.25, was assessed for income tax thereon for the year 1944. The assessment was affirmed by the Minister and appellant appealed to this Court.

Held: That the dividend note for $47.25 dated December 22, 1944, payable on December 15, 1964, or on such earlier date as in the note provided, received by appellant from the Company, is not "interest, dividends or profits" received from "stocks" during the year 1944.

2. That it will only acquire that quality when it is paid. *Association Insulation Products Ltd.* v. *Golder* (1944) 1 A.E.R. 533; (1944) 2 A.E.R. 203 followed and applied.

3. That presently it merely constitutes an acknowledgment of debt in so far as the Company is concerned and a claim with regard to the appellant.

APPEAL under the provisions of the Income War Tax Act.

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

C. B. Smith, K.C. and *G. S. Cowan* for appellant.

W. C. Dunlop, K.C. and *A. A. McGrory* for respondent.

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

ANGERS J. now (April 27, 1948) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act by Edward V. Flinn, of the Town of Dartmouth, Province of Nova Scotia, against the assessment with regard to income for the year 1944, which appears from the copy of the notice of assessment, included in the file of the Department of National Revenue transmitted by the Minister to the Registrar of the Exchequer Court, to have been mailed on July 21, 1945.

In his notice of appeal dated August 8, 1945, a copy whereof forms part of the record of the Department, the appellant says in substance:

the appellant is an accountant in the employ of Wagner Tours Limited, a body corporate having its head office at Halifax, in the county of Halifax;

in December 1944 he was the holder of 30 shares of the 7 per cent cumulative preference shares of five dollars each in the capital of United Service Corporation Limited, a body corporate with head office at Halifax;

in December 1944 United Service Corporation Limited, being in arrears in respect of the dividends on the said shares, declared a dividend of 31½ cents in respect thereof, but by the provisions of the resolution declaring this dividend postponed the payment thereof for a period of 20 years and, as evidence of the right to receive such dividend, issued dividend notes for the amount of such dividend payable on December 15, 1964, but subject to previous redemption as in the notes provided;

as holder of the said 30 shares the appellant received one of such dividend notes for the sum of $47.25, together with

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a letter from the president of the company outlining the steps taken in connection with the declaration of the said dividend and the issuance of the said notes;

annexed to the notice of appeal are copies of the following documents: (*a*) agreement dated December 9, 1944, between United Service Corporation Limited and Fred C. Manning, one of the holders of the said preference shares acting on behalf of himself and all other holders of said shares; (*b*) resolution of the Board of Directors of the said company passed on December 9, 1944; (*c*) the dividend note received by appellant; (*d*) the letter from the president of the company received by appellant;

the appellant desires to appeal from the said assessment only insofar as the sum of $47.25 has been determined by the Deputy Minister of National Revenue for taxation to be a part of the taxable income of the appellant and insofar as the appellant has been assessed in respect of taxation thereon in the sum of $16.50;

the appellant's reasons for appeal are as follows:

section 12 of the Income War Tax Act specifically provides that dividends shall be taxable income of the taxpayer in the year in which they are paid or distributed and inferentially they are not taxable in any other year;

the said dividend notes are not income within the meaning of any provision of the Income War Tax Act until paid;

the said dividend notes are merely evidence of the right to receive the dividend on the date on which by the terms of the declaration thereof such dividend is payable;

it has been the settled practice of the Minister of National Revenue not to treat the receipt of evidence of indebtedness as receipt of the indebtedness itself and in this regard the appellant craves leave to refer to the rulings of the Minister of National Revenue or the Deputy Minister for taxation in connection with the overdue interest on bonds of Abitibi Power and Paper Company.

The agreement between United Service Corporation Limited and Fred C. Manning, acting on behalf of himself and all other holders of preference shares in the capital stock of the company, after reciting that the capital of the company is divided into 150,000 7 per cent cumulative

preference shares of the par value of $5 each and 35,000 common shares without nominal or par value, that all the preference shares are issued and paid up, that dividends in respect of the preference shares are undeclared and in arrears for the period of four and one half years, that the amount of the said dividends has been earned through the operations of the company, but that it is considered inexpedient to deplete the working capital of the company by the payment of such dividends forthwith, that upon the execution of this agreement the directors of the company propose to declare dividends upon the preference shares in respect of the period of four and one half years, payable in accordance with the terms of certain notes of the company to be issued, that Fred C. Manning is the holder of two of the said preference shares and is contracting on behalf of himself and all other holders of preference shares, that by clause 64 of the articles of association of the company it is provided that if at any time the share capital of the company, by reason of the issue of preference shares or otherwise, is divided into different classes of shares, all or any of the rights and privileges attached to any such class may be modified, commuted, abrogated or otherwise dealt with by agreement between the company and any person purporting to contract on behalf of that class, provided such agreement is ratified in writing by the holders of at least three-fourths in number of the issued shares of the class or by a resolution passed and confirmed at extraordinary general meetings of the holders of such shares, stipulates as follows:

1. THAT the said Fred C. Manning agrees to and with the Company and for and on behalf of himself and all other holders of Preference Shares in the Capital Stock of the Company that if, as and when the Directors of the Company declare dividends upon and in respect of the said Preference Shares in respect of the said period of four and one-half years, for which the said dividends are presently in arrears, the said dividends to be payable according to the terms of, and at the times and in the manner specified in notes of the Company hereinafter described, the said holders of the said Preference Shares, and each of them, will accept postponement of the payment of the said dividends according to the terms, at the time or times, and in the manner specified in the said notes.

2. THAT the said notes referred to in paragraph one hereof, if, as and when issued, shall be unsecured notes of the Company, shall be payable December 15, 1964, unless sooner called for redemption in accordance with the terms thereof, shall bear interest at the rate of 4 per cent

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on the principal amount thereof payable half-yearly on the 15th days of June and December in each year until paid, shall be callable for redemption by the Company in whole or in part on any interest date at 102 per cent of the principal amount thereof on thirty days notice to the registered owners thereof, shall be subject to the right of the Company from time to time to purchase all or any of the said notes at prices not exceeding 102 per cent of the principal amount thereof, together with accrued interest, (any notes called for redemption or purchased by the Company to be forthwith cancelled) and shall be registered in the name of the holder thereof from time to time.

3. THAT this Agreement and everything herein contained shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

Annexed to this agreement is a ratification reading as follows:

WE, the undersigned holders of Preference Shares in the Capital Stock of UNITED SERVICE CORPORATION LIMITED, hereby ratify, sanction and confirm the attached agreement dated the "9th" day of December, A.D. 1944, made between the said Company and Fred C. Manning on behalf of himself and all other holders of Preference Shares in the Capital Stock of the said Company, and we hereby agree with the said Company and with each other to be bound by its terms.

This ratification bears the signature of a large number of shareholders with, opposite their names, the number of preference shares held by each of them.

A certified copy of this agreement was filed as Exhibit 4.

The resolution mentioned in the notice of appeal, after stating that the 7 per cent cumulative preferential dividend on the preference shares in the capital stock of the company is in arrears in respect of a period of four and one half years, that the holders of 75 per cent in number of the said shares have ratified an agreement dated December 9, 1944, between the company and Fred C. Manning, acting on behalf of himself and all other holders of the said preference shares, whereby the holders of the preference shares agree, in the event of the declaration of said dividend, to the postponement of the payment thereof in accordance with the terms of the notes therein and hereinafter referred to, concludes thus:

BE IT THEREFORE RESOLVED that the Directors do hereby declare a dividend in respect of the outstanding preference shares in the capital stock of the Company of thirty-one and one-half per centum (31½ per cent) of the par value thereof, being the amount of the arrears of the said dividend at the rate of 7 per cent for the period of four and one-half years, payable to the holders of the said Preference Shares of record as of the 15th day of December, A.D. 1944, according to the terms

of and at the time or times and in the manner specified in the form of note, a draft of which is attached hereto and initialled by the President of the Company for purposes of identification.

BE IT FURTHER RESOLVED that this Company do issue and deliver on or before the 30th day of December, A.D. 1944, to the holders of the said Preference Shares of record as of the 15th day of December, A.D. 1944, its notes in the form of the aforesaid draft as evidence of the rights of the said holders to the aforesaid dividend to which they may respectively be entitled and in the principal amounts of the said dividend to which they may respectively be entitled, and that the President or the Vice-President and the Secretary or the Assistant-Secretary of this Company be and they are hereby authorized from time to time to execute on behalf of this Company and affix the Corporate Seal of this Company to the said notes, and to do any and all matters and things and execute any and all documents necessary or useful for carrying into effect this resolution.

A certified copy of an extract from the minutes of a Directors' meeting of United Service Corporation Limited held on December 9, 1944, containing the said resolution, was filed as Exhibit 5.

The note received by the appellant, a copy of which is annexed to the notice of appeal, is in the following terms:

No. 33 *UNITED SERVICE CORPORATION LIMITED* $47.25

NOTE

UNITED SERVICE CORPORATION LIMITED, hereinafter called "the Company", will on the 15th day of December, A.D. 1964, or on such earlier date as the principal monies of this note become payable in accordance with the conditions endorsed hereon, pay to Edward V. Flinn of Dartmouth, N.S. or other registered holder for the time being, the sum of Forty-Seven Dollars and Twenty-Five Cents of lawful money of the Dominion of Canada.

The Company will pay to such registered holder interest on the said sum from the date hereof at the rate of four per centum per annum, until this note is paid, by half-yearly payments on the 15th days of June and December in each year, the first of such half-yearly payments to be made on the 15th day of June, 1945.

This note is issued subject to, and with the benefit of, the conditions endorsed hereon which are deemed to be a part of it.

GIVEN UNDER THE CORPORATE SEAL OF United Service Corporation Limited, this 22nd day of December A D. 1944.

(Sgd.) F. C. Manning, President
George C. Thompson, Assistant Secretary

A certified copy of this note was marked as Exhibit 6.

Attached to the note in question is a document entitled "Conditions", the only provisions whereof offering any interest in the present case read thus:

1. This note is one of a series of Notes payable on the 15th day of December in the year 1964, bearing interest at the rate of 4 per centum per annum.

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8. The notes of this series shall be callable for redemption by the Company in whole or in part on any interest payment date at 102 per cent of the principal amount thereof on thirty days notice to the registered holders thereof. In the event that the Company calls for redemption less than the whole of the outstanding notes, the notes to be so redeemed shall be determined by drawing lots, such drawing to be made by a person or persons appointed by the Board of Directors of the Company in such manner as may be determined by the Board. The said notes shall be subject to the right of the Company from time to time to purchase all or any of the said notes at prices not exceeding 102 per cent of the principal amount thereof, together with accrued interest to the date of purchase. Any and all notes redeemed or purchased by the Company as aforesaid shall be forthwith cancelled.

The letter of the president of United Service Corporation Limited to the preference shareholders of the company dated December 23, 1944, a copy whereof is attached to the notice of appeal, explains fully the circumstances in which the dividend note, with which we are concerned, was issued and the conditions of payment thereof. I believe it proper to quote the letter *in extenso*:

Dear Shareholder:

Your Directors have had under consideration for some time the question of payment of the arrears of dividends on the Preferred Shares of the Company in order that the Preference Dividend might be placed on a current basis. Dividends at the rate of 7 per cent per annum have been paid since 1936 but no progress has been made in paying the dividends which were passed for the four and one-half years preceding 1936. Having in mind the plans of the company for post-war expenditures your Directors have felt it inadvisable to reduce the current position of the company by the payment of these arrears at the present time.

On December 9, 1944, Mr. F. C. Manning, acting on behalf of himself and all the other preference shareholders, entered into an Agreement with the company whereby the Preference Shareholders agreed, on declaration of dividends in the amount of the arrears, to postponement of the payment thereof in accordance with the terms of 20-year notes for the amount to be issued by the Company. This agreement was ratified by the holders of more than 75 per cent of the outstanding Preference Shares of the Company and under the articles of association of the company this agreement is therefore binding on all Preference shareholders.

Following the making of the above Agreement the Directors on the 15th day of December, 1944, declared dividends on the Preference Shares covering the arrears and postponing the payment thereof in accordance with the terms of the note which is enclosed.

These notes are payable in twenty years on December 15, 1964, bear interest at 4 per cent per annum and are redeemable by the Company prior to the maturity date in accordance with the conditions endorsed on the note.

In the opinion of counsel for the company under existing legislation delivery of this note to you does not constitute payment of a dividend and is, therefore, not taxable income when the note is received; but when

the note is redeemed by the company, the amount paid will be taxable income in the hands of the registered holder of the note. Interest on this note when paid by the Company constitutes taxable income.

Yours very truly,
(Sgd.) Fred C. Manning
President
UNITED SERVICE CORPORATION LTD.

A certified copy of this letter was produced as Exhibit 7:

A copy of the memorandum and articles of association of United Service Corporation Limited was filed as Exhibit 2. The only article which offers any interest in the present instance is number 64, a certified copy whereof was marked as Exhibit 3; it reads thus:

Modification of Rights of Shareholders

64. If at any time the share capital of the Company, by reason of the issue of preference shares or otherwise, is divided into different classes of shares, in pursuance of the provisions of the next preceding article or otherwise, all or any of the rights and privileges attached to any such class may be modified, altered, varied, affected, commuted, abrogated or otherwise dealt with by agreement between the Company and any person purporting to contract on behalf of that class, provided such agreement is ratified in writing by the holders of at least three-fourths in number of the issued shares of the class or by a resolution passed and confirmed by the same majority and in the same manner as a special resolution at extraordinary general meetings of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be members holding, or representing by proxy, one-half in number of the issued shares of the class. This clause is not by implication to curtail the power of modification which the Company would have if this clause were omitted.

The question at issue is whether or not the dividend note of United Service Corporation Limited for $47.25 dated December 22, 1944, payable to the appellant on the 15th of December, 1964, or on such earlier date as the principal moneys of this note become payable in accordance with the conditions endorsed thereon, received by the appellant from the company, which on the date of the appellant's return of income for the year 1944 had not been paid constitutes an income. Income is defined in section 3 of the Act, the material part whereof reads as follows:

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

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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, . . .

I have to determine if in 1944 the appellant received "interest, dividends or profits" from "stocks or from any other investment".

It is clear to me that the appellant during the year 1944 received only from United Service Corporation Limited note number 33, dated December 22, 1944, for $47.25, which is to mature on December 15, 1964, or on such earlier date "as the principal monies of this note become payable in accordance with the conditions hereon".

As submitted by counsel for appellant the time of payment of a dividend determines the year in which it is assessable to tax.

Subsection 1 of section 12 of the Act indeed enacts:

Dividends or shareholders' bonuses shall be taxable income of the taxpayer in the year in which they are paid or distributed.

The authors and the jurisprudence support the doctrine that it is the time of payment of a dividend which determines the year in which it is subject to assessment.

Plaxton and Varcoe, in their "Treatise on the Dominion Income Tax Law", second edition, make the following comments (p. 168):

Received and Accrued:—In considering this question of the method to determine profits it should be remarked that the Dominion Act imposes the charge simply upon the annual net profit or gain directly or indirectly "received", rather than earned or made, and this provision contemplates the determination of profits by the best accounting system applicable to the particular business in question, and the word "received" must be interpreted to mean "received" in a sense in which it would be used by a business man in referring to the profits of the year of assessment. In many cases it means "accrued" or "earned" so that profits earned, but not actually received or paid, should wherever a business is carried on be regarded as "received" for the purpose of assessment.

In the case of *St. Lucia Usines and Estates Company Ltd. and Colonial Treasurer of St. Lucia*, (1), the headnote, fairly accurate and comprehensive, reads thus:

In 1920 the appellants sold all their property in St. Lucia and ceased to reside or carry on business there. In 1921 interest upon the unpaid part of the purchase price was payable to them, but it was not paid. The appellants were liable to pay income tax for the year 1921 under the Income Tax Ordinance, 1910, of St. Lucia, only if the interest above mentioned was "income arising and accruing" to them in 1921:—

(1) (1924) A.C. 508.

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Held, that though the interest was a debt accruing in 1921 it was not "income arising or accruing" in 1921, and that the appellants were not liable under the Ordinance to pay tax for that year.

Held, further, that the appellant not being liable to assessment at all for 1921, it was not material that by s. 25 of the Ordinance an assessment when entered in the list was to be "final and conclusive".

The following observation by Lord Wrenbury are pertinent and interesting (p. 512):

The words "arising or accruing" occur repeatedly in the Ordinance, e.g., in s. 4, sub-s. 1 (*a*) (*b*) (*c*) (*d*) and (*e*), coupled with the words "and derived from" or "or derived from". Sometimes the expression "derived from" is used alone, s. 5, sub-s. 1 (*a*) (*c*) (*g*) (i) and (ii). The respondent contends that the above interest "accrued" to the company in the year 1921, because it was payable in that year and none the less because it was not paid in that year. Their Lordships do not agree. The words "income arising or accruing" are not equivalent to the words "Debts arising or accruing". To give them that meaning is to ignore the word "income". The words mean "money arising or accruing by way of income". There must be a coming in to satisfy the word "income". This is a sense which is assisted or confirmed by the word "received" in the proviso at the end of s. 4, sub-s. 1. If the taxpayer be the holder of stock of a foreign Government carrying say 5 per cent interest, and the Government is that of a defaulting State which does not pay the interest, the taxpayer has neither received nor has there accrued to him any income in respect of that stock. A debt has accrued to him but income has not.

In re *Cross* v. *London and Provincial Trust, Limited,* (1), the Court of Appeal, affirming the judgment of Finlay, J., held that:

Where a debtor defaults and the appropriate income being money is not changed into something else but remains money which the debtor promises to pay at a later date, it cannot be said that the security has produced any income. The form of the funding bond was nothing but a promise to pay at a future date the interest in respect of which default had been made. The respondent company was not therefore assessable to income tax under Case IV. of Sch. D of the Income Tax Act, 1918, in respect thereof.

At page 796 we find the following relevant comments by Sir Wilfrid Greene, M.R.:

It is not open to question that income can be in the form of money's worth. Nor is it open to question that if the holder of a security, the contractual income from which is money, receives from the person liable to pay that money something of money's worth, namely goods, instead of the money, such goods are income arising from the security. Compare Scottish and Canadian General Investment Co., Ltd. *v.* Easson, (1922) 8 Tax Cas. 265, where debentures of a new company were received in place of interest due on bonds issued by an old company. On the other hand where there is a mere substitution of a promise to pay at a later date for the obligation to make an interest payment presently due, the owner of the security cannot be said to have received income from it. In such a case in truth that is exactly what has not happened, since the payment

(1) (1938) 1 K.B. 792.

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has been postponed instead of being made on its due date. Nor do I see how it can make any difference if upon the true reading of the transaction the original obligation is extinguished and the promise to pay at a later date is accepted in its place. If the holder of a mortgage agrees to accept a post-dated cheque in lieu of interest which has accrued due, it would surely be a misuse of language to say that he had received income from the mortgage, and that notwithstanding the fact (which I will assume) that the post-dated cheque was a thing of money's worth. A question of this nature arose under the Indian Income Tax Act (XI. of 1922) in Commissioner of Income Tax, Bihar and Orissa *v.* Maharajadhiraja of Darbhanga, (1933) L.R. 60 I.A. 146, 161.

MacKinnon, L.J., expresses the same opinion (p. 803):

The essential nature of the transaction was that the debtor, avowing his inability to pay what had fallen due, gave instead his written promise to pay at a future date. He might just as well have given his own post-dated cheque. Or, still more simply, he might have written on each of the gold bond coupons a promise to pay it in twenty years, with interest annually until payment.

It is quite true that income may arise by the receipt of money's worth as well as by the receipt of money. And it is equally true that a debtor may pay his debt by giving the promise of a third party to pay; indeed the best form of payment in the world, Bank of England notes, if subjected to the unusual treatment of being read, will be found to be promises by a third party to pay. But I am satisfied that there can never be payment of his debt by a debtor by giving his own promise to pay at a future date. And I am equally satisfied that, though income arises to a creditor from a debtors' having his debt, income does not arise by the debtor's promising that he will pay his debt later on.

The same view was adopted in *Associated Insulation Products Ltd.* v. *Golder* (1).

In the first instance that was a decision of Macnaghten, J., later affirmed by the Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.). The headnote relating to the judgment of Macnaghten, J., is thus worded (p. 533):

The appellant company was the beneficial owner of a number of shares in a corporation formed under the laws of the United States of America. On Dec. 15, 1936, the American corporation declared a dividend but by a further resolution provided that the distribution of the dividend should be in the form of a certificate of indebtedness to the shareholders payable on Jan. 1, 1940, with interest thereon at a fixed rate until payment. The appellant company contended that it was assessable to income tax in respect of this dividend in the year in which the dividend was declared:

Held: the company was assessable in respect of the dividend in the year in which it was actually paid.

In his judgment Macnaghten, J. makes the following observation (p. 534):

In the computation of the profits of a trade or business, debts due in respect of the trade or business must, no doubt, be included; but dividends are not assessable until they are received. Dividends payable in future are not assessable until they become payable *and are actually paid.*

(1) (1944) 1 A.E.R. 533 and (1944) 2 A.E.R. 203.

Counsel for appellant intimated that the facts in that case are very close to those in the case at bar, noting that the main difference is that the declaration of dividend in the latter was followed by the distribution of notes in compliance with the resolution, whilst in the former the American corporation, after declaring a dividend, provided by a further resolution that the distribution should be in the form of certificates of indebtedness. Counsel's submission that a promissory note is a certificate of indebtedness accompanied by a promise to pay at a later date is, in my opinion, well-founded.

In the Court of Appeal Scott, L.J. expressed this opinion (p. 203):

> The only question which I think calls for any consideration is what was the substantial effect of the double resolution of the American company passed on Dec. 15, 1936, and of the similar one passed on Dec. 20, 1937. If those resolutions provided in reality for a distribution by way of dividend not of money but of money's worth, the income tax due in respect of it under case V would be not on the money figure of interest payable on each share, but on the market value of the certificates on the date of their distribution multiplied by the number of shares held. If, on the other hand, the reality of the transaction was the declaration of a money dividend payable not presently, but only on a future date, namely, Jan. 1, 1940, then it follows that till the due date arrived and payment was in fact received by the respondent company as shareholder, no income arose from its foreign possessions.
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> On the whole I think the latter is the true view of what was done. The first half of the double resolution expresses the real intention rather than the second. The certificates seem to me to have been intended as a consolation for postponement of payment, which would on the one hand assure a reasonable rate of interest during postponement, and on the other give some of the advantages of a security for an existing debt, *debitum in praesenti* though only *solvendum in futuro*: for they would have some—perhaps a high—market value.

du Parcq, L.J. made substantially similar observations (p. 204):

> I cannot accept the suggestion put forward by the appellants that the decision in Cross's case (Cross *v.* London & Provincial Trust, Ltd., (1938) 1 K.B. 792) turned on the fact that the promise made under the funding plan was substituted for an earlier promise to pay interest. On the contrary, this court seems to me to have decided as it did, not because of, but rather in spite of, the fact that a new promise had been substituted for the earlier one. The Crown, as I read the report of the argument, was seeking to rely on that fact. The argument was that the old debt had gone, and that the bondholder had taken something marketable in its place. "The interest", it was said, "is discharged and money's worth takes its place". The argument for the subject was that a repeated promise to pay is no more equivalent to payment than the original promise. Promises are not payment. This latter argument prevailed and it was

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held that, when all was said, the funding bond then in question was "nothing but a promise to pay at a future date the interest in respect of which default has been made": see the judgment of Sir Wilfrid Greene, M.R., at p. 800 (1938) 1 All E.R., at p. 433). If the words "in respect of which default has been made" are omitted from that statement, the logic of the proposition and the principle which it states are alike unaffected. To my mind, it is clear from the judgment of Sir Wilfrid Greene, M.R., read as a whole, that a post-dated cheque, or a promissory note, or a promise in the form of the "negotiable instrument" (as it is called) which we have before us in the present case, can never be regarded as "income arising from securities out of the United Kingdom" or (to quote the words now applicable to the case) as "income arising from possessions out of the United Kingdom". They are money's worth, no doubt, but they are not income.

Uthwatt, J. agreed with his colleagues and stated (p. 205):

> The material surrounding circumstances as found by the Commissioners are (i) that the corporation while having a fund of profits available for distribution had not the necessary cash in hand and were unwilling to borrow and that this was the reason for the issue of the certificates; (ii) that while neither resolution used the word "dividend", the circular which accompanied the second distribution records that the directors in their resolution relating to it "had declared a dividend of 16 per cent", and states that "the distribution of 16 per cent is not to be paid in cash but to be in the form of scrip . . . which is in the form of a certificate of indebtedness"; (iii) the accounts of the corporation refer to the two distributions as "dividends" and to the latter distribution as a dividend paid; debit the total amount of their "surplus" and enter the amount payable under the certificates on the liabilities side of the balance sheet along with current indebtedness, but do not treat the sum in terms as loan capital.
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> To my mind the proper inference is that a distribution of profits as such was intended and made. The substance of the transaction, in my opinion, was the declaration of an ordinary dividend attracted by the stock, such dividend being payable at a future date, and the stockholders' rights in respect of the dividend being for convenience stated in a document which crystallized the position and made their rights conveniently marketable. Taking that view of the transaction, the first point taken by the company fails and upon the second point it follows that upon the authority of Cross' case ((1938) 1 K.B. 792) taxable income did not arise to the stockholders before the due date for payment under the certificates.

The case before me and that of *Associated Insulation Products Limited* v. *Golder* (supra) are very much alike. It would be difficult, I presume, to find two other cases showing so many points of similitude.

In the case of *Associated Insulation Products Limited* v. *Golder,* (supra) the resolution sets out that the Directors of the company have declared a dividend of 16 per cent and that its distribution will not be paid in cash, but in the form

of a scrip which is equivalent to a certificate of indebtedness, payable on a future date. In the matter now pending United Service Corporation Limited, which had on hand earnings, but not in the form of cash, and wished to pay to its shareholders the dividends in arrears, passed the resolution hereinabove related declaring a dividend payable twenty years later, save in certain contingencies which, by the way, did not materialize. Every condition required to be made in the Associated Insulation Products Limited case in order that a dividend should be paid in the year in which it was actually received and not the year in which the certificates were issued exists in the present case but, judging from the report of the Associated Insulation Products Limited case, the facts herein are more clearly established.

See also *Lambe* v. *Commissioners of Inland Revenue* (1).

There are no judgments of our Courts, as far as I know, in conflict with the decision of the Court of Appeal, which unanimously affirmed the judgment of Macnaghten, J. and I feel that it should be followed.

The balance sheet and the profit and loss statement (Exhibit 8) of United Service Corporation Limited for the year ending December 31, 1944, show the way in which the liability to the shareholders amounting to $236,250.17 was carried.

The same amount appears in the balance sheet and the profit and loss statement for the year ending December 31, 1945, filed as Exhibit 9.

The following decisions, in the same sense, may be consulted beneficially: *Income Tax Case No. 71* (2); *Rand Ropes (Proprietary) Ltd.* v. *Commissioner for Inland Revenue* (3).

In the first case it was held, allowing an appeal, that:

The receipt of a cheque did not result in a receipt of cash by the recipient until the cheque had passed through the bank and the amount had been credited to the payee; consequently on the basis of assessment adopted in respect of the appellant the amount of a cheque which could not be deposited with the bank for collection before the 1st July, 1925, could not be included in his income for the year ended on the 30th June, 1925.

(1) (1934) 1 K.B. 178.
(2) (1926) 3 S.A.T.C., 60.
(3) (1943) 13 S.A.T.C. 1 and (1944), A.D. 142.

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In re White Star Line Ltd. (1) the headnote, after relating the facts in detail, gives a brief but substantial summary of the judgment. I believe it apposite to quote this headnote:

> The R.M. Co. was the holder of a large number of shares in the W.S. Co. Both companies were in liquidation, and a claim was made by the liquidator of the W.S. Co. requiring the payment of £750,990 from the R.M. Co. as contributories in respect of the shares. The R.M. Co. contended that by an arrangement sanctioned by the court the sum of £750,990 was agreed to be satisfied by the issue of deferred creditors' certificates by which the payment of the debt was postponed to an indefinite date, the W.S. Co. together with all other creditors obtaining a certain measure of control over the business of the R.M. Co. and payment of interest in the meantime only out of contingent profits. It was contended that this was a payment in money's worth of the calls upon the shares. The deferred certificates were at all material times worth less than their face value:—
>
> *Held:* on a due consideration of all the facts, money's worth was not given by the issue of the certificates. The consideration for the release of the calls was, therefore, illusory and the transaction did not amount to payment within the Companies Act, 1929, s. 157.

See also *Hope* v. *Minister of National Revenue* (2); *Capital Trust Corporation Ltd. et al* and *The Minister of National Revenue* (3); *Robertson Ltd.* and *The Minister of National Revenue* (4); *Trapp* v. *Minister of National Revenue* (5); Dominion of Canada Taxation Service, H. H. Stikeman, formerly assistant deputy minister of the Department of National Revenue for taxation, pp. 12-2 and 12-3.

It was submitted on behalf of respondent that United Service Corporation Limited was in a position to pay the arrears of dividends which it owed and for which it distributed dividend notes to its shareholders. From this premise counsel concluded that the amount of these notes in the hands of the shareholders constituted income. In his opinion, the agreement between the company and its shareholders was that the company would declare the dividend and that the shareholders would lend the money back to the company and draw interest of 4 per cent per annum on the money so loaned. This would undoubtedly be a very ingenious scheme for evading income tax. The scheme however has not been established and I do not think that, without any evidence to that effect, I should assume

(1) (1938) A.E.R. 607.
(2) (1929) Ex. C.R. 158, at 161.
(3) (1936) Ex. C.R. 163; (1937) S.C.R. 192.
(4) (1944) Ex. C.R. 170.
(5) (1946) Ex. C.R. 245.

that the transaction which intervened between the company and its shareholders was executed for the purpose of avoiding income tax. On the contrary the balance sheet of the company for the year ending December 31, 1944, shows that, at the time the dividend notes were issued, the company had not the available cash to pay the outstanding dividends.

It was the duty of the Crown to establish that the appellant was liable to taxation; this the Crown has failed to do.

I do not think that the judgment in *Waterous* v. *The Minister of National Revenue* (1) cited by counsel for respondent is relevant and has any bearing on the question at issue.

A careful perusal of the Act, of the doctrine and of the precedents has convinced me that the dividend note for $47.25 dated the 22nd day of December 1944, payable on December 15, 1964, or on such earlier date as the principal monies of the note become payable in accordance with the conditions endorsed thereon, received by appellant from United Service Corporation Limited, is not "interest, dividends or profits" received from "stocks" during the year 1944. In my opinion, it will only acquire that quality when it is paid. Presently it merely constitutes an acknowledgment of debt in so far as the company is concerned and a claim with regard to the appellant. Like many other claims it may never be satisfied.

There will be judgment maintaining the appeal, setting aside the assessment for the year 1944 and the decision of the Minister affirming it and ordering that the sum of $16.50 representing the tax on the dividend note aforesaid be struck from the assessment.

The appellant will be entitled to his costs against the respondent.

Judgment accordingly.

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(1) (1931) Ex. C.R. 108.

1946
Apr. 2, 3
1948
Apr. 17

BETWEEN:

PAUL BELLEAU.....PLAINTIFF;

AND

MINISTER OF NATIONAL HEALTH AND WELFARE, THE HONOURABLE BROOKE CLAXTON AND THE CHIEF of NARCOTIC BRANCH, DEPARTMENT OF NATIONAL HEALTH AND WELFARE, COLONEL C. H. L. SHARMAN, both personally and ès qual..... DEFENDANTS.

Crown—Minister of National Health and Welfare—The Department of National Health and Welfare Act, 8 Geo. VI, c. 32, ss. 3 and 5 (g)—Chief of the Narcotic Branch—Action by a user of drugs seeking relief against orders given by the Minister and the Chief of the Narcotic Branch of the Department of National Health and Welfare and directed to his physicians to refrain from supplying him with morphine. —The Exchequer Court Act, R.S.C., 1927, c.34—Minister of National Health and Welfare is not an officer of the Crown within the meaning of s. 30 (c) of the Exchequer Court Act—The Opium and Narcotic Drug Act, 1929, ss. 6 (1), 7, 16 and rule 9—Acts done by the Minister and by the Chief of the Narcotic Branch acting upon the directions of the Minister in the administration of the Act, are not subject to review by the Exchequer Court if done in an administrative capacity—The Exchequer Court of Canada has no power under law to prevent a Minister of the Crown from transgressing his administrative function and entering the judicial field—The provisions of the Opium and Narcotic Drug Act, 1929, are intra vires of the Parliament of Canada —Action dismissed.

Held: That the Court has not jurisdiction to grant the relief sought in the action.

2. That the Minister of National Health and Welfare is not an officer of the Crown within the meaning of section 30 (c) of the Exchequer Court Act.

3. That the actions done by the Minister of National Health and Welfare and those by the Chief of the Narcotic Branch thereof acting upon the directions of the Minister in the administration of the Opium and Narcotic Drug Act, are not subject to review by the Exchequer Court if done in an administrative capacity.

4. That the Court has no power under law to prevent a Minister of the Crown from transgressing his administrative function and entering the judicial field.

5. That the Opium and Narcotic Drug Act, 1929, is valid and is not ultra vires of the Parliament of Canada. *Rex* v. *Gordon* (1928) 49 C.C.C. 272; *Ex parte Wakabayashi* (1928) 49 C.C.C. 392 and *Standard Sausage Company* v. *Lee* (1933) 4 D.L.R. 501; (1934) 1 D.L.R. 706 followed.

ARGUMENT on questions of law ordered to be set down and disposed of before the trial.

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

Charles M. Cotton, K.C. for plaintiff.

Rosario Genest, K.C. and *Charles Stein K.C.* for defendants.

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

ANGERS J. now (April 17, 1948) delivered the following judgment:

The plaintiff, by his action, asks that it be declared:

a) that under the Opium and Narcotic Drug Act, 1929, and its amendments and the regulations made thereunder the defendants have no right or authority to interfere in the treatment duly licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec, in good standing, consider necessary for their patients, and particularly to order physicians to refrain from prescribing such amount of morphine as they may deem their patients require for medicinal purposes;

b) that the defendants have no right or authority under the said Act, its amendments and regulations to deprive duly licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec, in good standing, of the right to obtain such morphine as they may require for their patients for medicinal purposes and to deprive them of the right of having their drug prescriptions filled;

c) that by giving orders to the attending physicians of plaintiff, all of whom were duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, to decrease the amount of morphine they deemed necessary to prescribe the plaintiff for medicinal purposes, the defendants violated the provisions of the Quebec Medical Act;

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d) that plaintiff is suffering from a medical and physical condition which requires him to receive such morphine as may be prescribed by his attending physicians for medicinal purposes;

e) that the defendants be enjoined for the future from interfering in any manner in the treatment that plaintiff's attending physicians may deem that he requires for medicinal purposes, and particularly that they be enjoined to refrain from giving any orders whatsoever to any attending physicians of the plaintiff, duly licensed and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, as to the amount of morphine such attending physicians may prescribe for him for medicinal purposes, whether the plaintiff be at a hospital or not;

f) that the defendants be ordered, after the service upon them of the judgment to be rendered herein, to abide by and obey all the orders therein contained under pain of all legal penalties;

g) that it be declared by the judgment to be rendered herein that the judgment will be authority for any druggist or other lawful supplier of morphine to fill in any prescriptions for morphine that any attending physician of plaintiff, duly licensed and a member in good standing of the College of Physicians and Surgeons of the Province of Quebec, may deem necessary to prescribe for plaintiff for medicinal purposes;

And subsidiarily, should the prayers contained in paragraphs a) and b) not be granted, that it be declared that insofar as the Opium and Narcotic Drug Act, 1929, its amendments and regulations made thereunder, may purport to authorize the defendants to interfere with the morphine treatment which duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec are of the opinion that their patients require for medicinal purposes and to order such physicians to cease so prescribing morphine for their patients and to blacklist such physicians who may not obey their orders and to deprive them of their rights to obtain morphine to treat their patients and to have their drug prescriptions filled, is to that extent unconstitutional

and ultra vires of the legislative powers of the Parliament of Canada as being for other reasons legislation relating to civil rights within the Province;

The plaintiff prays for costs in any event against the defendant Sharman personally, but without costs against the defendant The Minister of Health and National Welfare, except in case of contestation of the present action by them, and subsidiarily, should this prayer not be granted, that the Court recommend the Crown to pay the costs of the present action.

In his statement of claim the plaintiff says in substance as follows:

he is presently and has been for some months hospitalized at the public charge or at the charge of relatives at Notre Dame Hospital, City of Montreal, where he has been and is obliged to remain because of the illegal and ultra vires acts of the defendants;

he enlisted as a volunteer in the Canadian Army during the war of 1914-18; he was sent overseas, and subsequently in the fall of 1916, he was sent back to Canada as a 100 per cent war casualty from tuberculosis;

he was hospitalized in military hospitals till some time in 1917, when he was given his discharge;

he is in possession of the King's Certificate, which is only given to soldiers who suffer total disability and receive honourable discharge for honourable service;

subsequently to his discharge, he was in a private sanatorium until 1918, and thereafter at various times he was, because of his health, obliged to be in sanatoria and hospitals, up to 1920;

at all times while he was in military hospitals and in the sanatoria and other hospitals, he was administered morphine because of his medical and physical condition; and when he was not in hospitals, or sanatoria, he was under the care of physicians, who prescribed morphine for him because of his medical and physical condition;

in 1929, he was obliged to go to the "bush" for his health, and was given a permit by the Narcotic Branch of the Department of Pensions and National Health, to purchase morphine up to an amount of from 29 to 30 grains per day;

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from 1930 to 1938, the plaintiff and his physicians were in touch with the Department of Pensions and National Health, which at all times continued his permit to receive morphine because of his medical and physical condition;

the plaintiff was able, by great care, to regain his health and to reduce the amount of morphine that he requires because of his medical and physical condition to 10 grains a day;

in the fall of 1934, and the spring of 1938, the defendant Sharman wrote the plaintiff, congratulating him upon his success in reducing his dosage of morphine and of the way he had been able to re-establish himself in civil life;

the Department of Pensions and National Health, on several occasions during said period, advised the plaintiff that it was not the policy of the Department to interfere with the morphine treatment which physicians deemed necessary to prescribe for their patients;

under the care of his physician and because of the amount of morphine he was receiving, the plaintiff had succeeded in arresting his tuberculosis and re-establishing himself in civil life; he also was able to occupy a position that allowed him to support himself and his wife and to enjoy the respect of his relatives and friends;

during or about the year 1939, the defendant Sharman began to interfere with the treatment the plaintiff was receiving from his then attending physician, Dr. G. H. Courchesne, of the City of Quebec, and demanded that the said Dr. Courchesne take steps to change the treatment he considered the plaintiff required, and demanded that the plaintiff be submitted to a treatment leading to a complete cessation of the use of any morphine by him;

the said Dr. Courchesne, despite the numerous threats of legal proceedings made by the defendant Sharman, refused to accede to defendant's demands;

the defendant Sharman continued his threats of legal proceedings against plaintiff's attending physician, Dr. Courchesne, which threats he never carried into effect, and in the beginning of the year 1942, the Minister of Justice was approached to use his influence with the Department of Pensions and National Health, to have the defendant Sharman cease interfering with the treatment being given to the plaintiff by his physician;

at the request of the Minister of Justice, the plaintiff was examined by Doctors Lucien Larue and Sylvio Caron, both eminent physicians of the City of Quebec, who reported to the Minister that the hospitalization of the plaintiff would be useless and disastrous from more than one point of view;

the then attending physician of the plaintiff, Dr. Courchesne, also made a report to the Minister of Justice to the same effect;

the defendant Sharman refused to accept the reports of Doctors Larue and Caron made to the Minister of Justice and which had been forwarded by him to the then Department of Pensions and National Health;

Dr. Lucien Larue, in company with Mr. Jean Genest, K.C., interviewed the Minister of Pensions and National Health on behalf of plaintiff, at which interview Dr. Larue expressed very strong opinions about the hospitalization of the plaintiff as demanded by Colonel Sharman, stating it would be disastrous to the plaintiff in every respect;

on the representations of the said Dr. Lucien Larue and Mr. Jean Genest, K.C., the Honourable Ian Mackenzie, the then Minister of Pensions and National Health, agreed to appoint a Board of three physicians to examine the plaintiff and decide if he should continue to receive morphine and to study his case;

the doctors who would examine the plaintiff were to be chosen by Dr. Lesage, Dean of the Faculty of Medicine of the University of Montreal, who nominated Doctors Jarry, Saucier and Legrand, all eminent physicians of Montreal;

at the time when the said Board made their examination of plaintiff, he had succeeded in reducing his daily morphine dosage of 29 to 30 grains to 10 grains per day;

the said Board of Physicians found that they could not advise a complete discontinuance; they thought the daily dose plaintiff was receiving of 10 grains per day could be slowly reduced to a dose difficult to precisely foresee; the reasons of their advice were that while he did not have any active tuberculosis, he had been taking morphine for 27 years and that his habit was now very old; that he had vainly submitted to cures; that formerly his doses had been enormous (as much as 30 grains per day); but that with the aid of his physicians he had succeeded in reducing his

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dose to 10 grains per day, which was compatible with his daily work which he was satisfactorily accomplishing; that a part of his salary paid an allowance to his wife; and to cut off his morphine would have the effect of rendering hospitalization obligatory for an indefinite period; that the chances of success were very doubtful considering the length of the habit; that, moreover, he would lose his living and he was not of an age when he could easily find a new position; also that he might become mentally and physically unbalanced and a charge upon society; as to the recurrence of his tuberculosis it was impossible to foresee what would happen, the report of said physicians being dated the 22nd day of April 1942;

the defendant Sharman accepted the report of the said Board, and did not further interfere between the plaintiff and his then physicians till the fall of 1942;

contrary to the advice of the Board of Physicians, chosen by the Minister of Pensions and National Health to settle the plaintiff's case, about the end of October, 1942, without further examination of plaintiff and without any consultation with either plaintiff or his physician, Dr. Courchesne, the defendant Sharman ordered Dr. Courchesne to cease prescribing morphine for the plaintiff and required that the plaintiff be hospitalized;

Dr. Courchesne refused the reiterated demands of defendant Sharman to cease prescribing for the plaintiff and advised him that he would be prepared to face any charges that the defendant Sharman might see fit to bring against him under the Opium & Narcotic Drug Act;

instead of taking any proceedings against either plaintiff or his attending physician, Dr. Courchesne, before the Courts, where the respective rights of the parties could have been decided, the defendant Sharman cancelled the permit that the plaintiff had to purchase morphine and ordered the supplier from whom the plaintiff had been receiving his morphine to cease supplying him;

furthermore, illegally, capriciously and arbitrarily and without any authority under the Opium & Narcotic Drug Act, the defendant Sharman blacklisted plaintiff with all the doctors in the City of Quebec and neighborhood and ordered them not to treat the plaintiff or to prescribe any morphine for him;

by reason of the illegal, arbitrary and capricious action of the defendant Sharman, the plaintiff was forced to become an inmate of the Mastai Institution, Quebec, on or about the 18th of January, 1943, of which Clinic the said Dr. L. Larue of Quebec was the physician in charge;

at the said institution, the said Dr. L. Larue, because of his fear of the defendant Sharman, was forced, under unauthorized orders of the defendant Sharman, to reduce the amount of morphine administered to plaintiff, until his dosage had been decreased to one-third of a grain every 24 hours;

the said Dr. L. Larue was so forced to reduce the morphine dosage of plaintiff against his own strongly expressed opinion as to the advisability of such reduction;

the said reduction of the amount of plaintiff's morphine dosage at the said Mastai Institution under the illegal and unauthorized orders of the defendant Sharman had the result foreseen by the physicians in their report of April 28, 1942, the plaintiff under the said treatment losing 40 lbs. in weight, losing his appetite, his capacity to sleep, and beginning to run a temperature, a sure sign that his tuberculosis was again becoming active;

by reason of his having been forced to enter the Mastai Institution at Quebec the plaintiff lost his position, his social standing, exhausted his savings, lost his health and has become a public charge and unable to support his wife;

his condition became such that on or about the 17th day of June, 1943, the plaintiff left the Mastai Institution and came to Montreal where, because of his medical and physical condition, he was hospitalized at the Notre-Dame Hospital, Montreal, under the instructions of Dr. Jean Saucier, one of the physicians who had formed part of the Board appointed by the Minister of Pensions and National Health hereinabove set forth, where, under medical instructions, he was given four grains of morphine per day;

he remained in the said hospital to the end of July or the beginning of August, when he was forced to leave;

about the week (?), he went to St-Benoit Refuge, in the City of Montreal, where he was again given morphine according to his requirements;

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the authorities of the St-Benoit Refuge reported to the defendant Sharman that he was an inmate of that institution, and the said authorities were ordered by the defendant Sharman to immediately and drastically reduce plaintiff's morphine treatment, and further ordered, if plaintiff did not consent to such reduction, he was to be sent from the said institution;

plaintiff, in view of his experience at the Mastai Institution, was absolutely unable to consent to any reduction of his morphine requirements and was obliged to leave the said institution on or about the 10th September, 1943;

after leaving the said hospital, he was unable to obtain any proper treatment; and, after about ten days, plaintiff was in a state of collapse, and Dr. Edmond Laurendeau was called to see him and immediately ordered his hospitalization at the Hospital Notre-Dame de la Merci, of which hospital the said Dr. Laurendeau is Superintendent, and which said hospital is under the direction of the Frères Hospitaliers de St. Jean de Dieu;

he was hospitalized and received proper treatment at the said hospital, from the 20th September 1943 to about the 1st of May, 1944;

when plaintiff entered the said Hospital of Notre-Dame de la Merci, he was suffering from a right pleuro congestion of a tubercular nature;

the plaintiff was also suffering from an excessive amount of sugar in his blood;

the physical condition of plaintiff when he entered the said hospital was due to the plaintiff having been deprived of the amount of morphine which he required because of his medical and physical condition, and was the (cumulative) result of the reduction of his morphine doses at the Mastai Institution as hereinabove set forth and his subsequent inability to obtain proper treatment, the whole because of the illegal, unauthorized, arbitrary and capricious interference of the defendant Sharman in the treatment of plaintiff considered necessary by his physicians;

the said Dr. Laurendeau advised the defendant Sharman that plaintiff was in the said institution and notwithstanding the medical and physical condition of plaintiff, the said defendant Sharman illegally, capriciously, arbitrarily and

without right ordered the said Dr. Laurendeau to rapidly and drastically decrease the morphine being administered to plaintiff, and failing plaintiff's consent to said reduction, that he should leave the said institution;

plaintiff, because of his medical and physical condition and because of the effect upon his health of any reduction in the morphine doses would have refused to consent to such reduction and was obliged to leave the said hospital at the end of April or the beginning of May, 1944;

while plaintiff was out of hospitals, he was unable to get proper treatment;

on or about the 7th day of July, 1944, plaintiff was entered as a public patient in Notre-Dame Hospital, in a weakened condition and running a temperature, under arrangements made by the Department of Public Health for the Province of Quebec and by the Anti-tuberculosis League;

he remained in the said hospital till about the 19th day of February 1945;

while he was in the said hospital, representations were made to the defendant, the Minister of National Health and Welfare, the Honourable Brooke Claxton, requesting him to interfere and to see that the plaintiff was able to obtain the medical treatment that his medical and physical condition required;

the defendant the Minister of National Health and Welfare refused to interfere;

during the last few weeks the plaintiff was at the said Notre-Dame Hospital his morphine doses were reduced from 4 to 3 grains per day, without his consent;

the plaintiff was aware of such reduction because of its reaction upon his health, though his physician and hospital authorities assured him that he was still receiving 4 grains a day;

on the 19th day of February, he was again transferred to the Hospital of Notre-Dame de la Merci in such a weakened condition that for a time the said Dr. Laurendeau, the Superintendent of said hospital, had doubts that plaintiff would survive;

on the 18th day of March 1945, in view of a condition of progressive asthenia in the plaintiff, said Dr. Laurendeau referred plaintiff to Dr. Saucier for consultation;

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on the 23rd day of March 1945, Dr. Saucier reported that the plaintiff could not stand the reduction to 3 grains of morphine per day, that he had lost weight since his last reduction and had not regained it; that he slept badly, had no appetite and was coughing and that it was in the interest of plaintiff that he should be again given the dosage of 4 grains per day;

on the 4th of May, the said Dr. Laurendeau asked Dr. Antonio Barbeau, Neurological Professor at the University of Montreal and head of the Neurological Division of the Hôtel-Dieu, Montreal, and attached to the Neurological Department of Notre-Dame de la Merci Hospital, to examine the plaintiff, which he did; and after such examination, reported as follows:

> I do not believe that it would be wise to decrease the morphine of this sick person, because of the length of the habit and because of his organic and psychological state and because of the mental danger that, under the circumstances, might result from the discontinuance.

the defendant Sharman refused to accept the opinion of Doctors Saucier, Barbeau and Laurendeau, and on the 4th day of June 1945 wrote by his subordinate, K. C. Kossick, to Dr. Laurendeau to the effect that the Minister could not approve the continuation of morphine at the dosage indicated and required Dr. Laurendeau to advise him that the dosage would be immediately and rapidly diminished or that he would abandon the case;

at that time the plaintiff suffered from asthenia and from an eruptive sore with a grayish scab, in the planatary region of his right foot; also the right cavities of his heart were distended and the cross of his aorta had moved to the level of the clavicles;

the said Dr. Laurendeau also reported as Superintendent of the Hospital Notre-Dame de la Merci to the defendant Sharman he sincerely believed that the general condition of plaintiff was precarious and necessitated hospitalization;

in conformity with the orders of the defendant Sharman, the said Dr. Laurendeau, because of his fear of the defendants, required plaintiff to leave the Hospital of Notre-Dame de la Merci notwithstanding that he was strongly of the opinion that the plaintiff required hospitalization and had so advised the defendant Sharman;

no arrangements had then been made for the plaintiff to receive proper medical treatment when he left the

Hospital of Notre-Dame de la Merci, though such medical treatment was absolutely necessary in the then state of his medical and physical condition;

the plaintiff is presently being hospitalized in Notre-Dame Hospital, Montreal, where he has been obliged to remain because of his inability to receive proper medical treatment from responsible physicians outside of any hospital by reason of the illegal, wrongful and ultra vires interference of the defendants with his medical treatment deemed necessary for him by responsible physicians;

the present precarious and weakened health of the plaintiff is solely due to the illegal, unauthorized, arbitrary and capricious action of the defendants in interfering in the treatment of plaintiff deemed necessary by duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, and particularly by reason of the defendant Sharman ordering such physicians to refrain from prescribing such morphine as plaintiff required for medical purposes;

the defendants, by ordering the attending physicians of plaintiff, who were duly licensed and members of good standing of the College of Physicians and Surgeons of the Province of Quebec, to immediately and drastically reduce the amount of morphine such physicians deemed that plaintiff required for medicinal purposes, have violated the provisions of the Quebec Medical Act;

the defendants, and particularly the said Colonel Sharman, by giving the orders he has given as aforesaid to the attending physicians of plaintiff to cease prescribing such amount of morphine as they deemed the plaintiff required for medicinal purposes have arrogated to themselves powers and authority not given them under the Opium and Narcotic Drug Act 1929, its amendments and regulations made thereunder, and their interference in the treatment of plaintiff deemed necessary by his attending physicians as aforesaid has been and is a gross unauthorized, illegal and ultra vires abuse of executive power and actions in excess of the powers conferred upon them by the said Act, its amendments and regulations made thereunder;

the attending physicians of plaintiff submitted to the orders of the defendant Sharman, under fear of reprisal by the defendants and of being blacklisted and being unable

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to obtain any drug whatsoever which they may require for the treatment of their patients for medical purposes and to have their drug prescriptions filled;

if the Opium and Narcotic Drug Act, 1929, its amendments and regulations purport to authorize the defendants to interfere in the morphine treatment which attending physicians duly licensed and members of the College of Physicians and Surgeons in good standing believe to be necessary for their patients and to order such physicians to cease prescribing morphine to those patients, and blacklist any such physicians who may not obey their orders, the said Act, to that extent, is unconstitutional and ultra vires of the legislative power of the Parliament of Canada as being, for other reasons, legislation relating to civil rights within the Province;

as long as the plaintiff is hospitalized and is living a quiet life, he requires a minimum dosage of 4 grains of morphine a day which he is now receiving, but to regain his health and again take his place in society and to earn his livelihood he will require a minimum dosage of 6 grains a day because of his medical and physical condition;

the defendant Sharman is the subordinate and is under the complete power, orders and authority of the defendant the Minister of Health and National Welfare and the said defendant is bound to obey all directions and orders given him by the defendant the Honourable Brooke Claxton;

by reason of the illegal and ultra vires actions of the defendants, the plaintiff, in addition to losing his health, has been obliged to give up his occupation and by reason of the expenses to which he was put by the defendants, he has been reduced to penury and has been supported either at the public charge or by relatives;

the course of conduct of the defendant Sharman towards the plaintiff from the time he demanded that Dr. Courchesne cease prescribing morphine for the plaintiff, up to the present time, has been malicious;

without the benefit of an injunction to restrain in future the defendants from interfering in the medical treatment plaintiff requires and to restrain them from preventing plaintiff obtaining such morphine as he may require for medical purposes in the opinion of duly licensed physicians and members in good standing of the College of Physicians

and Surgeons of the Province of Quebec the plaintiff will be obliged to spend the rest of his life in hospitals, either at the public charge or at the charge of relatives, friends and should he be unable to remain in hospitals, he will be doomed to a premature and painful death.

In their original statement of defence the defendants, contrary to the provisions of Rule 95, denied generally the allegations of the statement of claim and pleaded specifically:

as a result of reports and inquiries made the Minister of the Department of National Health and Welfare came to the conclusion that plaintiff was a habitual user of drugs and that such drugs were supplied to him for self-administration and that he was not suffering from a diseased condition caused otherwise than by excessive use of drugs;

on September 22, 1942, the Deputy-Minister of the Department of Pensions and National Health wrote to Doctor Courchesne, the plaintiff's physician, and advised him that he was of opinion that there was not present in the plaintiff a diseased condition caused otherwise than by an excessive use of any drug and asked him to refrain from supplying narcotics to plaintiff, by prescription or otherwise, after October 31, 1942, and he advised him that, if he did not so refrain, appropriate action would be taken;

the statement of claim discloses no cause of action;

this Court has no jurisdiction to make the orders or grant the relief sought herein;

the defendant, the Honourable Brooke Claxton, is not an officer of the Crown within the provisions of the Exchequer Court Act;

all actions done by the defendant, the Honourable Brooke Claxton, as Minister of the Department of National Health and Welfare, in the administration of the Opium and Narcotic Drug Act, were done by him as he, in his discretion, saw fit and that such discretion is not subject to review by this Court;

the defendant, Colonel C. H. L. Sharman, in administering the provisions of the Opium and Narcotic Drug Act, was acting upon directions of his Minister, the Honourable Brooke Claxton, as the latter, in his discretion, saw fit and any acts done by him in pursuance thereto are not subject to review by this Court;

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this Court has no power to prescribe the manner in which a Minister of the Crown shall exercise his duties or functions.

As might be expected, plaintiff moved the Court:

for an order to strike out paragraph 1 of the statement of defence, as not being in compliance with Rule 95 of the Court;

for an order that the defendants furnish to plaintiff a statement specifically denying each one of the allegations of the statement of claim, which they do not admit, and the reasons for such denials;

for an order to try immediately the issues of law raised by the defendants in paragraphs 5, 6, 7, 8 and 9 of the statement of defence.

Rule 95 is clear and unequivocal; it reads thus:

95. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

Judgment was rendered on plaintiff's motion on February 22, 1946, ordering:

that the defendants furnish to the plaintiff a statement of defence specifically denying each one of the allegations of the plaintiff's statement of claim which the defendants do not admit before the 15th day of March, 1946;

that the issues of law raised by the defendants in paragraphs 5, 6, 7, 8 and 9 of the statement of defence be tried at the Exchequer Court, in the City of Ottawa, on Tuesday the 2nd day of April, 1946.

The defendants, on March 22, 1946, filed a "supplementary statement of defence" dealing specifically with each allegation of fact of the statement of claim. With this "supplementary" defence we are not concerned. The points of law to be disposed of in compliance with the judgment of the 22nd day of February 1946 may be summed up as follows:

1. Has the Exchequer Court jurisdiction to make the orders or grant the relief sought by the statement of claim?
2. Is the defendant, the Honourable Brooke Claxton, an officer of the Crown within the provisions of the Exchequer Court Act?

3. Assuming that all actions done by the defendant, the Honourable Brooke Claxton, as Minister of the Department of National Health and Welfare, in the administration of the Opium and Narcotic Drug Act, were done by him as he in his discretion saw fit, is such discretion subject to review by this Court?
4. Assuming that the defendant Colonel C. H. L. Sharman, in administering the provisions of the Opium and Narcotic Drug Act, was acting upon directions of His Minister, the Honourable Brooke Claxton, as the said Minister in his discretion saw fit, are any acts done by him in pursuance thereto subject to review by this Court?
5. Has this Court the power to prescribe the manner in which a Minister of the Crown shall exercise his duties or functions?

Counsel for plaintiff relies on paragraph (*c*) of section 30 of the Exchequer Court Act. The relevant part of the section reads thus:

> The Exchequer Court shall have and possess concurrent original jurisdiction in Canada
>
> (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer.

The first question arising is whether a Minister is an officer of the Crown within the meaning of paragraph (*c*) of section 30. The question has arisen several times and I deem it expedient to analyse briefly the various decisions which dealt with it.

In the case of *McHugh* v. *The Queen* (1), the head note, fairly accurate, is thus worded:

> 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. (*c*) of sec. 16 of The Exchequer Court Act.

The suppliant's petition was brought to recover damages for injuries he suffered by falling from his horse while crossing a bridge over the Old Man's River, at McLeod in the North West Territories. It was alleged in the petition that the bridge was out of repair and that the horse, having put a foot into a hole, stumbled and fell upon the suppliant,

(1) (1900) 6 Ex. C.R. 374.

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causing him serious injury. There were issues of fact as to whether or not the bridge was out of repair; also as to whether the fall took place on the bridge, because of its condition. These facts were denied. The Crown also relied on the defence of contributory negligence on the part of suppliant. After stating that he did not find it necessary to determine any of these issues, Burbidge J. expressed the following opinion (p. 381):

> There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (c) of the 16th section of The Exchequer Court Act. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under The Public Works Act, (1886) R.S.C. c. 36, it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for me, I think, to express any opinion as to whether the minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone.

The same view was adopted by Audette, J. in *Mavor* v. *The King* (1) where it was held (inter alia) that a Minister of the Crown is not an officer or servant of the Crown within the meaning of section 20 (now 19) of The Exchequer Court Act and that the Court will not review the decision of a Minister in the exercise of his statutory discretion.

The report shows that the suppliant, by his petition of right, was seeking to recover damages resulting from an accident he met with on a return trip in his automobile on the King Edward highway from Laprairie to the City of Montreal. The accident was alleged to be due to improper maintenance of the road by the Crown.

The learned judge came to the conclusion that there was not a tittle of evidence establishing that there was any officer or servant of the Crown whose duties or employment involved the maintenance of the road in question. He concluded that from this fact it will necessarily follow that there was not any negligence of an officer or servant of the Crown acting within the scope of his duties which

(1) (1919) 19 Ex. C.R. 304.

could have caused the accident. I believe it proper to quote a passage of the judgment (p. 309):

There is no evidence on the record to show that the Crown was in any manner, under any obligation to maintain the road in question in good repairs and as was decided in the case of McHugh *v.* The Queen, (1900), 6 Can. Ex. C.R. 374, in respect of a bridge built by and at the expense of the Dominion Government where there was no officer or servant of the Crown in charge of the same, that such duty could not be ascribed to the minister himself who is not an officer or servant of the Crown within the meaning of section 20 of the Exchequer Court Act Moreover the Court has no jurisdiction to sit on appeal from exercise of any statutory discretion given to the minister. Harris *v.* The King, (1904), 9 Can. Ex. C.R. 206; Municipality of Pictou *v.* Geldert, (1893) A.C. 524; Sanitary Commissioners of Gibraltar *v.* Orfila, (1890), 15 App. Cas., 400.

A judgment in the same sense, apparently overlooked, is the one rendered by Burbidge, J. in *The Hamburg American Packet Company et al.* v. *The King* (1). The head note reads in part thus:

There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

2. In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

On page 177 are the following observations by the learned judge:

Now it cannot be doubted that the ship channel between Montreal and Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada. But it does not follow that once the Minister has expended public money for such a purpose the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages. It is argued that the section of The Public Works Act to which reference has been made, and the 9th section of the same Act, which provides that the minister shall direct the construction, maintenance and repair of all harbours, roads or parts of roads, bridges, slides and other public works and buildings constructed or maintained at the expense of Canada, impose that duty and responsibility on the Minister, and that the Crown is liable for his failure to maintain any public work and to keep it in repair. With that view I do not agree. I do not think it was the intention of Parliament in enacting The Public Works Act to impose any such obligation or responsibility on the minister and through him on the Crown.

(1) (1901) 7 Ex. C.R. 150

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There is an evident intention to provide that when any work of the kind was to be done, it should, in respect of the enumerated works, be done under the direction of the Minister of Public Works; but I do not think there was any intention to make any such marked and striking departure from well understood rules and principles of government as that contended for. The Public Works Act was passed long before The Exchequer Court Act, and it cannot be doubted that it was never intended by any provision occurring therein to subject the Minister in respect of his political action or his discretion, or the Crown's as to the expenditure of public money, to the jurisdiction of any court.

This judgment was affirmed by the Supreme Court of Canada, 33 S.C.R. 252.

In the case of *Harris* v. *The King* (1) the facts were substantially as follows. The suppliant's husband was killed by being struck by the tender of an engine on a level crossing over the Intercolonial Railway tracks in Halifax. The evidence showed that the crossing was dangerous and that no special provision had been made for the protection of the public. Immediately before the victim attempted to cross the tracks, a train of cars had been shunted over this crossing in a direction opposite to that from which the engine and tender were coming. The engine used in shunting this train was leaking steam. The atmosphere was heavy and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke which was carried over toward the track on which the engine and tender were running and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross and, when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way.

In his judgment Burbidge J. set forth the following observations (p. 208):

And first, it is said that the accident would not have happened had there been gates or a watchman at the Green Street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman

(1) (1904) 9 Ex. C.R. 206.

or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection.

The decisions in *Municipality of Pictou* v. *Geldert* and *Sanitary Commissioners of Gibraltar* v. *Orfila,* above referred to, may also be consulted with advantage.

Another material case is that of *McArthur* v. *The King* (1). Discussing the scope of the words "officer or servant of the Crown" within the meaning of paragraph (*c*) of section 19 of the Exchequer Court Act, the President, after saying that, with a view to fixing the limits of the liability of the Crown for negligence within the terms of the statute it would not be a correct approach to the problem to assume that every person is included in the term merely because he is performing some national or public duty or service and is in receipt of an emolument from the Crown, made these remarks (p. 96):

That such an assumption is unwarranted seems obvious. It was contended, for example, in McHugh *v.* The Queen, (1900) 6 Ex. C.R. 374, that the Minister of Public Works was an "officer or servant of the Crown" within the meaning of section 16 (c) of the Exchequer Court Act of 1887, but this view was negatived by Burbidge J. This case was later approved and followed by Audette J. in Mavor *v.* The King, (1919) 19 Ex. C.R. 304. These two cases can be considered as authorities for the statement that the term "officer or servant of the Crown" in section 19 (c)

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

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of the Exchequer Court Act does not include a Minister of the Crown, even although he is in receipt of an emolument from the Crown. The Minister although appointed by the Crown is an adviser to the Crown and responsible to Parliament. There are also many other persons, who, although their appointments and emoluments come from the Crown, are clearly not in any sense "officers or servants of the Crown" within the meaning of the statute under discussion, such as, for example, the Lieutenant-Governors of the provinces who, although appointed and paid by the Crown, are His Majesty's representatives, and likewise the Judges of the Dominion or Provincial Courts, who, although appointed and paid by the Crown, are independent of it. These observations are made only for the purpose of showing that although the term "officer or servant of the Crown" is a general one, it does not follow that there are no limitations to its meaning. Indeed there are limitations to the term, inherent in the origin of the statute in which it appears, its context in the statute and the judicial interpretation of the meaning of the statute. . . .

Moreover, since it is quite clear that the liability of the Crown for negligence in the original statutory enactment was strictly limited, it is not to be assumed that the liability although it now covers a much wider field than it did at the outset, has now become unlimited.

A recent decision, which has some pertinence to the question at issue, is that rendered by the President in *Nicholson Limited* v. *The Minister of National Revenue* (1), in which the scope of the discretion of the Minister and the extent of the Court's jurisdiction are treated at some length (pp. 201-205).

In the case of *Literary Recreations Ltd.* v. *Sauvé* and *Murray* (2) it was held by the British Columbia Court of Appeal that "under the Post Office Act, R.S.C. 1927, c. 161, and the regulations made thereunder, the Postmaster-General of Canada has the right to determine which is 'mailable matter' and has a discretion to prohibit the use of the mails for the sending of non-mailable matter and his discretion is not open to review by a Court."

At the foot of page 391, we find the following comments by McPhilipps, J.A., relating to the discretionary power of the Postmaster-General to determine what is "mailable matter" and the absence of right of a Court of Justice to review his decision:

The Legislature having clothed the Postmaster-General with these extreme powers—but I have no doubt proper powers considering the question of peace, order and good government—it is not within the province of a Court of Justice to say what is the reasonable use of the conferred powers granted by statute. That is to say the discretion given by statute to the Postmaster-General is an unfettered discretion to determine what shall and what shall not be deemed to be mailable matter. How is it possible for the Court to say—that the Postmaster-General has

(1) (1945) Ex. C.R. 191. (2) (1932) 58 C.C.C. 385.

exercised a wrong discretion here? The language of the Legislature is, "if it be established to the satisfaction of the Postmaster-General . . . no letter . . . or other thing sent or sought to be sent through the Post Office . . . shall be deemed mailable matter:" reg. 219. That the Postmaster-General having pursued the statutory authority vested in him and having arrived at the conclusion that the appellant was using or endeavouring to use the Post Office for a fraudulent or illegal purpose—declared against the attempted user—something he was authorized to do and having exercised the power it is not for the Court to say that he has come to a wrong conclusion—he has acted and made his declaration all within the conferred powers granted to him by the Legislature. I cannot see that there is any right in the Court to invade the authority of the Postmaster-General so clearly and pronouncedly granted by the statute law.

Counsel for defendants referred to the decision of the Ontario Court of Appeal in *Peccin* v. *Lonegan et al.* (1), the head note whereof, sufficiently comprehensive and exact, is thus worded:

The fact that the Temiskaming and Northern Ontario Railway Commission appointed by the Lieutenant-Governor in Council to administer a public undertaking of the Crown in the right of the Province, is a body corporate and may sue and be sued, does not destroy the old constitutional right of immunity in respect of tortious acts of the Crown's servants or agents. The provision in the incorporating Act enabling a fiat to be granted by the Attorney-General and the fact that it was given in this case is not in itself sufficient to destroy that prerogative right.

The next case invoked by counsel for defendants is *The King and Noxzema Chemical Company of Canada, Limited* (2). The facts must be summarized briefly for a proper understanding of the decision of the Supreme Court, which, by the way, reversed the judgment of the late President of the Exchequer Court.

The respondent, a United States corporation, which had since 1932 carried on in Canada the business of manufacturing and selling toilet articles and medicated preparations to chain stores and wholesale dealers and paid sales and excise taxes on the basis of the prices charged, in 1938 entered into an agreement with Better Proprietaries Limited, a company incorporated under the laws of the Province of Ontario for the purpose of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations, whereby Better Proprietaries Limited became the sole distributor in Canada of the respondent's products.

In virtue of the said agreement, which became effective

(1) (1934) 4 D.L.R. 776. (2) (1942) S.C.R. 178.

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on January 1, 1939, Better Proprietaries Limited was to sell them at the prices previously charged by the respondent (unless the latter designated other prices) and to pay to respondent certain prices, which, it was calculated, were less than Better Proprietaries Limited's selling prices by amounts estimated to have been the cost to respondent of selling, of which it was relieved. The respondent thereafter paid sales and excise taxes on the basis of prices received from Better Proprietaries Ltd. The Minister of National Revenue, in pursuance of the powers vested in him by section 98 of the Special War Revenue Act (R.S.C., 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20), determined that these last mentioned prices were less than the fair prices on which such taxes should be imposed and that the prices at which Better Proprietaries Limited sold the goods to dealers were the fair prices on which the taxes payable by the respondent should be imposed. By information in the Exchequer Court His Majesty the King sued for the further taxes claimed and for penalties. The claim was dismissed and the Crown appealed.

It was held by the Supreme Court that the appeal should be allowed and that the Crown should have judgment for the additional taxes in accordance with the Minister's determination and for the penalties provided for by section 106 (5) of the Act.

Mr. Justice Kerwin, who delivered the judgment of Mr. Justice Rinfret, himself and Mr. Justice Hudson, made the following statements (p. 185):

I therefore turn to the grounds upon which the President proceeded and which, of course, are relied upon by the respondent. I proceed upon the assumptions that Better Proprietaries Limited is an independent sales corporation and that the Minister thought otherwise. Even with these assumptions, we cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal.

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The learned judge here referred to the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1) and quoted an extract from his judgment, which reads thus:

> And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In the judgment of the Chief Justice and Davis J., delivered by the latter, we find the following observations (p. 180):

> The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.
>
> My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

In the matter of Ontario Boys' Wear Limited et al. and The Advisory Committee, appointed pursuant to the provisions of the Industrial Standards Act and the schedules for the Men's and Boys' Clothing Industry, and The Attorney-General for the Province of Ontario (2), it was held that The Industrial Standards Act (R.S.O. 1937, chap. 191) and the regulations made thereunder were not ultra vires and that they were sufficiently complied with in the creation of the schedule in question. The judgment of the Ontario Court of Appeal, (1943) O.R. 526, affirming the judgment of Mackay J., (1942) O.R. 518, dismissing appellants' action, was affirmed.

The report discloses that the appellants, in their action, claimed that the Industrial Standards Act and the regu-

(1) (1885) 10 App. Cas. 229, at 235. (2) (1944) S.C.R. 349.

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lations made pursuant thereto were ultra vires and that, in any event, a certain schedule, purporting to have been established in conformity with the Act, which was approved by the Minister of Labour and on his recommendation declared to be in force by the Lieutenant-Governor in Council on or about April 1, 1939, of wages and hours and days of labour for the Men's and Boys' Clothing Industry for the Province of Ontario and which purported to confer upon the respondent, The Advisory Committee, among others, the power to collect certain assessments of money from appellants and other manufacturers engaged in the industry and to administer the schedule, was illegal and ultra vires because certain proceedings and conditions required for the creation of the schedule were allegedly not observed; that an injunction to restrain the said respondent and its servants from proceeding with prosecutions brought under the Act and from attempting to collect from appellants any sums whatever alleged to be owing under the said schedule, be granted; and that damages for legal expenses incurred in defending the prosecutions and for loss of time and travelling expenses incurred be allowed.

It appears from the notes of Kerwin J., who delivered the judgment of the Court (p. 354), that by section 8 of The Industrial Standards Act it was enacted that, if in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve it; that upon his recommendation the Lieutenant-Governor in Council may declare such schedule to be in force.

Further on (p. 357) Kerwin J. states:

On January 16th a number of persons attended at the designated committee room and the meeting was adjourned to January 19th. On that day a committee was selected with full power to consider the matters mentioned in the notice. The general meeting adjourned without any definite date being fixed. The committee met on various dates until on February 7th its members decided that a plenary session of the conference would be held on February 8th and informed the parties they represented to that effect. On February 8th the conference reconvened and agreed to a schedule. Strenuous objection was raised to this method of procedure, but by the first branch of section 8 of the Act it was the prerogative of the Minister, and his alone, to determine whether a schedule was agreed to by a proper and sufficient representation of employers and

employees. Such a determination is not reviewable by the courts, as has been held in many cases, a recent example of which is The King *v.* Noxzema Chemical Company of Canada Ltd., (1942) S.C.R. 178. The Minister exercised that prerogative, approved the agreed schedule (which was also approved by the Board), and, upon his recommendation the Lieutenant-Governor in Council declared it to be in force.

Reliance was also placed by the defendants on the decision of the Supreme Court in the case of *Les Commissaires d'Ecoles pour la Municipalité de la Paroisse de St-Adelphe and Joseph Charest et al and Patrick Douville and Les Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Adelphe, m.e.c.* (1).

An action had been brought by some ratepayers against the school commissioners, under the provisions of article 50 of the Code of civil procedure, asking that a certain resolution passed by the commissioners ordering the building of a school house be declared illegal, irregular and null and that a contract entered into between the commissioners and a contractor to do the work be set aside. It was held that the superintending and reforming power, order and control given to the Superior Court by article 50 of the Code of civil procedure are different from the power attributed to an appellate court; that the Superior Court cannot substitute its own opinion to the opinion of the persons or bodies mentioned in that article as to the decisions taken by the latter. It was further held that, in order to enable the Superior Court to exercise its power under that article, it is not sufficient that these persons or bodies have failed to perform some duties imposed upon them by law, but that it is necessary that their conduct will give rise to an illegality or a denial of justice which would be equivalent to fraud.

Article 50 of the Code of Civil Procedure reads thus:

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the Province are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

Mr. Justice Taschereau, who delivered the judgment of the Court, expressed the following opinion (p. 395):

La présente action est instituée sous l'empire de l'article 50 du Code de Procédure Civile qui accorde à la Cour Supérieure un droit de surveillance et de réforme sur les corps politiques et les corporations dans la province, et cette Cour a déjà décidé que la Cour Supérieure n'est pas

(1) (1944) S.C.R. 391.

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un tribunal d'appel des décisions des commissaires d'écoles. Le pouvoir conféré à la Cour Supérieure par l'article 50 C.P.C. est un pouvoir de contrôle et de surveillance qui diffère des pouvoirs que possède une cour d'appel.

The learned judge then referred to the case of *Hébert* v. *Les Commissaires d'Ecoles de St-Félicien* (1) and cited a passage from the judgment of Brodeur J. appearing on page 180. I do not deem it necessary to reproduce this passage which may conveniently be consulted.

Following an observation thereon, Mr. Justice Taschereau added (p. 396):

Les tribunaux, évidemment, n'interviendront pas lorsque, dans l'exercice des pouvoirs que la loi leur confère, les commissaires d'écoles prennent des décisions qu'ils croient être dans l'intérêt de la population et que, cependant, d'autres personnes peuvent ne pas approuver. Ce serait, comme le dit M. le juge Brodeur, dans la cause citée précédemment, substituer leur opinion à celle des commissaires, empiéter sur leurs attributions, et faire jouer à la Cour un rôle que la loi attribue aux membres de la commission scolaire.

See also *Therrien* v. *l'hon. W. Mercier et l'hon. Boucher de la Bruyère et al., m.e.c.* (2).

Counsel for defendants also rested on the judgment of Mr. Justice Pierre-F. Casgrain in the case of *Paul Belleau* v. *Hon. Brooke Claxton, Minister of National Health and Welfare,* and *The Chief of the Narcotics Branch of the said Department, Colonel Sharman, both personally and ès qual.* (3). The purpose of counsel in citing this judgment was to establish: 1. that a decision of a Minister in his administrative capacity cannot be revised by a Court; 2. that this judgment constitutes res judicata, the Superior Court of the Province of Quebec and the Exchequer Court having concurrent jurisdiction in virtue of paragraph (*c*) of section 30 of The Exchequer Court Act.

With respect to the first holding, which, though not very explicit, may possibly be inferred from the following "Considérant" (p. 222):

Considérant que la Cour est sans juridiction en raison de la matière vu qu'il s'agit dans l'espèce d'actes ministériels, faits et exécutés par un Ministre de la Couronne relevant du Parlement fédéral du Canada, dans l'exercice de ses fonctions comme ministre, et d'un employé subalterne de son Département, exerçant ses fonctions sous son contrôle, en vertu d'une loi fédérale et de ses règlements dûment édictés et approuvés par le Parlement du Canada;

it abides by the previous decisions on the subject.

(1) (1921) 62 S.C.R. 174.
(2) (1915) R.J.Q. 24 B.R. 352.
(3) (1946) R.P.Q. 220.

In connection with the second contention that the judgment constitutes res judicata counsel for defendants relied, as previously noted, on paragraph (*c*) of section 30 of The Exchequer Court Act. He could also have founded his contention on articles 40 and 48 of the Code of Civil Procedure of the Province of Quebec.

The material part of article 40 reads as follows:

40. The courts which have jurisdiction in civil matter in the Province are:

2. The Superior Court;

8. The Exchequer Court of Canada, which is a court of federal constitution.

Article 48 reads thus:

48. The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada and particularly in all suits or actions for alimentary pension; and it has exclusive original jurisdiction in cases of petition of right.

With respect to res judicata article 1241 of the Civil Code enacts:

1241. The authority of a final judgment (res judicata) is a presumption juris et de jure; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

Notwithstanding paragraph (*c*) of section 30 of the Exchequer Court Act, articles 40 and 48 of the Code of Civil Procedure and the concurrence of the three elements necessary: identity of the parties, of the cause and of the thing, seeing that the judgment of Casgrain J. is principally based on the fact that the defendants were not legally summoned before the Superior Court of the Province of Quebec sitting in the District of Montreal, because they have not their domicile or residence within its jurisdiction and because the whole cause of action did not arise therein, and that the other reason set forth by the learned judge is not clearly and definitely the *ratio decidendi,* but constitutes rather an *obiter dictum,* I do not think that I can accept the claim of res judicata.

The question arose as to whether the doctrine of res judicata applies in the case of an interlocutory judgment. I believe that it does when the judgment disposes finally

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of the suit. Be that as it may, the problem offers very little interest in the present case seeing the conclusion which I have reached.

Another argument set forth on behalf of plaintiff is that The Opium and Narcotic Drug Act, 1929, is unconstitutional and ultra vires of the legislative power of the Parliament of Canada as being legislation relating to civil rights within the province. This question was dealt with and decided against plaintiff's contention in the following cases: *Rex* v. *Gordon* (1); *Ex parte Wakabayashi* (2); *Standard Sausage Company* v. *Lee* (3). After studying attentively the relevant sections of the Act and carefully perusing these decisions, I have come to the conclusion that the Act is valid and is not ultra vires of the Parliament of Canada.

It was urged on behalf of plaintiff that the judgments in *McHugh* v. *The Queen, Mavor* v. *The Queen* and *MacArthur* v. *The King* (supra) deal with an entirely different section of The Exchequer Court Act, a section worded differently to paragraph (*c*) of section 30, namely paragraph (*c*) of section 19. Paragraphs (*c*) and (*f*) of section 19 mention the negligence of any "officer or servant" of the Crown, whilst paragraph (*c*) of section 30 refers only to any "officer" of the Crown. It is idle to say that no explanation of this difference in the terminology is given; one should not expect too much accuracy from our legislators.

In the French version we find in paragraphs (*c*) and (*f*) of section 19 the words "employé ou serviteur" and in paragraph (*c*) of section 30 the word "fonctionnaire". Again a dissimilarity, which is not astonishing, taking into account such occasional occurrence. The word "officer" in paragraphs (*c*) and (*f*) of section 19 is translated into "employé" and in paragraph (*c*) of section 30 into "fonctionnaire". I do not think that either word includes a Minister of the Crown. The term "officer" is not as explicit and clear; still it is the one which was adopted when the statute was drafted. Unfortunately laws enacted by the Parliament often lack clearness and precision.

(1) (1928) 49 C.C.C. 272.
(2) (1928) 49 C.C.C. 392.
(3) (1933) 4 D.L.R. 501 and (1934) 1 D.L.R. 706.

As pointed out by counsel for plaintiff the Department of National Health and Welfare was established by an Act entitled "The Department of National Health and Welfare Act", 8 Geo. VI, chap. 22, and a Minister was appointed to preside over it and have the management and direction of its business.

Counsel drew the attention of the court to paragraph (*g*) of section 5, which entrusts the Minister with the administration of, amongst others, the Opium and Narcotic Drug Act. The relevant portion of section 5 reads thus:

5. The duties, powers and functions of the Minister shall extend to and include all matters relating to the promotion or preservation of the health, social security and social welfare of the people of Canada over which the Parliament of Canada has jurisdiction, and, without restricting the generality of the foregoing, particularly the following matters:

(*g*) the administration of the Food and Drugs Act, The Opium and Narcotic Drug Act, the Quarantine Act, the Public Works Health Act, the Leprosy Act, the Proprietary or Patent Medicine Act and The National Physical Fitness Act and of all orders and regulations passed or made under any of the said Acts.

From this counsel concluded that the Minister is an officer of the Crown under paragraph (*c*) of section 30 of The Exchequer Court Act. I cannot agree with this view.

Counsel for plaintiff submitted that, if parliament has handed over to a Minister of the Crown or any other person the duty to decide certain questions and given them the discretion to do so, a Court cannot interfere with that discretion, provided it is exercised within the limits of the law; that, on the other hand, if that discretion is abused, if it is quasi-judicial and if it does not give the party towards whom it is exercised an opportunity to be heard, the Court may interfere. Counsel urged particularly that The Opium and Narcotic Drug Act, 1929, gives no discretion to the Minister with regard to the matters set forth in the statement of claim. He specified that the only discretion given to the Minister by the Act is in connection with the subjects enumerated in section 3 and that he can only exercise it with the approval of the Governor in Council. Section 3 contains, among others, the following provisions:

(1) With the approval of the Governor in Council, the Minister may

(*a*) issue licences for the import, export, sale, manufacture, production and distribution at a stated place of any drug;

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(b) name the ports or places in Canada where any drug may be exported or imported;

(c) prescribe the manner in which any drug is packed and marked for export;

(d) prescribe the record that shall be kept by any person in connection with the export, import, receipt, sale, disposal and distribution of the drug or drugs mentioned in the schedule to this Act; and

(e) make all convenient and necessary regulations with respect to the issue and duration and the terms and forms of the several licences that may be issued hereunder and to the payment of fees for such licences.

The Minister unquestionably has a discretion to exercise regarding the powers allotted to him by section 3. The section uses the word "may" and not "must" or "shall". This naturally implies on his part the liberty to determine whether he will or not do any of the acts prescribed in the various paragraphs of section 3. May we conclude that these instances are the only ones in which the Minister has the power to use his discretion? Unfortunately the Act is not definite in this regard and one must interpret it to the best of his knowledge. I do not think that the contention of counsel for plaintiff is correct. His interpretation of the Act with respect to the Minister's discretion seems to me too narrow.

In reply to counsel for plaintiff's contention, counsel for defendants referred to sections 6, 7, 9 and 16 and regulation 9. Section 6 has no relevance to the question at issue. The second part of section 7 which enacts that "every physician, veterinary surgeon, dentist and retail druggist shall make to the Minister, *as and when required,* a declaration . . ." implies a discretionary power. The same remark applies to section 9, especially subsection (2), which says that the provisions of subsection (1) shall not apply to a duly authorized and practising physician, veterinary surgeon or dentist but that such physician, veterinary surgeon or dentist shall on request furnish the Minister with any information which he may require under any regulation made under the Act with respect to the drugs received, dispensed, prescribed, given away or distributed by such physician, veterinary surgeon or dentist.

Rule 9, although somewhat differently worded, is to the same effect, in fact substantially a repetition.

Counsel for defendants dwelt at some length on the point that, apart from his right to obtain information from physicians, veterinary surgeons and dentists regarding drugs received, dispensed prescribed and distributed by them, the Minister is entitled to use some discretion in the enforcement of the Act and the regulations made thereunder.

I believe that the Minister, in his administrative capacity, has a discretion to exercise in connection with the enforcement of The Opium and Narcotic Drug Act and the regulations made thereunder. This discretion, however, is not boundless; it should be limited to acts of administration and should not embrace judiciary powers.

The jurisdiction of the Exchequer Court is strictly limited. It is fixed by the Exchequer Court Act. Jurisdiction is also attributed to it by various Acts with which we are not concerned in the present case.

Counsel for plaintiff relied on clause *c*) of section 30 of the Exchequer Court Act to establish that the Court is competent to grant the relief sought in the petition. The clause in question, as we have seen, provides that the Exchequer Court shall have concurrent original jurisdiction in Canada in all cases in which relief is sought against any *officer* of the Crown for anything done or omitted to be done in the performance of his duty. After giving the matter a careful and elaborate study I am satisfied that a Minister is not an officer or, according to the French version of the law, "un fonctionnaire" of the Crown within the meaning of clause *c*) of section 30.

Dealing with the issues of law raised in paragraphs 5, 6, 7, 8 and 9 of the original defence, in compliance with the judgment of the 22nd day of February, 1946, I wish to make the following statements.

The Court has not, in my opinion, jurisdiction to grant the relief sought in the present suit.

The Minister is not an officer of the Crown within the meaning of paragraph (*c*) of Section 30 of The Exchequer Court Act.

The actions done by the Minister of National Health and Welfare in the administration of The Opium and Narcotic Drug Act are not subject to review by the Court

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if done by the Minister in his administrative capacity. I must say that I feel loath to admit that the executive should be allowed to infringe the rights of the judiciary.

The actions of Colonel Sharman, in administering the provisions of The Opium and Narcotic Drug Act pursuant to the Minister's instructions, are not subject to review assuming that he acted in compliance with his Minister's instructions.

The Court has no power under the law to prevent a Minister from transgressing his administrative function and entering into the judicial field.

There are, in my judgment, far too many encroachments by Ministers, Deputy Ministers and functionaries in the judicial as well as the legislative field; if they are not curtailed, the country may in a not too remote future be ruled by a dictatorial government.

The main question arising in the present instance was whether the defendants, the Minister of National Health and Welfare and the Chief of the Narcotic Branch thereof acting in compliance with the orders of the former, were exercising a purely administrative function in interfering with the treatment which licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec consider necessary for their patients and to order them to refrain from prescribing such quantity of morphine as they may deem their patients require for medicinal purposes. I am of opinion that the Minister transgressed his competence; unfortunately, as the law stands, the Court is unable to grant the relief prayed for.

After carefully perusing the pleadings and listening very attentively to the able and exhaustive argument of counsel, I felt inclined to conclude that the Minister, in acting as he did, was not exercising an administrative function but performing a quasi-judicial act, which is, or at least should be, outside the sphere of his jurisdiction. It seemed to me inconceivable that a Minister could take the place of a physician and prescribe the treatment to be given to the latter's patients and the drugs which they ought to receive. It is difficult to believe that the Parliament in enacting The Opium and Narcotic Drug Act, 1929, intended to vest the Minister entrusted with its administration with

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such wide and exorbitant powers. It is idle to note that the medical profession is subject to the various provincial acts governing it (British North America Act, s. 92); in the Province of Quebec it is the Quebec Medical Act, R.S.Q. 1941, chapter 264.

Anyhow after having examined the law and reviewed the precedents, none of which unfortunately are directly relevant, I have no other alternative but to accept, reluctantly I must say, the doctrine expounded on behalf of respondents. The action will accordingly be dismissed. The defendants will be entitled to their costs, if they deem proper to claim them.

Judgment accordingly.

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Mar. 27

BETWEEN:

ROMÉO MELOCHE.....PÉTITIONNAIRE

ET

SA MAJESTÉ LE ROI.....INTIMÉ.

Crown—Petition of right—Action for damages by a father whose son while on active service in the Canadian army was killed in an automobile accident—Soldier and his dependents have no claim against the Crown on account of injuries or death under the Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 50A—Special remedy provided for by way of a pension by the Militia Act, R.S.C., 1927, c. 132, s. 73 and the Pension Act, R.S.C., 1927, c. 157, ss. 2 (j), 11 (2), (3), 33 (1) prevails over that enacted by the general law—Action dismissed.

The petition of right is one to recover alleged damages suffered by suppliant following the death of his son while the latter was a passenger in a military ambulance which collided with another vehicle. At the time of the collision, suppliant's son was a member of the Canadian forces and on active service and was being removed to a military hospital after a first accident.

Held: That a soldier of the Canadian army who is wounded or killed on active service and his dependents have no claim against the Crown on account of injuries or death under ss. 19 (c) and 50A of the Exchequer Court Act since Parliament has in their favour created a special remedy by way of a pension under the Militia and the Pension Acts.

2. That where a special remedy is created by a statute it prevails over that provided by the general law.

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PETITION OF RIGHT by suppliant to recover alleged damages following the death of his son in an automobile accident.

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

Maurice Lalonde, K.C. for suppliant.

Philippe Brais, K.C. for respondent.

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

ANGERS J. now (March 27, 1948) delivered the following judgment:

Le pétitionnaire réclame de Sa Majesté la somme de $7,376 pour dommages qu'il aurait subis à la suite de la mort de son fils Gérard tué dans une collision d'automobiles survenue à Montréal le 25 septembre 1945.

Dans sa pétition de droit le pétitionnaire déclare en substance:

il était le père de Gérard Meloche tué dans un accident d'automobile le 25 septembre 1945, à Montréal;

Gérard Meloche, au moment de l'accident, était soldat de l'armée active du Canada et était âgé de vingt ans;

le 25 septembre 1945, vers 4 h. 25 a.m., une ambulance de l'armée canadienne conduite par Jean-Marie Guertin, soldat de l'armée canadienne, est venue en collision avec une automobile de la police montée canadienne à l'intersection des rues Sherbrooke et Drummond, en la cité de Montréal;

la dite collision est due à la faute et à la négligence du chauffeur de l'ambulance qui a tenté de traverser l'intersection susdite à une vitesse de près de 40 milles à l'heure, malgré la lumière rouge lui interdisant le droit de passage;

le soldat Meloche, au moment de l'accident, était couché dans l'ambulance sans la protection d'un assistant et sans être retenu à la civière par des courroies ou liens quelconques;

la civière elle-même n'était pas attachée au châssis de l'ambulance;

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lors du choc, le soldat Meloche semble avoir rebondi en dehors de l'ambulance et s'être fracturé le crâne sur le pavé de la rue ou sur les portes de l'ambulance;

à la suite de cette collision le soldat Meloche a été transporté à l'hôpital militaire où il est mort sur la table d'opération comme conséquence de l'accident;

par la mort de son fils le pétitionnaire souffre des dommages au montant de $7,376 comme suit:

frais d'entretien du défunt, de sa naissance à l'âge de six ans		$ 750
frais d'entretien et d'éducation du défunt, de six à quatorze ans		1,500
frais d'entretien et d'éducation du défunt, de quatorze à dix-sept ans inclusivement		600
frais d'entretien et d'éducation, de 17 à 18 ans, à l'Ecole technique		750
aide future de son fils comme radio-électricien, 6 ans à $500 par année		3,000
dépenses occasionnées par le décès du défunt:		
cercueil	$150	
service	60	
terrain	16	
déplacement	300	
habits de deuil pour la famille	250	
		776
		$7,376

le pétitionnaire, âgé de 53 ans, est engagé depuis vingt ans dans les affaires comme radio-électricien et il souffre depuis quatre ans de mastoïdite chronique et d'insuffisance cardiaque avancée le rendant partiellement incapable de travailler à son métier;

à raison de son état de santé susdit le pétitionnaire se destinait son fils Gérard comme aide et associé et la mort de celui-ci lui cause un préjudice grave puisqu'il devra désormais engager un aide à raison de $35 par semaine.

Pour défense l'intimé plaide en substance:

il n'admet pas que le pétitionnaire soit le père de Gérard Meloche tué dans un accident d'auto le 25 septembre 1945;

il demande acte de l'admission que Gérard Meloche était membre des forces actives du Canada et dit que le certificat de naissance de celui-ci fait foi de son contenu;

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il nie les autres allégations de la pétition;

le chauffeur de l'ambulance du Ministère de la défense nationale n'a commis aucune faute, négligence ou imprudence relativement à l'accident;

il n'y a aucun lien de droit entre le pétitionnaire et l'intimé;

les dommages réclamés sont illégaux et exagérés;

l'intimé ne doit rien au pétitionnaire;

sous réserve de ce qui précède l'intimé ajoute:

la mort de Gérard Meloche n'est pas due à l'accident relaté dans la pétition, mais bien à un accident antérieur subi le même jour par la victime au coin des rues Craig et Saint-Hubert;

le pétitionnaire n'a aucun recours en dommages contre l'intimé à la suite de la mort dudit Gérard Meloche, lequel était au moment de l'accident un soldat de l'armée canadienne;

si le pétitionnaire a un recours contre qui que ce soit à la suite de la mort de son fils Gérard ce ne peut être qu'en vertu de la Loi des pensions du Canada et non en vertu de la Loi de la Cour de l'Echiquier ou du droit commun.

Pour réponse à la défense le pétitionnaire allègue en substance:

il demande acte de l'admission contenue au paragraphe 4 se lisant ainsi: "le chauffeur de l'ambulance du département de la défense nationale";

il nie les autres allégations de la défense ou lie contestation selon le cas;

l'accident antérieur mentionné au paragraphe 8 de la défense n'était pas de nature à causer la mort du soldat Gérard Meloche;

le chauffeur de l'ambulance du Ministère de la défense nationale était en devoir et en service commandé lors de l'accident survenu le 25 septembre 1945, vers 4 h. 29 du matin, et il portait le numéro matricule D-70094 et était accompagné par Edouard Trottier, numéro 163699, attaché au corps de la prévôté de l'armée canadienne;

le soldat Gérard Meloche est décédé à la suite des blessures recues lors de l'accident survenu le 25 septembre 1945, vers 4 h. 29 du matin;

la loi des pensions du Canada n'enlève pas au pétitionnaire le recours en dommages contre l'intimé;

le chauffeur de l'ambulance de l'armée canadienne a été tenu criminellement responsable de la mort du soldat Gérard Meloche par verdict de la Cour du Coroner siégeant à Montréal les 26 et 28 septembre 1945.

Dans sa réplique l'intimé nie les allégations de la réponse ou lie contestation selon le cas et ajoute que celle relative au verdict de la Cour du Coroner est irrégulière, illégale, mal fondée et devrait être retranchée des procédures, ladite allégation étant étrangère au litige et ne donnant pas lieu aux droits réclamés.

La duplique nie les allégations affirmatives de la réplique et lie contestation quant au reste.

La preuve révèle que Gérard Meloche, le fils du pétitionnaire, alors soldat de l'armée active du Canada, a, le 25 septembre 1945, subi deux accidents.

Vers 2 heures du matin il a été frappé par un tramway du circuit Rosemont sur la rue Sainte-Catherine, à quelque deux cents pieds à l'est de la rue Saint-Hubert. Il a été projeté à terre et sa chute lui a causé des contusions à la figure. Il a été transporté à l'hôpital Saint-Luc, où il a été admis vers 3 heures.

Une ambulance de l'armée est venue l'y chercher pour le conduire à l'hôpital militaire sur le Chemin de la Reine Marie. De l'hôpital Saint-Luc l'ambulance est allée au centre médical rue Sainte-Catherine près de la rue Guy, où, en l'absence d'un médecin, un *caporal* l'a examiné et un *chauffeur de taxi* lui a tâté le pouls. Ceci rappelle naturellement la remarque de Beaumarchais dans le mariage de Figaro: on pense à moi pour une place, mais par malheur j'y étais propre; il fallait un calculateur, ce fut un danseur qui l'obtint. L'ambulance a alors monté la rue Guy jusqu'à la rue Sherbrooke sur laquelle elle a tourné vers l'est. Elle filait à grande allure lorsque, rendue à l'intersection de la rue Drummond, elle a été frappée par un camion de la Royale gendarmerie à cheval allant du sud au nord sur cette rue. Comme résultat Gérard Meloche et la civière sur laquelle il était, ont été jetés sur la chaussée.

On a replacé Meloche dans l'ambulance et on l'a finalement transporté à l'hôpital militaire. Il y est mort un peu avant 6 heures du matin, le même jour, alors qu'on le préparait pour être opéré.

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Le procureur de l'intimé a plaidé que le pétitionnaire n'a pas droit à l'action qu'il a intentée parce que son fils Gérard était, au moment de l'accident, un soldat en service actif dans l'armée de Sa Majesté et que son seul recours, si recours il y a, découlerait de la Loi des pensions.

Le recours exercé par le pétitionnaire l'a été en vertu des dispositions du paragraphe (*c*) de l'article 19 de la Loi de Couronne selon les termes du paragraphe (*c*) de l'article 19, est ainsi conçue:

19. La cour de l'Echiquier 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, ajouté à la Loi de la Cour de l'Echiquier par le chapitre 25 du statut 7 George VI pour écarter tout doute possible quant à la responsabilité de la Couronne résultant de la négligence de membres des forces navales, militaires ou aériennes comme employés ou serviteurs de la Couronne selon les termes du paragraphe (*c*) de l'article 19 décrète ce qui suit:

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.

Le procureur de l'intimé a soutenu qu'un soldat en service actif n'a pas de recours en vertu des articles 19 et 50A pour blessures résultant de la négligence d'un employé ou serviteur de la Couronne dans l'exercice de ses fonctions, vu que le Parlement a adopté une loi qui lui accorde une pension et que cette loi exclut le recours prévu par les articles 19 et 50A.

Le procureur de l'intimé a fait valoir qu'il n'y a pas de recours contre la Couronne à moins d'un texte formel dans une loi lui donnant ouverture. La doctrine et la jurisprudence sur ce point sont unanimes et je ne crois pas qu'il y ait lieu de s'y attarder. Il me semble évident que les dispositions du paragraphe (*c*) de l'article 19 de la Loi de la Cour de l'Echiquier s'appliqueraient à un soldat comme à toute

autre personne, s'il n'existait une loi particulière créant en faveur du soldat un recours spécial et lui enlevant le recours général prévu par la Loi de la Cour de l'Echiquier.

Au moment de l'accident, comme nous l'avons vu, le fils du pétitionnaire, étant un soldat en service actif, était assujetti à la Loi de milice (S.R.C. 1927, chap. 132). En vertu de l'article 73 de cette loi un recours était accordé à ses dépendants. Cet article se lit ainsi:

73. Lorsqu'un officier ou un soldat est tué au service actif, ou meurt de blessures reçues ou de maladie contractée au service actif, à l'exercice ou à l'instruction, ou pendant qu'il est de service, il est pourvu au soulagement de sa veuve et de sa famille à même le Trésor public, suivant l'échelle prévue.

Le procureur de l'intimé a représenté que cet article se reporte à la Loi des pensions (S.R.C. 1927, chap. 157). Bien que le législateur, comme il arrive fréquemment, n'ait pas jugé à propos d'exprimer sa pensée clairement, je crois qu'en fait c'est bien la Loi des pensions qu'il avait en vue en stipulant qu'il est pourvu au soulagement de la veuve et de la famille d'un soldat tué au service actif ou qui meurt pendant qu'il est de service "à même le Trésor public, suivant l'échelle prévue".

L'avocat a particulièrement signalé le paragraphe (*j*) de l'article 2, les paragraphes (2) et (3) de l'article 11 et le paragraphe (1) de l'article 33. Il me semble opportun d'en citer le texte:

2. En la présente loi et en tout règlement fait en vertu des dispositions de la présente loi, à moins que le contexte ne s'y oppose, l'expression

j) "membres des forces" signifie toute personne qui a servi dans les forces navales, militaires ou aériennes du Canada depuis le commencement de la guerre;

11. (1) .....

(2) Au sujet du service militaire, durant la guerre avec le Reich allemand, qui a été entièrement accompli au Canada le ou après le vingt et unième jour de mai mil neuf cent quarante, et dont nulle partie n'a été accomplie sur un théâtre réel de guerre, et au sujet du service militaire en temps de paix, des pensions sont accordées aux membres ou relativement aux membres des forces devenus invalides, conformément aux taux énoncés à l'annexe A de la présente loi, et relativement aux membres des forces qui sont décédés, conformément aux taux énoncés à l'annexe B de la présente loi, lorsque la maladie ou la blessure ou leur aggravation ayant provoqué l'invalidité ou le décès au sujet desquels la demande de pension est faite était consécutive ou se rattachait directement à ce service militaire.

(3) Si un membre des forces, alors qu'il faisait du service durant la guerre avec le Reich allemand, a reçu une blessure ou contracté une

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maladie dont l'aggravation a provoqué une invalidité grave ou la mort à l'égard de laquelle une pension ne peut être accordée sous le régime des dispositions des deux paragraphes qui précèdent, et si ce membre des forces est dans le besoin, ou, advenant son décès, si sa veuve et/ou ses enfants sont dans le besoin, ou si, en l'absence de veuve ou d'enfants, son père ou sa mère ou ses père et mère à sa charge sont dans le besoin, la Commission peut discrétionnairement accorder la pension, n'excédant pas les taux payables sous le régime des Annexes A ou B de la présente loi, qu'elle peut à l'occasion juger convenable dans les circonstances.

33. Le père ou la mère ou tout individu tenant lieu de père ou mère d'un membre des forces décédé a droit à pension, lorsque ce membre des forces n'a pas laissé d'enfant, de veuve, ou de femme divorcée ayant droit à pension, ou une femme à qui une pension a été accordée sous l'autorité du paragraphe trois de l'article trente-deux de la présente loi, et lorsque ce père ou cette mère ou cet individu est dans un état de dépendance et qu'il était, lors du décès de ce membre des forces, totalement, ou à un degré important, entretenu par lui.

Le procureur de l'intimé a émis l'opinion que le fait par la Couronne d'avoir adopté une législation spéciale, savoir la Loi de la milice et la Loi des pensions, démontre que le soldat blessé ou tué en service actif et ses dépendants n'ont d'autres recours contre la Couronne que ceux prévus par ces lois. Cette opinion me paraît bien fondée. Lorsqu'un recours spécial est décrété par une loi, le recours prévu par la loi générale doit lui céder la préséance.

Cette doctrine est adoptée par les auteurs suivants: Craies, on Statute Law, 4e édition, p. 318; Maxwell, The Interpretation of Statutes, 9e édition, p. 183; Potter's Dwarris, General Treatise on Statutes, p. 131, Vattel's Rules, Rule No. 40.

La même opinion a été exposée dans les causes ci-après: *Garnett* v. *Bradley* (1); *City & South London Railway Company* v. *London County Council* (2); *London County Council* v. *The School Board for London* (3); *London County Council* v. *Wandsworth and Putney Gas Co.* (4); *The Uckfield Rural District Council and The Crowborough District Water Company* (5).

La même doctrine prévaut aux Etats-Unis, comme le démontre le jugement de la Cour d'appel de l'Etat de New-York dans la cause de *Goldstein et al.* v. *State of New York* (6), où le juge Hubbs, à la page 403, fait les observations suivantes:

(1) (1878) 3 App. Cas. 944.
(2) (1891) 2 Q.B. 513.
(3) (1892) 2 Q.B. 606.
(4) (1900) 82 L.T.R. 562.
(5) (1899) 2 Q.B. 664.
(6) (1939) 281 N.Y. 396.

The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this State has done in the Military Law (para. 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact, a complete system is set up for handling such claims. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable. "Statutes in derogation of the sovereignty of a State must be strictly construed and a waiver of immunity from liability must be clearly expressed." (Smith v. State, 227 N.Y. 405, 410.)

Je ne crois pas que les articles 18 et 18A de la Loi des pensions, invoqués par le procureur du pétitionnaire, s'appliquent en la présente cause. Ces articles ont trait aux réclamations qu'un soldat pourrait avoir contre des tiers.

Après avoir étudié avec soin la Loi de milice et la Loi des pensions, examiné la doctrine et la jurisprudence et lu attentivement les factums des parties, j'en suis venu à la conclusion que l'action du pétitionnaire doit être rejetée.

N'eût été le recours accordé au pétitionnaire et à son auteur par la Loi de milice et la Loi des pensions, qui les privaient de celui prévu par la Loi de la Cour de l'Echiquier, je n'aurais pas hésité à décider qu'il y a eu négligence de la part du chauffeur de l'ambulance militaire, tant après qu'avant la collision. Peut-être le pétitionnaire a-t-il encore un recours en vertu de la Loi des pensions; c'est une question qu'il ne m'appartient pas de décider.

Le pétitionnaire n'a pas droit au remède réclamé dans sa pétition de droit et celle-ci est en conséquence rejetée.

L'intimé aura droit à ses frais contre le pétitionnaire, s'il juge à propos de les réclamer.

Judgment accordingly.

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BETWEEN:

LOUVIGNY DE MONTIGNY.....DEMANDEUR

ET

RÉVÉREND PÈRE COUSINEAU, S.J. ...DÉFENDEUR.

Copyright—Infringement action—Custodian of Enemy Property vested with the rights of enemy authors—The Consolidated Regulations respecting Trading with Enemy, 1939, s. 24—Author of a work unless he expressly assigns his right retains the ownership of copyright therein and may take action for an infringement thereof—Section 4 of the Copyright Act, R.S.C., 1927, c. 32 remains in force notwithstanding a state of war—Copyright subsists in works of enemy authors but ownership thereof is vested in the Custodian—The Patents, Designs, Copyright and Trade Marks Emergency Order, 1939 (P.C. 3362)—Action dismissed.

Plaintiff, the general representative in Canada of a society of French authors whose rights in their works were vested, in June 1940, in the Custodian of Enemy Property pursuant to the Consolidated Regulations respecting Trading with the Enemy, 1939, was authorized by the Custodian to institute action against the defendant for having illegally reproduced certain writings in a magazine of which the latter was the owner.

Held: That unless he expressly assigns his right to a society of which he is a member and whose main object is the defence of the members' private interests, the author of a work retains the ownership of copyright therein and may take an action for the infringement thereof.

2. That on the 21st of June 1940 the Custodian of Enemy Property became the sole representative in Canada of the Société des Gens de Lettres de France and the members thereof and, in that capacity, may have had the power to exercise the rights of the injured authors but only in his own name and quality, no one except the Crown having the right to plead by an agent.

3. That by virtue of the War Measures Act, R.S.C. 1927, c. 206 the provisions of the Berne and Rome Conventions pertaining to copyright are no more in force and an enemy author may not become the owner of copyright, in Canada during a state of war.

4. That the result of the Patents, Designs, Copyright and Trade Marks Emergency Order, 1939 (P.C. 3362) by providing that the provisions of s. 4 of the Copyright Act, R.S.C., 1927, c. 32 shall be deemed, for the purposes of that Act, to continue in force notwithstanding a state of war, is that copyright shall subsist in works of enemy authors but the ownership thereof shall be vested in the Custodian of Enemy Property.

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ACTION for a declaration that the defendant has infringed the copyright of certain authors mentioned in the action, for an injunction and for damages resulting from the infringement.

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

Jean Genest, K.C. for plaintiff.

Jacques Perrault for defendant.

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

ANGERS J. now (March 15, 1948) delivered the following judgment:

Le demandeur poursuit le défendeur, faisant affaires sous la raison sociale AUJOURD'HUI, ENR., pour prétendues contrefaçons et reproductions illicites dans la revue *Aujourd'hui* d'articles d'auteurs protégés au Canada par l'effet de la Convention internationale de Berne et la Loi du droit d'auteur du Canada, pour dommages-intérêts au montant de $359.55 et les dépens.

Dans son exposé de réclamation le demandeur déclare:

il est homme de lettres, résidant en la Cité d'Ottawa, et le représentant général au Canada de la Société des Gens de Lettres de France, association corporative d'écrivains fondée à Paris, France, en 1838 et reconnue comme établissement d'utilité publique par décret du Président de la République Française en date du 20 décembre 1891; la dite société, qui a son siège à Paris, est commise à la sauvegarde des droits de ses adhérents et par eux autorisée à les représenter en justice; elle réclame aussi les droits d'écrivains français qui, n'étant pas ses adhérents, appartiennent à des groupements ou des périodiques de France qui l'ont chargée de revendiquer les droits de leurs membres et collaborateurs;

depuis 1940, sous le régime des Règlements de guerre établis par le Gouvernement canadien, le demandeur exerce cette représentation des auteurs français conformément aux

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instructions du séquestre du Canada et sous son contrôle, et il est autorisé aux présentes par celui-ci en vertu d'une autorisation spéciale du 17 avril 1943;

l'article 21 (2) des Règlements revisés sur le commerce avec l'ennemi (C.P. 3959 et 5353) attribue au dit séquestre et assujettit à son contrôle tous les biens au Canada appartenant aux personnes, corporations, fiduciaires ou administrateurs visés par la définition de "ennemi" contenue dans les dits Règlements; le séquestre possède ainsi le droit d'auteur sur tous les ouvrages protégés au Canada et dont les auteurs, leurs héritiers ou ayants droit résident en France ou en quelque autre pays couvert par les définitions de "Territoire ennemi" ou de "Territoire prohibé" contenues au premier article des dits Règlements;

le défendeur tient son bureau principal au numéro 1961 est, rue Rachel, à Montréal, Province de Québec; le ou vers le 1er février 1942 il s'est porté acquéreur du nom, de la revue et de la clientèle de la société enregistrée *Les Editions d'Aujourd'hui,* jusqu'alors propriétaire-éditrice de la revue mensuelle intitulée *Aujourd'hui* et publiée à Montréal, et le défendeur a continué à publier pour son compte la dite revue sous la raison sociale *Editions d'Aujourd'hui, Enr.;*

le défendeur a reproduit illégalement et sans autorisation, dans la revue *Aujourd'hui,* les compositions d'auteurs protégés au Canada par l'effet des lois nationales et internationales en vigueur; ces compositions, avec le numéro de la revue où elles ont été reproduites, le nom de l'auteur et le nombre de lignes qu'elles comportent, sont les suivantes:

Numéro de janvier 1942

La révolution française de 1940,
par André Desqueyrat.....600 lignes

M. Hitler a tout compris,
par Georges Bernanos.....180 lignes

Art et travail,
par Louis Hourticq.....140 lignes

Le char dans la guerre moderne,
par Jacques Darcy
(reproduit du *Figaro*).....200 lignes

L'astrologue Nostradamus,
par Bernard de Vaulx.....200 lignes

Famille et patrie,
par Henry de Montherlant
(reproduit du *Figaro*).....200 lignes

Numéro de février 1942

Situation de la peinture française,
par André Warnod.....100 lignes

Le vieil Hindenberg,
par Bernard de Vaulx.....180 lignes

Le bombardier en piqué,
par Bernard le Pecq
(reproduit de l'*Echo de Paris*).....200 lignes

Les timides sont des forts,
par Charles Fiessinger.....270 lignes

Numéro de mars 1942

L'Islam d'aujourd'hui,
par J.-E. Janot.....700 lignes

Numéro d'avril 1942

L'Art du théâtre,
par Henri Ghéon.....375 lignes

Numéro de mars 1943

Maritain intime,
par Yves-R. Simon.....250 lignes

Total .....3,595 lignes

le demandeur a souvent prévenu le défendeur des réclamations auxquelles il s'exposait en reproduisant ainsi, sans l'autorisation des auteurs, des compositions littéraires que les lois en vigueur lui interdisaient de reproduire, mais le défendeur a toujours persisté dans son refus de se mettre en règle;

le droit d'auteur sur ces compositions constitue une propriété qui tombe sous le coup des Règlements canadiens sur le commerce avec l'ennemi;

les auteurs des compositions susdites sont français et, à ce titre, sont protégés au Canada par la Convention internationale de Berne;

le défendeur n'a obtenu ni des auteurs, ni de leurs ayants droit, ni de la Société des Gens de Lettres, ni du demandeur, ni du séquestre, l'autorisation de reproduire ces compositions dont la reproduction sans autorisation est interdite par les lois en vigueur au Canada;

en pratiquant cette reproduction, le défendeur a causé des torts aux auteurs particuliers dont il a reproduit les compositions, et il cause généralement un tort considérable aux écrivains en les frustrant du légitime revenu de leurs tra-

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vaux, en les décourageant de travailler avec l'espoir d'obtenir quelque rémunération, et surtout en répandant le pernicieux exemple de l'exploitation littéraire;

les abus et violations du défendeur ne peuvent être réprimés que par ordonnance judiciaire et, à moins que la cour n'enjoigne au défendeur de cesser toute reproduction non autorisée de compositions littéraires dont les auteurs sont protégés au Canada, le défendeur continuera à violer le droit de ces auteurs qui, par les actes illégaux du défendeur, ont déjà subi des dommages considérables; le défendeur continuera également à frustrer le séquestre en tant que cessionnaire et détenteur, par l'effet des Règlements de guerre, des droits des auteurs protégés au Canada;

la reproduction des compositions susdites constitue autant de contrefaçons, et les exemplaires de la revue *Aujourd'hui* qui contiennent ces contrefaçons ou reproductions illicites sont, aux termes des lois en vigueur, la propriété du demandeur et celui-ci est fondé à en réclamer la remise ou une valeur équivalente;

pour ces causes, le demandeur réclame:

1) une déclaration que les auteurs susmentionnés sont les premiers titulaires du droit d'auteur sur les compositions qui portent leurs signatures, et que ces ouvrages sont protégés au Canada sans l'accomplissement d'aucune formalité et doivent rester protégés jusqu'à l'expiration d'une période de cinquante ans après la mort de leurs auteurs;

(2) une déclaration que le défendeur, en reproduisant ces compositions sans autorisation des auteurs, a violé le droit de ceux-ci et qu'il a également frustré le séquestre du Canada en tant que cessionnaire et détenteur, par l'effet des Règlements en temps de guerre susdits, des droits des auteurs dont le défendeur a reproduit les compositions;

(3) une ordonnance de cessation (Writ of Injunction) interdisant au défendeur toute reproduction, dans sa revue *Aujourd'hui*, de compositions d'auteurs protégés au Canada;

(4) des dommages-intérêts au montant de $359.50, représentant 10 sous par ligne des reproductions illégalement publiées par le défendeur;

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(5) une déclaration que les exemplaires de la revue *Aujourd'hui* contenant des reproductions illicites, c'est-à-dire des contrefaçons des ouvrages susdits, sont la propriété des auteurs qui sont les titulaires du droit d'auteur sur iceux, et une ordonnance obligeant le défendeur à remettre au demandeur ces exemplaires contrefaits des ouvrages faisant l'objet de la présente réclamation, ou de lui en payer la valeur équivalente;

(6) les frais de la présente réclamation.

Pour défense à l'action du demandeur, le défendeur plaide en substance ce qui suit:

le demandeur n'a pas droit d'agir pour les personnes mentionnées dans l'exposé de réclamation; les Règlements (C.P. 3959 et 5353) mentionnés dans l'exposé de réclamation et l'autorisation spéciale du 17 avril 1943 ne donnent pas au demandeur le droit d'intenter la présente action; en particulier la dite autorisation est illégale et *ultra vires;*

il admet qu'il édite la publication *Aujourd'hui* et dit que cette publication n'est pas une revue, tel que mentionné au paragraphe 2 de l'exposé de réclamation;

le défendeur a reproduit les compositions des auteurs R. P. Desqueyrat, jésuite, R. P. J.-E. Janot, jésuite, Henri Ghéon, Georges Bernanos et Yves-R. Simon avec leur autorisation et nulle action ne pouvait être intentée au défendeur à ce sujet;

les reproductions mentionnées au paragraphe 3 de l'exposé de réclamation sont permises par les lois en vigueur au Canada concernant le droit d'auteur, étant faites dans un but de recherche, de critique et de compte rendu;

au surplus, lors de la publication des articles mentionnés au dit paragraphe 3, le défendeur croyait et avait motif raisonnable de croire qu'à raison de l'état de guerre existant depuis septembre 1939 ces articles ne faisaient l'objet d'aucun droit d'auteur et que leur reproduction pouvait être faite, sans violation de droit d'auteur, dans une publication du caractère d'*Aujourd'hui;*

le demandeur, prié par le défendeur de lui faire connaître le mandat qu'il invoquait, a été incapable de lui communiquer l'information requise;

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il nie toutes les autres allégations de l'exposé de réclamation.

Pour réponse à la défense, le demandeur allègue en substance ce qui suit:

il nie les allégations de ladite défense, sauf celles ci-après spécifiquement admises;

aucun des auteurs mentionnés dans le paragraphe 3 (*a*) de la défense n'avait qualité pour donner autorisation quelconque tant qu'il se trouvait en territoire ennemi tel que défini par les Règlements de guerre, et tous leurs droits sont, en vertu desdits règlements, détenus par le séquestre officiel du Canada ou son représentant;

les articles mentionnés dans le paragraphe 3 (*b*) de la défense ne peuvent être considérés comme étant faits dans un but de recherche, de critique ou de compte rendu;

l'état de guerre n'a aucunement suspendu le droit d'auteur ou l'effet de la Convention de Berne.

Le procureur du demandeur a produit comme pièce 1 une autorisation, en date du 17 avril 1943, par le sous-secrétaire d'Etat et l'assistant séquestre au demandeur d'intenter une action contre le défendeur pour avoir reproduit sans autorisation les articles y énumérés dans le magazine *Aujourd'hui* durant la période de janvier 1942 à mars 1943. Cette autorisation se lit ainsi:

The Custodian of Enemy Property, by his duly authorized Deputy, Ephraim Herbert Coleman, under the Consolidated Regulations Respecting Trading with the Enemy (1939) being vested with the rights of André Desqueyrat, Georges Bernanos, Louis Hourticq, Jacques Darcy, Bernard de Vaulx, Henry de Montherlant, André Warnod, Bernard de Pecq, Charles Fiessinger, J.-E. Janot, Henri Ghéon and Yves-R. Simon, their heirs and assigns, and/or La Société des Gens de Lettres, a body politic and corporate duly incorporated under the laws of the Republic of France and having its head office and principal place of business in the City of Paris, France, hereby authorizes Mr. Louvigny de Montigny, of the City of Ottawa, in the Province of Ontario, general representative and attorney in Canada of the said La Société des Gens de Lettres, to institute action in the Exchequer Court of Canada against Reverend Father Jacques Cousineau, of the Society of Jesus, for having reproduced without authority the following writings in the magazine *Aujourd'hui* during the period from January 1942 to March 1943:

January 1942:

La révolution française de 1940,
by André Desqueyrat

M. Hitler a tout compris,
by Georges Bernanos

Art et travail,
by Louis Hourticq

Le char dans la guerre moderne,
by Jacques Darcy
(Reproduced from *Figaro*, a French newspaper)
L'astrologue Nostradamus,
by Bernard de Vaulx
Famille et patrie,
by Henry de Montherlant

February 1942:
Situation de la peinture française,
by André Warnod
Le vieil Hindenberg,
by Bernard de Vaulx
Le bombardier en piqué,
by Bernard de Pecq
(Reproduced from *l'Echo de Paris*, a French newspaper)
Les timides sont des forts,
by Charles Fiessinger

March 1942:
L'Islam d'aujourd'hui,
by J. E Janot

April 1942:
L'Art du théâtre,
by Henri Ghéon

March 1943:
Maritain intime,
by Yves R. Simon.

Pour établir les droits du séquestre dans les œuvres des auteurs énumérés au paragraphe 3 de l'exposé de réclamation, le procureur du demandeur a invoqué la clause (*f*) du premier paragraphe de l'article 3 de la Loi des mesures de guerre (S.R.C. 1927, chap. 206). La partie pertinente de cet article se lit ainsi:

3. Le gouverneur en son conseil a le pouvoir de faire et autoriser tels actes et choses et d'édicter quand il y a lieu les arrêtés et règlements qu'il peut, en raison de l'existence réelle ou appréhendée de l'état de guerre, d'invasion ou d'insurrection, juger nécessaires ou opportuns pour la sécurité, la défense, la paix, l'ordre et le bien-être du Canada; et pour plus de certitude, mais non pas de façon à restreindre la généralité des termes qui précèdent, il est par la présente loi déclaré que les pouvoirs du gouverneur en son conseil s'étendent à toutes les matières tombant dans la catégorie des sujets ci-après énumérés, savoir:

* * * * *

f) la prise de possession, le contrôle, la confiscation et la disposition de biens et de leur usage.

Des règlements ont été adoptés conformément à cette loi par un arrêté en conseil en date du 21 août 1940 (C.P. 3959), lesquels ont été abrogés et remplacés par un arrêté en conseil

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en date du 13 novembre 1943 (C.P. 8526). Une copie des premiers (version anglaise) a été produite comme pièce 2 et une copie des seconds comme pièce 3.

Le procureur du demandeur a produit comme pièce 4 une copie de la *Gazette du Canada* (version anglaise) du 14 décembre 1940, contenant à la page 2138 un arrêté en conseil en date du 31 juillet 1940 (C.P. 3515). La version française de cet arrêté en conseil, qui se trouve dans la *Gazette du Canada* du 21 décembre 1940 (p. 2258), est ainsi conçue:

Attendu que le Secrétaire d'Etat, avec l'agrément du ministre des Finances, signale que par suite de l'invasion de la France par des armées ennemies, et de la possibilité que l'ennemi exerce sa domination sur tout le territoire français en Europe, sur les territoires adjacents d'Andorre et de Monaco, la zone française au Maroc, la Corse, l'Algérie et la Tunisie, il est nécessaire et opportun, en vue d'empêcher les richesses que les habitants de ces territoires possèdent au Canada de tomber au pouvoir de l'ennemi, de placer, temporairement, sous séquestration protectrice tous les biens, droits et intérêts au Canada des personnes de ces territoires et de réglementer le commerce avec ces personnes; et

Que la mesure la plus propre à assurer cette protection et cette réglementation est d'utiliser le bureau du séquestre établi sous le régime des Règlements sur le commerce avec l'ennemi (1939), et de conférer au Secrétaire d'Etat, relativement auxdits biens, droits et intérêts au Canada des personnes résidant dans ces territoires, le pouvoir qu'il peut exercer à titre de Secrétaire d'Etat et de séquestre, en vertu des Règlements sur le commerce avec l'ennemi (1939) à l'égard de territoires interdits;

A ces causes, il plaît à Son Excellence le Gouverneur général en conseil, sur la recommandation du Secrétaire d'Etat du Canada, avec l'agrément susmentionné, et en vertu de la Loi des mesures de guerre (S.R.C. 1927, chapitre 206) de rendre l'ordonnance suivante:

A partir du 21 juin 1940 inclusivement, les dispositions des Règlements sur le commerce avec l'ennemi (1939) sont par les présentes étendues et censées applicables à tout le territoire français en Europe, aux territoires adjacents d'Andorre et de Monaco, et à la zone française au Maroc, à la Corse, l'Algérie et la Tunisie;

Toutefois, les dispositions de la présente ordonnance ne s'appliqueront pas aux biens, droits et intérêts déclarés exempts par le ministre des Finances, mais dans ce cas la permission du ministre des Finances ou d'un agent désigné par lui sera nécessaire pour transférer toute propriété ou possession, ou pour exercer tout commerce ou pour disposer de ces droits de propriété ou intérêts au Canada.

Le procureur du demandeur a invoqué le règlement 21. Ce règlement, dans les "Règlements revisés sur le commerce avec l'ennemi, 1939", décrétés en vertu de l'arrêté en conseil du 21 août 1940 (C.P. 3959), se lit ainsi:

21. (1) Tout bien au Canada appartenant à des ennemis au commencement ou postérieurement au commencement de la présente guerre, que ce bien ait été ou non divulgué au Séquestre selon les prescriptions des présents règlements, est par les présentes attribué au Séquestre et assujetti à son contrôle.

(2) Le présent règlement constitue une ordonnance d'attribution et confère au Séquestre tous les droits appartenant auxdits ennemis, y compris le pouvoir de disposer dudit bien de la manière dont il peut en décider à sa seule discrétion.

Le règlement 26 détermine la durée de l'ordonnance d'attribution ainsi:

26. Lorsque le bien de toute personne est attribué au Séquestre en conformité des présents règlements, ladite attribution ni toutes procédures s'y rattachant ou en découlant ne doivent être annulées ni atteintes par le seul fait que ladite personne serait, antérieurement ou postérieurement à la date de l'attribution, décédée ou aurait cessé d'être un ennemi, ou lorsque le bien est attribué par une ordonnance de la cour en conformité du règlement 25, par le fait qu'on aurait constaté subséquemment que ladite personne n'était pas un ennemi.

La définition des "biens" contenue dans ces règlements se trouve dans le paragraph (*h*) de l'article 1:

h) "biens" aux termes des présents règlements vise et comprend toute propriété foncière et personnelle de quelque nature que ce soit ainsi que tous les droits et intérêts qui s'y rattachent, en droit ou en équité, et, sans restreindre la portée de ce qui précède, toutes valeurs, dettes, créances, comptes et droits incorporels.

L'on trouve dans les sous-paragraphes (i) à (v) du paragraphe (*b*) de l'article 1 des mêmes règlements la définition du mot "ennemi". Il me semble à propos d'en citer la partie pertinente:

b) "ennemi" vise et comprend

(i) tout Etat, ou tout souverain d'un Etat de guerre avec Sa Majesté;

(ii) toute personne qui réside ou exerce des affaires sur un territoire ennemi ou prohibé, ainsi qu'une personne, à quelque endroit qu'elle réside ou exerce des affaires, qui est un ennemi ou considérée comme un ennemi et avec laquelle tout commerce est alors interdit par les présents règlements, par statut ou par proclamation de Sa Majesté, sur l'avis du Conseil privé de Sa Majesté pour le Canada, ou par le droit coutumier;

Le règlement 21, compris dans les "Règlements revisés sur le commerce avec l'ennemi, 1943", décrétés en vertu de l'arrêté en conseil du 13 novembre 1943 (C.P. 8526), plus élaboré, est ainsi conçu:

21. (1) Tous les biens ennemis sont par les présentes attribués au Séquestre et assujettis à son contrôle, qu'ils aient ou non été signalés au Séquestre selon les prescriptions des présents règlements.

(2) Le présent article constitue une ordonnance d'attribution et confère au Séquestre tous les droits d'un ennemi, y compris le pouvoir de disposer desdits biens, de la manière dont il peut décider à sa seule discrétion.

(3) Lorsque des biens sont détenus, inscrits ou enregistrés au Canada pour le compte ou au nom d'une personne dont l'adresse figurant dans le registre ou autre livre se trouve en territoire ennemi ou prohibé, ces biens

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sont par les présentes attribués au Séquestre et assujettis à son contrôle, qu'ils aient été ou non signalés au Séquestre selon les prescriptions des présents règlements, et le Séquestre peut disposer de ces biens comme s'ils avaient, avant l'attribution, entièrement appartenu à un ennemi.

(4) Le Gouverneur en conseil peut, par décret, déclarer que les biens spécifiés sont des biens ennemis, et faire publier une copie de ce décret dans la *Gazette du Canada;* dès lors, les biens ainsi spécifiés sont censés être des biens ennemis, attribués au Séquestre à compter de la date de l'arrêté en conseil, mais l'émission ou la publication d'un tel décret ne porte en aucune manière atteinte à l'attribution de biens prévue au paragraphe (1) du présent article.

Le règlement 26 déterminant la durée de l'ordonnance d'attribution est en ces termes:

26. Lorsque les biens d'une personne sont attribués au Séquestre en vertu des présents ou d'autres règlements, ou de quelque arrêté en conseil ou loi, cette attribution ne doit pas, non plus que les procédures relatives à l'attribution ou en découlant, être annulée ou atteinte par le seul fait que ladite personne serait, antérieurement ou postérieurement à la date de l'attribution, décédée ou aurait cessé d'être un ennemi, si les biens ont été attribués en vertu des dispositions de l'article 21, paragraphe (3) ou (4), ou de l'article 25 des présents règlements, en raison du fait qu'il a subséquemment été prouvé que ladite personne n'était pas un ennemi.

La définition des "biens" contenue dans ces derniers règlements se trouve dans le paragraphe (i) de l'article 1, qui se lit comme suit:

i) "biens" vise et comprend toute propriété mobilière ou immobilière, ainsi que tous les droits et intérêts y afférents, en droit ou en équité; et sans restreindre la portée générale de ce qui précède, l'expression "biens" comprend les valeurs, dividendes, intérêts ou parts de bénéfices, dettes, créances, comptes, brevets, droits d'auteur, marques de commerce, dessins ou tout intérêt y afférent, et les droits incorporels;

L'on trouve dans le paragraphe (*d*) de l'article 1 des mêmes règlements la définition du mot "ennemi". La partie de cette définition qui offre quelque intérêt en l'espèce est en ces termes:

d) "ennemi" vise et comprend
(i) tout Etat, ou tout souverain d'un Etat, en guerre avec Sa Majesté;
(ii) toute personne résidant dans un territoire ennemi ou prohibé;
(iii) toute personne exerçant des affaires dans un territoire ennemi ou prohibé;

Les mots "territoire ennemi" et "territoire prohibé" sont définis dans les paragraphes (*b*) et (*c*) de l'article 1, qui se lisent comme suit:

b) "territoire ennemi" désigne toute étendue de pays qui se trouve sous l'autorité suprême d'un Etat ou souverain ou occupé par un Etat ou souverain alors en guerre avec Sa Majesté;

c) "territoire prohibé" signifie toute étendue de pays à l'égard de laquelle le Gouverneur en conseil, par suite de l'état de guerre réel ou appréhendé ou autrement, ordonne la garde préventive des biens des personnes résidant dans ce territoire, la réglementation du commerce avec de telles personnes, ou les deux à la fois;

Dans l'appendice aux règlements de 1943 on peut voir, entre autres, les noms des pays déclarés territoires ennemis, parmi lesquels se trouve la France.

Le procureur du demandeur a produit comme pièce 18 une copie d'un acte de dépôt par le demandeur d'une procuration à lui donnée par la Société des Gens de Lettres le 21 novembre 1930, ledit acte fait et passé devant Me Victor Morin, N.P., le 26 août 1943.

Il est dit dans cet acte de dépôt que le comparant (Louvigny de Montigny) déclare que ladite procuration n'a pas été révoquée et qu'elle est en pleine force et vigueur. L'acte stipule que cette déclaration ainsi qu'une autre indifférente en l'espèce ont été faites solennellement par le comparant comme équivalentes à un serment en vertu de l'Acte de la Preuve en Canada.

Ladite procuration faite et passée à Paris, France, le 21 novembre 1930, devant Me André Oudard, notaire, par monsieur Georges Robert, agissant en sa qualité de délégué général du comité de la Société des Gens de Lettres, autorisé à cet effet par une délibération dudit comité tenue le 7 juillet 1930, constitue pour fondé de pouvoir et représentant général de ladite Société pour le Canada le demandeur et lui donne, entre autres, pouvoir:

de représenter la Société des Gens de Lettres et chacun de ses membres et adhérents en particulier, et les héritiers et ayants droit de ses membres ou adhérents décédés, ainsi que les organisations d'auteurs ou d'éditeurs affiliés à la Société des Gens de Lettres pour les fins particulières de la protection des œuvres leur ressortissant respectivement dans le Dominion du Canada.

* * * * *

de prendre les mesures et exercer les procédures qu'il jugera nécessaires ou opportunes pour sauvegarder, défendre ou revendiquer les droits de la Société des Gens de Lettres ou des organisations à elle affiliées comme susdit, ou ceux des membres adhérents ou ayants droit de la Société des Gens de Lettres ou desdites organisations affiliées, et d'exercer tous les recours possibles, d'après les législations nationales et internationales en vigueur au pays, afin d'empêcher la contrefaçon des œuvres ressortissant aux auteurs en cause ou à leurs ayants droit.

d'autoriser ou défendre selon le cas, la reproduction des ouvrages ressortissant aux auteurs en cause, quelle que soit la forme ou les procédés de reproduction, de formuler et faire valoir des réclamations devant les tribu-

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naux canadiens dans le cas de reproduction non autorisée ou autrement illicite, d'exercer toute action judiciaire pour prévenir pareille reproduction, pour la faire cesser ou pour réclamer les dommages-intérêts auxquels elle pourra donner lieu, d'exécuter tout jugement rendu, et de transiger, s'il y a lieu, soit avant soit après jugement.

* * * * *

La Société des Gens de Lettres, tant pour elle-même que pour ses propres membres et adhérents et que pour ceux des organisations à elle affiliées, ratifie par les présentes et confirme tout ce que fera ledit Monsieur Louvigny de Montigny ou ce qu'il fera faire dans l'exercice légitime des pouvoirs qui lui sont conférés, elle s'engage aussi à fournir audit Monsieur Louvigny de Montigny, au besoin, la preuve complète et recevable devant les cours de justice du Canada, des titres qu'elle possède, ou que possèdent ses membres adhérents ou affiliés, sur la propriété des œuvres pour la reproduction desquelles des droits d'auteur ou redevances seront réclamés.

Le procureur du demandeur a produit comme pièce 5 une déclaration de raison sociale *Editions d'Aujourd'hui* (*enrg.*), signée par le défendeur, datée le 30 janvier 1942. A la suite de cette déclaration est un certificat signé par Wilfrid Guérin, N.P., à l'effet que l'original a été enregistré au greffe de la Cour Supérieure pour le district de Montréal le 9 février 1942.

Le procureur du demandeur a produit un exemplaire de chacun des numéros d'*Aujourd'hui* de janvier, février, mars et avril 1942 et mars 1943, dans lesquels ont été reproduits les articles énumérés dans l'exposé de réclamation.

Tel que susdit, le défendeur a plaidé que le demandeur n'était pas qualifié pour intenter une action au profit des auteurs mentionnés dans l'exposé de réclamation et particulièrement que les règlements invoqués (C.P. 3959 et 5353) et l'autorisation du 17 avril 1943 (pièce 1) ne donnaient pas au demandeur le droit d'intenter cette action.

Avant de déterminer si le défendeur avait droit de reproduire dans la revue *Aujourd'hui* les articles dont il s'agit, il me semble opportun de décider:

(1) si la Société des Gens de Lettres de France avait qualité pour intenter une action pour le bénéfice des auteurs de ces articles;

(2) si le séquestre était investi des droits de ces auteurs ou de leurs héritiers ou ayants cause;

(3) assumant qu'il l'était, s'il pouvait céder ses droits au demandeur et si celui-ci avait le droit de poursuivre en son nom personnel.

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Relativement à la première question, il est avantageux de se reporter à l'arrêt de la Cour de Cassation, confirmant le jugement de la Cour d'Appel de Paris, dans la cause de la *Société des Gens de Lettres et Théodore Cahu c. Rouff et Cie* (1).

Le sommaire de l'arrêt se lit en partie comme suit:

La Société des Gens de Lettres constitue une association ayant pour objet la défense des intérêts privés des adhérents; et, si elle a été reconnue comme établissement d'utilité publique, cette reconnaissance n'a pas eu pour effet d'en modifier la nature.

(1) Pandectes françaises, 1917, tome 32, p. 41.

* * * * *

Il rentre dans les pouvoirs souverains des juges du fond de décider, par interprétation des statuts et du règlement intérieur de la Société des Gens de Lettres, et par appréciation de l'intention commune des contractants, qu'en entrant dans ladite société, un auteur ne s'est pas dessaisi du droit de reproduire ses œuvres, qu'il est resté propriétaire et maître de ce droit, et que la société est seulement chargée pour un temps contractuellement fixé, et moyennant un salaire déterminé, d'en encaisser le produit.

Il ressort du rapport que la Société des Gens de Lettres a été reconnue comme établissement d'utilité publique par décret du 10 décembre 1891; que l'article 20 des statuts prévoyait l'élaboration d'un règlement intérieur, obligatoire pour les sociétaires; que celui-ci a été voté par l'assemblée générale de la société le 21 février 1892 et revêtu, peu après, de l'approbation ministérielle; qu'aux termes de l'article 1er des statuts de la société a pour but "de prêter, dans les conditions prévues au règlement, aide et assistance à ses sociétaires par tous les moyens qui sont en son pouvoir et dans toutes les occasions où cela pourrait leur être utile, notamment *en ce qui concerne la reproduction de leurs œuvres littéraires*"; que l'article 23 du règlement dispose "que chaque sociétaire, en vertu du droit qui lui est reconnu par la loi du 19 juillet 1793, apporte dans la société, pour la durée de sa vie et pour être exploité en commun, son droit d'autoriser les journaux, revues et recueils périodiques français ou publiés en langue française à l'étranger et à reproduire ses œuvres publiées dans d'autres journaux, recueils ou volumes"; que le droit de reproduction passe ainsi, en principe, des auteurs à la société; que les auteurs peuvent cependant se réserver le droit de reproduction et que, pour ce faire, ils doivent mettre en tête de la publication la mention "Publication interdite" et en aviser la société.

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Le rapport relate que le 4 janvier 1884 Jules Mary, membre de la Société des Gens de Lettres depuis 1881, a cédé à la Société des publications Rouff et Cie la toute propriété illustrée de son roman "Le Docteur rouge" et que le 7 décembre 1896 Théodore Cahu a cédé à la même Société la toute propriété illustrée de son roman "Vendus à l'Ennemi".

Le rapport déclare qu'en 1903 la Société des publications Rouff et Cie a fait paraître dans un journal illustré, intitulé *Les grands Romanciers,* les romans de MM. Mary et Cahu.

Le rapport dit que la Société des Gens de Lettres, tout en reconnaissant que les sociétaires conservent le droit de traiter directement en ce qui concerne l'illustration, a considéré que les traités faits par MM. Mary et Cahu, portant aussi sur la reproduction du texte, dépassaient les droits qu'ils s'étaient réservés.

Par exploit du 23 novembre 1903 la Société des Gens de Lettres et MM. Mary et Cahu ont assigné MM. Rouff et Cie pour voir dire qu'ils avaient reproduit illicitement *Le Docteur rouge* et *Vendus à l'Ennemi,* s'entendre condamner à des dommages-intérêts à fixer par état et se voir faire défense de continuer la reproduction. A cette demande, MM. Rouff et Cie ont opposé qu'ils avaient acquis l'entière disposition des romans pour la reproduction illustrée et que, si la Société des Gens de Lettres pouvait, en thèse générale, se prévaloir contre les tiers contractants de l'apport stipulé dans l'article 23 du règlement intérieur, c'était à la condition que l'apport fût matériellement réalisé par une inscription de l'œuvre à la chronique ou au catalogue qui en est l'annexe, ce qui, d'après eux, n'avait pas eu lieu. Le rapport note qu'il y avait erreur de fait sur ce point en ce qui concerne le roman de Jules Mary, dont l'inscription à la chronique remontait à 1883.

Le rapport relate que le tribunal de la Seine a, par jugement du 22 juin 1906, décidé que le transport du droit de reproduction de l'auteur à la Société des Gens de Lettres s'opère par la remise d'une nomenclature des ouvrages sur lesquels le sociétaire fait abandon de son droit, nomenclature qui est portée à la connaissance des tiers par l'inscription au catalogue et à la chronique de la société. Le tribunal a rejeté la demande de la Société des Gens de Lettres

et de Théodore Cahu quant au roman *Vendus à l'Ennemi,* qui n'avait pas été inscrit au catalogue, mais il a accueilli la demande de la société et de Jules Mary quant au roman *Le Docteur rouge,* qui figurait au catalogue à l'époque du traité passé par M. Mary avec MM. Rouff et Cie. Toutefois, en raison des termes du traité, le tribunal a estimé que la société était seule fondée à réclamer sa part dans les droits d'auteur et il s'est borné, après avoir prononcé, pour le préjudice passé, une condamnation à des dommages-intérêts, à faire défense à MM. Rouff et Cie de continuer la reproduction sans payer la redevance due à la Société des Gens de Lettres.

Par exploit du 13 octobre 1906 la Société des Gens de Lettres et MM. Mary et Cahu ont fait appel devant la Cour de Paris. Plus tard, Jules Mary et la Société des Gens de Lettres ont accepté les dispositions du jugement concernant le roman *Le Docteur rouge,* en sorte que l'intérêt du litige s'est concentré sur la question de savoir si MM. Rouff et Cie avaient pu publier librement le roman de Théodore Cahu à raison de ce que ce roman n'était pas encore inscrit au catalogue de la Société lors du traité de cession.

Par arrêt rendu le 29 mars 1907 la Cour de Paris a confirmé le jugement du tribunal de la Seine, exprimant, entre autres, les considérations suivantes (p. 43):

Considérant, en effet, qu'aux termes de l'art. 1er des statuts annexés au décret du 10 décembre 1891, qui l'a reconnue comme un établissement d'utilité publique, la Société des Gens de Lettres a notamment pour but "de procurer aux gens de lettres les avantages qui doivent résulter de leurs travaux", et, plus particulièrement, en ce qui touche "la reproduction de leurs œuvres littéraires", de prêter "aide et assistance" à ses sociétaires; qu'il n'est aucunement question, dans ces statuts, de l'apport du droit de reproduction dans le fonds social, et qu'à cet égard, l'art. 10 énonce seulement que les ressources de la société se composent chaque année des "recettes" relatives au droit de reproduction; qu'à la suite de l'art. 13, qui établit l'inaliénabilité du capital social, l'art. 18, en cas de disssolution, applique, après paiement du passif, tout le surplus de l'actif au service des rentes et des charges imposées à la société ou à la création d'établissements en faveur des gens de lettres, et que, dans une liquidation ainsi réglée, il n'est pas possible de retrouver, dans une mesure quelconque, la propriété du droit de reproduction; qu'à la vérité, l'appelante ne sépare pas ces statuts d'un règlement intérieur du 21 février 1892, "dressé en conformité des statuts", et dont l'art. 23 est ainsi conçu: "Chaque sociétaire, en vertu du droit qui lui est reconnu par la loi du 19 juillet 1793, apporte dans la société, pour la durée de sa vie, et pour être exploité en commun, son droit d'autoriser les journaux, revues et recueils périodiques français ou

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publiés en langue française à l'étranger, à reproduire ses œuvres publiées dans d'autres journaux, recueils ou volumes"; que, sans qu'il y ait lieu de s'arrêter à certaines autres considérations contenues dans divers articles du règlement, et qui ne sont visiblement autre chose que l'application apparente de la stipulation précédente, il s'agit de rechercher si, en réalité, l'auteur a, malgré son adhésion aux statuts et au règlement de la société, conservé la propriété de son droit de reproduction, ou si, au contraire, il y a eu de sa part, selon la lettre de l'art. 23, un véritable apport social de son droit, en vue d'une exploitation en commun; qu'il convient d'abord de noter que l'interprétation proposée par l'appelante est contraire au sens manifeste des statuts, dont le règlement intérieur a pour objet d'assurer l'exécution; qu'elle tend à admettre l'addition à la société civile des gens de lettres d'une association commerciale pour l'exploitation du droit de reproduction, et à soumettre ainsi l'institution elle-même à des éventualités auxquelles les contractants n'ont certainement pas entendu s'exposer; qu'aussi bien, et quelles que soient les explications de l'art. 32 sur la clause et les bases du paiement fait à l'auteur, il n'en est pas moins formellement stipulé qu'il touche la part afférente à la reproduction de ses œuvres, seul, et sans aucun partage avec les autres membres de la société; qu'il est, de plus constant en fait que, sur le montant des sommes perçues, la société retient quinze pour cent et remet quatre-vingt-cinq pour cent à l'auteur; que la seule comparaison de ces chiffres démontre nettement que le prélèvement opéré par l'appelante n'est autre chose que la rémunération de ses soins et démarches, et que, dans tous les cas, c'est seulement la retenue ou la "recette" de quinze pour cent qui tombe dans l'actif social;...

Pourvoi en cassation par la Société des Gens de Lettres et Cahu soulevant deux moyens:

1er Moyen. Violation de la loi des 16-24 août 1790, tit. 2, art. 13, de la Constitution du 3 septembre 1791, tit. 3, chap. 5, art. 3, de la loi du 16 fruct. an 3, du décret déclaratif d'utilité publique de la société exposante du 10 décembre 1891, et du principe de la séparation des pouvoirs, en ce que la Cour s'est livrée, pour la solution d'un litige concernant la cession d'une propriété littéraire, à l'interprétation des statuts et du règlement intérieur formant annexe des statuts d'un établissement d'utilité publique, alors que cette interprétation n'appartient qu'à la juridiction administrative.

Il est évident que ce moyen n'offre aucun intérêt en l'espèce.

2e Moyen. Violation des art. 1134, 1599, 1833, 1841, 1851, C. civ., des statuts, et du règlement intérieur de la société exposante, notamment des art. 2, 7, 11, 18 et 20 des statuts, 14, 18, 23 à 34, 36, 69 et 87 du règlement intérieur: 1° en ce que la Cour a décidé, par l'interprétation incriminée dans le premier moyen, que la Société des gens de lettres n'est ni propriétaire, ni usufruitière du droit d'autoriser les repro-

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ductions des œuvres de ses membres, et qu'en conséquence tout auteur, malgré son adhésion aux statuts et au règlement intérieur, peut valablement céder ce droit à un tiers, au détriment de la société, alors que le règlement intérieur, prévu par les statuts, stipule, dans son art. 23, que "chaque sociétaire, en vertu du droit qui lui est reconnu par la loi du 19 juillet 1793, apporte dans la société, pour la durée de sa vie et pour être exploité en commun, son droit d'autoriser les journaux, revues et recueils périodiques français ou publiés en langue française à l'étranger, à reproduire ses œuvres publiées dans d'autres journaux, recueils ou volumes"; et 2° en ce que la Cour a jugé que, dans l'hypothèse même où chaque membre de la société exposante lui ferait apport en propriété ou en usufruit de son droit d'autoriser les reproductions, cet apport ne serait opposable aux tiers acquéreurs de la propriété littéraire qu'à la condition d'avoir été porté à leur connaissance par une mesure de publicité, alors qu'en matière de cession de droits incorporels, tels que les droits des auteurs sur leurs œuvres, la première cession s'oppose par sa seule antériorité, sans qu'il soit besoin d'aucune mesure de publicité, à la validité de toute cession ultérieure.

La Cour de Cassation a rejeté l'appel et dans son arrêt, relativement au deuxième moyen, le seul qui nous intéresse, a énoncé, entre autres, les motifs suivants (p. 44):

Attendu que, des constatations de l'arrêt attaqué, il résulte que Théodore Cahu, membre de la Société des Gens de Lettres depuis 1886, a, par traité du 7 décembre 1896, cédé à la Société Rouff et Cie "le droit de publier avec illustration, sous quelque forme que ce soit", le roman *Vendu à l'ennemi,* dont il est l'auteur; Attendu que, Rouff et Cie ayant entrepris la reproduction de cet ouvrage, la Société des Gens de Lettres les assigna devant le tribunal civil de la Seine, à l'effet de faire interdire cette publication, soutenant que, par suite de son adhésion aux statuts et règlements sociaux, Théodore Cahu avait apporté, dans la société, la propriété de son droit de reproduction, et qu'il ne pouvait plus, sans le consentement de ladite société, traiter valablement pour le texte avec Rouff et Cie; Attendu que l'arrêt attaqué a repoussé cette prétention; que, par interprétation de divers articles des statuts du 10 décembre 1891, rapprochés de plusieurs articles du règlement intérieur du 21 février 1892, et par appréciation de l'intention commune des contractants, il décide que "ces dispositions sont exclusives d'un dessaisissement de la propriété du droit de reproduire au profit de la Société des Gens de Lettres"; que l'auteur est resté propriétaire et maître de ce droit, et que la société est seulement chargée, pour un temps contractuellement fixé, et moyennant un salaire déterminé, d'en encaisser le produit pour le compte de ses adhérents;...

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Cette opinion a été adoptée par la Cour du Banc du Roi de la Province de Québec dans la cause de *Joubert* v. *Géracimo et autres* (1). Le sommaire du jugement contient, entre autres, le dispositif suivant:

La Société des Gens de Lettres, la Société des auteurs et compositeurs dramatiques, et la Société des auteurs, compositeurs et éditeurs de musique, en France, ne sont pas les cessionnaires du droit de propriété littéraire de leurs membres; elles ne sont, chacune dans sa sphère, que les agences de perception de leurs droits d'auteur. Il s'ensuit que chaque auteur peut poursuivre, au Canada, pour la violation ou la conservation de ses droits.

Dans les notes du juge Carroll l'on trouve ces déclarations (p. 98):

L'appelant Joubert est éditeur de musique et d'œuvres dramatiques à Paris. Il est propriétaire, entre autres choses, de quatorze comédies en un acte, dont les titres sont mentionnés dans son action.

Il se plaint: 1. de ce que les intimés ont représenté, sans autorisation, ces pièces à Montréal, à certaines dates qu'il indique; 2. de ce qu'ils ne les ont pas représentés sous les noms de leurs auteurs; 3. de ce qu'ils en ont représenté trois sous de faux titres.

* * * * *

Les principales allégations de l'action ont été prouvées, mais la demande de Joubert a été rejetée en première instance (M. le juge Monet) sur le motif principal, que, étant membre de la Société des auteurs, compositeurs et éditeurs de musique de Paris, il n'avait aucun statut pour poursuivre et que la Société seule pouvait faire valoir ses droits.

Deux motifs additionnels appuient le jugement de première instance: 1. Il n'y a pas de droits d'auteur à percevoir dans une salle de vues animées qui n'est pas un théâtre au sens propre du mot; 2. Les intimés ont agi de bonne foi.

Aucun de ces motifs ne me paraît fondé.

D'abord sur la question de procédure, je crois que Joubert, quoique membre de la Société des auteurs, compositeurs et éditeurs de musique, pouvait poursuivre en son nom personnel pour atteinte portée à des droits dont il est seul titulaire. Quand le présent litige aura été finalement décidé au fond, il y aura chose jugée à l'égard de la Société aussi bien qu'entre Joubert et Géracimo.

Il existe en France trois associations organisées pour surveiller les intérêts des auteurs: ce sont la Société des gens de lettres, la Société des auteurs et compositeurs dramatiques, et la Société des auteurs, compositeurs et éditeurs de musique.

Ces sociétés ne sont pas cessionnaires des droits de propriété littéraire de leurs membres. Chacune fait seulement, dans sa sphère spéciale, fonction de mandataire. Ce sont des agences de perception de droits d'auteurs, et de distribution subséquente de ces droits suivant des conditions déterminées aux règlements respectifs.

C'est sous cet aspect que ces trois sociétés ont été envisagées par les tribunaux français qui ont été appelés à étudier leurs statuts.

Le juge Carroll, après s'être référé à trois arrêts, l'un de la Cour d'appel de Paris, un autre de la Cour d'appel de

(1) (1916) R.J.Q. 26 B.R. 97.

Rouen et un troisième du tribunal de Caen, ajoute (p. 99):

Il y a un peu d'incertitude dans la jurisprudence lorsque, dans le cas spécial de conflit entre une de ces sociétés et quelqu'un de ses membres, il s'est agi d'établir une priorité de pouvoirs relativement à l'autorisation ou à l'interdiction de certaines représentations dramatiques ou de certaines reproductions de textes, mais, dans la cause actuelle, où est poursuivi un tiers auquel on demande indemnité pour des représentations non autorisées, il me paraît hors de doute que Joubert avait capacité juridique pour se porter personnellement demandeur. D'ailleurs, si l'action avait été intentée par l'intermédiaire de la Société des auteurs, compositeurs et éditeurs de musique, Joubert y aurait également figuré à titre de demandeur.

Pouillet, dans son Traité théorique et pratique de la propriété littéraire et artistique, exprime la même opinion: je crois opportun de reproduire quelques passages de son traité:

621. Le droit de poursuite appartient au propriétaire de l'œuvre originale; nous disons: le propriétaire, et non l'auteur; il est, en effet, certain que le droit de poursuivre la contrefaçon passe aux cessionnaires ou héritiers en même temps que la propriété de l'œuvre. C'est ce que le décret du 5 février 1810 disait expressément dans son article 39 ainsi conçu: "Les auteurs peuvent céder leur droit à un imprimeur ou libraire ou à toute autre personne qui est alors substituée en leur lieu et place".

827. *Droit de poursuite.*—Il appartient en principe à l'auteur de l'œuvre, et après lui à ses ayants cause, héritiers, légataires ou cessionnaires. Il appartient également au ministère public. Nous n'avons rien à ajouter aux développements que nous avons donnés plus haut sur ce point en ce qui touche le délit de contrefaçon. Tout ce que nous avons dit alors s'applique ici.

828, *Quid de la Société des auteurs?*—Nous avons rappelé qu'il existe deux Sociétés instituées pour la défense des droits des auteurs et nous avons brièvement défini leur objet, d'ailleurs tout à fait distinct. Il est clair que ces Sociétés parfaitement régulières peuvent poursuivre les faits qui portent atteinte à leurs droits. Il faut toutefois distinguer entre les faits qui font grief à la Société et ceux qui feraient grief aux auteurs, membres de la Société. Les premiers, la Société peut naturellement les poursuivre en son nom; c'est l'être moral qui est blessé; c'est à lui à se défendre. Les seconds ne peuvent être poursuivis que par les auteurs qui en ont victimes, en leur propre et privé nom. La Société, pour cette catégorie de faits, ne pourrait se substituer à eux. Il s'ensuit que le délit de représentation illicite doit être poursuivi au nom de l'auteur, dont le consentement était nécessaire. La Société ne pourrait poursuivre que si la propriété de l'œuvre ou tout au moins le droit de l'exploiter lui avait été constitué en apport par l'auteur.

Voir dans le même sens: Pandectes françaises, tome 48, Propriété littéraire, artistique et industrielle, nos 1365 et 1695; Pandectes françaises, supplément, tome 4, même sujet, nos 278 et 279; Huard et Mack, Propriété littéraire et artistique, no 215; Bry, Propriété industrielle, littéraire et

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artistique, nos 786 et 892; Gazette des Tribunaux, 1913, tome 1, première partie, p. 170; Dalloz, Répertoire Pratique, tome 10, Propriété littéraire et artistique, n° 170.

Depuis la défaite de la France et l'armistice, survenu au mois de juin 1940, le demandeur ne représente pas la Société des Gens de Lettres de France mais le séquestre. Celui-ci pouvait peut-être exercer les droits des auteurs des articles en question, mais il devait le faire en son propre nom. Personne ne peut plaider par procureur, si ce n'est le souverain. Ce principe est reconnu, entre autres, dans les Provinces de Québec et de l'Ontario et en France.

L'article 81 du Code de procédure civile de Québec contient, entre autres, la disposition suivante:

81. Personne ne peut plaider avec le nom d'autrui si ce n'est le souverain par ses officiers reconnus.

Plusieurs jugements ont été rendus en conformité de cette disposition; il suffira d'en citer quelques-uns: *Nesbitt et al.* v. *Turgeon et al.* (1); *Porteous et al.* v. *Reynar* (2); *Cartier* v. *Laviolette et al.* (3); *Lalonde ès qual,* v. *Legault* (4); *Berman* v. *La Société d'Administration Générale* (5); *Paquette* v. *Grondin* (6); *Letellier* v. *Leduc* (7); *Motherwell ès qual,* v. *Laganière* (8); *Bouchard* v. *Gagné et al. et Corporation du village de Mistassini* (9); *Bélanger* v. *Caron et al. et Morin et al., t.s. et Caron, contestant* (10).

Dans le droit anglais ou "common law" la même doctrine prévaut, tel qu'on peut le constater dans les auteurs et les arrêts suivants: Jenk's Digest of English Civil Law, tome 1, n° 65; Halsbury's Laws of England, 2e édition, tome 26, vis Practice and Procedure, p. 12, n° 3; Odgers on the Common Law, 3e édition, tome 1, p. 617; Corpus Juris, v° action, p. 982, nos 84 et s.,; *Fairlie* v. *Fenton et al.* (11); *Paice* v. *Walker et al.* (12); *Harper & Co.* v. *Vigers Brothers* (13).

La même doctrine a cours en France: Dalloz, Répertoire Pratique, tome 1, v° action, nos 64, 65, 66, 86, 87 et 88; Pigeau, La procédure civile des tribunaux de France, tome 1,

(1) (1845) 2 R. de L. 43.
(2) (1887) 11 L.N. 9.
(3) (1862) 6 L.C.J. 309.
(4) (1898) R.J.Q. 15 C.S. 297.
(5) (1916) R.J.Q. 51 C.S. 132.
(6) (1920) 26 R.L. n.s. 447.
(7) (1921) 23 R.P.Q. 232.
(8) (1925) 28 R.P.Q. 97.
(9) (1933) 36 R.P.Q. 353.
(10) (1940) R.J.Q. 78 C.S. 429.
(11) (1870) L.R. 5 Ex. 169.
(12) (1870) L.R. 5 Ex. 173.
(13) (1909) 2 K.B. 549.

pp. 51 et 52; Garsonnet et Cézar-Bru, Traité théorique et pratique de procédure, 3e édition, tome 1, nos 365 et s.; Rousseau et Laisney, Dictionnaire théorique et pratique de procédure, 2e éd., vis action en justice, n° 101. La doctrine est ici exposée avec clarté et précision; je crois à propos de citer le paragraphe:

101. Le mandataire est sans qualité pour exercer en son nom l'action de son mandant. Ainsi le veut l'ancienne maxime *que nul en France, excepté le roi, ne plaide par procureur.* En d'autres termes, le maître de l'action a seul qualité pour l'intenter. La loi n'admet pas qu'un mandataire simple, ordinaire, volontaire puisse figurer en son nom, comme mandataire, dans les qualités de l'instance La violation de cette règle entraîne la non-recevabilité de l'action, et la nullité de tous les actes de procédure signifiés à la requête du mandataire ou procureur, bien qu'il déclare au nom de qui il agit, et que les actes fassent connaître le mandant par ses nom et prénoms (Cass., 30 nov. 1849; Nîmes, 23 déc. 1830, S. 31. 2. 225; D 31. 2 181; Paris, 21 janv. 1861, S. 61. 2. 508; Contrà, Merlin, v° Prescript., t. 4, p. 96; Carré, Quest. 90; Berriat-Saint-Prix. Proc. civ. n° 196, note 9; Favard, t. 1, p. 136; Boitard, t. 1, p. 242; Boncenne, t. 2, p. 128; Bordeaux, 21 fév. 1851, S. 51. 2 245; D 51. 2 191; Rennes, 26 mars 1849, S 51. 2. 705; D. 51. 2. 154).

Le paragraphe 101 bis déclare que par application de la même maxime il a été décidé que le cessionnaire d'une créance doit poursuivre le débiteur en son nom personnel et qu'il ne peut exercer aucune poursuite au nom du cédant.

Il n'y a pas de preuve au dossier que les articles reproduits dans la revue *Aujourd'hui* aient été inscrits à la Chronique de la Société des Gens de Lettres ou au catalogue qui en est l'annexe. A mon avis, il résulte de cette absence d'inscription que les auteurs ont conservé leur droit de propriété dans leurs œuvres.

Les raisons énoncées ci-dessus suffiraient, il me semble, pour justifier le rejet de l'action. Je crois bon néanmoins de résumer brièvement quelques autres moyens de défense invoqués de la part du défendeur.

En vertu de la Loi des mesures de guerre les dispositions des Conventions de Berne et de Rome, relatives au droit d'auteur, sont suspendues et l'écrivain d'un Etat ennemi ne peut acquérir un droit d'auteur pendant la durée de la guerre. Tous les droits d'auteur invoqués par le demandeur ont été acquis durant la guerre par des ennemis. La France et les citoyens français sont devenus pays et sujets

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ennemis le 21 juin 1940 par un arrêté en conseil adopté le 31 juillet 1940 (C.P. 3515) en vertu de la Loi des mesures de guerre.

Je ne crois pas que l'article 8 de l'arrêté en conseil sur les brevets, les dessins de fabrique, le droit d'auteur et les marques de commerce (C.P. 3362) ait aucune portée sur le présent litige.

La présente action est basée sur la Convention internationale pour la protection des œuvres littéraires et artistiques, signée à Rome le 2 juin 1928, dont la ratification canadienne a été déposée le 27 juin 1931, et sur l'article 20 de la Loi du droit d'auteur.

L'article 4 de la Convention de Rome contient les dispositions suivantes:

(1) Les auteurs ressortissant à l'un des pays de l'Union jouissent, dans les pays autres que le pays d'origine de l'œuvre, pour leurs œuvres, soit non publiées, soit publiées pour la première fois dans un pays de l'Union, des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux, ainsi que des droits spécialement accordés par la présente Convention.

(2) La jouissance et l'exercice de ces droits ne sont subordonnés à aucune formalité; cette jouissance et cet exercice sont indépendants de l'existence de la protection dans le pays d'origine de l'œuvre. Par suite, en dehors des stipulations de la présente Convention, l'étendue de la protection, ainsi que les moyens de recours garantis à l'auteur pour sauvegarder ses droits, se règlent exclusivement d'après la législation du pays où la protection est réclamée.

L'article 7 de cette Convention stipule, entre autres, ceci:

(1) La durée de la protection accordée par la présente Convention comprend la vie de l'auteur et cinquante ans après sa mort.

(2) Toutefois, dans le cas où cette durée ne serait pas uniformément adoptée par tous les pays de l'Union, la durée sera réglée par la loi du pays où la protection sera réclamée et elle ne pourra excéder la durée fixée dans le pays d'origine de l'œuvre. Les pays de l'Union ne seront, en conséquence, tenus d'appliquer la disposition de l'alinéa précédent que dans la mesure où elle se concilie avec leur droit interne.

Le premier paragraphe de l'article 4 de la Loi du droit d'auteur décrète ce qui suit:

4. Subordonnément aux dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre originale littéraire, dramatique, musicale ou artistique, si, à l'époque de la création de l'œuvre, l'auteur était sujet britannique, citoyen ou sujet d'un pays étranger ayant adhéré à la Convention et au Protocole additionnel de cette même Convention, publiés dans la seconde annexe de la présente loi, ou avait son domicile dans les possessions de Sa Majesté; et si, dans le cas d'une œuvre publiée, l'œuvre a été publiée en premier lieu dans les possessions de Sa Majesté ou dans l'un de ces pays étrangers; mais ce

droit n'existera sur aucune autre œuvre, sauf dans la mesure où la protection garantie par la présente loi sera étendue, conformément aux prescriptions qui suivent, à des pays étrangers auxquels la présente loi ne s'applique pas.

L'article 5, concernant la durée du droit d'auteur, se lit ainsi:

5. A moins de dispositions contraires et formelles contenues dans la présente loi, la durée du droit d'auteur comprendra la vie de l'auteur et une période de cinquante ans après sa mort.

L'article 20 de la Loi du droit d'auteur, sur lequel s'appuie le demandeur, contient, entre autres, les dispositions suivantes:

20. Lorsque le droit d'auteur sur une œuvre aura été violé, le titulaire du droit pourra recourir, sauf disposition contraire de la présente loi, à tous moyens de réparation, par voie d'ordonnance de cessation ou d'interdiction, de dommages-intérêts, de décomptes (accounts) ou autrement, moyens qui sont ou seront garantis par la loi en vue de la violation d'un droit.

2. Les frais des parties dans toute action en violation du droit d'auteur seront librement déterminés par la cour.

L'arrêté en conseil sur les brevets d'invention, les dessins, le droit d'auteur et les marques de commerce (C.P. 3362), invoqué par le demandeur, n'a pas pour effet de maintenir en vigueur pendant la guerre cet article ni aucun autre article de la Loi du droit d'auteur, à l'exception de l'article 4. Il a été décrété particulièrement pour permettre au registraire des droits d'auteur d'émettre des licences autorisant la reproduction d'œuvres composées par un ennemi durant la guerre; hors ce cas le droit commun subsiste intégralement.

L'article 48 de la Loi du droit d'auteur, qui stipule que le Gouverneur en conseil "peut prendre les mesures nécessaires pour assurer l'adhésion du Canada à la Convention revisée de Berne, signée le treizième jour de novembre 1908, et au Protocole additionnel signé à Berne, le vingtième jour de mars 1914", et l'article 12 de la Loi modificatrice du droit d'auteur, 1931 (21-22 Geo. V, chap. 8) qui décrète que le Gouverneur en conseil "peut prendre les mesures nécessaires pour assurer l'adhésion du Canada à la Convention revisée pour la protection des œuvres littéraires et artistiques, signée à Rome, le deuxième jour de juin 1928", sont les seules dispositions législatives en vertu desquelles les Conventions de Berne et de Rome s'appliquent au Canada.

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L'arrêté en conseil du 27 octobre 1939 (C.P. 3362) ne mentionne point les articles 20 et 48 et par conséquent ne les maintient pas en vigueur pendant la durée de la guerre. La prétention du procureur du défendeur qu'un auteur ennemi, qui a écrit une œuvre pendant la guerre, ne peut se prévaloir de l'article 20 de la Loi du droit d'auteur me paraît bien fondé.

Relativement à la portée de l'arrêté en conseil du 27 octobre 1939 (C.P. 3362) Fox, dans son ouvrage The Canadian Law of Copyright, exprime l'opinion suivante (p. 554):

> Provisions enabling the Minister and the Commissioner of Patents or the Registrar of Copyright to deal in and make regulations affecting copyright and licenses thereunder, are contained in the Patents, Designs, Copyright and Trade Marks Emergency Order, 1939. The Emergency Order, 1939, contains regulations which have a direct effect upon Canada's international position respecting copyright. It is provided that, notwithstanding the provisions of the Regulations Respecting Trading with the Enemy, 1939, the Defence of Canada Regulations, 1939, or any rule or law relating to intercourse or dealings with or for the benefit of enemies, the provisions of s. 4 of the Copyright Act shall be deemed, for the purposes of that Act, to continue in force nothwithstanding the state of war, subject to any alteration, or variation thereof under that Act. Furthermore, any copyright that would have subsisted under s. 4 of the Copyright Act if the owner of the copyright had not been an enemy, shall so subsist where an enemy is, whether alone or jointly with any other person, the owner thereof.

Plus loin (ibid.) l'auteur ajoute:

> The result of the above regulations contained in the Emergency Order, 1939, is that the effect of s. 4 of the Copyright Act remains undiminished in that copyright shall subsist in works made or published by enemy citizens or subjects notwithstanding the existence of a state of war but that, nevertheless, the ownership of such copyright shall be vested in the Custodian under the Regulations Respecting Trading with the Enemy, 1939, s. 24 above referred to.

Ces commentaires de Fox me paraissent soutenir la prétention du défendeur.

La décision rendue dans la cause de *Zamacoïs c. Douville et al.* (1) ne peut faire autorité en l'espèce. Les faits qui y ont donné naissance se sont produits en février 1940, avant que la France et ses citoyens eussent été déclarés ennemis, ce qui n'eut lieu que le 21 juin 1940, par arrêté en conseil (C.P. 3515). L'action de Zamacoïs a été intentée le 14 juin 1940. Au surplus, c'est l'auteur lui-même qui a poursuivi.

(1) (1944) Ex. C.R. 208.

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Pour ces motifs additionnels je crois que l'action ne peut être maintenue. Il ne me semble pas utile dans les circonstances de m'attarder à discuter le droit du défendeur de reproduire les articles incriminés. Je me contenterai de noter que dans le cas des articles des Pères Desqueyrat et Janot, tous deux jésuites, la situation a été nettement éclaircie. Le Père Albert Le Roy, jésuite de la province de Paris et représentant des jésuites français au Canada, a déclaré qu'il connaissait les Pères Desqueyrat et Janot et qu'il sait qu'ils écrivent et publient des articles dans des revues françaises. Il a affirmé que les membres de la Compagnie de Jésus peuvent reproduire, sans autorisation spéciale et sans droit d'auteur, les articles de leurs confrères. Il a produit comme pièce D une lettre en date du 9 juin 1943, signée par lui, qui se lit ainsi:

A qui de droit,

Je soussigné, Albert Le Roy, membre de la province de Paris de la Compagnie de Jésus et membre de l'Action Populaire de Paris, seul représentant des Jésuites français en terre canadienne, certifie que le P. Jacques Cousineau, S.J., est autorisé à reproduire librement dans *Aujourd'hui* tous les articles publiés par les Jésuites français. Il ne saurait être question de droits d'auteur à réclamer.

Je certifie également que nul au Canada n'a reçu autorisation d'aucune sorte pour percevoir des droits d'auteur au nom des Jésuites français.

Je crois opportun de signaler en outre que la publication de l'article d'Yves-R. Simon, intitulé *Maritain intime,* a été autorisée par l'auteur lui-même par lettre du 11 février 1943 ainsi que par Robert Charbonneau, éditeur de *La Nouvelle Relève,* par lettre du 27 mai 1943 confirmant l'autorisation déjà donnée par téléphone. Ces deux lettres ont été produites comme pièce 12.

J'ajouterai que par lettre en date du 9 juin 1943, produite comme pièce E, Jean-Marie Parent, des Editions du Cep, a confirmé l'autorisation verbale donnée au défendeur en février 1942 de reproduire dans la revue *Aujourd'hui* un article d'Henri Ghéon *L'art du théâtre,* appendice *Quinze ans après.*

Je ne crois pas que le défendeur ait en l'occurrence fait preuve de mauvaise foi, nonobstant les affirmations du demandeur et de son avocat à cet effet.

L'action est rejetée, avec dépens.

Judgment accordingly.

1948
April 29
May 3

BETWEEN:

LIBBY, McNEILL AND LIBBY.....PLAINTIFF;

AND

CANADIAN CANNERS LIMITED.....DEFENDANT.

Practice—Trade marks—Compliance with Demand for Particulars—Reference in statement of defence to registered trade marks sufficient—Particulars of resemblances between registered trade marks and plaintiff's mark will not be ordered—Particulars of invalidity alleged must be furnished—Allegation of "common use" requires particulars of such to be furnished.

Held: That a reference to the registered trade marks on which a defendant will rely at trial is sufficient compliance with a Demand for Particulars; particulars of resemblances between certain registered trade marks and plaintiff's trade mark will not be ordered.

2. That when a defendant pleads invalidity of plaintiff's trade marks he must give particulars of the invalidity alleged.

3. That if a defendant intends to rely on particular users other than those owning registered trade marks he should furnish particulars of the first user in the trade and the names and addresses of a number of those alleged to have used the mark as a trade mark in the trade, such number of persons to be determined by the Court; the defendant will not be precluded from adducing further evidence at the trial.

MOTION for Particulars.

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

J. J. Connolly, K.C. for the motion.

Christopher Robinson contra.

CAMERON J. now (May 3, 1948) delivered the following judgment:

In this action the plaintiff claims infringement of its three registered trade marks, that the trade mark of the defendant be expunged, that damages be awarded and certain other ancillary relief. The defendant denies infringement and by counter claim asks for an order expunging the three trade marks of the plaintiff from the register.

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Paragraphs 6 and 7 of the Statement of Defence are as follows:

6. The trade marks covered by the registrations referred to in paragraphs 2, 3 and 4 hereof were not registrable by the plaintiff, since they resembled trade marks which were registered in respect of food products at the respective dates of such registrations, and since they did not contain the essentials of a trade mark properly speaking.

7. The trade marks covered by the registrations referred to in paragraphs 2, 3 and 4 hereof are not distinctive of the plaintiff's food products, since triangles are and have been for many years in common use in Canada by dealers on containers and labels for foods, including canned foods, and for non-alcoholic beverages, including canned and bottled fruit juices, and many trade marks including triangles have been registered in respect of such wares.

The plaintiff served a Demand for Particulars, the defendant replied thereto giving certain particulars and the plaintiff now moves for an order for further and better particulars, in respect of four matters:

1. The plaintiff asks for particulars of the respects in which the plaintiff's registered trade marks as set out in the Statement of Claim herein resemble the trade marks set out in paragraphs 1 and 2 of the said Reply to Demand for Particulars.

In its reply to the Demand for Particulars, the defendant has given the registration numbers and dates of certain registered trade marks which it alleges the plaintiff's trade marks resemble. Particulars of such resemblances are now asked for but in my opinion the defendant should not be required to give them. Full information on that point can be obtained by search in the Register of Trade Marks. Whether such resemblances do in fact exist is a matter to be determined at the trial by production of the record of registrations and argument in regard thereto. Such argument has no place in the pleadings. I am of the opinion on this point that the defendant has complied sufficiently with the demand for particulars by referring to the registered trade marks on which he will rely at the trial.

2. The plaintiff asks for particulars as to the manner in which the plaintiff's registered trade marks do not contain the essentials of a trade mark *properly speaking,* as alleged in paragraph 6 of the Statement of Defence.

A similar demand was made in paragraph 3 of the Demand for Particulars, but the defendant in its reply

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thereto gave no particulars. Paragraph 6 of the Statement of Defence (*supra*) is an allegation that the plaintiff's trade marks lacked registrability because (1) they resembled trade marks previously registered in respect of food products, and (2) they did not contain the essentials necessary to constitute a trade mark, properly speaking. (And should therefore not have been registered in view of the prohibition contained in the then existing section 11 (4) of the Trade Marks and Industrial Designs Act.)

The plaintiff asks for particulars on this point in order to be able to file its reply. I think it is well settled that when the defendant pleads invalidity of the plaintiff's trade marks, he must give particulars of the invalidity alleged; Kerly on Trade Marks, 6th ed., p. 537, where reference is made to *Rowland* v. *Mitchell* (1) in which case such particulars were ordered. It would be impossible for the plaintiff to properly frame its reply without knowing in what respect the defendant alleged invalidity of its (the plaintiff's) marks. It may be the case that paragraph 7 of the Statement of Defence (*supra*), in which it is alleged that the plaintiff's trade marks were not distinctive, is intended to disclose the particulars of the allegation in the previous paragraph that the plaintiff's marks "do not contain the essentials of a trade mark properly speaking." But it is not so stated either in the Statement of Defence or in the Reply to Demand for Particulars. In my view the plaintiff is entitled to be furnished with such particulars.

3. The plaintiff also asks for particulars of the common use in Canada of triangles by dealers on containers and labels for food, including canned foods, and for non-alchoholic beverages, including canned and bottled fruit juices, as alleged in paragraph 7 of the Statement of Defence, and in each case the name of the dealers, the date of first use, the date of registration of each such trade mark, the extent of the use thereof, the wares covered by each such trade mark and the description of each such trade mark.

The particulars given in paragraph 2 of the Reply to the Demand for Particulars constitute, I think, a sufficient compliance with paragraphs 3 and 4 of the Demand for Particulars insofar as *registered trade marks* are concerned,

(1) (1896) 13 R.P.C. 457.

for the same reason as I have set out in regard to Claim 1 of the Notice of Motion. But paragraph 7 of the Statement of Defence alleging "common use" in Canada is not confined to registered trade marks.

If the defendant intends to rely on particular users other than those owning registered trade marks (as set out in paragraph 2 of the Reply to the Demand for Particulars) the plaintiff should be furnished with particulars of the first user of triangles in the trade and the names and addresses of a number of persons alleged to have used the triangles as a trade mark in the trade (see Kerly on Trade Marks, 6th ed., p. 538). In the case of *Aquascutum Limited* v. *Moore* (1) such an order was made, but it was provided that the defendant at the trial would not be precluded from adducing further evidence, the order for particulars in that case requiring the defendant to name only three such alleged users of the mark. Unless, therefore, the defendant states that at the trial he does not intend to establish "common use" by reference to users other than those mentioned in paragraph 2 of the Reply to the Demand for Particulars, it should now give particulars of the first user of triangles in the trade and the names and addresses of three persons or firms (other than those mentioned in paragraph 2 of the Reply to the Demand for Particulars) alleged to have used "triangles" as marks in the trade. If the defendant has knowledge of less than three such alleged users, the number will be reduced to correspond with the number of users within the knowledge of the defendant; but at the trial the defendant will not be precluded from adducing further evidence.

4. The plaintiff also asks for further particulars of the trade marks set out in the said Reply to Demand for Particulars, more especially the description of each mark, the date of first use thereof, the date of registration, the name and address of the owner, and the wares covered by each mark.

The trade marks referred to on this point are all registered trade marks and I think it may be assumed that the defendant has no knowledge of the details thereof other than what may be contained in the Register of Trade Marks. As stated above these are open to inspection by

(1) (1903) 20 R.P.C. 640.

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the plaintiff and it has the same opportunity as the defendant to examine them. I do not think the defendant is required to give any further information on these matters.

The motion will therefore be granted to the extent indicated, and an order will go requiring particulars to be served and filed as above mentioned within fourteen days from the date of service of the order upon the defendant's solicitors; all further proceedings will be stayed until the delivery of such particulars by the defendant, and the plaintiff will deliver its Reply within fourteen days after delivery of the further particulars now ordered.

Costs of the motion will be costs to the plaintiff in the cause.

Order accordingly

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Oct. 31

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April 23

NOVA SCOTIA ADMIRALTY DISTRICT

BETWEEN:

HENRY W. ADAMS ET AL.....PLAINTIFFS;

AND

THE SHIP *FANAD HEAD*.....DEFENDANT.

Shipping—Collision at sea in dense fog—Convoy—Ship acting on her own when danger signal heard—Rule 16 International Rules of the Road—Negligent operation of ship in convoy causing collision.

The action is one for damages resulting from a collision at sea between the schooner *Flora Alberta* and the defendant ship on what is known as the Western Bank, a fishing ground 90 miles from the Port of Halifax, N.S. The *Flora Alberta* had spent two days on the fishing grounds and had drifted some distance. She was returning to the grounds when the collision occurred. Defendant ship was one of a convoy from Halifax, N.S., leading the port column, and with one ship only astern. Two hours before the collision occurred a dense fog was encountered which prevailed at the time of the collision. The Court found that defendant ship was not in an *enclosed* position or *enclosed* in the convoy.

Held: That the Master of defendant ship, one of a convoy proceeding in a dense fog, upon hearing a warning signal from another ship ahead of him and taking individual action to avoid a collision was guilty of negligence in assuming on hearing a second signal that such signal was from the same vessel and that she had changed her course and was clear and such negligence caused the collision between the two ships.

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ACTION for damages resulting from a collision at sea between the schooner *Flora Alberta* and defendant ship.

The action was tried before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax, N.S.

W. P. Potter, K.C. and *Donald McInnes, K.C.* for plaintiffs.

H. P. McKeen, K.C. for owners of defendant ship.

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

CARROLL, D.J.A. now (April 23, 1948) delivered the following judgment:

This is an action for damages resulting from a collision at sea between the fishing schooner *Flora Alberta* and the *Fanad Head,* the defendant. The collision occurred on what is known as the Western Bank, a fishing ground 90 miles from the Port of Halifax and in Latitude 43 degrees 31 min. North, Longitude 61 degrees 59 min. West. It is throughout the year frequented by fishing vessels.

The collision occurred on April 21, 1943. The *Flora Alberta* was sunk and of a crew of 28 members, only 7 were saved. The *Flora Alberta* was a power schooner, equipped also with sails; with a length of 145 feet overall, breadth 26·4 feet, depth 10·8 feet and length of engine room 18·4 feet, with a tonnage of 93 and capable of about 10 knots and perhaps a little more. Although neither Master or Mate had any certificates of competency, the ship was *legally* mastered and manned. The Master and crew had an abundance of service in such vessels and until the instant disaster, the Master had never been involved in a collision at sea.

The *Flora Alberta* had been on the fishing grounds since April 18th and continued fishing from that date until the evening or night of the 20th. On the night of the 20th, while hove to under sail, she had drifted some distance in an Easterly direction and about 4 a.m. Daylight Saving Time, the engine was started and a course was set West

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Magnetic to return to the fishing grounds and developed a speed of about 9 knots. Around 4:30 Daylight Saving Time, noting the depth of the water, the Master of the *Flora Alberta* altered course to West by North and about fifteen minutes before the collision, reduced his speed to approximately 4½ knots. The fog had been very dense from the time she got under way, the wind light from the North-west and a considerable swell on the sea. The fog whistle of the *Flora Alberta* was blown at regular intervals and those on board heard no sound of any fog signal or steamers until about the moment of sighting the *Fanad Head* when a whistle was heard on the starboard side and at the same time the lights of the *Fanad Head* were sighted about a vessel's length away on the starboard bow. The forward lookout on the *Flora Alberta* (I think Mr. Knickle) on seeing the steamer's lights, shouted *steamer* to the men below, (the Captain was below having breakfast) and at the same time yelled "keep off" to the helmsman. Captain Tanner was immediately on deck and ordered the engine stopped and while on the way after, the collision occurred. There was port action by the helmsman, but whether he swung to port or starboard would have made little difference because there was nothing the *Flora Alberta* could have done after sighting the ship, which was almost at the moment she heard the signal from the *Fanad Head*, to avoid the collision. She was trapped and any action would have been of no avail.

There is no doubt, however, that a speed of 9 knots in dense fog is in excess of the *moderate speed* required, under the prevailing circumstances, by the International Rules of the Road (Art. 16). The *Flora Alberta* did slacken her speed to about 4½ knots and I find that was her speed for the period mentioned before the collision, and I am therefore of opinion that her previous speed of 9 knots did not in any way contribute to the collision. It will be noted that the Daylight Saving Time was the time on the fishing schooner. The collision occurred at about 4:20 a.m. Standard Time.

The S.S. *Fanad Head*, mastered by Captain Thomas Heddles, a capable and matured seaman, left Halifax on

April 20, 1943, in convoy, leading the port column, with the S.S. *Timothy Dwight* following. The Commodore's ship S.S. *Telapa,* Captain Hugh Roberts, was leading the centre column. He was in charge of the convoy. The third column, on the starboard side, was led by the S.S. *Tetela.* There were eight ships in the convoy, three in the starboard column, three in the centre column and two in the port column, separated by three cables abreast and two cables in line, steering a course of 132 degrees true, with an ordered speed of 10 knots.

At 2 a.m. Standard Time, on April 21st, a very dense fog was encountered. The convoy was running, under orders, without lights, except for a white cluster shown at the stern of vessels as a guide for the following ships, and starboard lights on the *Fanad Head*; starboard and port lights on the Commodore's ship and port lights on the leader of the starboard column as a guide for the leaders. These were put on, I understand, after fog enveloped the ships. At this time the speed of the convoy was 8 knots—reduced from 10, not on account of the fog, but because at 10 knots it would arrive at a planned rendezvous with other ships joining the Halifax convoy at too early an hour. Fog signals were blown every ten minutes, consisting of various blasts indicating the leaders' numbers in the convoy, beginning on the Commodore's ship and then on the leader on starboard, the *Tetela* and then by the port leader, the *Fanad Head.* The period occupied by those blasts was about one minute. These, of course, are not the fog signals required by the collision regulations, but were the signals ordered for convoys,—this particular convoy, at any rate.

At 4:10 a.m. the officers on the bridge and the lookout on the forecastle head of the *Fanad Head* heard the sound of a high pitched whistle, which Captain Heddles and the lookout said sounded nearly ahead or fine on the port bow. Captain Heddles *at once took individual action and ordered the navigation lights switched on his ship,* and gave his column number independently to draw attention to the ship ahead, not waiting for the Commodore, and in three or four minutes blew his column number again independ-

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ently. This blast was apparently heard by the Commodore on his ship, the *Telapa*. He testified on this incident as follows:

> Shortly after four o'clock (Standard Time) in the morning I thought I heard a faint whistle—I was not sure of it—but I was the only one (on his ship) who heard it. It appeared to come from the port side, fine on the port side of the convoy and as a precaution I sounded my column number and the other column leaders sounded theirs.

At about 4:17 a.m. Standard Time Captain Heddles of the *Fanad Head* and officers on the bridge and I think the lookouts heard the sound of a whistle about, the Captain thought, 3½ points on the port bow. About this whistle Captain Roberts of the *Telapa* and the Commodore testified:

> I heard some time afterwards a definite sound signal a little forward of our port beam, one long blast, and close to the convoy. I formed the opinion (view) at that time that this signal had some connection with the previous one that I thought I heard. I was suspicious and I was on the alert and I knew definitely then that there was a ship in that vicinity.

On further examination Captain Roberts said, "She was about *2 or 3 points* forward of our port beam and apparently close to the convoy." On cross-examination Captain Roberts said, regarding the first whistle he heard, "Well, sound at sea is very deceptive but I should say that it bore about 1 or 2 points on (my) port bow".

Captain Heddles of the *Fanad Head* on hearing the second whistle, sounded his column number without waiting for the Commodore to blow first. He testified that on hearing the second whistle about 3 points on his port bow, he was led to believe that the ship whence the sounds came had passed out of danger. In about four or five minutes afterwards he testified that a white light and a green light appeared out of the fog about 3½ points on the port bow, I would estimate about 300 or 400 feet from his bow. He ordered "Hard astarboard and full astern" and three short blasts were blown on the whistle. At that time the collision was inevitable and nothing that Captain Heddles could do would have availed, that is from the time he saw the lights. At about 4:20 the collision took place. The *Flora Alberta* went down with the disastrous results already mentioned.

A suggestion was made by Captain Heddles that the *Flora Alberta* had changed her course, had turned around

in an easterly direction, probably after he heard the first blast. I do not so find. I find that she held her westerly course, the course outlined by the Master of the fishing vessel, and from the time he stated. There is also some evidence that the red light of the *Flora Alberta* was observed just before the accident, or at the time she was sighted by the *Fanad Head*. I do not so find. In fact the witness, the only witness I think who suggested it, finally said that he "believed he did see the red light but that he might well have been mistaken".

I am attaching very little importance to the conversation between Captain Tanner and Chief Officer Rea which is said to have taken place after the collision and on board the *Fanad Head*. Both denied making certain statements attributed to them and it may well be that under the circumstances that each misinterpreted what the other said.

I have said that from the time the *Flora Alberta* saw the *Fanad Head*—the signal from the *Fanad Head* was heard at about the same time as the ship was sighted—there was nothing she could do to void the collision. She made, however, what I consider, under the circumstances, the proper manoeuvre. The *Fanad Head* I think sighted the *Flora Alberta* a little before the *Flora Alberta* sighted her, but there was nothing the *Fanad Head* could have done after the sighting of the *Flora Alberta* that would have avoided the collision. She too made the proper movement. In a word, I consider that after the vessels were in sight of each other, everything possible was done by both vessels to avoid the collision. But that does not end the case.

The *Fanad Head* was in convoy. If she were not, it is clear that she would have been at fault for the collision by reason of the fact that she was obviously not going at a moderate speed in a fog and in a place, which to the knowledge of the Captain, is frequented by fishing vessels. The fog was very dense and eight knots an hour under those conditions was most certainly not a moderate speed. Being in convoy, however, she was subject to the orders of the Commodore, and his direction as to speed was eight knots for the convoy vessels. Under what I shall call Admiralty Regulations made by virtue of a Canadian Statute, similar I think to the British enactment, the

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Commodore had the legal authority to pass on an order as to speed and there is English legal authority for the proposition that the *Fanad Head* was under a legal compulsion to obey the order of eight knots *while in convoy* and subject to those orders. *The Vernon City* (1) and on Appeal, page 61. In that case, however, it was pointed out that each case "will depend on its own facts and circumstances" and that it was not his (the trial Judge's) desire or intention—

> to lay down any principle by which vessels in convoy can be said to be excused from any obligation under the Sea Rules which they could properly fulfil.

The trial Judge also points out (as quoted by Mr. Justice Lewis on appeal)—

> that in the case of a ship apparently acting in breach of Art. 16, he would require strong evidence of special circumstances or special danger to exonerate her from non-observance of her duty under the rules.

This case was followed a few months later by *The Scottish Musician* (2), and tried before and decided by Langton, J. who presided at the trial in the Vernon City. Mr. Justice Langton found the ship in convoy at fault and that negligence caused the collision and observed—

> A vessel enclosed in convoy has the same duty as every other vessel on the sea to take every possible means to avoid a collision. She is not to regard herself, because she is in convoy as a vessel which is excused from keeping a lookout outside the convoy . . . On the contrary she has to take every possible means of avoiding a collision which she can take without danger, *that is to say without creating more imminent danger still to her consorts in the convoy.* She has a duty to the convoy to keep her station, but she must not press that duty to the point of never taking measures to keep out of the way of some other vessel that is threatening her with collision.

The Justice had some caustic words to say regarding the interpretation of Direction 4 of No. 7 of the Admiralty Notices to Mariners which reads:

> In circumstances where a single vessel has not taken early measures to keep out of the way of a squadron . . . the Regulations for preventing collisions at sea must be the guide.

In that case as in the instant one the single vessel did not know of the presence of the convoy until almost the actual collision. That Regulation has, I think, been changed in wording and meaning, and made effective in 1943 after the judgments in the two mentioned cases were

(1) (1942) P. 9. (2) (1942) P 128

rendered. I do not know that it has the actual force of law. It is a "directive" and I think is more for the purpose of giving an interpretation to the rather stringent convoy regulations. I give the directive or regulation:

No. 7—CAUTION WITH REGARD TO SINGLE SHIPS APPROACHING SQUADRONS OR AIRCRAFT CARRIERS.

Former Notice—No. 2175 of 1942; hereby cancelled.

(1) The attention of shipowners and mariners is called to the danger to all concerned which is caused by single vessels approaching a squadron of warships or merchant vessels in convoy so closely as to involve risk of collision or attempting to pass ahead of or through such a squadron or convoy.

(2) Mariners are therefore warned that single vessels should adopt early measures to keep out of the way of a squadron or convoy.

(3) The fact that it is the duty of a single vessel to keep out of the way of a squadron or convoy does not entitle vessels so sailing in company to proceed without regard to the movements of the single vessel. Vessels sailing in a squadron or convoy should accordingly keep a careful watch on the movements of any single vessel approaching the squadron or convoy and should be ready, in case the single vessel does not keep out of the way, to take such action as will best aid to avert collision.

(4) Attention is also drawn to the uncertainty of the movements of aircraft carriers, which must usually turn into the wind when aircraft are taking off or landing.

NOTE—This Notice is a repetition of the former Notice quoted above (Notice No. 7 of 1/1/1943)

Authority—The Lords Commissioners of the Admiralty. (H. 339/42).

In this connection I refer to the evidence of Captain Roberts, the Commodore of the convoy. In dealing with convoy orders and referring to a ship in convoy—

If she is *in danger she has to take individual action.* The Admiralty instructions are that the Master of the ship is responsible for the safety of his ship and that if there is any position of danger it is up to the Master to take what action he thinks fit.

Questioned on the particular situation and circumstances of the present case, he answered as follows:

Q. Did you expect a ship under your command to go on and to continue steaming after hearing a ship ahead of her sounding?

A. No.

Q. Or a ship forward of her blow?

A. No.

He further testified that by virtue of the cluster of lights carried by the *Fanad Head* that the ship astern, the *Timothy Dwight* could take the necessary action to avoid the *Fanad Head* if any changed movement was made by the latter. He might also well have said that the signals required for any change of movement by the *Fanad Head*

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would be heard by the following ship and the necessary action taken by her, and I think without danger of collision between the two if both actions were promptly performed.

The Commodore further said:

> But if I thought there was danger, if I thought the whistle was close to . . . naturally I would take some action irrespective of any ships astern or on either side of me.

While dealing with the Commodore's evidence, I must point out that the Commodore testified that he could not identify the second whistle he heard as coming from the same ship as the first blast.

Now the Master of the *Fanad Head* on hearing the first high pitched whistle nearly ahead, took individual action. He switched on navigation lights and also blew his column number independently. Then he put himself "on his own". He must have felt there was danger ahead before taking himself out of the orders for the convoy. I think with deference that having regard to the fact that the location of the ship whence the whistle came was not ascertained nor the direction in which she was going, that the *Fanad Head* should have complied with the latter part of Rule 16:

> A steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

There can be little doubt, however, that this precaution should certainly have been taken after the *Fanad Head* heard the second blast at about 4:17, and about 3½ points on the port bow. His non attention to this rule was perhaps due to two assumptions which he made, first that the sound of the horn he heard at 4:10 a.m. was the actual hearing of the vessel blowing the same, and second in assuming that at 4:17 a.m. the horn was from the same vessel and that she had changed her course to a northeasterly direction and was clear. This judgment was formed on insufficient and unsound basis and is a fault attributable to him and therefore negligence and the negligence that caused the collision.

I quote from the *Nippon Yusen Kaisha* (1) on the question of inferences made in such circumstances:

> In order that the position of a vessel whose fog signal is heard by another vessel may be ascertained within the meaning of Art. 16 . . . the vessel *must be known* by the other vessel to be in such a position

(1) (1935) A.C. 177.

that both vessels can safely proceed without risk of collision. An *inference* as to the vessel's position, based upon the direction from which the fog signal was heard, the probable course she is taking and the improbability of her crossing the fairway in a fog, is not an ascertainment justifying a disregard of the precautions enjoined by the above article. Implicit obedience to the regulations upon which navigators are entitled to rely is of great importance.

Lord McMillan made the following statement:

The position of the *Toyooka Marie* was not in their Lordships opinion ascertained within the meaning of the regulations. It was *inferred* not *ascertained* and as it turned out, the inference was wrong.

The observations of Sir Gorell Barnes in the case of *In Re Aras* (1) are well worth repeating—

I think it is exactly the same because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bow and is not justified in thinking that it is broadening unless he can make sure of it.

It should be observed that the *Fanad Head* was not in an "enclosed" position or "enclosed" in a convoy. She was clear and free of ships both ahead and on her port with only one ship astern and there was no danger by taking the usual precautionary measures, with proper notice to the ship behind, of creating "imminent danger to her consorts in the convoy". He knew of the danger ahead from the time he took the independent action of throwing on his lights and giving the convoy signals.

I have had a very able and experienced seaman as nautical assessor, who rendered me much needed aid, and I have his concurrence on all findings which come within the ambit of his advice.

There will be judgment for the owners of the *Flora Alberta.*

Judgment accordingly.

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(1) (1907) P. 28.

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Dec. 11
1948
May 21

BETWEEN:

CONSTANCE CHISHOLM, in her quality of sole devisee and testamentary executrix of Andrew Gordon Chisholm, deceased..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Indian Act, R.S.C. 1927, c. 98, s. 90(2)—No recovery for services rendered Indians not approved by Superintendent General of Indian Affairs—Decision of the Minister is not subject to review by the Court.

Held: That there can be no recovery against the Crown for services rendered a band of Indians at the request of such band unless an agreement to such effect has been approved in writing by the Superintendent General of Indian Affairs.

2. That the decision of the Minister of Mines and Resources to pay or not to pay is not subject to review by the Court.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

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

Auguste Lemieux, K.C. for suppliant.

W. R. Jackett for respondent.

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

O'CONNOR J. now (May 21, 1948) delivered the following judgment:

This is a Petition of Right brought by Constance Chisholm, sole devisee and executrix of the will of the late Andrew Gordon Chisholm, K.C., who died at London, Ontario, on the 11th day of January, 1943.

In these proceedings the following question of law was set down for hearing:—

Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the Respondent for any of the relief sought by the Suppliant in the said Petition?

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O'Connor J.

The facts alleged in the Petition of Right are:—

The late Mr. Chisholm, between the years 1915 and 1942, both inclusive, rendered legal services to the Six Nations Indians, particulars of which are set out in the account of $5,034.70, annexed to and forming part of the Petition of Right. The services rendered were in connection with the preparation and prosecution of a claim by the Six Nations Indians against the Crown.

The Six Nations Indians are wards of the respondent and under the Indian Act, R.S.C., 1927, chap. 98, as amended, the Minister of Mines and Resources is and has been at all times material the trustee of the Indians, and as Superintendent General of Indian Affairs has the control, direction and management of the Indians in Canada, including their trust funds.

The professional services were rendered to the Six Nations Indians at their own request, and for their benefit and advantage and protection and promotion of their welfare as such band.

The charge for such services is most modest and reasonable. Mr. Chisholm applied to the respondent as trustee for the Six Nations Indians for payment of the account, but failed to obtain any settlement. The Six Nations Indians have always viewed with favour and approved the account, and have been willing that Mr. Chisholm be paid an adequate remuneration and by a resolution of the Six Nations, dated 8th of February, 1943, they duly approved and recommended that the sum of $1,500 be paid to the suppliant on account of the bill for such legal services, but no payment has been made.

For these reasons the respondent is indebted to the suppliant in the said sum of $5,034.70.

The facts alleged do not show that there is any liability on the respondent for the account. It is not suggested that the respondent ever instructed Mr. Chisholm to act. Because the respondent holds money in trust for the Indians does not impose a liability on the respondent to pay this account out of the trust funds or otherwise. The decision of the Minister either to pay or not to pay the account is not subject to review by the Court. The Court has no jurisdiction to do so.

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Nor is there any liability if the claim is on the basis that:—

(a) the Six Nations engaged Mr Chisholm and agreed to pay him out of the trust funds in the possession of the respondent

or

(b) the resolution approving and recommending payment is an assignment of the trust funds or an order to pay $1,500 out of such funds;

because Section 90 (2) of the Indian Act provides:—

No contract or agreement binding or purporting to bind, or in any way dealing with the moneys or securities referred to in this section, or with any moneys appropriated by Parliament for the benefit of Indians, made either by the chiefs or councillors of any band of Indians or by the members of the said band, other than and except as authorized by and for the purposes of this part shall be valid or of any force or effect unless and until it has been approved in writing by the Superintendent General.

It is not alleged that there was such approval.

The question of law will, therefore, be answered in the negative.

The costs will be costs in the cause.

Judgment accordingly.

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Jan. 7, 8 & 9
Apr. 23
May 21

BETWEEN:

FRANK MILLER, Chief Councillor of the Six Nations of the Grand River on behalf of himself and all others, members of the said Six Nations of the Grand River and the said Six Nations of the Grand River..... SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Argument on question of law—No cause of action disclosed—Petition of Right held not to lie against Respondent.

Held: That when suppliants sought relief for a breach of trust alleged to have resulted from the surrender of certain lands owned by the Six Nations Indians and such land was held in trust by the Crown solely for the purpose of granting the same to purchasers chosen by the Six Nations and such purchase money was received not by the Crown but by the trustee appointed by the Indians, a Petition of Right claiming damages for breach of trust does not lie against respondent.

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ARGUMENT on question of law ordered to be set down and disposed of before the trial.

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

Auguste Lemieux, K.C. for suppliants.

W. R. Jackett and *D. W. H. Henry* for respondent.

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

O'CONNOR J. now (May 21, 1948) delivered the following judgment:

In a Petition of Right the suppliants, Frank Miller, Chief Councillor of the Six Nations of the Grand River, on behalf of himself and all others, members of the said Six Nations of the Grand River, and the said Six Nations of the Grand River, claim damages for breach of trust on the facts herein set out.

On the application of the respondent an order was made to have the following question determined prior to the hearing:

1. Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants on October 21, 1943, and September 5, 1944, pursuant to orders made by the President of this Honourable Court on June 3, 1942, and December 21, 1943, respectively, to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition?

If a Petition of Right would otherwise lie against the Respondent for any of the relief sought by the said Petition, is the said Petition barred by the Exchequer Court Act and the Statute of Limitations (Ontario) as alleged by paragraph 19 of the Statement of Defence herein?

The facts alleged in the petition and the particulars appear to be:

The suppliants allege that part of certain lands granted to the Six Nations by a deed, dated October 25, 1784, and confirmed by a patent dated January 14, 1793, was surrendered to the respondent on February 5, 1798, by Captain Joseph Brant under a power of attorney from the Six Nations, dated November 2, 1796, and that such lands were held by the respondent in trust for the Six

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Nations to sell the said lands and to invest the proceeds for the purpose of providing an annuity for the Six Nations and their posterity.

The suppliants also allege:

4. About the year 1784 was formed in the Province of Upper Canada with the consent and approval of His Late Majesty George the Third, what is now known as the Department of Indian Affairs and which from its formation to the present time, by its superintendent General of Indian Affairs or other officer or officers charged with its control and management from time to time as an Express Trustee, has assumed the control and management as such of the lands and property of the Indians in Canada and has established what is known as the Indian Trust Fund handling and receiving, paying and being responsible as such Express Trustee for all Indian money paid to it or which should be collected and paid to it and generally and since its formation acting as Express Trustee for the Indians in Canada, including your suppliants, and maintaining the relationship of such Trustee and cestui que trust in respect of such Indian properties from its formation to the present time constituting such Indians as minors and wards of said Department, which status only has been accorded them to the present day.

The suppliants allege that the construction of the dam at Dunnville, Upper Canada, in 1826 by the Welland Canal Company, flooded and permanently destroyed 1826 80/100 acres which were a portion of the lands surrendered by Captain Brant, and although Section 9 of the Act incorporating the Welland Canal Company, being Statute 4, George IV, Chap. 17, expressly provided that compensation should be made to any tribe of Indians whose land was damaged by the construction of the canal, the respondent failed to collect from the proprietors of the said Welland Canal the amount of such damage.

The suppliants also allege that the Government of Upper Canada on October 20, 1886, passed an Order-in-Council declaring 368 7/10 acres, being a portion of the lands surrendered by Captain Brant, to be a free grant to the Grand River Navigation Company, and that the respondent did not collect the value of the lands conveyed to the said company.

The suppliants further allege that the respondent out of the monies realized from sales of the lands surrendered by Captain Brant on February 5, 1798, purchased worthless shares of the Grand River Navigation Company illegally and unlawfully.

The suppliants claim payment for:

(a) The value of the lands destroyed by the flooding, and
(b) the value of the lands contained in the free grant, and
(c) repayment of the cash paid for the shares of the Grand River Navigation Company out of the funds of the Six Nations arising from the sale of their land.

While the suppliants allege in paragraph 4 of the petition that the Superintendent General of Indian Affairs was an Express Trustee for the Six Nations because he assumed the control and management of their lands and property, there is no further allegation of any kind in respect to this.

But it is specifically alleged in paragraph 8 that the lands destroyed by flooding (claim (*a*)) and in paragraph 11 that the lands in the free grant (claim (*b*)), were portions of the lands surrendered by Captain Brant.

The claims under (*a*) failure to collect compensation, and (*b*) the making of the free grant, are made on the basis that the surrender by Captain Brant created a trust and made the respondent an Express Trustee for the Six Nations and that (*a*) and (*b*) constitute a breach of trust.

The claim under (*c*) purchase of worthless shares, is made on the basis that the surrender by Captain Brant created a contract and that (*c*) was "in breach of the contractual agreement" as set out in paragraph 15 of the petition.

The surrender by Captain Brant of February 5, 1798, described in paragraph 15 of the Petition of Right is fully set out in the particulars and consists of the minutes of the meeting of the Executive Council of Upper Canada of February 5, 1798, and the letter from the Honourable Peter Russell, president of the council, to the Duke of Portland, secretary for the Colonies. The power of attorney under which Captain Brant acted is recited in the minutes. From these documents it is clear that Captain Brant under a power of attorney dated November 2, 1796, surrendered to His Majesty the 352,707 acres on behalf of the Six Nations (at that time Five Nations) which "he prayed in their name that His Majesty would be graciously pleased to grant in certain portions", to five purchasers named and "leaving a blank for another portion which they are hereafter to recommend for". The surrender was accepted.

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Minutes of the Council meeting state:

The Attorney General then produced the Deeds of Grant (five in number) which the President signed in presence of the Board and ordered that the Great Seal of the Province shall be affixed thereto and that the Secretary of the Province shall be instructed not to deliver the said Deeds to any of the Parties to whom the said Lands are thereby conveyed, unless they shall produce and leave with him a Certificate under the hands and Seal, of the Honourable D. W. Smith, Wm. Claus, Esqr., and Alexr. Stewart, Esqr., Trustees authorized by the Five Nations to receive Mortgages of the said Lands; Certifying that the said Parties have done everything required of them, and necessary to secure to the Five Nations, and their Posterity the stipulated Annuities and Considerations which they agreed to give for the same.

The letter from the president of the Executive Council to the secretary for the Colonies states:

The Five Nations having appointed the Acting Surveyor General, the Superintendent of Indian Affairs in this District, and Alexander Stewart, Esqr., Barrister at Law, their Trustees to receive for their use Mortgages and other Securities for the Payment to them of the several and respective considerations stipulated; I have directed the Secretary of the Province not to issue to the Parties any of these Deeds, before they have delivered to him an order for so doing signed by each of the three Trustees.

The Secretary of the province was instructed to hand the deeds to the purchasers when the trustees appointed by the Six Nations certified that they had received mortgages and other securities for the payment of the considerations stipulated.

There is no allegation that the deeds of Grant were not eventually given to the purchasers or that the trustees did not receive the purchase monies. On the contrary it is alleged that the shares of the Grand River Navigation Company were purchased out of the monies arising from the sale of the lands surrendered by Brant:

The Crown did not hold the lands in trust for the Six Nations except for the purpose of granting the same to the purchasers chosen by the Six Nations. And the purchase money was received not by the Crown but by the trustees appointed by the Indians.

In the particulars furnished pursuant to the order dated June 3, 1943, the suppliant (Part III (*a*) (1)) gives particulars of the surrender by Captain Joseph Brant of "lands on the Grand River, mentioned in a schedule thereto attached dated January 15, 1798 . . ." referred to in paragraph 8 of the petition, and in (*a*) (2) gives particulars

of a further surrender dated February 5, 1798, referred to in paragraph 13 of the petition. The date of the surrender mentioned in Part III (*a*) (1) of the particulars furnished pursuant to the order dated June 3, 1943, is not given but is described as "mentioned in a Schedule thereto attached dated January 15, 1798". In (*b*) it is described as of January 15, 1798. The attention of counsel was called to this and after investigating he informed the court that this was in error and that no surrender was made on January 15, 1798.

It was also pointed out to counsel for the suppliants that on the facts alleged in the petition and in the particulars that the Crown was not a trustee in respect to the lands surrendered by Brant on February 5, 1798, except for the purpose of granting the lands to the purchasers and there was no allegation that the Crown had not done so. And the facts alleged were that the purchase monies were to be paid to the three trustees appointed and authorized by the Six Nations "to receive for their (Six Nations) use mortgages and other securities for the payment to them of the several and respective considerations stipulated". So that the three individuals were the trustees not the Crown.

Counsel then moved to:

(*a*) Examine an officer of the Department.

(*b*) To amend the petition by alleging that the trustees were appointed by the Crown, and that the trustees had failed to procure the Deeds for the purchasers and failed to collect the purchase price.

It was then pointed out to him that this was in direct conflict with the statements in the particulars furnished by the suppliants, in which he had quoted the minutes of the meeting of the Executive Council of Upper Canada, dated February 5, 1798, and the letter to the Duke of Portland from the president of the Executive Council.

Counsel for the suppliants then asked for further time in which to investigate, and for leave to submit a further brief. In the brief submitted he pointed out that Brant had only surrendered part of the lands in the original grant and that there was then a balance remaining. He asked leave to mend the petition by changing the petition so as to allege that the lands damaged by flooding and the lands

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contained in the free grant were *not* part of the lands surrendered by Brant, but were part of the remaining lands in the original grant.

But if the relief sought is not based on a breach of the Brant trust, then there would not appear to be any basis for the claim, or if there is a basis, it would be a new cause of action, which would require a new petition and a new fiat.

The motion to examine an officer of the Crown and all the motions to amend will be refused.

For the reasons I have given, the first question of law is, therefore, answered in the negative, and it is not necessary to deal with the second question.

The costs will be costs in the cause.

Judgment accordingly.

1948

May 11 & 12

May 19

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

FALCONER FISHING FLEET LIMITED ET AL..... } PLAINTIFFS;

AND

THE SHIP *ISLAND PRINCE*.....DEFENDANT.

Admiralty—Salvage—Award should be liberal—Cost of bail paid by plaintiff when excessive amount demanded.

Held: That upon the facts disclosed plaintiffs' vessel performed a salvage service, at no little risk to the salvaging vessel, which resulted in extricating the defendant salvaged vessel from a position of danger to one of complete safety; the service contained in some degree all the many and diverse ingredients of a salvage service and the reward to plaintiff on the ground of public policy should be liberal though not extravagant.

2. That when a plaintiff has demanded and obtained bail for an excessive amount it must pay the cost of the whole bail.

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ACTION for salvage.

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

J. Howard Harman for plaintiffs.

A. Bull, K.C. and *Vernon Hill* for defendant.

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

SIDNEY SMITH D.J.A. now (May 19, 1948) delivered the following judgment:

This is a claim for salvage services rendered to the defendant ship *Island Prince*. It is brought by the owner, master and crew of the fishing vessel *Glendale V*.

The *Island Prince* is a steam screw cargo vessel 123·5 feet long, 28·8 ft. beam, of 415·99 gross and 266·35 register tonnage, and having a speed of 8 knots. There was conflicting evidence as to her value, but I think $50,000 would not be far from the mark. In fixing this amount I do not wish to reflect in the slightest on the integrity of the witnesses to value, for on this there is room for wide variance of opinion. She was partially laden with a mixed cargo, part of which consisted of lumber stowed on deck; and was in the course of a voyage from Vancouver via various ports to Port Alice.

The *Glendale V* is a motor screw vessel of 27·57 register tonnage, fitted with a diesel engine, and engaged in purse seine fishing. She had a complement of three—master, mate and engineer. Her value is approximately $20,000.

On 21 April, 1947, at about 4 p.m., while proceeding to the fishing grounds at Goose Island, the Master of the *Glendale V* intercepted a radio-telephone message to all ships in the vicinity to the effect that the *Island Prince* was in difficulties and required assistance. The *Glendale V* was then in the neighbourhood of Hardy Bay, at the North end of Vancouver Island, and had in mind seeking shelter for the night. The position of the *Island Prince* was some 10 miles west (mag.) of Pine Island at the entrance to Queen Charlotte Sound, and therefore about 24 miles distant from the *Glendale V*. This signal, repeated some fifteen times during the afternoon and originating in a

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radio-telephone report from the Master to his Owner, was also intercepted by other vessels in the neighbourhood, notably the *Dinamac* and the Tug *La Pointe* (with two barges in tow), but these vessels had their own difficulties, and were thus unable to respond; although they kept in touch with developments by radio-telephone. The *Glendale V* proceeded through head seas to the assistance of the *Island Prince* and about 8.15 p.m. made up to her. This latter vessel had lost her rudder and in the course of rigging a jury rudder, had got her propeller fouled by a wire, thus losing both steering and motive power.

The situation of the *Island Prince* is well described in the following entry from her log-book:

> 12 40—Lost the rudder. All hands spent the afternoon rigging a jury rudder. After it was rigged the wire on the starboard side fouled the propeller and we were unable to use it. A sling load of 2" x 4"s was streamed from the bow to act as a sea-anchor. At 20.15 the fish boat *Glendale V* arrived and took us in tow. Sling load of 2" x 4"s had to be cut loose. Heavy seas were running causing the vessel to roll heavily. The excessive rolling did considerable damage to various parts of the vessel and cargo. Contacted the tug *Petrel* who is going to pick us up somewhere below Noble Id.

This is borne out by the oral evidence except as to the damage to the vessel, which was not elsewhere mentioned. I find the wind was from the North West, blowing with a force of approximately 25 to 30 miles per hour, with heavier gusts; and that the vessel was then in exposed waters, and in a position of appreciable though not actual or imminent danger. The log reference to the Tug *Petrel* concerned an arrangement made by the respective owners that this tug should tow the *Island Prince* either from Shushartie Bay or Hardy Bay to Vancouver. The tug was in such a position that had she proceeded north of these places to the exposed waters in which the *Island Prince* found herself, she could not have reached that vessel until 2 a.m.

The *Glendale V* succeeded in taking the *Island Prince* in tow, using for this purpose two of her own wires, and in due course reached Hardy Bay at 1.45 a.m., where she handed over her charge to the waiting *Petrel*. The voyage was not without adventure. The following wind and sea was of assistance; but some water came over the stern and there was risk of the tow overrunning the towing vessel.

One wire parted at the entrance to Christie Passage, and the *Glendale V.* had a hard tussle to make the entrance: but in the end all was successfully accomplished.

There is little to be gained by canvassing the evidence in detail. It will suffice to state my conclusions. But I think it right to say that I was impressed by those on board the *Glendale V.* I thought their evidence was refreshingly given to under-statement, rather than over-statement. I think this was undoubtedly a salvage service —a volunteered service, gallantly undertaken and skilfully executed; performed at no little risk to the salvaging vessel; and resulting in extricating the salved vessel from a position of danger to one of complete safety; and so containing in some degree all the many and diverse ingredients of a salvage service.

What should be the reward? On the ground of public policy it should be "liberal", though not "extravagant". Bearing in mind these factors, together with the values of the two ships, and the fact that money has not now the value it had a quarter of a century or so ago, I think an appropriate amount would be $2,500; and it is so ordered.

One other point calls for mention. The plaintiffs admittedly demanded security for an excessive amount. In the circumstances I think a bail bond of $4,000 or even $5,000 was all that could have been reasonably exacted. They demanded and obtained bail for $50,000, later reduced to $10,000. Following the practice of the Court in such cases, they must therefore pay the cost of the whole bail. I have always thought this rather a harsh rule. It seems to me that justice would be done by requiring the plaintiffs in such a case to pay the cost of the excess over what in the event would have been reasonable bail. But the practice has been too long established to be disturbed by me now; *The Race Rock* (1). All I can do is once more to point out that the Court will mark its disfavour of demanding excessive bail by dealing with the cost thereof in the manner indicated.

There will be judgment accordingly with costs, less the cost of bail.

Judgment accordingly.

(1) (1932) 45 B.C.R. 522 at 531.

1948
Mar. 18
May 25

BETWEEN:

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

AND

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

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

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

APPEAL under the Income War Tax Act.

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

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

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

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

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

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

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

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

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

The then relevant sections of the Act were as follows:

Paragraph A—First Schedule—

(*a*) With respect to Normal Tax.

Section 1—Rule 2.

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

(*b*) With respect to Graduated Tax.

Section 2—Rule 6.

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

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

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

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

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

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

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

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

But the word here is "employed".

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

> In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther.

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

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

I refer to the following definitions:—

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

(Omitting the references to physical things and time.)

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

(1) (1889) 18 S.C.R. 148.

(2) (1857) 6 H.L. Cas. 106.

(3) (1886) 16 Q.B.D. 636.

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

"Employed"

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

Webster's New International Dictionary.

"Employ"

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

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

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

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

"Employment"

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

2. That which engages or occupies; . . .

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

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

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

(*d*) an unmarried minister or clergyman in charge of a diocese, parish or congregation who maintained a self-contained domestic establishment and employed therein on full-time a housekeeper or servant.

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

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

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

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

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

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

The word "employed" also occurs in Section:—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The appeal will be allowed and the assessments will be referred back to the Minister for an adjustment of the figures consequential on the allowance of the appeal.

The appellant is entitled to the costs of the appeal.

Judgment accordingly.

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June 20

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May 27

BETWEEN:

ROBERT F. ACORN.....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sub paras. (I), (II), (III), para. (t) s. 4—Member of the reserve army Canadian Military Forces not entitled to exemption—Appeal dismissed.

Held: That a member of the reserve army of the Canadian Military Forces is not entitled to the exemption provided for in the Income War Tax Act, R.S.C., 1927, c. 97, paras. (I), (II), (III) para. (t) s. 4.

2. That sub paragraphs (I), (II), (III) of paragraph (t) of s. 4 of the Income War Tax Act, R.S.C., 1927, c. 97, as amended apply to members of the Canadian Naval, Military and Air Forces on active service.

APPEAL under the Income War Tax Act.

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

H. F. MacPhee, K.C. and *N. W. Lowther, K.C.* for appellant.

J. O. C. Campbell and *G. R. Holmes* for respondent.

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

ANGERS J. now (May 27, 1948) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act by Robert F. Acorn, of the City of Charlottetown, Province of Prince Edward Island, against the assessment concerning the income for the year 1943, which from the copy of notice of assessment included in the file of the Department of National Revenue transmitted by the Minister to the Registrar of the Exchequer Court, appears to have been mailed on January 31, 1945.

The notice of assessment says that the taxable income has been determined in the sum of $2,201.89 and notifies the taxpayer that he is assessed at $98 and that the amount payable after deduction at the source and application of other payments on the assessment is $29.40, payable on February 28, 1945, made up as follows:

amount of tax levied		$98.00
paid by deduction at source	$54.15	
other payments applied on assessment	14.45	
		68.60
		$29.40

In his notice of appeal dated February 28, 1945, a copy whereof forms part of the record of the Department, the appellant alleges (*inter alia*):

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whereas attached statement to income tax return filed by me for the taxation year 1943 in relation to Army Pay received, and declared as non-taxable income reads as follows:

annual training, 1943	$ 78.00
balance received, 1943	56.80
declared in 1942	87.20
	$222.00
less declared in 1942	87.20
balance	$134.80

and whereas having been assessed on the balance shown of $134.80, amounting to a tax of $29.40.

and whereas The Income Tax Act, Chapter 97, R.S.C. 1927, and amendments, July, 1943, Part II, Section 4T (1) (iii) reads as follows:

"Exemptions & Deductions

Excepted Incomes

4. The following incomes shall not be liable to taxation hereunder.

T The service pay and allowances of:

(i) Members of the Canadian Naval Military and Air Forces, etc. while in the Canadian Active Service Forces.

(iii) Members of the said Forces whose income from such service pay and allowances is at the rate of less than $1,600 per annum."

I therefore appeal this assessment on the grounds that I was paid at less than the yearly rate of $1,600 and am therefore not liable to the assessed sum of $29.40.

On April 30, 1945, the Minister of National Revenue, per C. F. Elliott, deputy minister of National Revenue for Taxation, affirmed the assessment on the ground that "the service pay and allowances received by the taxpayer while in the reserve army are not within the exemption provided by paragraph (*t*) of section 4 of the Act and

therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessment is affirmed."

In accordance with Section 60 of the Act the appellant sent to the Minister a notice that he was dissatisfied with his decision and that he desired his appeal to be set down for trial. With his notice of dissatisfaction the appellant forwarded a recapitulation of the facts, statutory provisions and reasons which he intended to submit to the Court in support of his appeal.

In his recapitulation of the facts, statutory provisions and reasons for appeal the appellant states in substance that during the year 1943 he was a member of the Canadian Military Forces holding the rank of Lieutenant from January 1 to June 1, 1943, and the rank of Captain from June 1, 1943, to the end of the year, that his unit was the 17th (R) Armoured Regt. with headquarters at Charlottetown, P.E.I., that as such member of the Canadian Military Forces he received service pay and duly reported it on an appendix to his income tax return.

The appellant adds that, since on this appeal a distinction will be made between the service pay received while attending the regular annual camp training and that received while attending the regular training parades at unit headquarters, he reported in his return the following amounts:

service pay for attending annual camp	$ 78.00
service pay for attending regular training parades at headquarters local	56.80
	$134.80

The appellant alleges that under sub-paragraph (iii) of paragraph (*t*) of Section 4 of the Act, the relevant portion of which is quoted in the notice of appeal and reproduced in these notes, the service pay of members of the Canadian Military Forces is exempt from taxation where the income for service pay is paid at the rate of less than $1,600 per annum. He declared that under the policy of training laid down for the 17th (R) Armoured Regt. by the Military

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Headquarters the maximum service pay which could be paid to a member of his unit in 1943 was 15 days at the annual camp and 40 days training at local headquarters and training for officers and non-commissioned officers, making a total of 55 days.

The appellant then explains how his pay and allowances were made up and sets out his family relations; I think I had better quote this part of the notice of dissatisfaction:

3. As a Lieutenant in the Canadian Military Forces I was paid $3.60 per day.

AND a day is made up by three nights attendance at regular training periods at local headquarters. The utmost pay I could receive as a Lieutenant for forty days training at local headquarters would be $144 and even if I were fully employed by the year I would receive only $1,314.

4. During the taxation year under review I was a married man and had three dependent children. Attached hereto is T1 Armed Forces (Supplemental) a form prescribed and authorized by the Minister of National Revenue. This form sets forth a table showing, according to the marital status of the member, the basic income of such member of the forces and reference to this table will show that the basic income for a married man with three dependent children is $2,520.

The appellant concludes the said notice with the contention that Section 4 (t) (iii) is clear and that the words "members of the said Forces" appearing in the first line of sub-paragraph (iii) of paragraph (t) can only have reference to "members of the Canadian Naval, Military and Air Forces", which are the governing words in the first line of sub-paragraph (i).

In his reply to the notice of dissatisfaction the Minister denies the allegations in the notice of appeal and the notice of dissatisfaction, in so far as incompatible with the statements contained in his decision, and affirms the assessment as levied.

A statement of facts agreed on by counsel for appellant and counsel for respondent was filed at the hearing; it reads thus:

1. There are no facts in dispute.

2. During all of the year 1943 the appelalnt was a member of the Canadian Military Forces, being an officer in the 17th (R) Armoured Regiment, a Unit of the Reserve Army, with headquarters at Charlottetown, in Prince Edward Island. From January 1 to June 1 of that year he held the rank of Lieutenant, and as such, was entitled to pay at the rate of $3.60 per day. From June 1 to December 31 of that year, he held the rank of Captain, and as such, was entitled to pay at the rate of $5.20 per day.

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3. Under the policy of training laid down for the said regiment by Canadian Military Headquarters, the maximum service pay which could be earned by an officer of that unit during the year 1943 was as follows:

15 days at annual Camp

40 days training at local headquarters (each day being made up by three nights attendance at regular training periods)

55 days total

4. The appellant received pay as such officer for the said year as follows:

16 days training at local headquarters at Lieutenant's pay, being $3.60 per day, less tax deducted of 80c	$ 56.80
15 days at annual Camp at Captain's pay, being $5.20 per day	78.00
	$134.80

5. The marital status of the appellant during the year 1943 was that of a married man with three dependents.

6. The question at issue is whether or not the military pay of the appellant as above mentioned is exempt from taxation under the provisions of the Income War Tax Act.

It was submitted on behalf of the appellant that the words "members of the said Forces" in sub-paragraph (iii) of paragraph (*t*) of section 4 can refer only to Canadian Military Forces and that in doing so the appellant is merely following the ordinary and grammatical sense of the words. In connection with the rule that words must be construed according to their ordinary and grammatical sense reliance was placed on Beal's Cardinal Rules of Legal Interpretation, 3rd edition, p. 343, where, under the heading "The Golden Rules", the author states:

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further.

Maxwell in "The Interpretation of Statutes", 9th edition, dealing with the literal construction, says at page 3:

> The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature. If there is nothing to modify,

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nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

Craies, in his "Treatise on Statute Law", 4th edition, at page 68, makes the following observations:

1. The cardinal rule for the construction of Acts of Parliament is that *they should be construed according to the intention of the Parliament which passed them.* The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.

See also Sedgwick, Interpretation and Construction of Statutory and Constitutional Law, 2nd edition, p. 219.

Maxwell in his work refers to, among others, the case of *The Queen on the Prosecution of J. F. Pemsel* v. *The Commissioners of Income Tax* (1), in which Fry L.J. expressed the following opinion (p. 309):

There are some rules of construction to which it is convenient to refer. The words of a statute are to be taken in their primary, and not in their secondary, signification. If, therefore, the words are popular ones they should be taken in a popular sense, but if they are words of art they should be prima facie taken in their technical sense. That was laid down by Lord Wensleydale in *Burton* v. *Reevell* (16 M. & W. 307), where he says: "When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears." That rule is not, in my opinion, the less applicable when the words have a distinct technical meaning and a vague popular one.

The judgment of the Court of Appeal was affirmed by the House of Lords sub-nom. *The Commissioners for Special Purposes of the Income Tax and John Frederick Pemsel* (2).

Maxwell also refers to *Corporation of the City of Victoria and Bishop of Vancouver Island* (3), where Lord Atkinson, who delivered the judgment of the Judicial Committee of the Privy Council, made these comments, which are very much to the point (p. 387):

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances

(1) (1888) 22 Q.B.D. 296.
(2) (1891) A.C. 531.
(3) (1921) 2 A.C. 384.

with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey* v. *Pearson* ((1857) 6 H.L.C. 61, 106) Lord Wensleydale said: "I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Lord Blackburn quoted this passage with approval in *Caledonian Ry. Co.* v. *North British Ry. Co.* ((1881) 6 App. Cas. 114, 131), as did also Jessel M.R. in Ex parte Walton ((1881) 17 Ch. D. 746, 751).

Reference may also be had to the following decisions: *Warburton* v. *Loveland* (1), *Perry* v. *Skinner* (2), *Attorney General* v. *Lockwood* (3), *Richards* v. *McBride* (4), *Christopherson* v. *Lotinga* (5), *Vacher & Sons Ltd.* v. *London Society of Compositors* (6), *New Plymouth Borough Council* v. *Taranaki Electric Power Board* (7).

This is trite law and it seems to me elementary.

It was argued on behalf of appellant that there is no inconsistency in the contention that the word "Forces" only has reference to the word as it appears in sub-paragraph (i) of paragraph (*t*) and that the statement that it can only refer to the Canadian Active Service Forces is not arrived at by following the ordinary and grammatical rules. Counsel contended that sub-paragraph (i) deals with the members of the Canadian Military Forces while in the Canadian Active Service Forces, that sub-section (ii), when mentioning the "said Forces", means the Canadian Military Forces, notwithstanding respondent's claim that the reference in sub-paragraph (ii) is to the Canadian Active Service Forces, and that the ordinary and grammatical sense of the words and the manner in which they are used tend to the conclusion that the word "Forces" as used in sub-paragraphs (ii) and (iii) refers to Canadian Military Forces, being the large class of "Forces" mentioned in sub-paragraph (i). I am unable to accept this proposition.

(1) (1832) 2 D. & C. 480, 489; (1832) 6 Bligh 1, 21.
(2) (1837) 2 M. & W. 471, 475.
(3) (1842) 9 M. & W. 378, 398.
(4) (1881) L.R. 8 Q.B.D. 119, 122.
(5) (1864) 15 C.B.R. n.s. 809, 813.
(6) (1913) A.C. 107, 113.
(7) (1933) 149 L.T.R. 594.

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Counsel for respondent agreed that the grammatical construction must be used in the interpretation of statutes.

Sub-paragraph (i) of paragraph (*t*) deals with members of the Canadian Naval, Military and Air Forces *while in the Canadian Active Service Forces and overseas on the strength of an Overseas Unit outside of the Western Hemisphere.*

Sub-paragraph (ii) relates to members of the said Forces to wit the Canadian Naval, Military and Air Forces, *while on active service in Canada or anywhere in the Western Hemisphere,* whose duties are of such a character as are required to be performed afloat or in aircraft.

It seems clear to me that both sub-paragraphs (i) and (ii) apply to members of the Canadian Naval, Military and Air Forces on active service. The same remark applies to members of the said Forces mentioned in sub-paragraph (iii).

It was urged on behalf of appellant that the words "said forces" in sub-paragraph (iii) refer to Canadian Naval, Military and Air Forces in sub-paragraph (i) but not to Canadian Active Service Forces.

I cannot see any foundation in this contention.

"Relative words", as stated in Broom's Legal Maxims, 8th edition, p. 528, must generally be referred to the last antecedent, the last antecedent being the last word (or words) which can be made an antecedent so as to have a meaning:

> Relative words must ordinarily be referred to the last antecedent, where the intent upon the whole deed or instrument does not appear to the contrary, and where the matter itself does not hinder it: the "last antecedent" being the last word which can be made an antecedent so as to have a meaning.

The last antecedent in the present case is "Canadian Active Service Forces". Those are the forces to which, as I think, the words "said forces" in sub-paragraphs (ii) and (iii) apply.

In support of this opinion reference may be had to the following cases: *King* v. *Wright* (1), *Esdaile* v. *Maclean* (2), *The Eastern Counties and The London & Blackwall Railway Companies* v. *Marriage* (3), *Re Hinton Avenue Ottawa* (4).

(1) (1834) 1 A. & E. 434.
(2) (1846) 15 M. & W. 277.
(3) (1860) 9 H.L.C. 32, 68.
(4) (1920) 47 O.L.R. 556, 563.

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I may perhaps note incidentally that the same words used in different sections, or subsections, of an act must be interpreted as having the same meaning: *The Wolfe Company* v. *The King* (1); *Blackwood* v. *The Queen* (2).

After reading carefully paragraph (*t*) of section 4 of the Act, perusing attentively the able and exhaustive argument of counsel and reviewing as elaborately as possible the doctrine and the jurisprudence, I have reached the conclusion that the appellant is not entitled to the exemption claimed by him, seeing that he was not in the year 1943 a member of the Canadian Military Forces on active service within the scope of paragraph (*t*) of section 4 but that he was then in the reserve army. His appeal must accordingly be dismissed and the assessment in question as well as the decision of the Minister affirming the same maintained.

The respondent will have his costs against the appellant, if he deems fit to claim them.

Judgment accordingly.

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March 5
May 28

BETWEEN:

HIS MAJESTY THE KING.....CLAIMANT;

AND

ALBERT SANSOUCY.....DEFENDANT.

Crown—Remedies for recovery of Crown debts—Writ of immediate extent —Jurisdiction of the Court—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 30, 35, 36—General Rules and Orders 2, 8, 9, Form 4—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48 (2), 48 (3), 54, 66, 70—Affidavit of debt and danger.

Motion to set aside writ of immediate extent and fiat therefor on the grounds that the Court had no jurisdiction to grant fiat or issue writ and that affidavit of debt and danger in support of fiat was insufficient and defective.

Held: That this Court has had jurisdiction over writs of extent at the suit of the Crown as fully as it was possessed in the United Kingdom by the Court of Exchequer there and its successors and that such jurisdiction remains intact and is unaffected by the abolition of writs of extent in England.

2. That the practice and procedure for the issue of such writs is that in force in the High Court of Justice in England on January 1, 1928.

(1) (1921) 63 S.C.R. 141, 154. (2) (1882) 8 App. Cas. 82, 94.

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3. That in the affidavit in support of an application for a fiat for a writ of immediate extent it is not sufficient merely to allege that the defendant is indebted to the Crown in a specified sum; the facts from which the indebtedness is alleged to have arisen showing the nature and origin of the debt must be stated with reasonable certainty. It must also be shown that the debt is such that an action for it would lie, that is to say, that it is not only due but is also payable.

4. That it is not sufficient in an affidavit of debt and danger merely to state that the debt is in danger of being lost; it is necessary to set out the facts from which the conclusion may be drawn that the debt is in danger and that there is need for the issuance of a writ of immediate extent for its speedy recovery. *Rex* v. *Pridgeon* (1910) 2 K.B. 543 followed.

5. That the writ of immediate extent is an extraordinary remedy calling for the exercise of the discretion of the Court where the need for it appears and it is essential that the requirements of proof which the law imposes under the circumstances should be strictly complied with.

MOTION to set aside fiat for writ of immediate extent and writ issued thereunder.

The motion was heard by the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

A. W. Beament K.C. and *M. H. Fyfe* for the motion.

J. A. Prud'homme K.C. and *C. Prevost K.C. contra.*

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

THE PRESIDENT now (May 28, 1948) delivered the following judgment:

Application on behalf of the defendant to set aside the writ of immediate extent issued out of this Court herein on February 12, 1948, and the fiat of Angers J. of the same date under which it was issued. The fiat was granted on the application of the claimant and the affidavit of W. V. Scully, the Deputy Minister of National Revenue for Taxation, and the writ of immediate extent issued under it was directed to the Sheriff of the Judicial District of Montreal and his bailiff. The grounds on which the defendant's application was made were that this Court had no jurisdiction to grant the fiat or issue the writ and that even if it did have such jurisdiction the affidavit of Mr. Scully was insufficient.

The writ of extent, or *extendi facias,* is a writ of execution at the suit of the Crown by which it may seize at once the lands, goods and debts or other choses in action of its debtor. There is some difference of opinion as to when it first became a remedy of the Crown. Robertson on Civil Proceedings by and against the Crown, 1908, at page 189, expresses the view that it was a Crown remedy at common law in the case of debts of record, and that it was extended by the Crown Debts Act, 1541-2, 33 Hen. VIII, chap. 39, to all debts owing to the Crown, whether of record or not. The weight of authority is against this view. The leading text book on the subject, West on Extents, 1817, states, at page 2, that "Extents at the suit of the crown are founded upon the stat. 33 H. VIII. c. 39". His opinion was that the writ of extent became a new process to the Crown by reason of the statute, that it was borrowed from the remedy previously available only to the subject by way of execution on what was known as the Statute Staple, "the extendi facias against body lands and goods being peculiarly the process on the statutes staple and statutes merchant", (securities for debts originally permitted among traders under certain circumstances for the benefit of commerce but now obsolete), and that it was first imparted to the Crown by the statute. *Vide* also in support of this view: Chitty on the Prerogatives of the Crown, 1820, at page 263; Manning's Exchequer Practice, 2nd edition, 1827, at page 4; *Bishop of Rochester* v. *Le Fanu* (1). But whether the writ of extent existed as a Crown remedy or not, even as to debts of record, prior to the statute referred to, it is clear, as West points out, that two important innovations in favour of the Crown were made by it; first, it gave the Crown the power of suing out process of execution for all its debts, whether they were debts of record or not, and secondly, it gave the Crown the power of taking the body, lands and goods of its debtor at once. Prior to the statute the Crown might have taken the body, lands and goods of its debtor, where the debt was one of record, but could not take them all at once; for example, it had to issue process against his goods and have a return of *nulla bona,* and take out a *capias* against his body, before it could proceed against his lands. To this extent the statute

(1) (1906) 2 Ch. 513 at 518.

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abrogated the commitment of Magna Charta that "we, or our bailiffs, shall not seize any land nor rent for any debt, as long as the chattels of the debtor forthcoming suffice to pay the debt, and the debtor himself be ready to satisfy therefore" and gave the Crown an extraordinary remedy against its debtor which it did not previously possess.

There were two classes of extents, namely, extents in chief and extents in aid. An extent in chief is one in which the Crown is the real, as well as the nominal plaintiff, which is sued out for the immediate benefit of the Crown and is for the recovery of the Crown debt, whether it be against the Crown's original debtor or the debtor of that debtor or a debtor in a more remote degree, whereas an extent in aid is one in which the Crown is the nominal plaintiff, the real plaintiff being a subject who is the Crown's debtor, and the action is for the recovery of the debt due to that subject and for his benefit. We are concerned here only with extents in chief.

These are of two kinds, namely, ordinary writs of extent and writs of immediate extent. There is no difference in their nature or scope but only in the circumstances under which each is issued. The ordinary writ of extent issues by way of execution in favour of the Crown on a judgment obtained by it or other debt of record due to it. The writ of immediate extent, on the other hand, issues even where there has been no judgment or other debt of record, due to it. The writ of immediate extent, on the other hand, issues even where there has been no judgment or other debt of record, in cases where the Crown debt is in danger of being lost. The writ of immediate extent had its origin in the Act of 33 Hen. VIII, chap. 39, which gave the Court of Exchequer power to issue the *extendi facias* if need shall require as unto the said Court shall be thought by its discretion expedient for the speedy recovery of the King's debts. The writ of immediate extent was, therefore, issued only when the Court in its discretion thought that need required it, the exercise of the discretion being shown by the fiat of one of the Barons of the Exchequer, later by that of one of the judges of the King's Bench, on proof of the Crown debt and that it was in danger. Such proof was by affidavit, commonly called an affidavit of debt and danger.

Although the statute gave the Court authority to issue the writ of immediate extent it was necessary since the writ was by way of execution that the Crown debt should be recorded and the practice was that a Commission issued under which an inquiry was held to find the debt; the debt having been found and certified by the Commissioners, the Court acted on their certificate and issued the writ. This practice of issuing a commission of inquiry to find the debt continued until it was provided by section 47 of the Crown Suits Act, 1865, that a commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an immediate extent. This proviso is repeated in Rule 8 of the General Rules and Orders of this Court. Apart from such provision there was no change in the nature of the writ or in the conditions for its issue until the Crown Proceedings Act, 1947.

In order to appreciate the defendant's contention that this Court had no jurisdiction to grant a fiat for a writ of immediate extent or to issue the writ thereunder it is necessary to refer to the relevant statutory enactments and rules. By section 37 of 33 Hen. VIII, chap. 39, jurisdiction over suits to recover the King's debts, including the issue of writs of extent, was vested in the Court of Exchequer. Under the Judicature Act, 1873, this Court became the Exchequer Division of the Supreme Court of Judicature, until it was amalgamated with the Queen's Bench Division of that Court by Order in Council in 1880, which later became the King's Bench Division of the High Court of Justice. The jurisdiction over the issue of writs of extent originally vested in the Court of Exchequer remained in the King's Bench Division of the High Court of Justice until writs of extent were abolished by section 33 of the Crown Proceedings Act, 1947, which came into effect on January 1, 1948.

The Court of Exchequer was first established in Canada in 1875 by The Supreme and Exchequer Court Act, Statutes of Canada, 1875, chap. 11, under the name of the Exchequer Court of Canada, and continued as such under the same name in 1887 by An Act to amend "The Supreme and Exchequer Court Act", and to make better provision for the Trial of Claims against the Crown, commonly called the Exchequer Court Act, 1887, Statutes of Canada, 1887,

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chap. 16, by which this Court was established separately from the Supreme Court of Canada. By Section 17 of this Act, now section 30 of the Exhcequer Court Act, R.S.C. 1927, chap. 34, the Exchequer Court was given concurrent original jurisdiction in Canada, *inter alia,* in all cases relating to the revenue in which it is sought to enforce any law of Canada, and in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. In my view, this Court has had jurisdiction over writs of extent at the suit of the Crown ever since its establishment as fully as it was possessed in the United Kingdom by the Court of Exchequer there and its successors. It has issued many writs of extent, both ordinary and immediate, and this is the first time that its jurisdiction to do so has been challenged. The challenge arises as the result of the combined effect of sections 35 and 36 of the Exchequer Court Act, Rule 2 of the General Rules and Orders of this Court and section 33 of the Crown Proceedings Act, 1947, of the United Kingdom. Section 35 of the Exchequer Court Act provides:

35. All provisions of law and all rules and orders regulating the practice and procedure including evidence in the Exchequer Court, now existing and in force shall, so far as they are consistent with the provisions of this Act, remain in force until altered or rescinded or otherwise determined.

And section 36, as amended in 1928, Statutes of Canada, 1928, chap. 23, reads:

The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in His Majesty's High Court of Justice in England on the first day of January, 1928.

Rule 2 of the General Rules and Orders of this Court, 1931, is in the following terms:

(1) 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*) If the cause of action arises in any part of Canada, other than 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 Supreme Court of Judicature in England; and

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(*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 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.

And finally, section 33 of the Crown Proceedings Act, 1947, of the United Kingdom provides:

33. No writ of extent or of diem clausit extremum shall issue after the commencement of this Act.

the commencement date being January 1, 1948. It is obvious, of course, that the Crown Proceedings Act, 1947, of the United Kingdom does not *per se* extend to Canada or have any effect here but the argument is made that the abolition of writs of extent, being a matter of practice and procedure, is brought into effect in Canada through the instrumentality of Rule 2 of the General Rules and Orders of this Court and the authority of section 36 of the Exchequer Court Act. It is clear that if it were not for Rule 2 and the use of the words "at the time in force" therein the practice and procedure regulating the issue of writs of extent would be that in force in the High Court of Justice in England on January 1, 1928, as set forth in section 36 of the Exchequer Court Act. The argument of counsel for the defendant, therefore, really turns on the use of the words "at the time in force" in Rule 2 and runs, as I understand it, as follows: namely, that even if the cause of action in the present case arose in the Province of Quebec, where the defendant resides, thus bringing the case within Rule 2 (1) (*b*), there is no similar suit, action or matter in the Province of Quebec as a writ of extent at the suit of the Crown; that resort must consequently be had to the practice and procedure at the time in force in the Supreme Court of Judicature in England; that the relevant time in force is the date of the issue of the writ, namely, February 12, 1948; that at such date writs of extent had been abolished in England by section 33, of the Crown Proceedings Act, 1947; that there was then no jurisdiction in England to issue writs of extent and consequently no practice or procedure for issuing them; and that by virtue of Rule 2 there was no practice or procedure for issuing

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them in Canada. From this reasoning the conclusion is drawn that since January 1, 1948, this Court no longer had any jurisdiction to issue any writ of extent.

There are several reasons why a conclusion leading to such an astonishing result cannot be adopted. One fallacy in the argument lies in the fact that it fails to distinguish between the practice and procedure regulating the exercise of a right and the right itself. When the Act of 33 Hen. VIII, chap. 39, authorized the issue of writs of extent for the recovery of the King's debts it conferred a right upon the Crown which did not previously exist. This was not a matter of practice and procedure but of substantive right. The right to issue the writ must be distinguished from the practice and procedure regulating its issue. Similarly, the abolition of writs of extent by the Crown Proceedings Act, 1947, was not a matter of practice or procedure. If it had been it could have been accomplished by the judges under their rule making powers. It was the abrogation of a previously existing right which only Parliament could effect. Moreover, it is axiomatic that the rules made by the judges under their rule making power are designed for the purpose of regulating the exercise of the jurisdiction of the Court, and cannot either create or destroy jurisdiction. If, therefore, Rule 2 has the result suggested by counsel for the defendant it is clearly beyond the powers of the rule making authority and must be held to be invalid. But such a result ought not to be found unless the language of the rule necessarily so demands. And it ought not to be held that Parliament intended to abrogate a right of the Crown of long standing or to destroy the Court's jurisdiction over it in the circuitous manner suggested, if the language of the rule in its context with the governing section of the Act is fairly capable of an interpretation that would lead to a more reasonable result. As I read Rule 2 and section 36 of the Exchequer Court Act, it was contemplated that resort should be had to the practice and procedure in force in the High Court of Justice in England on January 1, 1928, unless there was some other later practice or procedure that should be in force. The section gave authority to the judges to make a rule substituting for the practice and procedure referred to therein the practice and procedure

that should be in force at the time the cause of action should arise. But it is essential that the rule should lead to a practice and procedure that is in force at such time, and not to the absence of any practice or procedure. The alternative is between a practice and procedure in force at the fixed date mentioned in the section and a subsequent practice and procedure in force at the time of the cause of action in accordance with the rule. Section 36 and rule 2 contemplated that the procedure in force at the time of the cause of action should be substituted for that in force at the time specified in the section if it should be different from it, but the section did not authorize the making of a rule that would result in the nullification of the section by the substitution of the absence of any practice or procedure at all for that prescribed by the section. Yet such an absurd interpretation of the section and rule would have to be made if the argument for the defendant were adopted. Consequently, since the rule does not lead to a practice or procedure in England that was in force at the time the writ of immediate extent was issued it can have no application in the present case and resort must be had to the practice and procedure that was in force in the High Court of Justice in England on January 1, 1928, as specified in section 36. That being so, the foundation for the defendant's argument of lack of jurisdiction in the Court wholly disappears. I have no hesitation in expressing the opinion that the jurisdiction of this Court in respect of writs of extent remains intact and is unaffected by the abolition of such writs in England.

The second part of the defendant's argument may now be considered. It dealt with the propriety of granting the fiat and issuing the writ under it on the material before the Court on the assumption that it had the necessary jurisdiction. The only General Rules and Orders of this Court relating particularly to writs of extent are Rules 8 and 9, of which the former reads as follows:

8 A commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an Immediate Extent or a writ of Diem Clausit Extremum; and an Immediate Extent may be issued on an affidavit of debt and danger, or a writ of Diem Clausit Extremum may be issued on an affidavit of debt and death, and, in either case, on

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the *fiat* of a judge of the Exchequer Court of Canada. See 28-29 Vict. (U.K.), ch. 104, sec. 47, and following. (For forms of affidavit, order and writ, see Forms 4, 5 and 6 in the Appendix to these Rules).

It is an essential condition of the issue of a writ of immediate extent that there should be a fiat of a judge of the Court and an affidavit of debt and danger. The fiat herein was granted by Angers J. on the following affidavit of William Vincent Scully:

1. That I am the Deputy Minister of National Revenue for Taxation and as such have knowledge of the matters hereinafter deposed to.

2. That a preliminary assessment of the taxpayer's revenue was made on the 11th day of February, 1948, from which it appears that the above taxpayer is indebted to the Crown for taxes for the years 1942 to 1946 inclusive, amounting to the sum of $863,331.85 or thereabouts, plus interest.

3. That securities amounting to approximately $1,000,000, belonging to the above mentioned taxpayer, are at present under seal by the Foreign Exchange Control Board, who are contemplating prosecution of Albert Sansoucy for withholding United States funds and also are considering releasing the above mentioned securities to Sansoucy upon completion of prosecution against him as hereinabove described.

4. That I am informed and verily believe that unless some method more speedy than the ordinary proceedings at law be had against the said Albert Sansoucy, the said sum of $863,331.85 or thereabouts, plus interest, owing as aforesaid is in danger of being lost.

Three attacks were made upon the proceedings in the present case. The first was that the fiat was not for the amount sworn to in the affidavit and that the writ was not for the amount mentioned in the fiat. The fiat authorized the issue of a writ for the recovery of the sum of $863,313.85 whereas the writ was issued for the sum of $863,331.85. This is the amount specified in the affidavit. It is obvious that the figure set out in the fiat is the result of a purely clerical error, which ought not, in my judgment, to serve as a ground for setting aside the proceedings.

The other two attacks were directed against the affidavit. It was contended that it was insufficient and therefore defective in two respects, namely, that there was no proper evidence of a debt to the Crown, and that no proof of danger was given. It is clear that although section 47 of the Crown Debts Act, 1865, dispensed with the requirement of a commission of inquiry to find the debt due to the Crown, when it was not a judgment or other debt of record, it made no change in any other requirements of the proof necessary for the valid issue of a writ of immediate

extent. The old authorities as to what must be proved in an affidavit of debt and danger are still fully applicable.

I shall deal first with the proof of debt that is required. Under the old procedure of a commission of inquiry to find the debt the evidence as to its existence given before the Commissioners was by way of affidavit. The kind of debt that might be found on an inquisition is stated by West, at page 25, as follows:

> Wherever there is such a debt to the Crown as that an action of debt or indebitatus assumpsit, might be maintained against the debtor, were it due to a subject; such debt may, it is apprehended, be found under the inquisition, for the purpose of issuing a scire facias, or immediate Extent for it.

West also says that the inquisition should state how the debt to the King is constituted and not merely that the party is indebted to the King. *Vide* also Manning's Exchequer Practice, at pages 15 and 18. The fact that no commission of inquiry is now needed to find the debt does not change the nature of the kind of debt that must be proved or the kind of proof that must be made. The former rule that a mere allegation of indebtedness is not sufficient still applies and is the basis of the indication in Form 4 in the Appendix to the General Rules and Orders of this Court that the affidavit should state the manner in which the indebtedness to the Crown arose. It follows that in the affidavit in support of an application for a fiat for a writ of immediate extent it is not sufficient merely to allege that the defendant is indebted to the Crown in a specified sum; the facts from which the indebtedness is alleged to have arisen showing the nature and origin of the debt must be stated with reasonable certainty. It must also be shown that the debt is such that an action for it would lie, that is to say, that it is not only due but is also payable.

It was contended that the affidavit of Mr. Scully did not meet these necessary requirements. Paragraph 2 of the affidavit was criticized on a number of grounds, namely, that it did not state the kind of taxes that were due, that there was no such thing as a "preliminary" assessment, and that the Income War Tax Act did not provide for the assessment of a taxpayer's revenue but only of his income. While I am of the opinion that these criticisms of the affidavit were well founded and that it was not drawn as

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carefully and as precisely as would be desirable, I am also of the view that if this were the full extent of counsel's criticism of the paragraph these defects would not be fatal. But counsel went farther and contended that there was no proof of a payable debt. He relied upon an admission that section 48 (2) of the Income War Tax Act was not applicable to the defendant taxpayer in respect of the years 1942 to 1946 and contended that his case came under section 48 (3) which reads:

> 48. (3) Every person, other than a corporation or a person to whom subsection two of this section applies or a person whose chief business is that of farming, shall pay all taxes, which he is liable to pay upon his income during any taxation year under any of the provisions of this Act except sections 9B, 27 and 88 thereof, as estimated by him on his income for the year last preceding the taxation year or on his estimated income for the taxation year, in either case at the rates for the taxation year, by quarterly instalments during the taxation year as follows . . . and if, after examination of any person's return under section fifty-three of this Act, it is established for the purposes of this Act that the instalments paid by him under this subsection 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 at four per centum per annum from the thirty-first day of December in the taxation year until one month from the date of mailing of the said notice of assessment and thereafter at seven per centum per annum until the date of payment.

From this section he argued that, since it was provided that if the amount of income tax paid by a taxpayer on his income as estimated by him was less than the tax which he ought to have paid "he shall forthwith after notice of assessment is sent to him under section fifty-four of this Act, pay the unpaid amount thereof", it followed as a necessary consequence that there was no payable debt by the taxpayer to the Crown until after notice of the assessment under section 54 of the Act had been sent to him. It was submitted that, even although there was always a liability on the part of the defendant to pay the tax that ought to be paid, and even although the tax became debt due to the Crown on the making of the assessment under section 54 of the Act and pursuant to section 70 thereof, it was a condition precedent to the debt becoming a payable debt that notice of the assessment should have been sent to the defendant; that before a writ of immediate extent can validly issue it must be shown

that there is a debt upon which the Crown could at the time of the issue of the writ proceed to judgment; that it was consequently necessary to prove not only that an assessment had been made but also that notice of it had been sent to the defendant; that there was no statement in the affidavit that notice of the assessment had been sent to the defendant; and that since the affidavit failed to prove this essential condition of there being a payable debt it was defective and could not sustain the fiat or the writ under it. Counsel for the claimant did not meet this particular objection and I have been unable to find any answer to it. I have come to the conclusion that in addition to stating the facts relating to the making of the assessment the affidavit should also have set out that notice of the assessment was sent to the defendant, if such was the case, and that the amount of the assessment remained unpaid, and that counsel for the defendant was right in his contention that the affidavit did not prove a payable debt to the Crown and that it was consequently defective.

But even if the affidavit were considered as sufficiently proving a payable debt to the Crown the remaining objection that it was defective in that no proof of danger was given appears to me to be unanswerable. Paragraph 4 of the affidavit is open to several criticisms. In the first place, the affiant does not say by whom he was informed or on what grounds he bases his belief as he ought to have done under Rule 168. But there is a much stronger reason for holding that the affidavit is defective. There is merely a statement that the sum specified as owing is in danger of being lost. It is, I think, indisputable that such a bare statement is insufficient. In dealing with the proof of danger required West on Extents says, at page 52:

> With respect to the allegation of danger in the affidavit, it is apprehended that the affidavit should contain not only a general allegation of the defendant's insolvency, but also some fact or instance of insolvency: such as "that he has stopped payment", "has absconded", "a docquet has been struck against him", or that he has committed an act of bankruptcy or insolvency, particularizing the act.

And in *Rex* v. *Jans vel Smith* (1) the statement that the defendant "was in suspicious circumstances, and that the

(1) (1731) Bunb. 300.

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debt was in danger of being lost" was held not to be sufficient. The following statement was also made by West, at page 180:

> If the affidavit be defective in the statement of the defendant's insolvency, the defendant may move to set it aside: and it is the more necessary that this statement should be complete, as the defendant has no means of contradicting or explaining the fact which is alleged as the proof of insolvency; the Court having refused to grant a rule to shew cause on counter affidavits as to that point: and that he could not traverse the fact of insolvency is clear; as it constitutes no part of the record, but is merely a statement in the affidavit required by the rules of the Court, as a ground for the exercise of their discretion in issuing the Extent:

Vide also Chitty on the Prerogatives of the Crown, at page 278. I agree with counsel's suggestion that the matter is concluded by the decision of Bray J. in *Rex.* v. *Pridgeon* (1). There a writ of extent had been issued upon an affidavit of debt and danger in which the deponent stated the fact that a debt was due to the Crown from a certain debtor, and the nature and origin of the debt, and proceeded to allege that from enquiries he had made he had ascertained and believed that the debt due to the Crown from the debtor would be lost unless some more speedy course than the ordinary method of proceeding were forthwith had and taken to recover the same on behalf of His Majesty. On a motion to set aside the writ it was held that the affidavit was defective in that it omitted to state the facts from which the Court might infer that the debt was in danger of being lost and the writ was accordingly set aside. The case establishes that it is not sufficient in an affidavit of debt and danger merely to state that the debt is in danger of being lost; it is necessary to set out the facts from which the conclusion may be drawn that the debt is in danger and that there is need for the issuance of a writ of immediate extent for its speedy recovery. Bray J. approved the statement of West, at page 180, to which I referred and said of the cases cited in support of it:

> They establish that it is necessary to state facts leading to the conclusion that the debt is in danger. Even in a case where insolvency is alleged it is not sufficient simply to state the fact of insolvency without specifying facts which lead to that inference. The affidavit in the present

(1) (1910) 2 K.B. 543.

case does not go so far as even to allege insolvency. It merely alleges that there is danger of the debt being lost. In my opinion the affidavit is insufficient and the proceedings are irregular.

I come to a similar conclusion in the present case. Counsel for the claimant suggested that the allegations in paragraph 3 of the affidavit sufficiently supported the statement that the debt was in danger of being lost. I am unable to agree. I cannot see what bearing these allegations have on the issues before the Court. Nor can the practice of the Court in the past of issuing writs of immediate extent on affidavits similar in effect to the one under review be an answer to the defendant's complaint. The repetition of an erroneous practice cannot make it a correct one and this is the first time that the practice has been challenged. Nor can it be said that the correct practice is difficult to find. Indeed, it is indicated in Form 4 of the Appendix to the General Rules and Orders, where it is stated that the affidavit "should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded or that an execution has issued against him." The form itself shows that a mere allegation of danger is not enough.

The writ of immediate extent is an extraordinary remedy calling for the exercise of the discretion of the Court where the need for it appears. In the very nature of things the application for it is made ex parte. The applicant for the remedy must show that a proper case has been made out for the exercise of the Court's discretion. The remedy sought being such an extraordinary one it is essential that the requirements of proof which the law imposes under the circumstances should be strictly complied with. There has not been such compliance in the present case. It follows that there must be judgment setting aside the fiat and the writ of immediate extent issued under it. The defendant will also be entitled to his costs.

Judgment accordingly.

1948
June 8
June 9

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

ALEXANDER ET AL.....PLAINTIFFS;

AND

THE SHIP *GAMBIER ISLE*.....DEFENDANT.

Shipping—Salvage—Service rendered at risk of salvor—Cost of bail bond paid by plaintiffs when exorbitant amount demanded.

Plaintiffs on board the fishing vessel *Col. Roy* found defendant ship deserted and adrift and at some risk took her in tow, which towage was continued for some minutes when the mate of the *Col. Roy* succeeded in starting the engine of the *Gambier Isle,* which then proceeded under her own power to Long Bay, a distance of five miles, escorted by the *Col. Roy* and was then made fast.

Held: That plaintiffs performed a salvage service which was well and successfully carried out, the *Gambier Isle* being in actual danger, from which danger she was snatched by the timely efforts of and at some risk to the *Col. Roy.*

2. That plaintiffs having demanded and obtained bail for an exorbitant amount must pay the costs of the bail bond.

ACTION for salvage award.

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

Herbert R. Barclay for plaintiffs.

Vernon R. Hill for defendant ship.

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

SIDNEY SMITH D.J.A. now (June 9, 1948) delivered the following judgment:

This action for a salvage award is brought by the plaintiffs for services rendered on the morning of 17th September, 1947, to the fishing vessel *Gambier Isle* 31·7 ft. long; 9·3 ft. beam; and of 10·31 tons gross. There is little or no dispute about the facts.

The motor-vessel *Col. Roy* (length 43 ft.; beam 11·6 ft.; fitted with an 82 horse-power diesel engine; gross tonnage 16·8 tons) is owned by the plaintiff Alexander; and at the time in question was operated by Alexander as master and the plaintiff McDougall as mate. Its usual occupation is that of salvaging logs, but on this occasion the vessel was in the course of an intended voyage from Long Bay, Gambier Island, to Horse Shoe Bay. On account of the weather this was abandoned, and it was decided to proceed down Collingwood Channel and thence to Vancouver. The weather was not good; the wind, known locally as a "squamish", was blowing with a force of admittedly 30 miles an hour, if not more. There was also some sea running. When off Hope Point those on board the *Col. Roy* discerned a vessel, which afterwards proved to be the *Gambier Isle,* apparently adrift. They made up to her and McDougall, at some risk, jumped on board. He found her deserted; but it was quite clear that she had been blown away from her anchorage, for anchor and cable were hanging from the bow. As it turned out, she had been anchored just North of Halkett Point—some 6 miles to windward. She was now in a position about 200 yards off Cotton Point, Keats Island—a dead lee shore. McDougall tried to haul up the anchor, failed, and so cut the anchor rope. The *Col. Roy* then took her in tow, and towage continued for 15 or 20 minutes. Meanwhile McDougall went into the engine room and succeeded in getting the engine to operate, and the vessel then proceeded under her own power. She was escorted to Long Bay, 5 miles distant, by the *Col. Roy* and there made fast. The whole operation did not occupy more than an hour or two.

I am satisfied this was a salvage service and that it was well and successfully carried out. I think the *Gambier Isle* was in actual danger off Cotton Point, and that she was snatched out of this danger by the timely efforts of, and at some risk to, the *Col. Roy.* In the prevailing weather and in that locality the anchor would have been of little avail. I think she might quite easily have become very seriously damaged, if not totally lost, had the *Col. Roy* not lent her aid. The value of the *Gambier Isle* is approximately $7,000; the value of the *Col. Roy* much the same, or perhaps a little more. The sum of $300 was paid into

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ALEXANDER ET AL v. THE SHIP GAMBIER ISLE

Sidney Smith D.J.A.

Court as being sufficient for the services rendered. In view of the real danger to the *Gambier Isle* I think that this is on the low side. In my view, in all the circumstances, an adequate award would be $500, and I so find.

The plaintiffs demanded and obtained bail for an exorbitant amount; and therefore must themselves pay the costs of the bail bond. (See the *Island Prince* recently decided in this Court.) Subject to this, plaintiffs will have their costs.

Judgment accordingly.

1947

July 28

1948

May 7

EDGAR PERREAULT.....REQUÉRANT;

VS

SA MAJESTE LE ROI.....INTIMÉ

Crown—Petition of Right—Exchequer Court Act, R.S.C., 1927, c. 34, ss. 19 (c), 50A—Rule 149 of Exchequer Court General Rules and Orders—Crown not liable at common law for negligent acts of its officers or servants—Liability of Crown rests on statute—Damages claimed must result from a negligent act or omission of an officer or servant of the Crown while acting within the scope of his duties or employment in order to create a lien de droit between suppliant and Crown—Crown not liable to third parties for infraction of military regulations and doctrine of respondeat superior does not apply—Action dismissed.

Suppliant was advised by some uniformed soldiers stationed at a school of aviation that his shop would be destroyed if he failed to comply with certain demands they made upon him. Suppliant immediately informed the military police of such demands and was told by them that no soldier would leave the camp that evening. The shop was burned down that night. Suppliant seeks to recover damages from the Crown alleging negligence on the part of the aviators and their officers. The matter now comes before the Court for determination of certain questions of law set down for hearing before the trial.

Held: That the Crown's liability resulting from the negligence of its officers or servants does not rest on the common law but exists only in cases provided for by the law creating it.

2. That in order to create a *lien de droit* as between the suppliant and the Crown, the damages claimed must result from an act or omission done through the negligence of the officer or servant of the Crown while acting within the scope of his duties or employment.

3. That an infraction of the military regulations does not impose any liability on the Crown towards third parties and the rule *respondeat superior* does not apply in such a case.

4. That a question of law may be disposed of by the Court before the trial.

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ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before the Honourable Mr. Justice Michaud, Deputy Judge of the Court, at Rimouski.

L. J. Gagnon for suppliant.

Raoul Fafard for respondent.

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

MICHAUD D.J. now (May 7, 1948) delivered the following judgment:

Par sa pétition de droit en date du 5 avril 1944, et produite le 27 mai de la même année, le requérant réclame de Sa Majesté le Roi la somme de $7,350 avec intérêt et dépens.

Le requérant allègue en substance, aux paragraphes 1, 2 et 3 de sa pétition que le 27 avril 1942, il était propriétaire d'une boutique de forge située dans la paroisse de Ste-Flavie, district de Rimouski, province de Québec, à proximité d'un aéroport du Gouvernement du Canada; qu'il avait exploité cette boutique de forge pendant plusieurs années, qu'elle rapportait $50 par semaine, qu'elle valait avec son outillage et les machines qui y étaient en réparation, $3,130.

Aux paragraphes 4, 5, 6 et 7, il allègue qu'au cours du mois d'avril 1942, une campagne intense a été faite dans la province de Québec, relativement au plébiscite qui avait été ordonné par le gouvernement fédéral et qui devait avoir lieu le 27 avril; que l'objet de ce plébiscite était d'obtenir une expression d'opinion des électeurs de tout le Canada afin que le gouvernement pût savoir si la population était disposée à le relever de certaines promesses relativement au service militaire; que tous les partis politiques dans la province de Québec attachaient une grande importance au résultat du plébiscite et que pour cette raison une campagne intense de publicité a été faite dans le Québec, plus particulièrement dans le district de Rimouski; qu'à la demande de différentes organisations politiques, le requérant

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a consenti à ce que des affiches exposant différents aspects de la question fussent posées à l'extérieur de sa boutique de forge.

Au paragraphe 8, il allègue que le 27 avril, dans le cours de l'après-midi, un groupe d'aviateurs en uniforme, de l'aéroport de Mont-Joli, connu sous le nom d'Ecole de Bombardement et de Tir N° 9, se sont arrêtés à la boutique de forge du requérant, l'ont sommé de faire disparaître les affiches favorables à une réponse négative au plébiscite qui étaient affichées sur les murs, ont tenté même d'arracher lesdites affiches, cherchant à se rendre maîtres du requérant et lui déclarant plus spécialement que si lesdites affiches n'étaient pas enlevées, sa boutique allait sauter.

Au paragraphe 9, il allègue qu'il a téléphoné à la police militaire de l'aéroport de Mont-Joli pour se plaindre desdites menaces et pour faire savoir que ceux qui les avaient faites semblaient bien disposés à les mettre à exécution; qu'une personne en autorité a alors assuré le requérant qu'aucun aviateur ne sortirait du camps au cours de la soirée et qu'il serait protégé.

Au paragraphe 10, il allègue que, contrairement à cette déclaration, aucune mesure de protection n'a été adoptée, que des aviateurs, stationnés à la dite Ecole N° 9, sont sortis dans le cours de la nuit et ont incendié vers deux heures du matin la boutique de forge du requérant avec tout ce qu'elle contenait et lui ont causé une perte de $7,350.

Les paragraphes 11, 12, 13 et 14 de la pétition rapportent les démarches infructueuses que le requérant a faites auprès de la Police Provinciale pour identifier les coupables, et les ennuis suscités par les officiers de l'aviation pour empêcher la découverte de celui ou ceux qui auraient pu commetttre le délit.

Dans les paragraphes 15, 16 et 17 le requérant allègue que l'incendie de sa boutique de forge a été causé par des membres du personnel de l'aéroport de Mont-Joli qui ont intentionnellement mis le feu à la bâtisse du requérant pour donner suite aux menaces antérieurement faites; et que dès après l'incendie et avant que toute autre personne ait pu circuler, le requérant et ses voisins ont constaté que des pistes, bien marquées sur la neige, se dirigeaient de l'en-

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droit où le feu avait été mis à l'arrière de la boutique du requérant jusqu'au terrain même de l'aéroport; et seule une personne pouvant venir de l'école et faisant partie de son personnel a pu allumer le feu qui a causé l'incendie et les dommages réclamés dans sa pétition.

Dans le paragraphe 17 il allègue en conclusion que les dommages qu'il réclame ont été causés par suite de la faute et négligence des préposés de l'intimé, tous membres des forces aériennes de Sa Majesté le Roi.

Dans les paragraphes 18 et 19, il allègue la perte de clientèle à la suite de l'incendie de sa boutique et la perte d'emploi et une diminution de gains.

Enfin, dans le paragraphe 20, il allègue qu'il est bien fondé à réclamer les dommages mentionnés dans sa pétition puisque l'intimé est responsable de ses préposés et de leurs actes, et particulièrement des actes et délits commis par les membres de ses forces aériennes pour le compte du Canada et spécialement des actes, délits et négligences des membres de la force aérienne du Canada stationnés à l'Ecole N° 9 de Mont-Joli.

L'intimé dans sa défense produite le 27 juin 1944, nie tous les allégués contenus dans la pétition excepté ceux des paragraphes 6, 7 et 11 qu'il admet, et en plus il soulève les objections suivantes:

Le Procureur Général du Canada au nom de Sa Majesté soumet que la pétition de droit est mal fondée en droit, en ce qu'elle n'allègue aucune cause d'action contre Sa Majesté ou quelques faits qui puissent engager la responsabilité de Sa Majesté ou pour lesquels Sa Majesté puisse être appelée à répondre. Si, de plus, la pétition de droit contient quelque cause d'action contre Sa Majesté, ce n'est pas une cause d'action pour laquelle, en vertu des dispositions de la loi et de la pratique, une pétition de droit puisse avoir lieu ou être plaidée; le Procureur Général du Canada soumet que ces objections en droit et toutes autres à l'encontre de cette pétition de droit devraient être entendues et déterminées avant la preuve de faits en cette cause.

Par ordonnance, en date du 28 juillet 1947, conformément aux dispositions de la règle 149 des règles et ordonnances de cette Cour, j'ordonnais aux procureurs des parties de soumettre chacun un plaidoyer par écrit. L'intimé a

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produit le sien le 9 octobre 1947, et celui du requérant fut produit le 12 janvier 1948, et la réponse de l'intimé le 10 février 1948. Si cette Cour a juridiction dans la présente cause, elle doit découler des articles 19 (*c*) et 50 (*a*) de la Loi de la Cour de l'Echiquier (S.R.C. 1927, ch. 34) telle qu'amendée, lesquels se lisent comme suit:

9. La Cour de l'Echiquier 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.

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.

L'argument soulevé par le Procureur Général au nom de l'intimé se résume à ceci: la pétition de droit est mal fondée en droit et en ce qu'elle ne relève d'aucune cause d'action contre Sa Majesté, ni d'aucun fait qui puisse engager la responsabilité de Sa Majesté.

En réponse le requérant soumet:

que dans sa pétition, par l'ensemble de ses allégués, il montre un bon droit d'action;

que les faits allégués sont suffisants s'ils sont prouvés, pour établir la responsabilité de la Couronne en sa faveur;

qu'en droit il n'est pas nécessaire d'attribuer à tel ou tel officier, aviateur ou autre serviteur de la Couronne en particulier, la faute, négligence ou imprudence dont il se plaint;

que la faute ou négligence alléguée s'applique aux serviteurs de la Couronne, officiers en charge du camp d'aviation de Mont-Joli, lesquels, par leur faute, négligence ou incurie, bien qu'ils aient été avertis du danger qui menaçait les biens du pétitionnaire, ont négligé de prendre les précautions voulues pour empêcher que cette menace se réalise et, subséquemment, ont pris tous les moyens qui étaient en leur pouvoir pour empêcher le requérant de découvrir les aviateurs qui avaient commis le méfait dont il a souffert, et dans l'exercice de leurs fonctions.

Il me semble assez clair que le pétitionnaire soit sous la fausse impression que l'intimé est responsable de tous les

actes de ses préposés et de leurs délits. Il l'affirme au paragraphe 20 de sa pétition et le répète dans son plaidoyer écrit.

La responsabilité de la Couronne pour la négligence de ses employés et serviteurs est de droit strict, purement statutaire; elle ne repose pas sur le droit commun et n'existe que dans les cas prévus par la loi qui l'a créée. Ce principe a été maintenu par les tribunaux et par cette Cour, notamment dans la cause *Legault* v. *Le Roi* (1):

> Where a liability not existing at common law is created by Statute, and the Statute provides a particular remedy, that remedy must be followed. Fort Francis Pulp & Paper Co. v. Spanish River Pulp, Paper Co. (1931) 2 D.L.R. 97.

Les dispositions statutaires en question, sont les articles 19 (*c*) et 50A de la Loi de la Cour de l'Echiquier du Canada (*supra*).

Pour qu'il y ait lieu de droit entre le pétitionnaire et l'intimé, il faut que les dommages résultent d'un acte ou d'une omission dû à la négligence d'un employé ou serviteur de l'intimé pendant qu'il *agissait dans l'exercice de ses fonctions ou de son emploi.*

Dans la cause de *Halparin* v. *Bulling* (2), à la page 474 le juge Duff s'exprime ainsi:

> The principle of law by which our decision in this appeal must be governed is stated in these words by Cockburn, C.J. in Storey v. Ashton at page 479: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as a servant."

Dans la cause de *Curley* v. *Latreille* (3) le juge Anglin, à la page 156 dit:

> But there is no liability in either country where the illegal or criminal act is done wantonly for some purpose of the servant himself and not in the course of his duties.

Dans sa pétition et ses autres déclarations écrites le requérant se garde bien d'affirmer ou d'alléguer que l'aviateur qui aurait mis le feu à sa boutique agissait dans l'exercice de ses fonctions ou de son emploi.

Même si tous les faits allégués dans la pétition de droit étaient prouvés, et qu'un membre du personnel de l'aéroport de Mont-Joli aurait, dans la nuit du 27 avril, mis le feu à la boutique du requérant, Sa Majesté ne pourrait

(1) (1931) Ex.C.R. 167 et s.
(2) (1914) 50 S.C.R. 471.
(3) (1919) 60 S.C.R. 131.

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être tenue responsable envers le requérant. Qu'il me suffise de citer à l'appui de ceci, deux décisions, l'une de cette Cour dans la cause de *Bouthillier* v. *Le Roi* (1); l'autre, de la Cour Suprême du Canada, dans la cause *The King* v. *Anthony and Thompson* (2).

Dans la première de ces causes, *Bouthillier* v. *Le Roi,* un sergent-major de l'armée canadienne, sous permission, et même après refus de la part du sous-officier en charge de la garde des véhicules moteurs, s'était emparé d'un camion de l'armée et filait sur la route de Chambly lorsqu'il frappa une jeune fille et la blessa grièvement. Il fut trouvé coupable de négligence. Comme il n'était pas en devoir et n'agissait pas dans l'exercice de ses fonctions, mais qu'il était en permission et qu'il allait visiter l'aéroport de St-Hubert pour satisfaire sa légitime curiosité, j'ai dû décider que la Couronne n'était pas responsable de son délit. J'ai dû aussi décider que la Couronne ne pouvait être responsable des dommages par la négligence du sous-officier qui avait laissé sortir le camion, puisque ce n'était pas la négligence du sous-officier qui était cause de l'accident et des dommages mais bien celle du sergent-major.

Dans la cause *Thompson and Anthony* v. *The King* un groupe de soldats étaient transportés dans un camion de la Défense nationale d'un endroit à un autre et sous la surveillance d'un sous-officier. Durant le parcours, pour s'amuser, certains tirèrent des cartouches blanches de l'arrière du camion. L'un d'eux tira une cartouche inflammable qu'il avait volée au dépôt et mit le feu à une grange. La Cour Suprême décida que la Couronne n'était pas responsable de l'action du soldat (Morin) puisqu'il n'agissait pas dans l'exercice de ses fonctions lorsqu'il tira cette cartouche inflammable, mais que c'était un acte librement posé de sa part. La Cour décida en plus que la Couronne ne pouvait être liée par la négligence du sous-officier en charge pour ne pas avoir empêché Morin et les autres soldats de tirer puisqu'il n'existait aucune responsabilité de la part du sous-officier vis-à-vis des tiers, les propriétaires de la grange, et de son contenu, Anthony et Thompson.

Si les faits dans ces deux causes ne sont pas identiques à ceux de celle qui nous occupe, ils s'en rapprochent beau-

(1) (1946) Ex.C.R. 39. (2) (1946) S.C.R. 569.

coup, et suffisamment pour appliquer à la décision de cette dernière les principes établis dans celles déjà décidées, et surtout les principes posés dans la cause *Thompson and Anthony* v. *The King* par la Cour Suprême.

Il semble évident que le requérant désire établir la responsabilité de la Couronne et le lien de droit plutôt par la négligence des officiers en charge de l'aéroport en ne prévenant pas le délit, que par celle d'un aviateur ou employé quelconque qui aurait allumé le feu et aurait incendié la boutique. Dans les paragraphes 8, 9 et 10 de sa pétition de droit il allègue que les officiers de l'aéroport qu'il aurait mis au courant des intentions des aviateurs qui lui auraient fait des menaces, eussent dû prendre certaines mesures de précautions pour le protéger, notamment l'interdiction aux aviateurs de sortir de leurs quartiers, sans doute sous l'autorité de certains règlements militaires qu'il ne mentionne cependant pas. Dans le cas de *Bouthillier* v. *Le Roi* (*supra*), où une question semblable fut soulevée par le pétitionnaire, j'ai déjà décidé que (1): "Les règlements établis par l'armée sont pour la régie interne des camps et l'infraction à ces règlements ne saurait engager la responsabilité de la Couronne vis-à-vis des tiers, à moins que les infractions soient la cause directe des dommages". *Volkert* v. *Diamond Truck Co.* (2).

La question qu'une infraction aux règlements militaires ne peut engager la responsabilité de la Couronne vis-à-vis des tiers et que la règle *respondeat superior* n'a pas son application en pareil cas fut posée par l'honorable juge Rand, à la page 571, dans la cause précitée de *The King* v. *Anthony and Thompson* et à la page 574 il dit:

> The Military law is a body of rules which among other objects, the possibilities of illegal and injurious actions, 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 the authority must have regard to private interests before they may safely abstain, in any situation, from exercising it.

et plus loin sur la même page 574:

> It is clear that an officer is not within the rule "respondeat superior" for the act of one within his command, and it would be extraordinary if liability could be raised indirectly through a responsibility based not on his act but on his authority.

(1) (1945) Ex. C.R. 47. (2) (1940) 2 D.L.R. 673.

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Même si les faits allégués et prouvés établissaient indifférence ou même négligence de la part des officiers en charge du camp en ne prenant pas de mesures pour empêcher les employés de sortir du camp, cela n'imputerait pas d'obligation ou de responsabilité vis-à-vis du pétitionnaire de la part desdits officiers, et encore moins de la part de la Couronne. En droit il ne peut y avoir négligence ou responsabilité sans obligation.

Lord Wright dans *Lochgelly Iron and Coal Co. Ltd.* v. *McMullan* (1) précise la notion de négligence:

> Negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

Dans *Hay* v. *Young* (2) l'on a distingué la nature de l'obligation:

> Damage does not result from "negligence" unless the breach of duty from which it resulted was a breach of duty owed to the person damaged.

Le pétitionnaire n'allègue rien dans sa pétition ni dans son plaidoyer écrit qui puisse établir l'obligation de la Couronne de ne pas laisser sortir les aviateurs du camp, même après que quelques-uns d'entre eux lui eussent fait des menaces.

La cause de *The King* v. *Laperrière and Dubeau* (3), que le pétitionnaire cite à l'appui de sa réclamation, se distingue de celle-ci. Là, le juge qui avait été saisi de ces deux causes en première instance, avait décidé que la preuve établissait négligence de la part des officiers en charge en laissant un "Thunder Flash" dans un champ, et la Cour Suprême l'a confirmé. Puisqu'il s'agissait d'un explosif, objet dangereux, "per se", la règle "res ipsa loquitur" s'appliquait.

Ici il s'agit d'êtres raisonnables et non de choses inanimées dangereuses en elles-mêmes pour le public.

Dans *The King* v. *Anthony and Thompson* (*supra*) où il avait été établi qu'un soldat (Morin) avait causé un incendie en faisant feu sur le bâtiment, la Cour Suprême a trouvé (p. 574) que cet acte posé librement par Morin, l'avait certainement été en dehors de ses fonctions et instructions.

Je suis d'opinion que les faits allégués dans la pétition de droit ou cités dans le plaidoyer écrit du pétitionnaire,

(1) (1934) A.C. 1.
(2) (1943) A.C. 92.
(3) (1946) S.C.R. 415.

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même s'ils étaient prouvés ou admis, ne pourraient fonder un recours contre la Couronne parce qu'ils ne résultent pas de la négligence d'un employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi, aux termes de l'article 19 (1) (*c*) de la Loi de la Cour de l'Echiquier (S.R.C. chap. 34) telle qu'amendée.

Si, tel qu'allégué et plaidé par le pétitionnaire, les officiers en charge du camp de Mont-Joli et de l'Ecole de Bombardement et de Tir se sont rendus complices *après le fait* de l'acte qui aurait été commis par un de leurs subalternes, cette complicité ne peut donner ouverture à un recours contre la Couronne sous les dispositions de l'article 19 (1) (*c*) de la Loi de la Cour de l'Echiquier, ni sous les dispositions d'aucun autre article de cette même Loi, *Le Roi* v. *Legault* (*supra*).

Dans son plaidoyer écrit le pétitionnaire plaide que "l'inscription en droit n'est pas recevable à ce stage-ci des procédures" en réponse au plaidoyer de l'intimé fait sous les dispositions de la règle de pratique 149 de cette Cour. Cette règle se lit comme suit:

> No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial; provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

Je suis d'opinion que la question de droit soulevée par l'intimé peut être décidée sans enquête. D'ailleurs, c'est cette éventualité que prévoient les dispositions de l'article 149 précité.

Après avoir bien considéré tous les allégués de la pétition de droit et tous les faits soumis par le requérant dans son plaidoyer et la question de droit soulevée par la défense aussi bien que l'argumentation du requérant, il m'est impossible d'en arriver à une conclusion autre que la pétition de droit est mal fondée en droit et en ce qu'elle ne révèle aucune cause d'action contre Sa Majesté, ni aucun fait qui puisse engager la responsabilité de Sa Majesté même si tous les faits allégués étaient admis ou prouvés. Il serait donc inutile de procéder à l'enquête de ces faits. Pour ces raisons je renvoie la pétition de droit avec dépens.

Judgment accordingly.

1948

May 13, 14 and 15

June 3

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

HUMPHREYS ET AL.....PLAINTIFFS;

AND

THE M/V *FLORENCE NO. 2*.....DEFENDANT.

Shipping—Salvage—Misconduct of owner of vessel rendering salvage services—Demand for excessive salvage award—Owner deprived of costs—Factors which make salvage—Misconduct of owner does not deprive master and crew of salvage award.

The action is one claiming a salvage award. The plaintiffs are the owner, master, engineer and fishermen—crew of the ship *Emma K.* The Court found that the service rendered the defendant ship by the *Emma K.* was one of salvage performed by means of towage to Alert Bay because of the disabled and submerged condition of defendant ship and the seasonably coming to her rescue by the *Emma K.* Under instructions of the owner of the *Emma K.* defendant ship was towed by her from Alert Bay to Vancouver against express orders of officials of the Board of Marine Underwriters representing the owners of the *Florence No. 2.*

Held: That the plaintiffs are entitled to an award for salvage, such award not to include the towage from Alert Bay to Vancouver.

2. That the misconduct of the owner of the *Emma K.* does not deprive the master and crew of a salvage award.

3. That the factors which go to the making of a salvage award are the degree of the danger to the property salved, its value, the effect of the services rendered and whether other services were available; the risks run by the salvors, the length and severity of their efforts, the enterprise and skill displayed, the value and the efficiency of the vessel they used and the risks to which they have been exposed.

4. That because of the misconduct of the owner of the *Emma K.*, he is deprived of costs. The master and crew are entitled to recover their costs from defendant.

ACTION for salvage.

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

Walter S. Owen, K.C. and *Evans Wasson* for plaintiffs.

A. Hugo Ray and *J. W. Wallace* for defendant.

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

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HUMPHREYS ET AL v. FLORENCE No. 2

Sidney Smith D.J.A.

SIDNEY SMITH D.J.A. now (June 3, 1948) delivered the following judgment:

The plaintiffs claim a salvage award for services rendered to the *Florence No. 2* in the following circumstances:

The *Emma K.* is a purse seine fishing vessel 54 feet long, of 41 tons gross, and propelled by a diesel engine of 65 horse power. At all relevant times the first plaintiff was the owner of this vessel, the second plaintiff her master, the third plaintiff the engineer, and the other four plaintiffs composed her fishermen-crew. Her agreed value is $30,000.

About 2 or 2.30 p.m. on 8th October, 1947, while crossing Johnstone Strait, from Robson Bight to Blackney Passage, in moderate weather: S.E. wind with choppy sea and white caps: this vessel came upon the fishing-vessel *Florence No. 2,* which had fallen over on her beam ends and lay submerged in the water with the stern somewhat higher than the bow. The *Florence No. 2* is of similar type, but somewhat smaller than, the *Emma K.*—length 52·5 feet, of 38 tons gross, equipped with a 77 horse power diesel engine, and normally carrying a complement of 7 men, including the master.

Johnstone Strait is a long, busy thoroughfare lying between Vancouver Island, and the mainland; it runs first in a general northwesterly direction for about 25 miles, thence westerly for 50 miles, with a fairly constant width of from 1½ to 2 miles; the tidal streams attain a rate of from 1 to 5 knots, with short periods of slack water, although these do not synchronize with the times of high and low water by the shore, but occur from 1 to 2 hours later. The *Florence No. 2* had shortly before been crossing the Strait from Robson Bight to Growler Cove, and when about the middle of the Strait had capsized with the loss of two men. There was no evidence pointing to the cause of this casualty, but I am satisfied that it was not due to the weather then prevailing. The master and remaining 4 members of her crew had saved themselves by scrambling into the skiff and were soon thereafter picked up by the much smaller fishing-vessel *London* and by her taken to Growler Cove. There they boarded the fishing-vessel *Glendale V* of comparable size to the *Emma K.*, and at once returned to the scene of their misfortune.

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There they found the *Emma K.* in process of putting a line on board. Captain Beswick of the *Glendale V* spoke to the master of the *Emma K.*, and gave some advice as to securing the towline to the submerged ship. Being assured by the *Emma K 's* master that he could handle the situation, Beswick said he would proceed with the rescued crew to Alert Bay (10 miles away) as they were suffering some distress in their wet condition from cold and exhaustion. He did so.

Meanwhile, or very shortly thereafter, other fishing-vessels gathered at the scene; some six in all, of which the *Invercan 2,* in the same ownership as the *Florence No. 2,* was to perform a prominent role. At about 3 p.m. or later, the *Emma K.* began towing, accompanied by the *Invercan 2,* whose master, Myers, gave advice and assistance (to be mentioned later) as the towage proceeded.

The tide at the time was ebbing to the westward and the wind, as I have said, being from the S.E., both combined to carry the towing and towed vessels to the westward, and thus towards Blackney Passage. Myers advised the *Emma K.* to make for Blackney Passage, and this course was adopted; and later it was agreed to head for Parson Bay.

Blackney Passage runs roughly North and South, and its Southerly entrance lies between Cracroft Point to the East and the Easterly end of Hanson Island. From the position of commencement of the towage to Cracroft Point is a distance of 2 to 3 miles, and thence to Parson Bay another 3 miles. Once past Cracroft Point the vessels were sheltered from wind and sea. The chart shows the tide ebbs through the Passage at from 3 to 5 knots, towards Parson Bay. The towing of the *Florence No. 2* however was hampered by that vessel's nets which had become foul of some of her gear. Tug and tow would seem to have got too far west at the entrance to Blackney Passage which required the *Emma K.* to pull hard in a general easterly direction to keep clear to the end of Hanson Island. In order to assist her progress Myers with another man put out in the skiff of the *Invercan 2* and cut the nets adrift. When in this vicinity the *Florence No. 2* sank deeper, righted herself, and again rose to the surface. Much was made of this as an incident causing unusual danger to the

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Emma K. and requiring heroic work on her part to cope with it. While giving full value to the circumstance, I do not quite regard it in that light. The evidence is clear that the cutting of the tow-line would at once have put an end to all danger, and it is elementary practice to have an axe on hand for such a contingency. When clear of wind and tide the two vessels accomplished the rest of the voyage without difficulty, and arrived in the Bay about 7 p.m., where the *Florence No. 2* was securely made fast for the night between a *V* frame and the *Emma K.* There is, perhaps understandingly so, some uncertainty about the times. No log-books or written memoranda were produced. The *Invercan 2* escorted tug and tow until this Bay was reached, and left when everything was under control.

So far there is no serious conflict on the evidence; but I formed the impression that those on board the *Emma K.* were inclined to magnify the severity of the weather and the difficulties of the towage. My own view in this regard was confirmed by the plaintiffs' concluding witness, one, Beswick, master of the *Glendale V,* whose testimony had been taken *de bene esse.* I think his evidence must be accepted as giving the fairer version of the events that came under his notice. He said, *inter alia,* that they had fished in weather just as bad as it was that day. The evidence does not persuade me of the likelihood of either the sinking or the stranding of the *Florence No. 2,* had no assistance been rendered during the course of the next 24 hours or so after her collapse; though, no doubt, as darkness fell, she would have been faced with the added potential danger of being run down by passing ships.

The first phase of this matter ends here; and the second opens with the *Florence No. 2* full of water, but upright, safe and undamaged (save as to a broken mast) in Parson Bay. The termination of the danger marks the termination of the salvage service. I have no doubt that the service performed by the *Emma K.* to this point was one of salvage, and not one of towage only. It was a salvage service performed by means of towage. It was lifted into the higher category of salvage on account of the disabled and submerged condition of the *Florence No. 2* and of the *Emma K's* seasonably coming to her rescue. A towage

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service contemplates the towage of an uninjured vessel. It was pressed upon me that the *Florence No. 2* was then either a derelict or a wreck; but I cannot accept this contention. It is plain that in the circumstances mentioned she was neither the one nor the other. 30 Hals. 870 and 872. In my opinion the *Emma K.* was never at any point in any appreciable danger. The service she rendered did not contain any important element of risk or skill. Moreover there were other efficient means of assistance to the *Florence No. 2*—other vessels on the spot ready, able and willing to perform the same service, had the *Emma K.* not been a little ahead of them. I gathered that the others, quite properly, stood aside to permit of the first-comer's winning her salvage award. I speak chiefly of the *Invercan 2* and the *Glendale V*, since the other vessels only dimly appear in the evidence. I had, but did not need, the assurance of the masters of these two that they would and could have done the job in the absence of the *Emma K.* Nor do I need a like assurance from the masters of the other craft, although they were smaller and so might have had to team up to complete the task. For "it is the duty of all ships to give succour to others in distress; none but a free-booter would withhold it", as Lord Stowell said in *The Waterloo* (1). And that not the less so because this duty, as regards the saving of life, is now statutory; Canada Shipping Act, 1934, Ch. 44, Sec. 519. Unless deprived by subsequent misconduct the plaintiffs are entitled to a salvage award commensurate with their services, and erring, if at all, on the side of generosity.

The master and crew of the *Emma K.* turned in, and did no work that night. In the morning they found the *Florence No. 2* some two feet lower in the water, and supported her by two cedar logs, one on either side. About 9 a.m. the master of the *Florence No. 2* with one of his crew, arrived in the *Glendale V*. He requested that he be told when she was pumped out so that he could obtain the crew's effects. After an hour or so he left again on the *Glendale V* but never received this information. Something was made of the master's having given no instructions about the preservation or movements of his ship, but the matter had by then passed out of his hands into those of Mr. Olney of

(1) (1820) 2 Dods. 433.

Alert Bay, and his colleagues. The most the plaintiffs can make out of this is that the master took no steps to prevent what was done. This Mr. Olney represented the Vancouver office of the Board of Marine Underwriters of San Francisco, who in turn represented the owners of the *Florence No. 2*; about noon of the same day he appeared on the scene, prepared and duly authorized to take charge of operations on behalf of the owners. He was there about two hours. While there he heard a call on the radio-telephone to the master of the *Emma K.*, telling him "not to pay any attention to them fellows at Alert Bay". The call came from Mr. Gilbert Humphreys, the son and representative of the owner of the *Emma K.* in the vicinity. "So that's that" said Olney. "Yes, I guess it is" replied the master. Mr. Olney therefore, recognizing that his assumption of control would be resented, contented himself with engaging the services of Mr. Harry Mann, a logging operator at Parson Bay, to pump out and raise the *Florence No. 2.* Mann provided his own equipment for this purpose, and was duly paid for his services by the said Board of Underwriters. He was assisted in this work by the master and crew of the *Emma K.* By 11 p.m. the vessel was practically clear of water.

Next day, the 10th October, at noon, began the third phase; for then the *Emma K.* left Parson Bay, with the *Florence No. 2* in tow, bound for Vancouver where she arrived about midnight on the 13th. I find she undertook this towage, on the orders of her own owner (acting through his son), and against the express instructions of the officials of the said Board of Underwriters; and I have no doubt her object was to augment her salvage claim. Instead of merely doing what was needed, and either leaving the *Florence No. 2* at Parson Bay, or towing her (as the Board of Underwriters desired) to Alert Bay, 10 miles distant to the westward in sheltered waters, the owner of the *Emma K.* insisted upon taking the salved vessel to Vancouver, a distance of 170 miles to the eastward, most of the way through exposed waters. It is to be noted that the plaintiffs' claim is for $18,000 and that the agreed salved value of the *Florence No. 2* is $24,982; that plaintiff Sydney Humphreys swore on affidavit that the salvage service continued till the vessel's arrival at Vancouver.

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This clearly was untrue. Moreover, at Vancouver (so Counsel informed me, without contradiction) the salvors retained possession of the *Florence No. 2* and the crew's effects till they had obtained an appropriate undertaking for payment of their claim. All this indicates grasping misconduct, happily of rare occurrence, of which the Court must mark its disapproval. Improper conduct of the salvors may cause a diminution or total disallowance of the award. *The Marie* (1); *The Capella* (2); *The Clan Sutherland* (3); *The Gypsy Queen* (4). Here the owner of the *Florence No. 2* was wrongfully deprived of the control of his vessel for at least four days.

Three officials of the Board of Marine Underwriters gave evidence, namely, the aforesaid Mr. Olney of Alert Bay, Mr. Williams of Alert Bay (who, in addition to being a barrister and solicitor, is a Stipendiary Magistrate there) and Mr. Hichon of Vancouver. As such officials they all three occupy a responsible and semi-public position in maritime affairs; and part of their duties consists of the very matter they had here in hand, viz., the giving of skilled assistance to owners whose vessels have met with misfortune. It was suggested in argument that these men may have connived at falsehood to shield their own, or the Board's, misdoings or negligence. There is no ground whatever for any such suggestion. They each gave their evidence with frankness and with care; I accept it, and the whole of it, without reservation. Their testimony convinces me that from first to last the instructions received by the owner of the *Emma K.* from the Board was to tow the vessel to Alert Bay. As to this there could be no room for misunderstanding. I did not form so favourable an impression of the plaintiff Humphreys. I thought he did not deal quite frankly with the Court. It remains to be noted that his son, Gilbert Humphreys, who had much to do with the whole series of transactions, did not give evidence before me.

I do not associate the master and crew of the *Emma K.* with this high-handed behaviour. They merely obeyed their owner's instructions, and I do not think they were aware of the essential facts that showed they were acting wrongly. If left to themselves they would no doubt have

(1) (1882) 7 P.D. 203.
(2) (1892) P. 70.
(3) (1918) P. 332.
(4) (1922) 284 Fed. Rep. 607.

acted very differently. Nor does the misconduct of their owner deprive them of a salvage award, although they all join with him as co-plaintiffs. *The Neptune* (1); *The Kenora* (2). The Court watches carefully the interests of seamen and will resolve doubts in their favour. But clearly I can give no reward, either to the owner or to the master and crew, for the towage to Vancouver. That was a wrongful and deliberate act for which there can be no excuse. Liabilities are not to be forced on shipowners in this way against their wishes. Any compensation to which the master and crew may be entitled for this towage must be sought from the owner of the *Emma K.*

But there was the salvage service on the 8th October and the further service on the 9th. Strictly these latter services should have ended at noon upon the arrival of Mr. Olney, the representative of the owner of the *Florence No. 2.* The control of the operations should then have been handed over to him. This has been settled long ago, and I would refer to the following passage from the judgment of Sir James Hannen in *The Pinnas* (3):

> Mr. Crown (the managing partner of the salvors) thought he had a right to exclude the owner from his own vessel, and insisted on doing what he thought necessary to be done up to the time of getting the vessel into dock. I have no hesitation in saying that I am of opinion that he had no such right. I can conceive the possibility of such circumstances that would morally excuse a man for saying, "You must not interfere; it is a critical moment and if you interfere in the way you propose we shall lose the ship". Circumstances of that kind might arise, but in this case it was simply an assertion by Mr. Crown of his assumed right to complete the job, and on salvage terms and not on ordinary tradesman terms.

Nor did such circumstances arise in the present case.

It should be noted, too, that no question was raised here, nor could be raised here, of the plaintiffs' losing their right to immediate security by so acting. That could have been arranged at any time it was mooted. If there was the slightest doubt about the matter all they had to do was to bring an action *in rem* to enforce their maritime lien. But Mr. Olney did not take a very firm stand and there is no doubt of the valuable assistance given by the master and crew of the *Emma K.* on the 9th both before and after his arrival. This must be carefully taken into account in arriving at the salvage award.

(1) (1841) 1 Wm. Rob. 297.
(2) (1921) P. 90.
(3) (1888) 6 Asp. M.C. 313 at 314.

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I think too, but with some doubt, (for he who seeks a salvage award must come "with clean hands") that I should not withhold a full reward to the owner for the use of his vessel, as the salving instrument during the afternoon of the 8th, and all day on the 9th, bearing in mind however the very slight risk to which she was at any time exposed. I have in mind also the evidence as to loss of fishing profits, though this was unsatisfactory and lacking in precision. Such profits form an element, but only element, of the award. In this respect I would adopt the language of Mr. Justice Pilcher in the *St. Melante* (1) as follows:

> It is well established now that, while the pecuniary sum which represents, or which is alleged to represent, the loss of catch due to the performance of the salvage service is an element which has to be taken into consideration in making the salvage award it is also well recognized that any sum which the tribunal thinks would be an appropriate sum in respect of that is not given, in any sense of the word, as moneys numbered, but merely forms an element of the award.

The factors which go to the making of a salvage award are well-known and well-established, but may bear repetition here. They are, first, the degree of the danger to the property salved, its value, the effect of the services rendered, and whether other services were available; next, the risks run by the salvors, the length and severity of their efforts, the enterprise and skill displayed, the value and efficiency of the vessel they have used, and the risks to which they have been exposed here. The amount of the award depends on the degree in which all, many, or few of these factors are present.

Giving every consideration to these various matters and to the others I have mentioned, my view is that the owner should receive $750 for the use of his vessel, and the master and crew $1,500 for their total services on the 8th, 9th and whatever work was accomplished on the 10th pumping out the last of the water.

The question of apportionment amongst the master and crew was not before me. But I think it right to say that the master, the engineer, and Vilandor (who with the engineer went out in the skiff and made fast the tow-line) should receive the lion's share. The remaining members of the crew should be compensated on a much lower level,

(1) (1947) 80 Lloyds L.R. 588 at 591.

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as there is no evidence of any particular part played by any of them in these events, and it is doubtful if they were even seriously inconvenienced.

As to costs—on account of the misconduct of plaintiff Humphreys, I deprive him of costs. The other plaintiffs will have their costs. In my discretion I apportion these as being one-quarter incurred by the former and three-quarters by the latter. In the result the defendant must pay three-quarters of the costs of the whole action to the plaintiffs, excluding plaintiff Humphreys. There will be judgment accordingly.

Judgment accordingly.

NEW BRUNSWICK ADMIRALTY DISTRICT

1947

April 14

1948

May 13

BETWEEN:

ESTONIAN STATE CARGO AND PASSENGER STEAMSHIP LINE } PLAINTIFF;

AND

PROCEEDS OF THE STEAMSHIP *ELISE*

AND

MESSRS. LAANE and BALTSER ..... } (INTERVENORS) DEFENDANTS.

Shipping—International law—Canada Shipping Act 24-25 Geo. V, c. 44, s. 705—De facto government—Action in rem against proceeds of sale of foreign ship arrested in Canadian port—Recognition of decree of de facto government—Distribution of proceeds of sale of ship—Ship's register not conclusive of national character of ship—Flag prima facie evidence only of ship's national character except in matters of prize—Intra vires acts of de facto government purporting to have extra-territorial effect.

In October, 1940, a decree of the *de facto* government of Estonia purported to nationalize the vessel *Elise* privately owned by the (intervenors) defendants, "wheresoever it may be" and further legislative acts of that government purported to vest in the plaintiff "all rights, title and

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possession in, to and out of" the vessel. All legislative acts purported to apply within and without the territory of Estonia. The *Elise* was in Canadian territorial waters at any material date herein and at all material times was *in transitu*. The defendants were citizens of Estonia, residing and domiciled therein and subject to the said *de facto* government. The *Elise* was registered in Estonia. The defendants owned the *Elise* prior to June 17, 1940, when the *de facto* government commenced functioning and their ownership continued in so far as the issues herein are concerned. In November, 1940, the *Elise* was arrested initially at the suit of the crew for wages and then on various other claims. She was sold in 1941 by order of the Court. The claims referred to were paid from the proceeds of the sale and the balance remained in Court. The plaintiff issued a writ *in rem* claiming that it is entitled to the money in Court. The (intervenors) defendants also claim this money. At the trial it was admitted *inter alia* that "the Government of Canada recognizes the government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* Government of Estonia."

Held: That for the purposes of this action the legislative acts of both the Estonian Soviet Socialist Republic and the Union of Soviet Socialist Republics with respect to Estonia are to be treated as taken by a *de facto* Government.

2. That the decree and statute mentioned in the admissions were within the constitutional powers of the government in question.

3. That in the absence of evidence to the contrary the presumption of the continuance of a new government applies.

4. That the effect of recognition of a *de facto* government is retroactive to the time of the original establishment of that government.

5. That for the purposes of this action there is no distinction between a *de facto* and a *de jure* government in the matter of legislative power.

6. That the register is not conclusive evidence of a ship's national character.

7. That in cases in prize a ship is clothed with the nationality of the country whose flag she flies, but otherwise the flag is only *prima facie* evidence of such national character.

8. That the law of Canada recognizes that the legislative acts of the *de facto* government in question were *intra vires* in purporting to have extraterritorial effect.

9. That the national character of the *Elise* is to be identified with the country controlled by the *de facto* government in question and in Canadian law there may be implied an immunity to the extent of permitting the legislative acts of that government to take effect upon the proprietary rights in the *Elise* while at a Canadian port; the recognition of the title of the plaintiff in the *Elise* is only conforming to the long established principle of protecting a proprietary interest acquired under the foreign law which had complete jurisdiction to establish that right.

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ACTION *in rem* against the proceeds of a foreign ship arrested in a Canadian port and sold pursuant to Court order.

The action was tried before Mr. Arthur W. I. Anglin, now the Honourable Mr. Justice Anglin, District Judge in Admiralty for the New Brunswick Admiralty District, at Saint John New Brunswick.

C. F. Inches, K.C. for the plaintiff.

J. Paul Barry for (intervenors) defendants.

H. A. Porter, K.C. for Custodian of Enemy Property.

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

ANGLIN, D.J.A., now (May 13, 1948) delivered the following judgment:

The Steamship *Elise* was a merchant vessel registered at Parnu, Estonia, on the Baltic, and during 1940 carried cargoes between the United Kingdom and Canada. While at the port of Saint John, New Brunswick, in November, 1940, she was arrested initially at the suit of the crew for wages and then on various other claims, and sold in 1941 under process of this court. Those claims were paid from the proceeds of the sale, and the plaintiff has issued a writ *in rem* claiming that it is entitled to the balance in the sum of approximately $44,000 remaining in court. The plaintiff admits that the *Elise* was originally owned by Messrs. Laane and Baltser, who did business in co-partnership at Parnu, but alleges that after a Soviet regime was established in Estonia in June, 1940, the vessel was nationalized and the title thereto transferred to the plaintiff by virtue of certain legislative acts of the Estonian Soviet Socialist Republic and of the Union of the Soviet Socialist Republics. An appearance was entered for Messrs. Laane and Baltser as intervenors. They allege that this court may not, on various grounds, recognize or implement those acts, and claim to be entitled to the balance of the proceeds. The intervenors will hereafter be referred to as defendants.

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The Court's Order of March 12, 1947, fixing the time and place for trial was made on the application of the solicitor for the defendants, and it contained the following:

AND IT IS FURTHER ORDERED (the Solicitors for the parties herein having consented thereto) that evidence purporting to establish any document or fact in the action may be given at the said trial by signed admission of Counsel or by affidavit filed and served on or before the 31st day of March, 1947, and that evidence in rebuttal of any such evidence given by affidavit may also be given by affidavit.

Pursuant thereto a statement as follows was filed with the court for the trial held on April 14, 1947:

ADMISSIONS

The parties in this cause, for the purpose of this cause only, hereby admit the following statements.

1. That prior to the 17th day of June, A.D. 1940, there existed the Republic of Estonia, the existence of which and the Government of which was recognized by the Government of Canada.

2. That prior to June 17 1940, the Steamship *Elise* was owned by Ado Laane and Frederick Baltser, hereinafter sometimes referred to as defendants, who did business in co-partnership at Parnu in the said Republic of Estonia under the firm name and style of "Laane & Baltser" and the said steamship was registered at Parnu aforesaid and was of the approximate gross tonnage of nine hundred ninety tons.

3. That prior to July 1939, the said steamship *Elise* had left the Republic of Estonia, and had arrived in the Port of Saint John in the Province of New Brunswick in the Dominion of Canada on or about the 15th of August, 1940, without having returned to Estonia in the meantime, the said steamship having been sailing between the United Kingdom and the Dominion of Canada only during 1940.

4. That while the said steamship *Elise* was in the said port of Saint John it was arrested by virtue of several processes issued out of this Honourable Court and it was ordered sold by this Honourable Court, the sale taking place on the 25th day of January, 1941.

5. That the proceeds of the said sale, namely: $88,000 were received by this Honourable Court and, after satisfying the claims against the said steamship there is a balance on hand in the custody of this Honourable Court amounting to $43,709.08 with bank interest from December 31, 1945, which balance is claimed by said Laane & Baltser on the one hand and by the plaintiff on the other.

6. That on or about June 17, 1940, a new government was established in Estonia, known as the Estonian Soviet Socialist Republic, hereinafter referred to as the E.S.S.R.

7. That the E.S.S.R. became a constituent Republic of the Union of the Soviet Socialist Republics (Soviet Russia) hereinafter referred to as the U.S.S.R., and was recognized as such by the Government of Canada, *de facto* but not *de jure*

8. That on August 28, 1940, a new constitution of the E.S.S.R. was published of which Article 6 declared, *inter alia*, water transport to be state property.

9. That on July 23, 1940, the newly established government passed a decree in the form of a declaration, as to the nationalization of banks

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and large industries, a copy of which decree is hereto annexed marked "A".

10. That on August 1, 1940, a further decree was passed in the form of a regulation concerning the movement of ships, a copy of which decree is hereto annexed marked "B".

11. That on October 8, 1940, there was passed a decree of the Presidium of the Provisional Supreme Soviet of the E.S.S.R. on Nationalization of Shipping Enterprises and Seagoing Ships and Riverboats, Section 1 of which purports to nationalize, *inter alia,* the Steamship *Elise* "wheresoever it may be" and Section 2 of which fixes the amount of compensation to be 25 per cent of its value; a copy of this decree is hereto annexed marked "C".

12. That on October 25, 1940, there was passed a decree of the Council of People's Commissars of the U.S.S.R. on organization of the Estonian State Steamship Line, Section 1 of which provides for the organization on the territory of the E.S.S.R. of the Estonian State Steamship Line in direct subordination to the People's Commissariat of Maritime Fleet of the U.S.S.R. with the seat of its administration at Tallinn. A copy of this decree is hereto annexed marked "D".

13. That hereunto annexed marked "E" is a copy of the Statute of the Estonian State Cargo and Passenger Steamship Line by virtue of which the plaintiff is a corporation organized under the laws of the U.S.S.R.

14. That on said June 17, 1940, and on the respective dates of the said decrees, the said Ado Laane and Frederick Baltser were citizens of Estonia, residing and domiciled therein, and Frederick Baltser is presently residing in Sweden.

15. That on or about the 11th day of September, 1942, the plaintiff herein issued a summons in *Rem* against the proceeds of the sale of the Steamship *Elise,* claiming ownership of the said proceeds by virtue of the laws of the U.S.S.R., and E.S.S.R. and in particular the decrees hereinabove referred to, the said Steamship *Elise* and all rights of title and possession thereof, were transferred to and became vested in the plaintiff herein and the plaintiff therefore is entitled to the said balance of the proceeds of sale.

16. That the Government of Canada recognizes the Government of the E.S.S.R. as the *de facto* government, but not as the *de jure* government, and the attitude of the government of Canada is expressed in the hereto attached questions and answers marked (1).

17. That the said decrees set forth in paragraphs 11 and 12 herein and the statute set forth in paragraph 13 herein purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said steamship *Elise.*

18. The plaintiff alleges that on the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute of the *de facto* government hereinabove referred to, nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds; and the defendants deny this allegation, contending that as a matter of law based upon the said facts herein recited and admitted, the said decrees do not have the effect alleged by the plaintiff and that the said statute and decrees are (*a*) acts of a *de facto* government only, (*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority and (*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940.

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19. That the questions at issue between the plaintiff and defendant, are:

(1) Were the decrees and statutes herein recited effective in nationalizing the Steamship *Elise* and transferring ownership to the plaintiff herein?

(2) Is the plaintiff entitled to maintain the action and receive the proceeds?

Dated this 7th day of April 1947.

(Sgd.) C. F. Inches
of Counsel for Plaintiff.

(Sgd.) J. Paul Barry
of Counsel for Defendants
Laane and Baltser.

I am not reciting, nor making any extracts from, the translated decrees and statute attached to the admissions, because, as will be shown later, the court may not under our law examine or construe foreign legislative acts without the assistance of expert evidence, and there was no evidence of that nature adduced.

The letter referred to in paragraph 16 of the admissions is as follows:

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA

OTTAWA
January 2, 1947

Dear Sir,

Re: Estonian State Cargo and Passenger Steamship Line *v.* Proceeds of the Steamship *Elise*.

Your letter of December 23 encloses four questions put jointly by you and Mr. C. F. Inches, representing all the parties to this action. You desire my answers to these questions for production to the Court in this case.

Question 1. Does the Government of Canada recognize the right of the Council of Peoples' Commissars of U.S.S.R., or any other authority of the U.S.S.R., to make decrees purporting to be effectual in Estonia?

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. The question of the effect of a Soviet decree is for the Court to decide.

Question 2. Does the Government of Canada recognize the existence of the Republic of Estonia as constituted prior to June, 1940, and if not when did such recognition cease?

Answer: The Government of Canada does not recognize *de facto* the Republic of Estonia as constituted prior to June, 1940. The Republic of Estonia as constituted prior to June, 1940, has ceased *de facto* to have any effective existence.

Question 3. Does the Government of Canada recognize that the Republic of Estonia has entered the Union of Soviet Socialist Republics, and if so, as from what date, and is such entry recognized as being *de facto* or *de jure*?

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics but has not recognized this *de jure*. It is not possible for the Government of Canada to attach a date to this recognition.

Question 4. Does the Government of Canada recognize the Government of the Estonian Soviet Socialist Republic, and if so, from what date.

Answer: The Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia. It is not possible for the Government of Canada to attach a date to this recognition.

Sincerely yours,
(Sgd.) Louis S. St. Laurent
Secretary of State for
External Affairs.

J. Paul Barry, Esq.,
Barrister,
P.O. Box 33,
Saint John, N.B.

At the trial the following affidavit under date of April 3, 1947, was placed in evidence on behalf of the defendants subject to objection by counsel for the plaintiff that paragraph 4 thereof "would be only opinion evidence" on the part of the deponent:

I, Johannes Kaiv of the City of New York in the State of New York in the United States of America, Estonian Consul, make oath and say:

(1) that I am Acting Consul-General for the Republic of Estonia in the United States of America.

(2) that I have knowledge of the matters and facts to which I hereinafter depose.

(3) that I do depose and swear that none of the acts, decrees, statute or change of constitution dated July 23, August 1, August 28, October 8, October 25, October 29, 1940, were adopted in accordance with the Constitution of the Estonian Republic as it existed on the 17th day of June A.D. 1940, but, on the contrary, are in contravention thereof.

(4) that the decrees mentioned in paragraph (3) herein are confiscatory in nature and contrary to the said Constitution as it existed in June 1940.

(5) that the Master of the Steamship *Elise* in 1940 and until the sale of the said vessel in January A.D. 1941 was Robert Onno.

(6) that I am informed and verily believe that the said Robert Onno did not recognize the change of government in Estonia and always regarded Laane and Baltser as his employers.

(7) that no compensation has been paid to Ado Laane or Frederick Baltser on account of the purported nationalization and the plaintiff herein never had actual or physical possession of the steamship *Elise* nor of the proceeds of the said steamship.

(8) that the decrees and statute dated October 8, October 25, and October 29, mentioned above are the same decrees and statute discussed in the English case of A/S Talinna Laevaehisus and others *versus* Talinna Shipping Company Limited and another.

(Sgd.) J. Kaiv

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The only other item of evidence adduced at the trial was an extract-translation from the Estonian State Gazette of July 28, 1940, which was described by counsel for defendants in submitting it as "a list of shipping enterprises subject to nationalization . . . based on the declaration of the Chamber of Deputies of July 23rd."

Horace A. Porter, K.C., attended at the trial on behalf of the Secretary of State of Canada who is the Custodian of "enemy" property. It appears that when the Germans invaded Estonia it became necessary for Canada under appropriate Orders-in-Council to declare that country "enemy territory", which it did as of August 2, 1941. The proceeds in court then came under the Custodian's control on behalf of the foreign parties in interest. Mr. Porter stated that "the Custodian wants the court to adjudicate on it and according to the finding of the court the Custodian's consent (to payment out) will be given."

It is well settled that an action *in rem* may be brought against the proceeds in court, and that the balance on hand after payment of all claims of third parties, should be paid out to whomever is beneficially entitled thereto. *The Neptune* (1); *The Nordcap* (2); Mayers on Admiralty Law and Practice, (1916), 301. Lord Atkin in *The Colorado* (3) said:

> Now when an action *in rem* has been brought in these Courts in respect of a ship, the Court by its decree controls the money which represents the *res* as the result of sale or bail, and directs payment to be made to such claimants as prove their claims in the order of priority directed by the Court. To give the necessary directions the Court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the *res* at all.

The parties admit, and I so find, that "the plaintiff is a corporation organized under the laws of the U.S.S.R." The admissions refer to the act incorporating the plaintiff as a "statute", and to other legislative acts in question as "decrees." All such acts are stated to be enactments of a "*de facto* government." It is patent, however, from the admissions that the decree of October 25, 1940, and the statute relating to the organization of the plaintiff both emanated from the U.S.S.R. There is no evidence that the U.S.S.R. is other than a government recognized as

(1) (1853) 3 Knapp 94.
(2) (1888) Stockton 172.
(3) (1923) P. 102 at 110.

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de jure by Canada and having normal legislative power. The plaintiff as a foreign corporation may of course sue in our courts.

The parties admit that certain decrees and the statute "purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said Steamship *Elise*." In paragraph 18 of the admissions "the plaintiff alleges that on the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute . . . nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds," and the defendants, as the initial attack in their case, "deny this allegation, contending that as a matter of law, based upon the said facts herein recited and admitted, the said decrees do not have the effect alleged by the plaintiff."

As to the effect of the decrees and the statute in that regard no expert evidence was adduced to resolve this question of foreign law. At the trial Mr. Beck, a member of the Bar of the State of New York who acted with counsel for the defendants, reviewed the specific terms of the translated decrees and statute in evidence under the admissions, and contended that all that could be spelled out of the decrees was that the *Elise* is "subject to be nationalized, but it is not nationalized," and, further, that, if it was nationalized, there are no words in particular which provide for the granting of title in the *Elise* to the plaintiff. Mr. Beck's views may very well be sound, but I am precluded in our law from making a finding as to the nature or effect of these decrees and the statute by construing them myself. As Mr. Justice Strong has said in the Supreme Court of Canada, "it is not sufficient proof of foreign law thus to produce a code or statute, without showing by the evidence of experts, what the written law so referred to actually establishes"; *Worthington* v. *Macdonald* (1). And Mr. Justice Duff has in addition said that "it is settled law that if the evidence of such experts is conflicting or obscure the court may go a step further and examine and construe the passages cited itself in order to arrive at a satisfactory conclusion"; *Allen* v. *Hay* (2). See also *Lazard Bros.* v. *Midland Bank* (3), where Russian decrees were under

(1) (1884) 9 S.C.R. 327 at 334.
(2) (1922) 64 S.C.R. 76 at 81.
(3) (1933) A.C. 289 at 298.

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consideration. According to Mr. Kaiv's affidavit (paragraph 8) these two decrees and the statute were before the court in a recent English action which I shall call for brevity *The Vapper Case. A/S Tallinna Laevauhisus and Others* v. *Tallinna Shipping Co. Ltd., and Estonian State Steamship Line* (1). In that case the Estonian State Steamship Line (a short form of the name of the plaintiff in the present action) claimed the insurance moneys which had been paid into court upon the *Vapper* being sunk in July, 1940. The *Vapper* had been a vessel owned by a shipping enterprise of Estonia, and the claimant maintained that the decrees and statute entitled it, and not the original owners, to be paid the fund in court. The Foreign Office advised the court that the E.S.S.R. was recognized as the *de facto* government of Estonia, and also that the Republic as constituted prior to June, 1940, had "ceased *de facto* to have any effective existence." Mr. Justice Atkinson in the trial court said at p. 258: "The trouble is that I have no evidence whatever of the meaning or effect of these decrees." In the Court of Appeal (2) Lord Justice Scott said:

> Under the new regime the old Estonian law, written and unwritten, would under international law, as recognized in English courts, continue to apply save in so far as it was displaced or amended by the new legislation.
>
> As questions of foreign law are in our courts questions of fact and have to be solved by properly admissible evidence, one would naturally have expected the Soviet side to have been prepared with and to have called evidence proving the various stages of Estonian law introduced by the new Sovereign State—whether that was the E.S.S.R. or the U.S.S.R. The defendants, however, did not take that course. They called no evidence. Mr. Devlin for the plaintiffs called a very distinguished Estonian lawyer, Dr. Rei, who was exceptionally well qualified to give evidence about Estonian law as it was before the Russian assumption of sovereignty; and was also adequately qualified to speak of the new Estonian law gradually introduced thereafter by the E.S.S.R.; but he expressly disclaimed qualification to give evidence about the law or legislation of the U.S.S.R. . . . Whether any of the U.S.S.R. decrees were, even as documents, really in evidence, was discussed before us. Mr. Devlin below, naturally enough as the case was in the Commercial List, asked questions of his expert witness about documents which he anticipated his opponent would call evidence to prove; but he did so *de bene esse,* not as either proving or admitting them, but in order to make plain to the court and to his opponent what his case would be about them if and when proved by the defendants, and under express reservation of his rights to disregard them altogether, if the defendants did not choose to call evidence to prove them. (pp. 105-6).

(1) (1945) 79 Lloyd's L.L.R. 245. (2) (1946) 80 Lloyd's L.L.R. 99.

The fact and content of foreign law must be proved by expert evidence . . . The illegality of the various legislative steps taken under Russian domination, as judged by the criterion of the law and constitution of old Estonia and demonstrated by Dr. Rei, would, of course, have become immaterial if the Russian legislation had been proved below: but it is on that probative step that the defendants' case in my opinion failed, for they called no evidence to prove it effectively. (p. 109).

Lord Justice Tucker in his judgment (on this appeal) expresses the view that those documents in Bundle 29 which purport to be decrees of the Soviet Estonian government must be regarded by this court as having been sufficiently proved by Dr. Rei; though the necessary proof, that their contents established the allegations in the defence and counter-claim of their effect, was lacking. In view of the other conclusions at which my brethren arrive at a decision on this point is not necessary: but, as I have said, my own view is that Mr. Devlin's caveats which I have quoted prevent us treating Dr. Rei's production of, or comments upon, those documents as constituting proof of the documents as legislation; in other words that Mr. Pritt was not entitled to treat them as having been "put in", or as being before the court at all. But be that as it may, putting the foreign legal documents in was only the first of several steps in proof incumbent on the defendants, and I agree with Lord Justice Tucker's view that the further steps were never accomplished. (p. 111).

Accordingly, on the issue of whether the said decrees and statute nationalized and vested in the plaintiff "all rights, title and possession in, to and out of the said Steamship *Elise,*" I may only consider the admission that they "purported" to do so. The question arose at the trial as to what had been the intention of the parties in employing the word "purport". The following statements were made by the respective counsel:

Mr. Inches . . . I applied for a commission to prove the passing of these decrees and their legal effect. That was to be taken in Moscow My learned friend also wanted to put in evidence with reference to the laws of Estonia. He realized that if I had to prove my case by commission without him admitting anything, that naturally he would have to prove his own case by putting in expert testimony. Finally we came to an agreement that these decrees would be admitted in evidence . . . Then my learned friend brought up the point that he would have the right in court to interpret these decrees . . . Then we got together again and we added something. Section 11. (Reads) That is what we agreed that decree purported to do. That is why that was put in there—to obviate the necessity of putting an expert in Russian law to tell us what the decree purported to do. If you look at section 17. (Reads) Mr. Beck says there are no words of granting or vesting in those decrees. We admitted that the purport of the decree was to do that . . . We cannot argue that these decrees do not vest when we admit that they purport to vest the title.

Mr. Barry: I admit that they purport to vest.

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In so far, therefore, as the issue of the moment involves the intended effect of the relevant decrees and statute I must find for the plaintiff.

It is appropriate at this stage to consider next the ultimate contention of the defendants that the decrees and statute of the *de facto* government in question "(*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940". The evidence adduced in support of that contention is contained in the affidavit of Johannes Kaiv, paragraph 3. It appears from statements made at the trial by Mr. Beck that Mr. Kaiv is a lawyer learned in the law of the former Republic of Estonia, and was the Consul-General at New York for that Republic when the Second World War began. Mr. Beck also said:

> The United States government has not gone as far as the British government because we do not recognize the *de facto* existence of the Soviet government in Estonia . . . The invasion took place in a few hours and the Estonian minister in London was there at the time and Mr Kaiv was in New York and they continued to function . . . The old Estonian constitution is still alive . . . Mr. Kaiv's jurisdiction is in the United States and North America.

Mr. Kaiv states in his affidavit that the decrees and statute here under reference are in contravention of the constitution of Estonia as it existed on June 17, 1940. I do not doubt that this may be true. But it is stated in the letter in evidence from our Department of External Affairs that the government of Canada "does not recognize *de facto* the Republic of Estonia as constituted prior to June, 1940," and that it "has ceased *de facto* to have any effective existence." Furthermore, the letter states that the government of the E.S.S.R. is recognized "to be the *de facto* government of Estonia", and that the E.S.S.R. "has *de facto* entered the U.S.S.R." The decrees and statute in question having been proved by the admissions to be enactments of the *de facto* government so recognized I am precluded in our law from considering whether they are contrary to the constitution of the Republic of Estonia. The plaintiff is therefore entitled to succeed on this issue. The point in law is illustrated by the following cases. In *Banco de Bilbao* v. *Sancha* (1) the reasons for judgment, concurred in by all members of the Court of Appeal, contain the following at pp. 194-6:

(1) (1938) 2 K.B. 176

The question what body of directors have the legal right of representing the Banco de Bilbao, a commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to the general law, must be governed by the *lex loci contractus* . . . i.e. by the law from time to time prevailing at the place where the corporate home was set up . . . What is the government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the government of the territory in which Bilbao is situate. Should the question arise as to what government must be recognized in this court as the government of the territory in which Bilbao is situate, the question must, in case of doubt, be resolved by a statement made by His Majesty through the appropriate channel.

The propositions so far enunciated seem to be indisputable. The only question open to argument arises from the fact that His Majesty's government recognize the Spanish Republican Government with its seat in Valencia or Barcelona as the *de jure* government of the whole of Spain, but at the same time recognize the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situate . . . This court is bound to treat the acts of the government which His Majesty's government recognize as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts.

Thus in the courts of this country no regard can be paid for the present purpose to the legislation enacted by the Republican Government which during the material period cannot be treated in this court as the government of the area in which Bilbao is situated.

In *The Maret* (1), it was held in the United States that in view of the non-recognition by the American government of the E.S.S.R. and of its decrees nationalizing Estonian ships the Circuit Court of Appeals could not recognize the Estonian State Steamship Company as the owner of Estonian ships requisitioned by the United States Maritime Commission. In *The Ramava and The Otto* (2), the decrees in the present case were under consideration by the Supreme Court of Eire with respect to merchant ships registered in Estonia and owned by citizens of the latter country. When the ships arrived at ports in Eire the masters signed "Certificates of Delivery" to the agents of the Sovfracht through which the U.S.S.R. operated their nationalized mercantile marine, but the masters retained physical possession. The plaintiffs issued writs *in rem* claiming declarations that they, as duly accredited repre-

(1) (1946) 145 Fed. R. 2nd 431. (2) (1942) Ir. R. 143.

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sentatives of Estonia, were trustees of the lawful owners of the vessels. The U.S.S.R. moved to set aside the proceedings on the ground that they, a sovereign state, were impleaded by the proceedings and that they had not consented to the jurisdiction. The government of Eire did not recognize the U.S.S.R. as a sovereign state in Estonia either *de jure* or *de facto*. It was held that, having regard to that circumstance, the court must treat as nullities the various transactions and documents alleged to culminate in the sovereignty of the U.S.S.R. in Estonia and purporting to pass the property in the ships, and that the U.S.S.R. was not in any way affected by the proceedings.

I shall now return to consider the defendants' second contention, namely, that the decrees and statute in question are "(a) acts of a *de facto* government only." By this I take it that it is contended, as indicated in the statement of defence and at the trial, that those legislative acts did not operate extraterritorially with respect to the *Elise* at Saint John because the Estonian government was recognized as *de facto* and not as *de jure*. Actually, as will be shown later, it is well settled that our law does not make any distinction in this connection between a *de facto* and a *de jure* government, but as to whether a foreign decree or statute, where enacted with that intent, does have extraterritorial effect upon a ship in a Canadian port, and, if so, whether our law will recognize this and implement the decree or statute, are questions upon which there is not the same consensus of juridical opinion. I shall therefore deal with the defendants' contention on this broader footing after disposing briefly of some minor but relevant matters.

One of such matters is that if the evidence established that the *Elise* was on the high seas while such legislative acts as purported to apply to her were in force, there is ample authority that they would be considered as operating upon the proprietary rights in the vessel. Counsel for the plaintiff said at the trial:

> At the time that this property was nationalized by virtue of these decrees, the vessel was not within the territorial limits of the country of Estonia. It was somewhere in the Atlantic ocean I believe, plying between America and England. I am not sure.

But there is no evidence that the *Elise* was on the high seas outside any territorial waters at a time when any material legislation could have had such effect. According to the admissions the vessel sailed between the United Kingdom and Canada during 1940, and arrived at the port of Saint John about August 15th, from which she did not depart until sold in January, 1941. There is no evidence of the relevant terms and effect of the decrees of July 23, and August 1, 1940. The admissions only speak of the former as "a decree in the form of a declaration as to the nationalization of banks and large industries," and of the latter as being "in the form of a regulation concerning the movement of ships." The new constitution for the E.S.S.R. declaring "water transport to be state property" is stated in the admissions to have been "published" on August 28, 1940. It will be noted that in paragraph 13 of the admissions no date is given for the statute "by virtue of which the plaintiff is a corporation organized under the laws of the U.S.S.R." Mr. Kaiv, however, in paragraph 3 of his affidavit of April 3, 1947, obviously assigns October 29, 1940, to that statute, and I would, therefore, adopt that as the actual date thereof. It is quite clear from paragraph 17 of the admissions that the parties consider, and I so find, that the nationalization decree of October 8, 1940, the decree of October 25, 1940, providing for the organization of the plaintiff on the territory of the E.S.S.R., and the statute of October 29, 1940, incorporating the plaintiff, are the legislative acts which are material in this action, and they were all enacted while the *Elise* was at Saint John.

There are several other matters which should first be clarified or determined. They are in brief as follows:

(i) As the decree of October 8, 1940, is attributed in the admissions to the E.S.S.R., and the decree of October 25, 1940, and the statute of October 29, 1940, are therein attributed by the parties to the U.S.S.R., what precisely is the "*de facto* government" which is contemplated in the admissions?

(ii) May the decree and statute organizing the plaintiff corporation be impugned on the ground that there is no evidence of the legislative authority of the enacting body?

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(iii) What consequence, if any, is to be accorded in law to the circumstance that the Germans apparently superseded the *de facto* government of Estonia during their occupation of that country from August, 1941, to October, 1944?

(iv) May any retroactive effect be given to the recognition by Canada in January, 1947, of the *de facto* government of Estonia, and, if so, to what date?

(v) With respect to its legislative power, is there any distinction in our law between a *de facto* and a *de jure* government?

As to the above question (i), the content of paragraphs 6 and 7 of the admissions is "that on or about June 17, 1940, a new government was established in Estonia, known as . . . the E.S.S.R." and "that the E.S.S.R. became a constituent Republic of the . . . U.S.S.R., and was recognized as such by the government of Canada, *de facto* but not *de jure*." The Department of External Affairs in its letter of January 2, 1947, advises that "the government of Canada recognizes that Estonia has *de facto* entered the U.S.S.R. but has not recognized this *de jure*", and that it "recognizes the government of the E.S.S.R. to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia." There is no further evidence on the relationship of, or on the division of legislative authority between, the E.S.S.R. and the U.S.S.R. Even if I had the necessary knowledge, I do not think that I may take judicial notice of the constitutional relationship of those two foreign countries. *A/S Rendal* v. *Arcos, Ltd.* (1), reversed on other grounds (1937) 3 All E.R. 577. In the circumstances and on the material of record I think it fair to the parties and the issue to assume that what was intended to be meant by "*de facto* government" was the legislative and executive authority over Estonia exercised by the E.S.S.R. and also by the U.S.S.R., in so far as the latter had, or it is admitted to have had for the purposes of this case, jurisdiction with respect to that country. In brief, for the purposes of this case, the legislative action of both the E.S.S.R. and the U.S.S.R. with respect to Estonia is to be treated as taken by a *de facto* government. If I am correct in this assumption, there is no occasion to

(1) (1936) All E.R. 623 at 631.

consider in particular the effect on the E.S.S.R. of a decree of the U.S.S.R., which the Department of External Affairs said in its answer to the first question submitted by counsel was a question for the court to decide.

In this connection, however, there is for consideration the above question (ii) respecting the constitutional validity of the said decrees and statute. Counsel for the defendants said at the trial: "We have no evidence in this case as to the right of the Council of Peoples' Commissars to pass decrees." (Actually, on the admissions, it was only the decree of October 25, 1940, which was enacted by that council. The statute of October 29, 1940, is not therein attributed to any legislative body of the U.S.S.R.) It appears from the authorities that the court has a right and duty, even where the foreign legislative act was enacted by a state duly recognized, to examine its constitutional validity. *Re Amand (No. 1)* (1); Mann, The Sacrosanctity of the Foreign Act of State, (1943), 59 L.Q.R. 42 at 44, 159; McNair, Legal Effects of War, 2nd Ed., (1944), 374-377. But, as foreign law is a question of fact, this examination may only be accomplished through appropriate evidence. See *The Amand Case, supra,* and *Lorentzen* v. *Lydden & Co.* (2). It is true that there is no evidence in this regard in the present action either supporting or attacking the validity of those legislative acts, and I assume that the reason therefor is that given above by counsel with respect to the question of the effect of the content of those acts. In the result, again I must resort to the admissions, and I think it is implicit therein that the said decree and statute were within the constitutional powers of the *de facto* government in question.

As to the above question (iii), Mr. Beck argued that the *de facto* government which may have existed in Estonia in 1940 fled before the Germans when they overran the Baltic states in August, 1941, after declaring war on the U.S.S.R. He claimed that when that government failed to maintain itself *de facto*

> All these decrees and acts go by the board . . . It was not able to maintain its power . . . It cannot govern today and run away and govern tomorrow . . . The government in existence in Estonia today existed there about October, 1944 . . . We come back to the question of the recognition by your government of the *de facto* existence of the

(1) (1941) 2 K.B. 239 at 253. (2) (1942) 2 K.B. 202.

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government in Estonia. There is no date. Apparently it is the government that is functioning there now. But the government that is functioning there now is not the government that passed these decrees that this plaintiff is relying on.

Counsel for the plaintiff objected to this construction of the questions submitted to the Department of External Affairs, and counsel for the defendants then said:

> When I framed the questions and they were agreed to by my learned friend, we did not distinguish between the government which passed the decrees and the government that is now in existence in Estonia.

It appears therefore that the admissions were drafted on the assumption that there is no material distinction to be made between the government having authority over Estonia from June, 1940, down to the time of the invasion by the Germans, and the government having such authority from the expulsion of the Germans until the present time. It also seems clear that the Department of External Affairs in answering the questions submitted had this same assumption in mind. In brief, all concerned assume that the period of the German occupation of Estonia was simply a hiatus in the *de facto* government of that country which was inaugurated in June, 1940. In any event, there is no evidence that the present government is not for the purposes of this case the government which was newly established there in 1940, and the presumption of the continuance of the new order applies.

There remains, however, Mr. Beck's initial point that because of the hiatus in the government of Estonia "all these decrees and acts go by the board." Mr. Beck cited a passage from *Williams* v. *Bruffy* (1), where it was observed that one kind of *de facto* government was where a portion of the inhabitants of a country separate themselves from the parent state and establish an independent government. Mr. Justice Field said:

> The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it.

I do not think that those statements are relevant in the present case. As already discussed, it is to be taken that the Estonian government of the latter half of 1940 did succeed in re-establishing itself permanently after the

(1) (1877) 96 U.S. 176.

Germans were driven out of the country in 1944. And, as cited in *Republic of Peru* v. *Dreyfus Bros.* (1), Wheaton in his International Law says:

> If the revolution in the government of the state is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy.

As to the above question (iv), the Department of External Affairs in its answer to questions 3 and 4 said that it was not possible to attach a date to the recognition of the *de facto* government of Estonia. It was first settled by the Supreme Court of the United States in *Williams* v. *Bruffy, supra,* that the effect of such recognition is retroactive to the time of the original establishment of the government. That decision on that point was followed by the English Court of Appeal in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2) (hereafter to be referred to in brief as *Luther* v. *Sagor*), and by the House of Lords in *Lazard Bros.* v. *Midland Bank, supra,* at 297. As there are no Canadian decisions on this point I should follow those high authorities on a question of international law; *The Ship North* (3). The parties in their admissions assign June 17, 1940, as the date of the establishment of "a new government" in Estonia, known as the E.S.S.R. No date is therein assigned to the entry of the E.S.S.R. as a constituent member of the U.S.S.R. Mr. Justice Atkinson in his judgment at p. 256 on the trial in *The Vapper Case, supra,* says that this latter date was August 6, 1940. In view of the nature of the *de facto* government already adopted above for the purposes of this action that date would be appropriate, and the decrees and the statute which are material were all enacted in October, 1940.

Finally, as to the above question (v), again I must follow high authority in British-American jurisprudence and hold that for the purposes of this action there is no distinction between a *de facto* and a *de jure* government in the matter of legislative power. In the *S.S. Arantzazu Mendi* (4), in the House of Lords the Foreign Office by letter informed the court that His Majesty's government recognized that the Nationalist government exercised *"de*

(1) (1888) 38 Ch. D. 348 at 360
(2) (1921) 3 K.B. 532 at 549.
(3) (1906) 37 S.C.R. 385.
(4) (1939) A.C. 256.

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facto administrative control over the larger portion of Spain" and "effective administrative control over all the Basque provinces of Spain," and was "not a government subordinate to any other government in Spain." Lord Atkin said at p. 264:

> My Lords, this letter appears to me to dispose of the controversy. By "exercising *de facto* administrative control" or "exercising effective administrative control", I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a government as possessing all those attributes in a territory while not subordinate to any other government in that territory is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign state.

It is clear from those remarks of Lord Atkin that in the present case the legislative acts of the *de facto* government in question must be treated as if they emanated from a *de jure* government. Other cases supporting this conclusion are: *Republic of Peru* v. *Peruvian Guano Company* (1); *White* v. *The Eagle Star and British Dominions Insurance Co.* (2); *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (3); *Banco de Bilbao* v. *Sancha, supra.* In *Luther* v. *Sagor, supra,* the Soviet government was recognized by the United Kingdom as the *de facto* government of Russia. Lord Justice Bankes said at p. 543, citing an American authority on international law:

> Wheaton quoting from Mountague Bernard states the distinction between a *de jure* and *a de facto* government thus: "A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign state of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn. The government of this country having, to use the language just quoted, recognized the Soviet government as the government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

It will be noted that no attempt is made in the above cases to determine what is the legal difference between a

(1) (1887) 36 Ch. Div. 489 at 496.
(2) (1922) 127 L.T.R. 571.
(3) (1937) 1 Ch. Div. 513 at 521

de jure and a *de facto* government. Oppenheim on International Law, 5th Ed., Vol. 1 at 136, says:

> The political reasons for deciding in certain circumstances to grant *de facto* recognition rather than *de jure* recognition are obvious. The legal difference, however, between them is not so clear. It is believed that in International Law the tendency is to regard *de facto* recognition as revocable and *de jure* recognition once given as definitive and irrevocable.

But it does not appear that municipal law attributes any legal effects to this distinction. McNair, *op. cit.* at 353.

Accordingly, in the present case the decrees and statute are not invalid because they are "acts of a *de facto* government only," and a *de facto* government has no less power than a *de jure* government to enact legislation with the intent that it apply extraterritorially.

We may deal now with what to my mind is the major issue on this branch of the present case, namely: In the eyes of Canadian law are the legislative acts of the *de facto* government in question *intra vires* in purporting to apply to the *Elise* while in Canadian territorial waters, and, if so, are they to be recognized and implemented?

Counsel for the parties cited in argument cases containing only dicta relating to this issue, and they are in conflict. There is apparently only one decision in British-American jurisprudence (a judgment in Scotland in 1939) where the circumstances with respect to a ship were similar to those in the present case, and, as will be noted later, implementation of a Spanish requisitioning decree was refused. The views of text-writers are at variance. It is necessary, therefore, to examine the legal aspects of this issue at some length. But, first, it is essential that the precise facts under consideration be settled.

In October, 1940, a decree of the said *de facto* government purported to nationalize the privately owned *Elise* "wheresoever it may be," and to fix the amount of compensation at 25 per centum of its value. Further legislative acts of that government in the same month purported to vest in the plaintiff "all rights, title and possession in, to and out of" the vessel. It is implicit in the admissions that all relevant legislative acts purported to apply within and without the territory of Estonia. There is no evidence that the *Elise* was other than in Canadian territorial waters at any material date.

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At all material times the defendants Laane and Baltser were citizens of Estonia, residing and domiciled therein, and subject to the said *de facto* government. The *Elise* was registered in that country, but there is no evidence of the flag she flew at any time. On the admissions the defendants owned the vessel "prior" to June 17, 1940, when the *de facto* government commenced functioning, and I assume that their ownership continued in so far as the issues in this action are concerned therewith. It is in evidence that the master of the *Elise* "did not recognize the change of government in Estonia and always regarded Laane and Baltser as his employers." The master, therefore, and, I think I may fairly assume, the defendants also, did not attorn either to the authorities of the *de facto* government or to the plaintiff with respect to any proprietary interest in the *Elise* upon or after her alleged nationalization. In my opinion there is no significance to be attached to this circumstance on the present issues. The master, the crew and the vessel were subject to the same law (if it had any extraterritorial effect) as her owners were subject. *The Queen* v. *Anderson* (1). The master in our law (which I may apply in the absence of evidence of the foreign law) was a custodian of the vessel, and the actual possession thereof was in whoever at any material time were the owners. *The Jupiter No. 3* (2).

On the strength of the ownership and citizenship of the defendants the national character of the *Elise* is to be identified with the country over which the said *de facto* government had jurisdiction. *Chartered Mercantile Bank of India* v. *Netherlands Indian Steam Navigation Co.* (3); *John S. Darrell & Co.* v. *The Ship American* (4). The register is not conclusive evidence of a ship's national character. *Le Cheminant* v. *Rearson* (5); *The Queen* v. *Moore* (6); *Stone* v. *S.S. Rochepoint* (7); 30 Halsbury's Laws of England, 2nd Ed., p. 176. In cases in prize a ship is clothed with the nationality of the country whose flag she flies. *The Vrow Elizabeth* (8); *The Bellas* (9), more fully reported in Mayers, *op. cit.* at 512. But other-

(1) (1868) 38 L.J.M.C. 12 at 19.
(2) (1927) P. 122 at 131.
(3) (1883) 10 Q.B.D. 521 at 535.
(4) (1925) Ex. C.R. 2.
(5) (1812) 4 Taunt. 651.
(6) (1881) 2 Dorinis C.A.S. 2.
(7) (1921) 21 Ex. C.R. 143.
(8) (1803) 5 C. Rob. 2.
(9) (1914) 20 D.L.R. 989.

wise the flag is only *prima facie* evidence of such national character. *Chartered Mercantile Bank of India Case, supra,* at 535.

I also hold that at all material times the *Elise* was *in transitu.* The parties state in their admissions that the vessel arived at Saint John in August, 1940, "having been sailing between the United Kingdom and the Dominion of Canada only during 1940." From this, I assume that she was engaged in the commercial business of her private owners, and that, but for the call at Saint John and the arrest there on November 9, 1940, at the instance of the crew for wages, she would have continued in that business. At the time, therefore, of the decree of October 8, 1940, and until her initial arrest the *Elise* may fairly be considered to have been *in transitu.* In any event, there is no evidence in this regard that other than the normal circumstances obtained with respect to a privately owned merchant vessel carrying on in international trade. If the vessel was not *in transitu* it may fall to be treated in law as an ordinary chattel on land with the result that the present problem in the conflict of laws might be quite different. There appears to be no decision on the point. Lord Wright once remarked in the House of Lords "that the *Cristina,* even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land." *Compania Naviera Vascougado* v. *Steamship Cristina* (1). It is not clear whether His Lordship had the *in transitu* quality in mind, but it seems fair to assume that he was visualizing a vessel moored at a dock. The *in transitu* quality, as Hellendall observes, only comes to an end when some "legal contact" has been established with the place where the chattel is actually situate. Hellendall on The Res in Transitu and Similar Problems in the Conflict of Laws, 1939 Canadian Bar Review pp. 7 and 105 at 111. To illustrate the meaning of "legal contact" Hellendall says:

> Thus the question whether an inn-keeper has a lien on a motor car for his claim against a lodger would be determined by the *lex situs,* a legal contact having been established by the contract between the lodger and the inn-keeper by which the car was subjected to such lien.

I would not think that the unloading and loading, or the surveying and repairing of a vessel, even if done under

(1) (1938) A.C. 485 at 509.

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local contract, were sufficiently significant in the case of a merchant vessel engaged in its normal commercial function to warrant holding that it had established a legal contact at a port of call where such activities were carried out. It would in my opinion be unrealistic and forced to hold otherwise.

Such are the circumstances of the present case which I have in mind in proceeding to examine the authorities on that part of the immediate issue which involves the *intra vires* aspect of such foreign legislation. Dicey in his Conflict of Laws, (1932), 5th Ed., at p. 20 says:

> A state's authority, in the eyes of other states and the courts that represent them is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory.

It is to be noted, as Mr. Justice Atkinson did in the *Lorentzen Case, supra,* at 206, that the above quotation contains the qualifying words "speaking very generally". The lack of such authority to legislate for things abroad may be a concept of international law which is adopted in some instances by municipal law, but it is certainly not universally accepted. The Emergency Powers (Defence) Act of the United Kingdom enacted in 1939 provided that any Defence Regulation made thereunder would, unless the contrary appears therefrom, "apply to all ships, vessels or aircraft in or over the United Kingdom and to all British ships or aircraft, wherever they may be." The Statute of Westminster, 1931, declares and enacts "that the Parliament of a Dominion has full power to make laws having extraterritorial operation." Sec. 35 of the Canada Shipping Act, 1934, provides that "if at a port not within His Majesty's dominions . . . a ship becomes the property of persons qualified to own a British ship and if such persons declare to him an intent to apply to have her registered in Canada, the British Consular officer there may grant to her master a provisional certificate," which shall have the effect of a certificate of registry under the Act. In *Cunard S.S. Co.* v. *Mellon* (1), the Supreme Court of the United States said:

> We do not mean to imply that Congress is without power to regulate the conduct of domestic ships when on the high seas, or to exert such

(1) (1923) 262 U.S. 100 at 129.

control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign, for it long has been settled that Congress does have such power over them.

Maxwell's The Interpretation of Statutes, (1946), 9th Ed., at 148 contains the following:

> Primarily, the legislation of a country is territorial . . . The laws of a nation apply to all its subjects and to all things and acts within its territories, including in this expression not only its ports and waters which form, in England, part of the adjacent country, but its ships, whether armed or unarmed, and the ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships within its ports.

Counsel for the defendants cited the case of *Lecouturier* v. *Rey,* (1), but the following remarks of Lord Macnaghten at p. 265 were actually *obiter,* even if they were in fact pertinent to the present issue:

> To me it seems perfectly plain that it must be beyond the power of . . . any foreign legislature to prevent the (Carthusian) Monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations (under which the Carthusian Order was dissolved by France) is a penal law—a law of police and order—and is not considered to have any extra-territorial effect.

Whether Dicey's proposition is in general valid or not with respect to chattels, he and most authorities feel impelled to make an exception for ships, and a few are inclined to the view that a state may effect by legislation an involuntary transfer of the ownership of a vessel abroad which has the national character of that state. The following is a brief review of such authorities as I have been able to find. Dicey in his treatise, *supra,* at p. 996 says:

> It is, in fact, impossible to accept the view of a ship as being in the same position as an ordinary movable, so that its *lex situs* is the law of any place where it may be for the time being . . . A real difficulty unquestionably arises when there is a possible competition of laws, as when a ship is actually at a port in a foreign country, so that a transfer by sale or mortgage is capable of being carried out under two distinct laws, either having obviously a *prima facie* claim to validity. But clearly the balance of reason is in favour of making the country to which the ship belongs decisive as to voluntary transfers of ships, and it is difficult to see any ground on which this principle can be impugned.

Again, to his Rule 154 (1) at p. 620 laying down that "the transfer or assignment of a movable, wherever situate, in accordance with the law of the owner's domicil (*lex*

(1) (1910) A.C. 262.

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domicilii) or the place where such transfer or assignment is made (*lex actus*) may be presumed to be valid," Dicey adds a footnote at p. 622:

The case of ships is sometimes adduced as illustrating this rule. But it seems best to regard transfers as regulated by the law of the flag as the *lex situs* (Rule 152), the *situs* being in the case of ships the country of registration. The transfer of British ships can only be carried out voluntarily under the Merchant Shipping Act, 1894; similar provisions exist in the United States . . . See *Simpson* v. *Fogo*, (1863), 1 H. & M. 195; *The Segredo*, (1853) Spinks Eccl. and Adm. 36, where the sale of a ship was denied validity on the score of the *lex loci contractus* and referred instead to a general maritime law, which we may fairly reduce to the English law in matters maritime.

Westlake in his Private International Law, (1925), 7th Ed., at 202 and 210 says:

If the question refers to a ship which was at sea at the moment of the alleged transfer or acquisition, it must be decided by the personal law of the owner . . . that law will operate either as the *lex situs*, on the ground of the fiction which makes ships a part of the territory ascertained by their flag, or in its own character of the personal law, in obedience to which alone the owner can lose his right when no *lex situs* is applicable against him. It would however be pedantic to apply the general doctrine (i.e. that the *lex situs* generally applies to the transfer or acquisition of property in corporeal movables) so as to bring in the law of a casual and temporary *situs*, not contemplated by either party in the dealing under consideration, as in the case of goods which at the moment of the dealing may be on board a ship of a third country, or temporarily warehoused in a port of a third country.

A British ship is British territory so long as she is sailing on the high seas, or in a foreign tidal river below all bridges, although in the latter case, if she is a private ship, the state to which the river belongs may have concurrent jurisdiction. If she belongs to an English port, the law applicable in consequence of her being British territory is that of England.

McNair, *op. cit.*, at p. 378 says:

There is considerable amount of authority in favour of the existence of a rule that the essential nature of ships and their peculiar connection with the State whose flag they fly keep them notionally within the territorial jurisdiction of the flag State, wherever physically they may be.

In 1939 the Privy Council exploded the floating island theory in a case where a cabin boy had killed by shooting on board the captain of a Chinese cruiser when the vessel was in the territorial waters of Hong Kong. The accused was convicted and sentenced to death by the British court in that city, and he appealed to the Privy Council claiming that the court had no jurisdiction. *Chung Chi Cheung* v. *The King* (1). The Judicial Committee said at p. 174:

Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim (*International*

(1) (1939) A.C. 160.

Law, 5th Ed., 1937, Vol. 1, para 450), which regards the public ship "as a floating portion of the flag-State" However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts.

In Hellendall's article, *supra,* ships are dealt with specially in Part C. British-American and European cases are reviewed and then the author says at p. 123:

> The fact that this branch of the law can hardly be regarded as settled in any of the legal systems which have been the object of this investigation may considerably affect the chances of obtaining credit for those persons whose principal assets are ships. For this reason it is not surprising that it has been attempted to settle and unify this branch of the law by way of international convention. Thus, as early as 1885, the Institut de Droit International in its Brussels conference suggested . . . that the law of the flag should govern all questions of title to a ship.

But nothing has yet come of this suggestion, and the author concludes at p. 125:

> Thus, although it is desirable that the law of the flag should be applied, if it could be applied universally, it would seem that as no unification of this branch of the law is achieved, the solution at present adopted by the English courts is more realistic and more practical.

This solution he lays down at p. 113 in the following principle, in so far as we are presently concerned:

> If the creation, acquisition or transfer of a proprietary right takes place while the vessel is situate within the territorial limits of a certain country, the validity of such a transaction is always governed by the *lex situs,* whether the transaction is voluntary or involuntary.

The only authority cited by the author with respect to an involuntary transaction is *The Jupiter (No 3),* (so numbered in the reports because there had been two previous actions concerning this ship), *supra,* and (1927) p. 250, (C.A.). He says at p. 112:

> The judgment of the court was based on the principle that undoubtedly property passes according to the law of the place where it "is situate", and that . . . the title to the ship could not be affected by a confiscation decree which came into force when the ship was not on territory controlled by the Soviet government. Thus it was held that the law of the flag, Russian law, was immaterial to the decision.

In my view, on the facts in that case the matter of an involuntary transaction, and the application of Russian law, did not arise, for both the trial and appellate courts clearly found that the Soviet decree did not purport to have any extraterritorial effect. It is necessary to examine the case in some detail because of a dictum therein, relevant to the present action, which was not questioned in the British courts until 1942.

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The *Jupiter* belonged to a Petrograd company, and was registered at Odessa which was not within the territory controlled by the U.S.S.R. when nationalization decrees were enacted by it in 1918 and 1919. Following the passing of the last decree the company moved its ships to Marseilles and carried on business from France. In 1920 the *Jupiter* was in England and the master handed the vessel over to the representatives in London of the U.S.S.R., who then purported to sell her to an Italian company. The owners brought an action claiming possession, and the U.S.S.R. supported the Italian company in the defence. There was judgment for the plaintiff on the trial, which was affirmed by the Court of Appeal. Mr. Justice Hill in his trial judgment said:

> Undoubtedly property passes according to the law of the place where it is situate. But if it is said to have passed by an act of State of the foreign sovereign, is that not a fact which must be proved in the ordinary way by proof of the act of State, of its application to the property, and of the local situation of the property? (p. 139) . . .
>
> Mr. Dunlop has not refrained from contending that the effect of the decrees was at once to transfer to the R.S.F.S.R. the property in the ships of the company, wherever situate. Two questions are here involved: First, whether they at once transferred the property; and secondly, whether they transferred the property, though it was not locally situate within he terriory of he R.S.F.S.R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the transfer of the property upon the completion or in the course of the liquidation. (p. 143) . . . As to the second question—that is, whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property.* (Italics mine. W.A.I.A.) This seems to me to be recognized in all the cases: see, for instance, per Atkin, L.J. in *Goukassow's Case,* (1923) 2 K.B. 682, 693; per Sargeant, L.J. in *Sedgwick, Collins & Co.'s* case in the court of appeal (1926) 1 K.B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords, (1927) A.C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R.S.F.S.R. itself, as set forth in two circulars . . . (one) addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R.S.F.S.R. abroad . . . (and the other) issued by the People's Commissariat of Justice to all District Courts . . . These circulars show that the R.S.F.S.R. recognizes and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular recognizes that the nationalizing decrees do not operate upon property outside the territory of the

R.S.F.S.R. . . . I may at once say that I find . . . that it is not proved that the Jupiter ever was within the territory of the R.S.F.S.R. (pp. 144-145).

The decision of Mr. Justice Hill was upheld in the Court of Appeal without any adverse comment by anyone of the three judges. No specific observations were made upon the above dictum shown in italics. McNair, *op. cit.* says at p. 365 with respect to this dictum that "as Hill, J. found that the Soviet decrees did not purport to have extra-territorial operation and that *The Jupiter* was not within Soviet jurisdiction at the relevant time, his opinion was doubly *obiter.*"

Before leaving *The Jupiter* case I should mention that counsel for the defendants in his brief refers to some remarks in the Court of Appeal and submits that they indicate that the law is that "the promulgating authority must be in a position to take possession and must have taken possession of nationalized property" before title to a ship under such a decree would be complete. But it was held in *Hooper* v. *Gumm* (1) that "a ship is not like an ordinary chattel; it does not pass by delivery, nor does the possession of it prove the title to it." Furthermore, we are dealing here with legislation and not a transaction between private parties.

The dictum in *The Jupiter (No. 3)* case was considered by another trial judge in an English court in 1942 when in *Lorentzen* v. *Lydden & Co., supra,* at 210, he declined to accede to a contention "that under no circumstances will our courts give extra-territorial effect to decrees of a foreign state." The facts in that case were that the Norwegian government, recognized as the *de jure* government of Norway by His Majesty's government, made an Order in Council requisitioning all Norwegian shipping outside of Norway and at the same time making provision for compensating the owners. The order further provided that the Norwegian Director of Shipping was entitled to collect outstanding claims of Norwegian shipowners and to enforce them by action. In this case the director was suing an English firm for damages for breach of a contract to charter a Norwegian vessel which had been entered into with the Norwegian owners prior to the Order in Council. The defendants maintained that the Norwegian government

(1) (1867) L.R. 2 Ch. 282 at 290.

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could not by any legislative or executive act transfer the title to claims or other property situate in England. The first case relied upon by the defendants was *The Jupiter (No. 3)*, and Mr. Justice Atkinson disposed of it, after close analysis, by saying: "It seems to me that so far from being an authority in support of the defendants' contention it is all the other way." His Lordship's view was (p. 209) that the case stood for nothing more in this connection than that on "the construction of the decrees themselves they did not purport to affect the title to property outside Russian territory." He referred to the authorities which Mr. Justice Hill had felt supported his statement, and was satisfied there was nothing therein which should be so construed. He treated the dictum as being addressed to the facts in *The Jupiter (No. 3)* case rather than to the law that might be applicable. After reviewing other cases put forward by the defendants his Lordship concluded at pp. 212 and 216:

> There is no authority which has been cited to me which prevents me from giving effect to this Order in Council . . . To suggest that the English Courts have no power to give effect to this decree making over to the Norwegian government ships under construction in this country seems to me to be almost shocking . . . It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations. Therefore I determine that issue in favour of the plaintiff.

I am constrained to comment, with respect, that the above reference to ships is actually *obiter* in an action which was founded only on a claim for breach of contract. In passing I may add that where *The Jupiter (No. 3)* case is cited in 26 Halsbury, *op. cit.* at p. 255 as authority for the footnote—"Decrees of the Soviet government had not the effect of transferring property outside its jurisdiction"—one should not construe that statement as enunciating a legal principle.

As already mentioned there was in 1939 a Scottish case which dealt with the effect on Spanish ships abroad in foreign ports of a requisitioning decree made by the government of the Republic of Spain. *The El Condado* (1). The vessel was registered at Bilbao; her owner was a Spanish company; and at the date of the decree she was at Greenock Harbour. It is not necessary to state the complicated

(1) (1939) S.C. 413; 63 Lloyd's L.L.R. 83, 330.

circumstances of the action which the trial judge dismissed. McNair's comment on the trial judgment in his *op. cit.* at p. 380 is:

> Lord Jamieson, apparently treating the Spanish decree (erroneously, we submit, as it was a requisition for public purposes) as confiscatory, declined to give effect to it as regards property situated outside the territory of the government issuing the decree (*semble*, at the time when the decree became or remained operative).

The Court of Session dismissed an appeal therefrom, and I must examine closely the reasons given as this Scottish case is the only one I have had cited to me, or been able to find, where the circumstances are almost identical with those in the present action. The Lord Justice-Clerk (Aitchison) said:

> If the decree of requisition of the Spanish government fell to be regarded as a confiscatory or penal law, it could have no validity outside Spanish territory, and the courts of this country, in accordance with an accepted rule of international law, would not grant their aid to its execution . . . Does that rule apply equally to legislation which is not confiscatory or penal in the full sense, but the effect of which is to subject the owner of moveable property in his use and control of that property, to the overriding control of the State where, as in this case, the property is requisitioned by the State for public purposes There is no direct authority upon the point. The nearest case is *The Jupiter No. 3*. It was there held that the nationalization decrees of the U.S.S.R. did not operate on moveable property outside the territory of the Republic, whether such property belonged to a Russian citizen or not . . . In the *Jupiter*, Hill, J., pointed out that no distinction could be drawn between ships and other chattels and that the same principles were applicable to both, and he reached the conclusion that the decree of nationalization was ineffectual to transfer the property in the ship, which was not within the jurisdiction at the date of the decree. His judgment both as regards fact and law was affirmed by the Court of Appeal. The case is not on all fours, but in my opinion the principle of Hill, J.'s, judgment applies to the present case . . . it was moveable property that was out with the territory and jurisdiction of the foreign Sovereign State, and having been so at the date of the decree, it was not capable of being affected by the requisition.

It was apparently not drawn to his Lordship's attention that Mr. Justice Hill and the Court of Appeal clearly established that the decrees in *The Jupiter (No. 3)* case did not purport to have any extraterritorial effect. Furthermore, the Court of Session had under consideration *The Cristina, supra,* but apparently again the above mentioned dictum of Lord Wright was not drawn to their attention.

Lord Mackay of the Court of Session said:

> I had prepared an examination of the cases referred to by your Lordship. I shall not repeat, but only say that I find in them a most

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emphatic train of eminent English judges in favour of the view that such "decrees" of a foreign country as purport to have extraterritorial effect, and to attach property in a subject situated, and at a time when it is situated, in this country or its territorial waters, will not be recognized by our laws and courts . . . I am of opinion that such extraterritorial validity is not recognized by Scots law.

Lord Pitman said:

Requisition is not a legal method in this country of transferring property or rights of user of property, except at the instance of the Crown . . . It would be strange, indeed, if a foreign State were allowed to exercise similar powers and by its officials take forcible possession of property requisitioned.

Lord Wark said:

On such a matter as this there is no difference between the law of England and the law of Scotland, and the decisions of the English courts to which the Lord Ordinary refers, especially the case of *The Jupiter (No. 3)*, appear to me to be sufficient authority to support his decision . . . It is true that that case dealt with the question of transfer of property, but the *ratio* upon which it proceeds is that the decree of a foreign government has no effect whatever upon moveable property, including ships, outwith the territory. This doctrine rests upon the principle that jurisdiction is limited by effectiveness. It is recognized in several recent cases. (His Lordship then referred to English cases dealing with the Russian nationalization decrees in connection with banking and insurance, and also quoted Dicey's statement on a state's legislative authority, as already mentioned above.)

In view of this Scottish decision adopting what was actually only a dictum in *The Jupiter (No. 3)* case, which was not followed in *Lorentzen* v. *Lydden, supra,* by the English court, I do not feel, with great respect, that I am justified in accepting the result without question.

In the American case of *The Navemar* (1) in 1939 the Circuit Court of Appeals for New York held (per headnote) that:

The decree of the Spanish Republican Government was effective to appropriate the vessel when she was on the high seas and to transfer the title and right to possession in her to the Republican government, rendering her immune from seizure in a possessory action brought by her owners in the United States courts. (For previous litigation over *The Navemar* see (1937) 59 Ll. L.L.R. 17, (1938) 62 Ll. L.L.R. 76 and note appended reporting a decision in the Supreme Court of the United States.)

The Circuit Court of Appeals said:

It is not necessary to say that the decree effected an expropriation of the vessel while she was in foreign territorial waters at Buenos Aires, though it was promulgated and notification thereof was given to the

(1) (1939) 64 Lloyd's L.L.R. 220.

master when the ship was at that port. Even if the decree might not be effective while *The Navemar* was at Buenos Aires, nevertheless it was an instrumentality of expropriation that would become operative upon the vessel as soon as she reached the high seas . . . We have seen that in *Crapo* v. *Kelly*, 16 Wall. 610, jurisdiction was exercised upon the theory that a ship on the high seas is part of the territory of the sovereign whose flag she flies. Later and more generally accepted reasoning supports jurisdiction upon the theory of personal allegiance rather than of territoriality. As Mr. Justice Van Devanter said in *Cunard S.S. Co.* v. *Mellon*, (1922), 262 U.S. 100 at 123, when dealing with the theory sometimes adopted that a merchant ship is a part of the territory of the country whose flag she flies:

> But this . . . is a figure of speech, a metaphor . . . The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty . . . It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

Finally, McNair in his *op cit.* (published in 1944) reviews some of the British-American cases above mentioned and in conclusion says at p. 382:

> Thus the question of the extraterritorial operation of legislation upon privately-owned merchant ships cannot be regarded as settled. It is clear that for many purposes such a ship carries the law of her flag state with her, and it would not be surprising if this body of law included legislation involving a compulsory change of ownership. So far as the Crown is concerned, the statutory power of requisitioning ships in times of national emergency is wide, but, of course, that does not involve the proposition that other countries enforce our municipal powers of requisitioning to the full extent or that we enforce theirs. Nevertheless, the requisitioning by a State of merchant ships flying its national flag while in foreign ports is now becoming frequent and widespread, and it would not be surprising if this practice were upheld by British and other courts.

On the question of the extraterritorial operation of foreign enactments respecting ships I think it pertinent to note the attitude of our own legislature. I have already mentioned that under the Canada Shipping Act, 1934, Canada has legislated with respect to ships over which she has jurisdiction and laid down a procedure by which registration may be effected upon a change of ownership while those vessels are in foreign waters. There are several other provisions in that Act which are intended to apply to Canadian merchant ships and seamen when they are within the jurisdiction of a foreign state. Furthermore,

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it is patent from the following section of the Act that our legislature contemplates that foreign law may apply to foreign ships while in our ports:

705. Where the Governor in Council is satisfied that—

(*a*) ships of a foreign country are required by the law of that country to comply with any provisions which are substantially the same as or equally effective with any provisions of this Act which apply to foreign ships while they are within a port of Canada; and

(*b*) that country has made or has undertaken to make provision for the exemption of ships registered in Canada, while they are within a port of that country, from the corresponding requirement of the law of that country;

the Governor in Council may direct that any such provisions of this Act, as aforesaid, shall not apply to any ship of that country within a port of Canada, if it is proved that the ship complies with the corresponding provisions of the law of that country applicable to that ship.

I feel that where the Canadian legislative authorities have thus exercised their power of dealing with our merchant ships and seamen while in foreign territorial waters and no doubt fully anticipate that their enactments will be recognized and implemented on appropriate occasions, and where they also concede that foreign law relating to matters peculiar to shipping has effect in our ports, the judiciary should act consistently therewith and reciprocate with respect to foreign legislation which deals with matters in no way connected with Canadian interests. Professor Brierly has noted in reviewing the decisions in England on international law over a period of fifty years that the trend has been for the judiciary to accept without question the rulings of the Foreign Office on the status of a foreign government. He adds that "foreign affairs are pre-eminently the province of the executive department of government, and public policy requires that the country should not speak with a divided voice." International Law in England, (1935), 51 L.Q.R. 24 at 32. There would seem to be every reason for the judiciary to act in harmony with the legislature as well as with the executive branch of the government in any case arising under the present circumstances. Accordingly, I hold that in the eyes of Canadian law the legislative acts of the *de facto* government in question were *intra vires* in purporting to have extraterritorial effect.

There remains, therefore, on this branch of the case the question of whether a court may aid in implementing that

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legislation with respect to the *Elise*. In my opinion this question involves the determination of the extent of the immunity to be accorded in our law to a foreign merchant vessel calling at our ports in the course of international trade. There appears to be no Canadian decision expressly so holding but it is implicit in the cases that Canadian law subscribes to the general doctrine that "the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn." Per Lord Atkin in the Judicial Committee (repeating the remarks of Chief Justice Marshall of the United States) in *Chung Chi Cheung* v. *The King, supra,* at 169. "The implied consent to permit them to enter our harbours may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose." Per Mr. Justice Brewer in *Patterson* v. *Bark Eudora* (1). This tacit leave to enter a port is upon the understanding that "the general rule of the law of nations is that a merchant or private vessel entering a foreign port subjects herself to the local jurisdiction and territorial law of the place." Per Mr. Justice Angers in *Cashin* v. *The King* (2). And it is also accepted that foreign vessels are "still subject to the laws of their own country as though they were on the high seas." Per Mr. Justice Martin in *The Ship North* (3). The Supreme Court of the United States in *Cunard S.S. Co.* v. *Mellon* (4) (deciding that the Eighteenth Amendment and the National Prohibition Act forbade foreign merchant ships carrying, as ships stores, intoxicating liquors for beverage purposes into ports of the United States) said at p. 124:

> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter . . . Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

I think it must also be accepted that such immunity will be accorded the foreign vessel in port as may reasonably be taken as being consistent with such leave to enter. Thus

(1) (1903) 190 U.S. 169 at 178
(2) (1935) Ex. C.R. 103 at 109
(3) (1905) 11 Ex. C.R. 141 at 144.
(4) (1923) 262 U.S. 100

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the local sovereign would seldom, if ever, interfere with the internal administration of the foreign ship, because he would desire that his own ships be so treated abroad, and, in any event, internal administration is not a matter which would ordinarily impinge upon the peace, order and good government of his domain. The remarks of Lord Atkin in the *Chung Chi Cheung* case, *supra,* at 176, with respect to a public ship, are to my mind equally applicable to a privately owned vessel after substituting "owner" for "sovereign", where he said:

> The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction.

In *Wildenhus's case* (1) Chief Justice Waite said:

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce required.

It is not necessary to attempt to review the nature and extent of such immunities vouchsafed to foreign ships. A survey of the practices of various nations is to be found in Chapter III of Jessup's Law of Territorial Waters and Maritime Jurisdiction, (1927), and the concluding remarks at p. 192 are:

> It is undoubtedly true that nations are more and more finding it to their interests to avoid mixing in the internal affairs of foreign vessels and the multitude of treaties which incorporate this principle bear witness to its desirability.

But before proceeding to determine whether those immunities may be considered in our law to embrace an involuntary transfer of ownership intended by foreign law I would refer again to the remarks of Lord Atkin in the *Chung Chi Cheung* case, *supra.* It is to be appreciated that His Lordship is dealing with a public ship, but I consider that the spirit of his observations on the question of immunities applies also to a private ship under the

(1) (1886) 120 U.S. 1 at 12.

circumstances of the present case. After repudiating the floating island theory His Lordship went on to say at pp. 167-176:

The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs. Their lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our domestic law. There is no external power that imposes its rules upon our code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our courts, and on what principle are they based?

The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange* v. *McFadden*, (1812), 7 Cranch. 116, a judgment which has illumined the jurisprudence of the world: . . . "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." The Chief Justice then proceeds to illustrate the class of cases to which he has referred. (Reference is then made to the exemption of a sovereign himself within a foreign territory, the immunity allowed to foreign ministers, and the granting of free passage to foreign troops.) He points out that, differing from the case of armed troops, where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction: "But in all respects different is the situation of a public armed ship . . . It seems then to the court, to be a principle of public law, that national

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ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."

This conclusion is based on principles expounded in the extracts from which the Chief Justice summarized: "The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; and that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act." . . .

Their Lordships agree with the remarks made by Professor Brierly in the *Law of Nations*, (1928), p 110: "The term exterritoriality is commonly used to describe the status of a person or thing physically present in a state's territory, but wholly or partly withdrawn from that state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term . . . At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends." . . .

When the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the court will of its own initiative give effect to it . . .

But if the principles which their lordships have been discussing are accepted, the immunities which the local courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign court over his rights of property.

In conclusion, therefore, on this issue, I am satisfied that in the circumstances of the present case the national character of the *Elise* is to be identified with the country controlled by the *de facto* government in question, and that in Canadian law there may be implied an immunity to the extent of permitting the legislative acts of that government to take effect upon the proprietary rights in the *Elise* while at Saint John. I find nothing in the nature of this case precluding my extending that far the undefined immunity enjoyed by a foreign merchant ship in one of our ports, and, to employ the words of Chief Justice Marshall endorsed by the Privy Council, I feel that this conclusion is in accord with "the views under which the parties (i.e. the E.S.S.R. and Canada) requiring and conceding it must be supposed to act." Both nations enact legislation purporting to operate extraterritorially on their respective merchant vessels, and it does not appear to me

unwarranted that it may deal in any manner with proprietary interests in those vessels. In the result, recognition of the title of the plaintiff in the *Elise* is only conforming to the long established principle of protecting a proprietary interest acquired under the foreign law which to my mind had complete jurisdiction to establish that right. If there is any question of policy or comity involved in such a conclusion on this issue, then I feel that it is simply a matter of pragmatic, reciprocal advantage, and in the present case there is no aspect of that conclusion which derogates from any Canadian policy or interest of which I am aware or can conceive. Furthermore, if a foreign state for itself or its subjects accepts that the purchaser of a ship of that state, which is sold abroad under the judgment of a court having effective jurisdiction, acquires an indisputable title thereto, is it not consistent that a like respect should be paid by the court to the decree of a foreign government dealing with the proprietary interests in a vessel over which that government could fairly assume that it had effective, even if not physical, jurisdiction?

I will confess that if it were not indicated by the decisions that one should resolve an issue of this nature in the manner I have attempted above, I think the solution rests on as simple a proposition as that shown by Mr. Justice Frankfurter in *United States* v. *Pink* (1), where he said at pp. 234, 237 and 240:

> Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of private litigation, is to invoke a narrow and inadmissible frame of reference . . .
>
> In the immediate case the United States sues, in effect, as the assignee of the Russian government for claims by that government against the Russian Insurance Company for monies in deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian government has decreed payment to itself . . . No invocation of a local rule governing "situs" . . ., however applicable in the ordinary case, is within the competence of a state court if it would thwart to any extent the policy which the United States has adopted when the president reestablished friendly relations in 1933.

(1) (1941) 315 U.S. 203.

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Furthermore, it is to be observed with respect to requisitioning decrees and legislation of a nature under review in the present case that the process of a foreign court is a convenient means for enforcing abroad the home law which is being disregarded by a recalcitrant crew. To my mind such reciprocal aid outweighs the objections put forward in *The El Condado, supra,* and it is not a new or novel proposition. In *The See Reuter* (1) Lord Stowell said at p. 23:

> I think it is a very powerful ingredient in this case that the master has detained this ship five years together in foreign ports, and still refuses to return to Rostock to abide the decisions of the court there, though called upon by a large majority of the owners to do so . . . These are questions which . . . depend on the municipal regulations of different countries, with which this court can be but very imperfectly acquainted . . . (But) here is an order of the court at Rostock, that this ship be given up to the representative of the owners; this is a positive declaration of the law by the proper tribunal, and I think that I am bound to support the sentence.

It is to be noted that well over a hundred years ago Lord Stowell found no difficulty in the submission that foreign law should be implemented by the Admiralty Court with respect to a foreign vessel in an English port. The only concern his Lordship had in exercising his discretion to entertain the suit was whether the foreign state consented to his doing so. This he found implied in the decree of the appropriate authority in Rostock directing the master to deliver up the possession of the ship to the agent in England of the majority of the owners. The modern view in the United Kingdom is that there is no established rule that the Admiralty Court will not entertain possession suits in respect of foreign vessels except at the request of both parties or with the consent of the accredited representative of the country to which the vessel belongs; the matter is one for the discretion of the court. *The Jupiter (No. 2)* (2); Roscoe's Admiralty Practice, (1931), 5th Ed., p. 42. This view has been followed in Canada. *Michado* v. *The Hattie and Lottie* (3). I should like to record in respect of the present case that there was no suggestion by either of the parties, nor any request through diplomatic channels, that this court should decline to exercise its jurisdiction. Furthermore, as the plaintiff is ostensibly a public corporation and "in direct subordination to the

(1) (1811) 1 Dods. 22.
(2) (1925) P. 69.
(3) (1904) 9 Ex. C.R. 11.

People's Commissariat of Maritime Fleet of the U.S.S.R.", it would appear that the Soviet authorities have at least acquiesced in the present proceedings. See *The Annette*: *The Dora* (1); *The Cristina, supra,* at 507 and 523.

The last contention of the defendants for consideration is that the decrees and statute in question are "(*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside the jurisdiction of the promulgating authority." Actually, on the admissions, there is only one legislative act at which this attack could be directed, namely, the E.S.S.R. decree of October 8, 1940, "Section 1 of which purports to nationalize, *inter alia,* the Steamship *Elise* 'wheresoever it may be' and Section 2 of which fixes the amount of compensation to be 25 per cent of its value."

Mr. Kaiv says in his affidavit that the decrees "are confiscatory in nature and contrary to the said Constitution as it existed in June, 1940." I take this as an expression of opinion by Mr. Kaiv with respect to the law of the former Republic of Estonia. Under the circumstances already discussed his view is of course irrelevant. The contention as above framed, and as indicated by the argument at the trial, is that the decree is confiscatory in the eyes of Canadian law. Some remarks of Lord Justice Scott in *The Vapper Case, supra,* with reference to this same decree were strongly advanced by counsel for the defendants. His Lordship said at p. 111:

> If the decree did apply, the legislation involved taking 75 per cent of the moneys without compensation and English law treats as penal foreign legislation providing for compulsory acquisition of assets situate in this country, and *a fortiori* of assets which consist of choses in action enforceable only in English courts, unless the legislation provides for just compensation: and 25 per cent of money cannot be just compensation. In *Luther* v *Sagor* the crucial point was that the property, which was held to have passed, was within the territory of the foreign state, and not in England.

Those remarks upon the compensation were clearly *obiter,* and, with respect, I do not think it strictly correct to describe legislation of this type as "penal". In the Canadian case of *Huntington* v. *Attrill* (2) the judicial committee said:

> Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the

(1) (1919) P. 105.
(2) (1893) A.C. 150 at 161.

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of an offence against their municipal law, their lordships will humbly advise Her Majesty to reverse the judgments appealed from.

In *Banco de Vizcaya* v. *Don Alfonso de Bourbon y Austraia* (1), cited at the trial in the present action, the court refused to enforce a foreign confiscatory decree on the ground that it was penal in the above sense. The government of the Spanish Republic had declared the ex-King of Spain a traitor, and decreed that all his property should be seized for the benefit of the state. I appreciate that the dictionary meaning of "confiscate" is to appropriate to public use by way of penalty, but it is also used colloquially without the penal connotation. It would appear that the nationalization decree in question should not be considered as of a penal nature, for so far as I am aware it was designed to carry out the economic or social programme of the Soviets, and not as an instrument for the punishment of those engaged in private enterprise.

It is to be noted that Dicey in his *op. cit.* does not deal with confiscatory legislation under his Rule 54 at p. 212: "The court has no jurisdiction to entertain an action—(1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign state", but mentions it at p. 25 under his "General Principal No. II—English courts will not enforce a right otherwise duly acquired under the law of a foreign country; . . . (B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions." In his notes thereon at p. 27 Dicey remarks that "wholesale confiscation of private property in the U.S.S.R. is not treated in England, though it is in France, as immoral."

But if, as I have already held, the decree in question may be treated as having extraterritorial effect, I do not think that it is necessary to inquire into the question of whether the recognition of the decree and the rights acquired by the plaintiff thereunder would be inconsistent with our public or moral interests. In my opinion the

(1) (1935) 1 K.B. 140.

following remarks of Viscount Cave in the House of Lords are conclusive on the issue under the circumstances of this action:

My Lords it is not an agreeable task for a British court of justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign state of the assets of private persons "on the basis of complete confiscation." But the Soviet government has been recognized by Great Britain as the lawful government of Russia; and this being so its decrees must, as Bankes, L J. said in *Luther* v. *Sagor & Co.*, be treated by the courts of this country as binding so far as the jurisdiction of the Russian government extends. *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1).

In *Luther* v. *Sagor, supra,* the facts were that the Soviets had nationalized all privately owned woodworking establishments in 1918. In 1920 agents of the U.S.S.R. sold some plywood from a mill in Russia to the defendant firm in London, who imported it to England. In 1921 the Soviet government was, as already mentioned above, recognized by the United Kingdom as the *de facto* government of Russia. The plaintiff, the original owner of the plywood, claimed, but did not succeed in obtaining, a declaration that the goods were its property. In the Court of Appeal Lord Justice Bankes said at pp. 145-6:

It is necessary now to deal with the point made by the respondents that the decree of confiscation . . . is in its nature so immoral, and so contrary to the principles of justice as recognized by this country that the courts of this country ought not to pay any attention to it . . . The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think any authority can be produced to support the contention . . . Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the *de facto* government of a civilized country of a policy which it is considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws.

On the same appeal Lord Justice Scrutton said at p. 559:

The English courts act on the rule "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intenion is expressed in unequivocal terms:" *Central Control Board* v. *Cannon Brewery Co.,* (1919) A.C. 744, 752. If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of

(1) (1925) A.C. 112 at 123.

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their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.

The above remarks were cited with approval by the Supreme Court of the United States in *United States* v. *Belmont* (1). In that case a Soviet decree nationalized a Russian corporation and all its assets wherever situated. A sum of money previously deposited by the company with August Belmont, a private banker in New York, was assigned by the Soviet government to the United States government. Mr. Justice Sutherland said at p. 332:

> The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without just compensation . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.

Reverting to the above quoted dictum of Lord Justice Scott in *The Vapper Case, supra,* I submit, with great respect, that the "crucial point" in *Luther* v. *Sagor, supra,* and also in *Princess Olga Paley* v. *Weisz* (2), was not that the property was within "the territory of the foreign state, and not in England", but that it was within the ambit of the jurisdiction of the foreign state. This appears to be the view of Viscount Cave in *The Mulhouse Case, supra,* and is clearly the view of the Supreme Court of the United States even with respect to choses in action. In the result, a court is not in such cases enforcing foreign law with respect to chattels having a local *situs,* but is recognizing and protecting rights acquired under foreign law. Hence the alleged confiscating character of Soviet nationalization decrees is immaterial. See McNair, *op. cit.,* p. 361, and Mann, *op. cit.,* pp. 168-171.

I should speak of the case of *Wolff* v. *Oxham* (3) which counsel for the defendants cited in his brief. As summarised by Lord Sterndale, M.R., in *In re Ferdinand, Ex-Tsar of Bulgaria* (4), it was a case where

(1) (1936) 301 U.S. 324 at 329.
(2) (1929) 1 K.B. 718.
(3) (1817) 6 M. & S. 92.
(4) (1921) 1 Ch. 107 at 125.

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a Danish subject ordinarily resident in Denmark was sued for a debt due to the plaintiffs who were carrying on business in England. His defence was that he had during the war between England and Denmark paid the debt to commissioners appointed by the Danish government, by whose order all debts due to English subjects by Danes were sequestrated and made payable to the commissioners. Lord Ellenborough delivering the judgment of the court of King's Bench in 1817 held the defence bad and the ordinance to be contrary to the law of nations.

Lord Sterndale reviewed the grounds of error in that early case and the subsequent decisions contra, and concluded: "Taking these matters into consideration I do not think *Wolff* v. *Oxholm* displaces the other authorities to which I have referred." For further criticism of the case see 6 Halsbury's Laws of England, 2nd Ed., p. 504 fn; Dicey, *op. cit.*, pp. 610 fn, 615 fn, and 678 fn. *Wolff* v. *Oxholm* is better taken as authority for the proposition stated in 6 Halsbury, *op. cit.*, p. 198, that English courts will not recognize a foreign war ordinance intended to injure enemy countries by penalizing particular classes of English persons. And so also *Simpson* v. *Fogo* (1) may be treated, as observed by Scrutton, L.J. in *Luther* v. *Sagor*, *supra*, at p. 558, "as a retaliation by English courts on foreign states whose tribunals refuse to recognize rights acquired by English law."

Before leaving this branch of the present case I would like to add that if for any reason the alleged confiscatory aspect of this foreign legislation may be considered material, then I have grave doubt that I would consider nationalization with twenty-five per centum compensation as being regarded in Canadian law as contrary to essential principles of justice and morality. We may not be willing to support a like programme of nationalization in our own country, but that is not the ground on which to resolve a problem of this nature. As Westlake says, *op. cit.*, p. 307:

> The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation.

I would take a view on the present issue in accord with the decision of the British Columbia Court of Appeal in *National Surety Co.* v. *Larsen* (2). Mrs. Larsen's husband and son had been arrested and charged in the State of Washington with smuggling aliens into the United States.

(1) (1863) 1 H. & M. 195.

(2) (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918.

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They were released on bail furnished by the plaintiff to whom Mrs. Larsen gave a mortgage on land in British Columbia by way of indemnity. The bail was forfeited, and the plaintiff sued Mrs. Larsen to enforce payment of the mortgage. Indemnification of bail is unlawful in British Columbia as being against public policy, but it is lawful in the State of Washington. Mr. Justice Macdonald said:

> It is, I think, difficult to say that where the courts of a highly civilized country regard a course of procedure as legitimate and legal it should offend against the principles of natural justice in this country to give effect to it. I do not say that it is not sound practice to prevent one giving bail from accepting security, it may be from a friend of the accused or from the accused himself thus permitting the latter if so disposed to escape without loss to the bailor. It goes further than a question of practice. It is based on principles of the greatest importance. But we must go further if this mortgage is to be regarded as unenforceable and say that for our courts to countenance the practice followed elsewhere would mean the violation of public, moral and social interests . . . On the whole, therefore, in view of the parties concerned, viz., the wife, husband and son, the validity of the transaction in the State of Washington I think it is just that the mortgage security should be enforced. I cannot say that it is essentially and inherently repugnant to moral and public interests in this provice to permit the appellant to prosecute the action.

Accordingly, on all the issues raised I am of the opinion that the plaintiff is entitled to succeed. But I do not think that that conclusion disposes of all the elements in the action. Although the defendants claim the entire proceeds in court "and such further and other relief as the circumstances may require," there is no specific claim, and there was no suggestion at the trial by either party, that in the event of the plaintiff succeeding on the main issues the defendants' compensation for the nationalization of the *Elise* should be first paid out of the fund under dispute. I think that a proper disposal of the case requires that I give this aspect due consideration.

As already mentioned, the parties admit that on October 8, 1940, there was passed a decree of the E.S.S.R. nationalizing the *Elise* "Section 2 of which fixes the amount of compensation to be 25 per cent of its value." Mr. Kaiv states, and it is not denied, that Laane and Baltser have not been paid any compensation. It might be said that a fair inference from the admissions, and in any event, would be that the state was solely responsible for compen-

sation on nationalization, but that is not abundantly clear nor necessarily so. The parties admit in paragraph 17 that the nationalization decree, together with the further decree and statute organizing the plaintiff corporation, "purport to transfer and vest in the plaintiff all rights, title and possession in, to and out of the said Steamship *Elise*." Having no expert evidence before me on the construction of the legislative acts in question, nor on the laws of Estonia generally, I must, as already explained, rely solely on the admissions of the parties. And I think it is indicated by the admissions that the title to the *Elise* vested in the plaintiff *cum onere* with respect to the compensation for the defendants provided for in the decree through which the plaintiff claims to be entitled to the *Elise*. In any event, it is well settled that in dealing with remedies the court applies the *lex fori*. *The Colorado, supra.* In *The American* (1) Mr. Justice Audette said on an appeal to the Exchequer Court of Canada on its Admiralty side:

> The Court is not absolutely ministerial, and it is at liberty to hold its hand when it appears equitable to do so.

In *Montreal Dry Docks and Ship Repairing Co.* et al. (Plaintiffs) v. *Halifax Shipyards Ltd.*, (Intervenor) (2), after the arrest of the vessel by the plaintiffs the intervenor was left in possession, and, without any instruction from the court, completed work on the ship previously ordered by the owner. The intervenor claimed payment in full from the proceeds of sale on the value of work done and materials supplied after as well as before the arrest. Mr. Justice Anglin in the Supreme Court of Canada referred to precedents in respect of the equitable jurisdiction of the Exchequer Court and said:

> In determining the question as to the extent of the plaintiffs' rights the court may properly so deal with the *res* under its control that an injustice shall not be done to a person who by the expenditure of money in good faith has improved the subject matter of the common security and increased its saleable value.

The judgment of the court was in favour of the intervenor, although the latter had carried out work on the ship without appropriate authority. In the present case the owners have been involuntarily divested of their title to the *Elise* and it does not seem improper to allow them

(1) (1920) Ex. C.R. 274; 61 D.L.R. 661.
(2) (1920) 60 S.C.R. 359; 54 D.L.R. 185.

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the decreed compensation from the proceeds of their own property where no explanation has been offered as to why they have not been paid or should not be paid.

I would not feel justified in contemplating what to my mind is a convenient and possibly final disposal of the matter for the parties if I did not think that there is available a valuation of a minimum nature which may be used for calculating the portion of the proceeds to be applied to such compensation. I would assume from the admissions that the nationalization of the *Elise* under the decree of October 8, 1940, was to be of immediate effect and, accordingly, the value may be taken as of that date as well. There is, however, no specific evidence of the value of the *Elise* on that date. Under an order of the late District Judge of this court the vessel was appraised on January 3, 1941, and reported to have a value of $112,000 "provided that she is placed in running order and back in class at Lloyds." This report adds that the above valuation "does not include extra equipment, stores or fuel on board." The *Elise* was sold by the Marshal at public auction on January 25, 1941, for $88,000. The date of sale having been only about four months subsequent to the date of the decree, it would appear fair to all concerned to take $88,000 as the basis for calculating the compensation. The allowance for compensation may therefore be taken to be $22,000. If anyone concerned places a greater value on the *Elise,* this sum should of course be treated as only partial satisfaction.

H. A. Porter, K.C., on behalf of the Secretary of State of Canada as Custodian of "enemy property" under the latest Order in Council (P.C. 8526) of November 13, 1943, has informed the court that the Custodian waives the commission of two per centum chargeable on the proceeds in court by the terms of that order. The itemized account for Mr. Porter's costs with respect to all actions in connection with the *Elise* has been approved by the respective solicitors on the record in the aggregate sum of $978.13, and they have consented to this sum being paid from the proceeds without taxation.

In view of the difficulty of the main point of law involved in this action, and of the distribution of the proceeds

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between the parties, there will be no order with respect to the costs of the parties in the cause or for the applications in chambers preceding the trial.

There will be a reference to the Registrar to report on the amount of the proceeds in court and the net sums payable to the plaintiff and the defendants respectively. The Registrar's fees hereafter chargeable, and the court stenographer's costs on the trial will be paid from the proceeds before payments to the parties. In the result, the defendants are entitled to the sum of $22,000 less half the above fees and costs, and the plaintiff is entitled to the balance of the proceeds then remaining. All payments will be subject to the consent of the Custodian.

There will be a stay of sixty days or until such prior time as may be agreed by the solicitors.

Judgment accordingly.

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Feb. 8

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July 20

BETWEEN:

M. COMPANY, LIMITED.....APPELLANT;

AND

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

Revenue—Excess Profits Tax—The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, as amended, ss. 2 (1) (h), 2 (1) (i), 5 (1), 5 (3), 5 (4), 13—Quantum of standard profits under section 5 exclusively a matter for Board of Referees—Statutory conditions for ascertainment of standard profits under section 5 (3)—Court may not substitute its opinion for advice of Board or satisfaction of Minister.

Appellant applied to the Minister for a reference to the Board of Referees to determine its standard profits. The application was first made under section 5 (1) of The Excess Profits Tax Act, 1940, and later under section 5 (3). The Minister referred the application to the Board for advice as to whether or not departure from capital standard was justified and, if such departure was justified, for determination of standard profits under section 5 (3), but if not, the Board was requested to ascertain standard profits under section 5 (1). The Board ascertained the standard profits under section 5 (1), the Minister approved its decision and appellant was assessed accordingly. Appeal from assessment dismissed.

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Held: That the appellant had a statutory right to have the Board of Referees advise the Minister whether a departure from the capital standard in determining its profits was justified or not.

2. That the decision of the Board of Referees to ascertain the appellant's standard profits under section 5 (1) must be read as its reply to the Minister's request for advice as to whether or not a departure from the capital standard was justified and the proper inference to be drawn from it is that the Board thus advised the Minister that in their opinion a departure from the capital standard was not justified.

3. That the quantum of the standard profits of a taxpayer determinable under section 5 of the Act is not a matter for the Court. Parliament has set up special machinery for its determination. If the provisions of the Act have been complied with the ascertainment of the amount of the standard profits, whether under section 5 (1) or under section 5 (3), is, subject to the provisions of the Act, within the sole discretion of the Board of Referees and the Court has no right to interfere with it. It was never intended by Parliament that the findings of the Board of Referees made within their sphere of function should be subject to review by the Court.

4. That the scope of the Court's function is confined to determining whether the requirements of the Act have been complied with.

5. That if the Board acted within the field of jurisdiction assigned by the Act and dealt with the appellant's application in a judicial manner, as they did, it is not within the jurisdiction of the Court to review their decision and substitute its opinion for the advice which the Act requires the Board to give and the Minister to have. Nor is it contemplated by the Act that the Court should substitute its opinion for the satisfaction of the Minister. It is not for the Court to determine whether the facts of the case are such as to warrant the ascertainment of standard profits under section 5 (3), but exclusively for the Minister on the advice of the Board.

APPEAL from an assessment under The Excess Profits Tax Act, 1940, as amended.

The appeal was heard by the Honourable Mr. Justice Thorson, President of the Court, at Hamilton.

F. Morison K.C. and *Hon. G. P. Campbell K.C.* for appellant.

H. H. Stikeman for respondent.

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

THE PRESIDENT now (July 20, 1948) delivered the following judgment:

This is an appeal from an assessment for excess profits tax for the year 1940 under The Excess Profits Tax Act,

1940, Statutes of Canada, 1940, chap. 32, as amended. The assessment appealed against was in respect of the appellant's profits for the year 1940 in excess of its standard profits, as ascertained by the Board of Referees appointed under the Act and approved by the Minister. The appeal raises the important question whether the decision of the Board as to the appellant's standard profits and its approval by the Minister can be successfully attacked.

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The relevant provisions of the Act are sections 5 (1), 5 (3) and 5 (4) which, at the time of the hearing before the Board and its decision, read as follows:

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

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

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

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

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

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard

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profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

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

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

These sections were enacted in the above forms by an amendment of the Act in 1942, Statutes of Canada, 1942-43, chap. 26, sec. 3. By section 2 (1) (*i*), as enacted by the said 1942 amendment, sec. 1 (2), the term "standard profits" means, subject to certain provisoes, "the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or the standard profits ascertained in accordance with section five of this Act", and by section 2 (1) (*h*), as enacted by an amendment of the Act in 1941, Statutes of Canada, 1940-41, chap. 15, sec. 2, the term "standard period" means, subject to certain provisoes, "the period comprising the calendar years one thousand nine hundred and thirty-six to one thousand nine hundred and thirty-nine, both inclusive, or such years or parts thereof since the first day of January, one thousand nine hundred and thirty-six, during which the taxpayer was in business."

All of the amendments referred to were deemed to have come into force on and after the commencement of the Act.

Section 13 provided for the appointment of a Board of Referees as follows:

13. The Minister may appoint a Board of Referees to advise and aid him in excercising the powers conferred upon him under this Act, and such Board shall exercise the powers conferred on the Board by this Act and such other powers and duties as are assigned to it by the Governor in Council.

The Board of Referees was appointed by Order in Council P.C. 6479, dated November 16, 1940. *Vide* Canada Gazette, December 14, 1940, p. 2138.

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On August 8, 1940, the Minister authorized the Commissioner of Income Tax to exercise the powers conferred upon him by the Act. *Vide* Canada Gazette, September 13, 1940, p. 852.

The facts relating to the appellant's application for a reference to the Board of Referees to determine its standard profits are as follows.

The original application, dated December 10, 1940, was made pursuant to section 5 of the Act, as it then stood, on Form S.P. 1 (Exhibit 1), and the reason given for it was that the appellant's business, while not being one of a class which was depressed during the standard period, was itself abnormally depressed during such period. The application was accompanied by a statement of particulars, dated December 6, 1940, in which it was stated that the appellant had sustained losses in the years 1936, 1937 and 1938, and a small taxable profit in 1939, and that it would be unjust to base the excess profits tax on one fourth of the amount of the profit in 1939. The history of the appellant was given showing operating losses for seven years prior to the commencement of the standard period, which had greatly depleted its previous surplus. It was claimed that the standard profit should be fixed on the basis of an adjusted capital, giving the capital employed on December 31, 1938, at a stated amount, which included $182,230.63 for depreciation at 50 per cent of normal rates during the years of loss, from which it was contended no benefit had accrued. It was then urged: "In view of the heavy losses sustained and the heavy liabilities thus carried the Company considers that the standard profit fixed at $45,000 would be a conservative amount to allow before it becomes liable to the tax at 75 per cent." Supplementary to Form S.P. 1, the appellant, on September 18, 1941, gave further particulars on a form called S.P. 1. Questionnaire. Both of these documents related to the appellant's claim to have its standard profits fixed on the basis of the amount of capital employed by it.

Before this application had been referred to the Board of Referees a departure from the standard of the amount of capital employed as a basis for determining standard profits was authorized in certain cases by section 5 (3) of

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the Act, as enacted in 1941, Statutes of Canada, 1940-41, chap. 15, sec. 6. Moreover, section 4 (1) (*d*) of the Act, as originally enacted, had provided:

> 4. (1) The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:
>
> (*d*) adjust the standard profits by reference to any increase or decrease in depreciation allowances or other charges to such a basis that the said charges during the standard period are comparable with similar charges during the taxation period.

By section 5 of the amending Act of 1941, already referred to, this paragraph (*d*) was repealed. Under this state of the law the appellant's chartered accountants, on November 4, 1941, wrote to the Inspector of Income Tax at Hamilton, after an interview with him, that they were instructed to maintain the appellant's claim for $45,000 as its standard profit. The letter contained the following statement:

> When the Statement of Particulars was prepared on December 6th last, this claim was well within the 10 per cent of Capital set up in accordance with the Rulings at that time, but the later amendment of the Act disallows Depreciation from which no benefit is derived thus reducing the Capital by $182,230 63 which was the depreciation for seven years 1929 to 1935 inclusive when the losses were in excess of the depreciation.

It also repeated that the appellant had sustained operating losses for 10 years up to the end of 1938 and said that these were in excess of the remaining capital employed after disallowing depreciation from which no benefit was derived, and that in view of this they were instructed by the appellant to "maintain its claim of $45,000 as a standard profit, as under the amended Act a reasonable amount is not available either on average profits or the remaining capital employed". The letter concluded with the sentence:

> In view of the foregoing the Company authorizes us to maintain its claim of $45,000 as standard profit under the Excess Profits Tax Act under section 5 (3) (*b*) of the Act.

This is the first reference on behalf of the appellant to section 5 (3).

On December 22, 1941, the Commissioner of Income Tax referred the appellant's application to the Board of Referees as follows:

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

Dear Sir:

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

For advice as to whether or not departure from capital standard is justified and if such departure is justified for determination of Standard Profits under Section 5 (3). If not, the Board is requested to ascertain Standard Profits under Section 5 (1).

The following documents are enclosed herewith:

1940 T. 2; T. 20; S.P. 1; S.P. 1 Questionnaire; financial statements.
T. 2's 1936 to 1939 inc.

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

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

It does not appear whether the letter of November 4, 1941, was referred to the Board or not, unless it is included in the "financial statements" mentioned in the reference. In any event, the question is unimportant for on December 24, 1941, the secretary of the Board wrote to the appellant stating that its standard profits claim had been referred to the Board and would be considered at an early date, enclosing a copy of "Instructions to Taxpayers filing Standard Profits Claims", asking the appellant, if any of the information requested had not been provided in its statement of particulars, to file complete details with the Board, and informing it that when its claim had been considered it would be given an opportunity to appear before the Board at Ottawa if it desired to make personal representations to it. The instructions included paragraph 4 relating to depressed businesses or new businesses carried on by taxpayers who request under section 5, ss. 3, that the standard profits be determined by the Board of Referees on the basis other than that of capital employed and setting out what information must be supplied in such cases.

On January 8, 1942, the appellant's chartered accountants prepared a Supplementary Statement of Particulars (Exhibit 4), in which they set out the history of the appellant and its predecessor, referred to the claim originally made in December 1940, in which the amount of capital stated to be employed included depreciation from

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which no benefit accrued in the years 1929 to 1937 which later was disallowed. It was also stated that in thus reducing the allowable capital the claim to have a standard profit of $45,000 established was in excess of 10 per cent of the capital, that the appellant maintained its claim for $45,000 and that it came under clause 4 (1) of the instructions to taxpayers. The statement then set forth the appellant's reasons for its claim including its operating losses for the ten year period up to December 31, 1938, that these were far in excess of the remaining capital in 1940 after two years of profits and giving particulars of such losses and a comparison between its financial position as at December 1, 1928, and that as at December 31, 1938. It was contended that this comparison indicated that the result of excessive taxation would very seriously jeopardize the continuation of the business and the conclusion was stated that the appellant authorized them to maintain its claim of $45,000 as standard profit under the Excess Profits Tax Act under section 5 (3) (*b*) of the Act. As part of this supplementary statement information was given for every year from 1921 to 1940 of Sales, Capital Employed at commencement of year, Net taxable income and Rate Earned on Capital Employed.

On August 18, 1942, the appellant was notified that a date for the hearing of its Standard Profits Claim had been set for September 16, 1942, and asked to arrange to have a representative appear before the Board of Referees at that time. At the hearing before the Board the appellant was represented by Mr. B. E. James, its secretary, and Mr. S. G. Richardson, its chartered accountant. It appeared that the amount of capital employed as at December 31, 1938, as estimated by the Department, was $3,450 less than that shown by the appellant on Exhibit 4, and when the chairman of the Board, the Honourable Mr. Justice W. H. Harrison, asked the appellant's representatives to accept the Department's figure they did so. Otherwise they made no oral representations to the Board, contenting themselves with the written material submitted. At the trial Mr. Richardson admitted that between the written submissions and the oral hearing all the relevant facts were made available to the Board.

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On September 22, 1942, the Board reported its decision to the Minister as follows:

To:

The Minister of National Revenue,
Ottawa, Ontario

Re: (name of appellant)

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees under date of 22nd December, 1941, in accordance with the provisions of The Excess Profits Tax Act, 1940, as amended.

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

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

(*a*) Find that the business of the taxpayer was depressed during the Standard Period.

(*b*) Compute the *Capital Employed* by the taxpayer at 1st January, 1939, at .....$ 357,240 32

(*c*) Ascertain *Standard Profits* of the taxpayer at .....$ 21,434 42 being an amount equal to interest at 6 per cent per annum on the Capital Employed as above.

Dated at Ottawa this twenty-second day of September, 1942.

Board of Referees

W. H. Harrison.....Chairman
C. P. Fell.....Member
Courtland Elliott.....Member

The decision of the Board of Referees was approved by Mr. C. F. Elliott, Commissioner of Income Tax. On September 29, 1942, the appellant was advised of the Board's decision and its approval and given a copy of the decision.

On March 17, 1943, the appellant was given notice of its assessment for 1940, from which it appealed to the Minister. The Notice of Appeal does not state the grounds of appeal clearly but the general tenor of complaint is that the Board erred in principle in fixing the standard profits under section 5 (1) and should have acted under section 5 (3). The Minister affirmed the assessment on the ground that he had approved the decision of the Board of Referees as provided in section 5 (4) of the Act and that such decision was final and conclusive. Being dissatisfied with the Minister's decision the appellant now brings its appeal from the assessment to this Court. In its Notice of Dissatisfaction the complaint is made that the Board made its finding on the basis of capital employed and did not make any finding under section 5 (3), and it is contended that it should have given relief under section 5 (3) (*b*). The

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real substance of the appellant's grievance is contained in the last two paragraphs of the Notice of Dissatisfaction as follows:

> 11. In order to give the Company a chance to recover and continue operating in the future the Standard of Profits should be fixed at least at $45,000 per year as requested and determined by the taxpayer.
>
> 12. Standard Profits of $21,434.42 determined by the Board, it is submitted, is too low under the circumstances and if allowed to stand will in the years 1940-1943 impose a taxation burden which may be disastrous to the appellant.

On the argument before me counsel for the appellant made two arguments. His main one may be summarized as follows. He contended that the Board of Referees was appointed by the Minister to advise and aid him in exercising the powers conferred upon him under the Act, that until a standard profit had been determined in accordance with the Act there was no right to levy any tax under it, that section 5 gave the taxpayer a right to have his standard profits determined in accordance with its provisions if he came within them, and that the determination of whether he was entitled to the remedy provided by the section was the act of the Minister on the advice of the Board. In his view, it was not the Board but the Minister on the advice of the Board that determined the taxpayer's standard profit. The submission was that since the Board was an advisory body it was only its advice that was final and conclusive; but that it was the Minister's approval that established the standard profit, that the appellant's application for relief was to the Minister and that it was his duty to see that all the requirements of the Act were complied with. Counsel conceded that the decision of the Board, if within the Act, was final and conclusive and that there was no appeal from it, but contended that it did not become effective until the Minister had acted as the Act provided, and that there was nothing in the Act making the Minister's approval final and conclusive. Counsel agreed that the Act did not contemplate a review by the Minister of the representations made to the Board, but contended that he had referred this case to the Board to be determined under section 5 (3), that it was his duty to see that they had done so and that the Board's decision showed on the face of it that they had dealt with the case entirely under section 5 (1). It was argued that

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before the Board could determine the case under section 5 (1) they must first advise the Minister that the taxpayer had not brought himself within section 5 (3), that before the Minister approved their decision he should have demanded advice whether the case came under section 5 (3), that there was nothing in the Board's decision to show whether they had considered the case under that section, that the Minister in approving the Board's decision had acted without the advice which the Act required him to have and that, under the circumstances, his approval could not be regarded as final and conclusive. Counsel urged that since the application had been made under section 5 (3) the appellant had a right to have it dealt with and disposed of under that section before any order could be made under section 5 (1), that until this was done the Board's decision under section 5 (1), although approved by the Minister, was not final and conclusive and that the Court should refer the assessment back to the Minister so that he might obtain the advice of the Board as to whether a departure from the basis of capital employed as provided by section 5 (1) was justified or not. This was the main argument on behalf of the appellant.

Acceptance of this argument would benefit the appellant only if the Board had not already considered its case under section 5 (3) and if on the matter being referred to them they should advise that a departure from the capital employed standard was justified. But if, on the other hand, they had in fact already considered the matter under section 5 (3) and had concluded that a departure from the capital standard was not justified then the appellant's major complaint that the Board had not advised the Minister in the matter and that he had not obtained their advice thereon would be met by specific advice to the Minister and the appellant would find itself in exactly the same position as its present one. Counsel realized that the acceptance of his major contention might thus well be a hollow victory and put forward a second argument. He contended, as a matter of law, that the case came within section 5 (3) and that the appellant was entitled to have its standard profits determined under it. It was urged that even if it were assumed that the Board had considered the case under section 5 (3) it had improperly interpreted it

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or improperly applied the facts and thus deprived the appellant of a right to which it was entitled, that the evidence showed that there had been an abnormal impairment of capital, that no reasonable body of men sitting in a judicial capacity could fail to find such abnormal impairment, that if the Board had realized the facts they would have determined the appellant's standard profits under section 5 (3), that the Court could find that the case came within the section and that the appellant was entitled to relief under it and that the Court should refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5 (3).

I agree with counsel for the respondent that counsel for the appellant in his main argument attacked the assessment under appeal along the only avenue that could lead to a reconsideration of the appellant's application. If the Board of Referees did not give any answer to the Minister's request for advice as to whether or not a departure from the capital standard was justified then it would follow that the appellant's application for the determination of its standard profits under section 5 (3) (*b*) has not yet been disposed of in accordance with the requirements of the section but is still pending before the Minister, that the Board's decision under section 5 (1), notwithstanding its approval by the Minister, was premature and inoperative, and that the assessment based on it was invalid and should be set aside. Before there could then be a valid assessment the Minister would have to request the advice of the Board as to whether a departure from the capital standard was justified or not and the Board would have to answer it. If the Board should give its advice in the affirmative and the Minister was satisfied, he would have to direct that the standard profits be ascertained by the Board under section 5 (3). But, if on the other hand, the Board should answer the request for advice in the negative the Minister could properly request them to ascertain the standard profits under section 5 (1). The essence of the argument is that the Board gave no advice at all to the Minister under section 5 (3) and that until they did so, the Minister could not validly approve a decision under section 5 (1). The complaint on this head is not against the Board for not

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giving any advice but rather against the Minister for failing to obtain it. The appellant's alleged grievance is that it had a statutory right to have the Board of Referees consider and advise the Minister whether its standard profits should be determined by reference to some standard other than that of capital employed or not, and that this right has not been accorded to it. This branch of the appeal is thus reduced to very narrow limits.

The onus of showing that the Board did not answer the Minister's request for advice under section 5 (3) is, of course, on the appellant. The disposition of this part of the appeal depends upon what inference ought to be drawn from the decision of the Board when read in the light of the reference by the Minister. The Reference to the Board was

> For advice as to whether or not departure from capital standard is justified and if such departure is justified for determination of Standard Profits under Section 5 (3). If not, the Board is requested to ascertain Standard Profits under Section 5 (1).

While the decision made no express reference to whether departure from capital standard was justified or not, counsel for the respondent urged that it must be read as the Board's reply to the Minister's request for advice; that the Board had given their answer to the Minister's request for advice in the manner indicated by the reference, and that the proper inference to be drawn from their decision to ascertain the standard profits under section 5 (1) was that they had thus advised the Minister that in their opinion departure from the capital standard was not justified. At the hearing of the appeal I was impressed with the argument of counsel for the appellant and inclined to give effect to it, but I have come to the conclusion that the inference that ought to be drawn from the Board's decision is the one urged by counsel for the respondent. The reference requesting advice as to whether or not departure from the capital standard was justified indicated that the answer might be given in a specified manner. If the Board considered that a departure was justified, they were to determine the standard profits under section 5 (3). Such action by the Board would clearly be an affirmative answer to the request for advice. Similarly, if the Board thought that a departure was not justified they were to

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ascertain the standard profits under section 5 (1) and their decision thereunder would be an answer in the negative. In either case, the request for advice could be answered by a prescribed course of action with its necessary implication just as fully as by express words. The contrary inference suggested by counsel for the appellant was that the Board had given no answer at all to the request for advice contained in the reference. I am unable to agree. The very wording of the reference shows that it was a reference for advice and action under section 5 (3), if the Board considered that a departure from the capital standard was justified, and action under section 5 (1), if they did not. To draw the inference suggested by counsel for the appellant would be tantamount to saying that the Board disregarded the terms of reference, closed their eyes to that part of it which requested them to consider whether the case was one which fell under section 5 (3) and saw only that part which requested them to proceed under section 5 (1). In my opinion, an inference based on such an assumption would be an unreasonable one and I reject it. The result is that this part of the appellant's case falls to the ground.

Once it is found that the Board answered the Minister's request for advice whether a departure from the capital standard was justified or not then that, I think, ends the matter. It was then within the competence of the Board under the terms of the reference to ascertain the appellant's standard profits under section 5 (1) and within that of the Minister to approve the Board's decision. I am quite unable to accept the appellant's second argument that the Court could determine that the case came within section 5 (3) and that it should refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5 (3). There are several reasons for coming to this conclusion.

I think it is plain from a review of the appellant's documentary submissions that a compelling, if not the most important, reason for causing it to switch its original claim to a claim under section 5 (3), after that section was enacted, was that the large item of $182,230.63 of depreciation during the seven years of loss prior to 1936, which the

appellant had included in its first estimate of capital employed, was disallowed. Its disallowance brought the amount of capital employed to a figure below that necessary to support its claim of $45,000, even if the Board were to allow the full limit of 10 per cent permitted by section 5 (1). What the appellant was primarily concerned with was the maintenance of its claim at $45,000 and, since this could not be done under section 5 (1) after the disallowance of the depreciation item because of the limitation of 10 per cent, the claim was switched to one under section 5 (3) in the belief or hope that there would be a better chance of maintaining its claim under that section. The appellant's real complaint is against the amount of the standard profits fixed by the Board rather than the basis upon which it was ascertained. It would not be unfair to conclude from the documents submitted by the appellant that if the item of depreciation had been allowed to be included in the computation of capital employed it would have been quite willing to have its standard profits ascertained on such basis. Moreover, if the Board had allowed a return of 10 per cent instead of 6 per cent on the amount of capital employed as determined by the Board much of the appellant's ground of complaint would have disappeared. To a considerable extent, therefore, if not wholly, the appellant's complaint is against the quantum of standard profits allowed. With that question the Court can have no concern. The quantum of the standard profits of a taxpayer determinable under section 5 of the Act is not a matter for the Court. Parliament has set up special machinery for its determination. If the provisions of the Act have been complied with the ascertainment of the amount of the standard profits, whether under section 5 (1) or under section 5 (3), is, subject to the provisions of the Act, within the sole discretion of the Board of Referees and the Court has no right to interfere with it. Parliament has enacted that the decision of the Board shall not be operative until approved by the Minister but that when it has been so approved the decision shall be final and conclusive: it is also provided that if the decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and that its decision shall be final and conclusive. I think it is

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beyond dispute that it was never intended by Parliament that the findings of the Board of Referees made within their sphere of function should be subject to review by the Court. It must be careful to confine itself within its own field of jurisdiction and not to intrude upon a field which Parliament has assigned to another body. It is not for the Court, therefore, to express any opinion whether the quantum of the standard profits allowed to the appellant was adequate or not.

In my view, the scope of the Court's function in the present case is confined to determining whether the requirements of the Act have been complied with. It having been found that the Board of Referees did advise the Minister that departure from the capital standard was not justified the only remaining question is whether there is any merit in the appellant's second argument that the facts are such as to warrant a finding by the Court that the appellant's case falls within section 5 (3) and that its standard profits should be ascertained thereunder.

We have already seen that the ascertainment of standard profits under section 5 (3) must be made by the Board. But before such ascertainment can be made certain statutory conditions must be complied with. In the first place, the taxpayer must apply under the section. Secondly, the Minister must be satisfied either that the business was depressed during the standard period or that it was not in operation prior to January 1, 1938. So far there is no difficulty. But in addition, the Minister must be satisfied either (*a*) that the business is of such a nature that capital is not an important factor in the earning of profits, or (*b*) that the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low. The appellant contends that it comes under (*b*). But it is not enough that the capital has become abnormally impaired or is abnormally low. It must also be shown that because of either (*a*) or (*b*) the Minister was satisfied that the ascertainment of standard profits by reference to capital employed would have certain consequences, namely, either result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination, or jeopardize the continuance of the business of the taxpayer. And the third statutory condition is that the Minister must

arrive at his satisfaction on the advice of the Board. It would be very difficult even to estimate the scope of section 5 (3). It was not intended as an alternative to section 5 (1) under which the taxpayer could as a matter of choice get better treatment. But while it is not possible to state with precision the kind of cases that might come under section 5 (3), it is clear that, while section 5 generally was of an exceptional nature in that it dealt with taxpayers whose businesses were depressed, section 5 (3) was intended to apply only to extraordinary cases. There was, therefore, very sound reason for entrusting to a special body such as the Board of Referees the advising of action under it. The matters on which the section requires the Minister to be satisfied are all questions of relative weight and of degree which do not readily lend themselves to precise findings of fact but are rather matters of opinion and discretion.

Although the conditions required by section 5 (3) before the Minister must direct the Board to ascertain standard profits under it have not been complied with counsel contended that the Court should find that the case falls within section 5 (3) and should be referred back to the Minister so that he might direct a reference to the Board under it. This assumes that the Court may substitute its findings for the advice of the Board and the satisfaction of the Minister. In my view, even if the Court could make such a finding, there is no justification for doing so. There were no new facts before the Court that were not before the Board. The appellant had every possible opportunity of presenting its case before them. It made its written submissions and appeared at the hearing through its secretary and its chartered accountant. When they were asked to accept the Department's figure of capital employed they did so without making any plea or argument that some basis other than that of capital employed should be used. It is admitted that between the written submissions and the oral hearing all the relevant facts were made known to the Board. Under these circumstances, I am quite unable to find that the Board or the Minister acted on any wrong principle of law or failed in any way to perform the functions assigned to them or that the Board should have advised the Minister that a departure

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from the capital standard was justified or that the Minister should have been satisfied that there should be such a departure.

But there is a more important reason for rejecting the argument. Although section 5 (3) requires that the Minister must be satisfied as to the matters therein specified before he must direct the Board to ascertain standard profits under it and that such satisfaction must be on the advice of the Board, the argument assumes that the Court may make a finding that would take the place of the satisfaction of the Minister on the advice of the Board. The Court is asked to find that a departure from the capital standard was justified, notwithstanding the Board's advice that it was not. There is no authority for any such assumption. If the Board acted within the field of jurisdiction assigned by the Act and dealt with the appellant's application in a judicial manner, as they did, it is not within the jurisdiction of the Court to review their decision and substitute its opinion for the advice which the Act requires the Board to give and the Minister to have. Moreover, the argument makes another unwarranted assumption. Before the Board may ascertain standard profits under section 5 (3) they must be directed to do so by the Minister after he is satisfied that a departure from the capital standard is justified. Yet it is urged that the Court should send the assessment back to him for reference of the application to the Board for determination of standard profits under section 5 (3), whether he is satisfied that such a course should be taken or not. It is not contemplated by the Act that the Court should substitute its opinion for the satisfaction of the Minister. In my view, it is not for the Court to determine whether the facts of the case are such as to warrant the ascertainment of standard profits under section 5 (3), but exclusively for the Minister on the advice of the Board. Under the circumstances, since the appellant's application has been dealt with under the machinery set up by the Act for the purpose and in accordance with the requirements of the law, the Court has no right to interfere. The decision of the Board as to the appellant's standard profits and its approval by the Minister must stand.

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It was suggested by counsel on the opening of the hearing that the computation of the capital employed by the appellant as made by the Board was incorrect in that there was no obligation on its part to take any allowance for depreciation during the years of loss even although it was the practice of the department to require taxpayers to take 50 per cent of the normal depreciation in such years. But on the argument this contention was not put forward. There is no foundation for it.

The appellant having failed to show wherein the assessment appealed from is incorrect either in fact or in law its appeal therefrom must be dismissed with costs.

Judgment accordingly.

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March 4
May 14

BETWEEN:

JOHN E. CRADDOCK.....APPELLANT;

AND

THE MINISTER OF TRANSPORT.....RESPONDENT.

Shipping—Appeal from decision of Commissioner—Canada Shipping Act, 1934, s. 569 (3)—Order in Council P.C. 333, Jan. 18, 1944—Failure of master of ship in performance of duty—Appeal dismissed.

Appellant's Certificate of Competency as Master was suspended for a period of six months following a formal investigation into the circumstances surrounding the stranding and loss of the ship he commanded.

Held: That P.C. 333, January 18, 1944, providing that on the hearing of an appeal, in addition to the evidence in the Court below, this Court may receive further evidence on question of fact either orally or by affidavit in effect makes the appeal a trial de novo.

2. That it was appellant's duty to be on the bridge of his ship in the absence of instructions to the mate and of a look-out and his default and failure to comply with that duty together with negligence on the part of the mate caused or contributed to the stranding of his vessel.

APPEAL under the Canada Shipping Act, 1934.

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

C. L. McAlpine, K.C. for appellant.

L. A. Kelley, K.C. for respondent.

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

O'CONNOR J. now (May 14, 1948) delivered the following judgment:

A formal investigation into the circumstances attending the stranding and subsequent loss of the M.V. "Gulf Stream" near Powell River, B.C., on October 11, 1947, with loss of life, was held before the Honourable Mr. Justice Smith, Commissioner, assisted by two assessors.

The Court found that the stranding of the vessel was caused or contributed to by the wrongful act or default of John Edward Craddock, Master, and Raymond Charles Ketchum, Second Mate, and suspended the Certificate of Competency No. 16792 as Master in the Home Trade, held by the said John Edward Craddock for a period of six months from November 12, 1947, and suspended the Certificate of Competency as Mate in the Home Trade held by the said Raymond Charles Ketchum, for a period of four months from the said date.

From such decision the said John Edward Craddock appeals under the provisions of Section 569 (3) of the Canada Shipping Act, 1934, which provide that an appeal shall lie from the decision to the Exchequer Court of Canada on its admiralty side.

The facts, relevant in this appeal are not in dispute and may be summarized as follows:—

The M.V. "Gulf Stream" was a yacht type freight and passenger vessel; tonnage 335·74; length 134·58 feet; breadth 22·97 feet; depth 13·89; draft 9 feet 6 inches; speed 14 knots; 15 tons cubic capacity. At 1.30 p.m., Saturday, October 11, 1947, the vessel left Vancouver, B.C., with passengers and express cargo on her usual week-end run up the coast to Van Anda, Westview, Savary Island, Lund, Bliss Landing, Refuge Cove and Blind Creek in Cortez Island, where she was due to arrive at 10.30 p.m., and where she would normally have spent the night, returning on the southward trip early next morning. The ship reached the wharf at Westview and completed the unloading at that point and on the departure of the ship from Westview at 7.30 o'clock that evening the Master, John

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Edward Craddock, took her away from the wharf. Captain Craddock stated that the ship was lying at Westview wharf, at the port side to—on the southeast end of the dock and was backed out with the rudder hard to starboard and the engines hard to stern, a good 500 feet before stopping the engines, and coming half ahead and then hard aport with the helm to come around on our course. The ship was steadied up on the course of 285° by the steering compass and he stated that he was satisfied that the ship was on her course. He said that he was on watch for approximately five minutes after the ship left the position at Westview, and then the Second Officer (Ketchum) came up on the bridge to relieve him so that he would be able to go down and have a sandwich and a cup of coffee before they got up in the Islands. He stood by the Second Officer Ketchum approximately five minutes until he was certain he could see and his eyes were used to the lights and he then gave him the course of 285° and was sure he thoroughly understood that course and then departed from the bridge. Captain Craddock then went below first to the galley with a passenger for coffee and then to the stateroom of another passenger who was preparing to disembark at the next stop, viz., Savary Island. He intended to return to the wheelhouse some forty minutes later when approaching Mace Point, which is about 12 miles from Westview and forms the easterly point of Savary Island; and must be rounded to get to the wharf hard-by.

The general conditions existing and continuing on the run from Westview to the stranding on Dinner Rock were:

The night was dark and overcast, the visibility normal but variable, and at times there was rain. The wind was southeasterly (a following wind), force about 15 m.p.h., the sea was moderate (also following); the tide was about two hours ebb on a small run out, but not of such significance as to interfere with the speed of the ship which was 14 knots.

The area and the channel are clearly and concisely described in the reports as:—

> The coast-line on the starboard hand from Westview to Hurtado Point (which is opposite to Mace Point previously mentioned; the channel between being a little over a mile in width) runs fairly evenly in a general direction of West-North-West. About one mile and a half below Hurtado Point and about one-fifth of a mile from the shore lies

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Dinner Rock. This Rock rises 65 feet above the surface at high water and is approximately circular in description with a diameter of say 500 feet. It is prominently marked on the chart and is mentioned in the British Columbia Pilot. A vessel has to be very close inshore indeed to strike it. Opposite Dinner Rock there is a reef running E.S.E., from Mace Point. The distance between the Rock and the nearest edge of the reef is approximately one mile and a quarter. A mid-channel course therefore takes a vessel at least ½ mile clear of all dangers. To this short description need only be added the circumstance that the first land on the port hand, after leaving Westview bound North, is a large island known as Harwood Island, the Northerly point of which is 5½ miles from Westview. Between this point and the main shore on the starboard hand is a distance of one mile and a third.

The Mate, R. C. Ketchum, said that it was the regular practice for him to take over the watch at that particular time and that when he did so on the night in question he saw the silhouette at Harwood and the lights of Powell River, and that in his judgment the ship was in the proper position when he took over at 7.40 p.m. Two minutes later he decided that, "we were, as far as I could judge, that we were still in a proper position in connection with looking at the Sliammon village lights". He made a check by turning on the searchlights but he did not pick up anything. It was still raining a little.

What happened from there on is set out in his evidence:

Shortly after that the rain stopped and the wind seemed to me to increase a little at Shearwater Passage, I think it is—that is through Shearwater Passage.

Through Shearwater Passage?

Yes, there was a heavy overcast from west of Harwood Island right past Cortez and Don Islands. I could not make out any silhouettes ahead. I carried on for—I had it figured at 14 minutes after we had been at Harwood I should pick up Ragged Island light. That would be 35 minutes after Westview.

I took a couple of glances at the clock and when it came around to 14—after I didn't pick up the lights, and I figured we were either quite a little too close or there must have been a squall ahead that obliterated the light or it was not burning. There were several things in my mind at that moment. I carried on for a while and still no light. It must have been about five or six minutes afterwards, maybe a little more when I spotted the rock straight ahead—that would be Dinner Rock dead ahead at about 50 to 75 yards. It looked like a white patch across the bow and I could not figure out what it was for a couple of seconds.

Just at that time the helmsman must have glanced up and seen it and said, "What is that". At the same time as that I realized it was a rock and gave him an order hard to port, which he did. She was swinging around on that, with the helm hard to port when we struck and bounced up onto the next ledge and bounced again and went right up on the

rock, and capsized right over to port, with the bottom up in the air. I don't know how to describe its position. It is in the pictures there, I believe.

He also stated that he had not seen Hurtado Point, Mace Point or Savary Island and that he had not at any time picked up Ragged Islands light, and that he knew they might have been hidden by Hurtado Point. He stated that the Ragged Islands light should have opened up at a point 2·1 miles from Dinner Rock and that the Rock was 3/10 to half a mile off the proper course. He also stated that he took no steps to fix the position of the ship after passing Harwood and that—"No, I didn't even consider using the chart", and—"There is no real way you can fix the position except by Ragged Islands light or have your observation of the coastline", and that he had not picked up the coastline.

The Court said as to Ketchum:

His mind, we think, was not alive to the fact that he was in dangerous waters in charge of the watch on a high-powered 14 knot passenger vessel; and that neither did he grasp the full significance involved in his failure to see Ragged Islands Light; he failed to realize that the time for wondering had passed, that the time for immediate action was imperatively at hand, and that he must come to a swift and peremptory decision.

In discussing the cause of the stranding the Court said:—

But taking the course as it was given, (285°), what caused the ship to deviate therefrom and to strike Dinner Rock? Many matters may have contributed to that end, for pilotage is not an exact science and never will be. Pilotage is simply the art of determining the correct courses when working a ship along a coast or in the neighbourhood of navigational dangers. A distance of 2,000 feet is not much to be out, one way or the other, at the end of a 10 mile run. An expert witness, Captain Landheim, said that with wind and tidal conditions as they were, a set-in toward the shore, caused mostly by the wind, might be expected. That alone would explain it.

The Court also said:—

We think therefore that there should have been a seaman posted on the look-out, and whose sole duties were to keep a look-out. This might have saved the ship.

We might add in this concluding paragraph that if a prudent Master Mariner were asked what caused the casualty in this case, we think he would reply that it was caused, firstly, by the vessel being set on too fine a course that left too narrow a margin of clearance off Dinner Rock, and secondly, by her being left in charge of a young officer with insufficient instructions as to the navigational dangers involved in the prevailing conditions; and who failed to keep a vigilant look-out; and that on the facts both Master and Second Officer failed in their duty; such at least is the unanimous opinion of this Court and it is to this opinion that we are bound to give effect.

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I do not find it necessary to deal with or to pass on these statements of the Court below, because there is another ground that satisfies me that the appeal should be dismissed. While this is termed an appeal, Order-in-Council P.C. 333, January 18, 1944, provides that on the hearing of the appeal, not only is the evidence taken before the Court below, before this Court, but, in addition, this Court has full power to receive further evidence on questions of fact either orally or by affidavit. And, in addition, evidence may be given by special leave of this Court as to matters which have occurred since the date of the decision from which the appeal is brought. While no additional evidence was given here, I point out these provisions to show that they provide for an appeal which is, in effect, almost a trial de novo.

The position was this,—the ship was proceeding at 14 knots in dangerous waters. At the end of a ten-mile run she would pass between Dinner Rock and the reef running E.S.E., from Mace Point. If the coastline could not be seen, and the Mate said he did not see Hurtado Point, Mace Point or Savary Island, then the position of the ship could only be definitely fixed for the first time by the light of Ragged Islands. This light was the main guide for the clearance of Dinner Rock. If the course were made good the ship would pass about 2,000 feet from Dinner Rock and as the Court below stated, a distance of 2,000 feet is not much to be out, one way or the other, at the end of a ten-mile run under the existing circumstances.

I am advised by the experienced assessors who have assisted on this appeal that, in these circumstances, the time when the light from Ragged Islands was due to open up was of the greatest importance, and that it was essential that the position of the ship be ascertained at that time.

That being so, then it was clearly the duty of Captain Craddock to be on the bridge at that time so he could, himself, ascertain whether the course set had been made good, and, if not, take the necessary action. Even assuming that the course was not too fine, it was sufficiently fine to warrant the exercise of great care. Assuming that the Mate required no instruction, and that it was not necessary to post a look-out, the fact that the Mate had no instructions and there was no look-out made Captain Craddock's presence on the bridge all the more essential.

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Had Captain Craddock been on the bridge at the time the light was due to open up, he would no doubt have taken the proper steps when the light failed to open up.

It was his duty to be on the bridge at that time and he failed in that duty. His default and the negligence of the Mate caused or contributed to the stranding of the vessel.

The appeal will be dismissed with costs, which will include the fees of the assessors pursuant to Rule 114 of the Rules in Admiralty.

Judgment accordingly.

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March 16,
April 22
July 23

NOVA SCOTIA ADMIRALTY DISTRICT

BETWEEN:

ROVER SHIPPING CO. LTD.....PLAINTIFF;

AND

THE SHIP *KAIPAKI* AND HER OWNERS ..... } DEFENDANTS.

Shipping—Collision—Duty of ship in fog—Article 16, International Rules of the Road—Defendant ship entirely at fault.

Held: That defendant ship did not take reasonable care to avoid collision between it and plaintiff's ship because it failed to comply with Article 16 of the International Rules of the Road by not stopping its engines on hearing the first fog whistle of plaintiff's ship and in altering course after the first whistle and again on hearing the second whistle of plaintiff's ship without in either instance ascertaining the position of the other ship.

2. That plaintiff's ship not having changed her course after hearing the whistle of defendant ship and having exercised reasonable care the sole cause of the collision between the two ships was the negligence of defendant ship.

ACTION for damages resulting from a collision at sea between defendant ship and one owned by plaintiff.

The action was tried before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax.

C. B. Smith, K.C. for plaintiff.

F. D. Smith, K.C. for defendant ship.

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ROVER SHIPPING CO. LTD. v. THE SHIP KAIPAKI AND HER OWNERS

Carroll D.J.A.

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

CARROLL D.J.A. now (July 23, 1948) delivered the following judgment:

This action concerns a collision between the S/S *Liverpool Packet* owned by the plaintiff Company and the S/S *Kaipaki,* which occurred in a dense fog on September 24, 1947, at about 8.40 p.m. Daylight Saving Time (on the *Liverpool Packet*) and about 7.30 p.m. ship's time (on the *Kaipaki*). The approximate position of the ships at time of the collision was 45 deg. 30′ N. Lat. and 60 deg. 16′ W. Long. and about 11 miles off the South Coast of Cape Breton Island.

The *Liverpool Packet* is a steamship built in Saint John, N.B. in 1945, having a length 315 5/10 ft., beam or main breadth 46 5/10 ft., and her depth in hold from tonnage deck to ceiling amidship 23 feet. Her gross tonnage is 2894·31 and registered tonnage is 1651·35 tons. Her dead weight capacity 4,000 tons. She has a reciprocating triple expansion engine and her registered speed between 10 and 11 knots. She was laden with newsprint (a part cargo) of between 2,300 and 2,400 tons.

The *Kaipaki* is a single screw motor vessel; gross tonnage 5,862; net tonnage 3,421; length 460 feet overall; beam 59 ft. 2 in.; dead weight capacity about 9,750 tons; speed fully loaded 12½ knots; Doxford Diesel engines, right handed propellor, and had at the time about 4,000 tons general cargo (partly loaded), and forward draught 16 ft. 10 in. and 22 ft. 10 inches stern—(6 ft. down by the stern).

The S/S *Liverpool Packet* was on a voyage from Botwood, Newfoundland, bound for New York. She called at Sydney, Nova Scotia, for bunker coal, whence she sailed about twelve noon September 24, 1947. At two p.m. thick fog patches were encountered and the engine room telegraph was put on "Standby", which according to the Captain and Chief Engineer meant a speed of eight knots. This weather condition prevailed until about 8 p.m. when the fog became dense. The regulation sound signals were given on the whistle at regular intervals. At about 8.35 p.m. the fog signal of another ship was heard by the *Packet* which sounded ahead or a little on the starboard

bow. The engine room telegraph was put on "Stop" and the engines responded. Two further blasts were heard from the other ship at about one minute intervals which sounded one to two points on the starboard bow. On hearing the last of these blasts the engines of the *Packet* were put "full speed astern" and about one half minute later the masthead and port lights of the *Kaipaki* were seen about three points on the starboard bow. About two minutes later, between 8.40 and 8.42 p.m., the stem of the *Kaipaki* struck the *Liverpool Packet* on the starboard side, in way of the engine room, causing damage to the superstructure and hull through which sea water filled the engine room and stockhold to sea level and eventually some water entered the holds doing damage to cargo.

The S/S *Kaipaki* was bound from Providence, U.S.A., to Montreal with a part cargo (general) on board. Fog was encountered during the voyage, with intervals of clearing, which became dense during the afternoon of September 24th. At 5.59 p.m. the ship was proceeding at half speed, about 8 knots, steering 52 degrees true, sounding the fog signals at regular intervals. At about 7.45 p.m., ship's time, the fog signal of another ship was heard, which sounded right ahead, or fine on the port bow. Captain Cameron ordered "Slow" and then "Dead Slow" was rung on the engine room telegraph, which signal was made effective. This would mean a speed of between 4½ and 5 knots after the way had run off the ship. At the time the "dead slow" signal was given the course was altered 10 degrees to starboard. After a short interval, another fog blast was heard, which sounded about one point on the port bow. The course was then altered to another 10 degrees to starboard. Shortly after, the *Kaipaki* sighted the masthead light of the *Packet* two or three points on the port bow, and in a few seconds a green light.

The fog signal of each vessel was heard by the other at about the same time, a little more than five minutes before the actual collision. During the interval the movements of the S/S *Liverpool Packet* were in compliance with the Rules of the Road:

> A steam vessel, hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall so far as the circumstance of the case admit, stop her engines and navigate with caution until danger of collision is over.

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There is not any doubt that the movements of the S/S *Kaipaki* were not in accord with the Rule, indeed neither were her engines stopped nor caution displayed in the ships' navigation. In other words there are two distinct faults attributable to the Master of the S/S *Kaipaki* during that five minute interval:

1. In not stopping his engines on hearing the first fog whistle of the other ship;

2. In altering his course 10 degrees to starboard after the first whistle and again 10 degrees to starboard on hearing the second whistle of the other ship, without in either instance ascertaining the position of that other vessel.

A submission is made on behalf of the Master of the *Kaipaki* that there were circumstances which excused him from complying with the rule, or perhaps that the circumstances of this particular case did not admit or permit him applying the rule. In the preliminary Act it is set out in question 12 "it was considered neither safe nor prudent to stop the engine by reason of the strong westerly set striking the vessel" and in his evidence Captain Cameron suggested what amounts to the same thing; that stopping would cause his ship to lose steerage way; swing his ship's head around and put her across the track and in the road of the approaching vessel. There is far from sufficient evidence before me to warrant a finding that the set there had any such force at or near the place indicated—in fact some of the results of the soundings indicate a contrary conclusion. Putting it another way, it has not been shown to my satisfaction that the circumstances of the case rendered a departure from the rule necessary, that is the part dealing with engine stoppage. In the case of *The Vernon City* (1), the trial judge points out (and is quoted with approval in the Appeal Division by Mr. Justice Lewis):

> That in the case of a ship apparently acting in breach of Article 16 he would require strong evidence of special circumstances or special danger to exonerate her from non-observance of her duty under the rules.

It seems quite plain to me also that the *Kaipaki* did not take reasonable care to avoid the collision after breach of the first part of the rule, because she changed her course 10 degrees to starboard on two occasions without having

(1) L.R. (1942) P.D. 61.

ascertained the position of the *Packet*. I have no intention of giving any dissertation as to the unreliability of sound signals in fog as a means of ascertaining the position of the instrument whence the sound comes. It is accepted by all marine authorities, and is taken cognizance of by all courts having admiralty jurisdiction, that inferences made from fog signals as to locations of ships are not considered ascertainment of their positions. I quote from the judgment in *Nippon Yusen Kaisha* (1):

> In order that position of a vessel whose fog signal is heard by another vessel may be "ascertained" within the meaning of Art. 16 the vessel *must be known* by the other vessel to be in such a position that both vessels can proceed without risk of collision. An *inference* as to the vessel's position based upon the direction from which the fog whistle was heard, the probable course she is taking and the improbability of her crossing the fairway in a fog is not an ascertainment justifying a disregard of the precautions enjoined by the Article.

Lord MacMillan in his speech in the same matter said:

> The position of the *Toyooka Merie* was not in their Lordships' opinion "ascertained" within the meaning of the regulations. It was inferred not ascertained.

The observations of Sir Gorell Barnes in the case of *In Re Aras*, (2), has special application to the facts of the instant case, especially to the changes of the *Kaipaki* to starboard:

> I think it is exactly the same because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bow and is not justified in thinking that it is *broadening* unless he can make sure of it.

I find as a fact that the *Packet* did not change her course after hearing the whistle of the other ship. Her Master and others testified to that fact. The Master of the *Kaipaki* gave evidence that from his observations the *Packet* was swinging to port and continued to do so after sighting her. A very strong argument was advanced by *Kaipaki's* counsel that Captain Cameron's evidence should be accepted; this argument was implemented by other circumstances, and he suggested that I would have to find Captain Cameron a prevaricator if I accepted the evidence of the *Packet*. I do not think that is the necessary consequence. One is giving direct evidence of something, of his actual movements, the other is giving the result of his observations which under

(1) (1935) A.C. 177. (2) (1907) P. 28.

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the circumstances of the sudden surprise of finding the *Packet* where he did not expect to find her, and of his own instant manoeuvre led him to believe that she must have changed her course to port. I think Captain Cameron became a bit confused at the moment—indeed his recollections under cross-examination in England were confused. There are of course other circumstances in the whole case that indicate that there was no change in course by the *Packet*.

It is also urged by counsel that the *Packet* was not proceeding at a moderate speed through fog which is in direct violation of the first part of Article 16:

> Every vessel, shall in a fog mist, falling snow or heavy rain storm go at a moderate speed having careful regard to the existing circumstances and conditions.

For some time previous to the hearing of the whistles the *Packet* was proceeding at more than 8 knots. Under the conditions this was not a moderate speed within the meaning of the rule but it did not contribute to the collision. I am also of the opinion that the speed of the *Kaipaki* over 10 knots per hour—before the whistles were heard was also immoderate.

I am also of opinion that there was nothing the *Packet* could have done to avoid the collision; every reasonable care was exercised by her and as already indicated, I find that the sole and only causes of the collision and consequent damages was the defaults and negligence of the *Kaipaki*.

Both these vessels were properly manned and equipped and proper lookouts were being kept.

I have the concurrence on all these findings of the two nautical assessors who assisted me, that is on all findings which came within the ambit of their advice.

There will be judgment for the plaintiffs with costs.

Judgment accordingly.

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May 31
June 1,
2 & 3
July 24

BETWEEN:

SAMUEL COHEN.....APPELLANT;

AND

THE REGISTRAR OF TRADE MARKS..RESPONDENT

AND

THE EMPIRE SHIRT MANUFACTURING CO. LTD..... } OBJECTING PARTY.

Trade Marks—"Esco" and "Escone"—Similar wares—Similar marks—Likelihood of confusion resulting by contemporaneous use of similar marks in same area—The Unfair Competition Act 1932, secs. 2 (k) (l), 26 (f), 29 (1)—Appeal dismissed—Motion for declaration under s. 29 (1) of the Unfair Competition Act dismissed.

An application for the registration of the word "Escone" as a trade mark in connection with the sale of wares described as "ladies and girls fur coats, cloaks, coats, suits, sport coats, jackets, slacks, dresses and dress suits", was refused by the Registrar of Trade Marks. At the hearing of an appeal from such refusal the Empire Shirt Manufacturing Company Limited appeared as objecting party its word mark "Esco" having been registered for use in connection with wares described as "work shirts and other garments".

At the hearing of the appeal, appellant moved for a declaration under s. 29 (1) of the Unfair Competition Act 1932, that the word mark "Escone" has been so used by him as to become generally recognized by dealers and users of the class of wares in association with which it has been used as indicating that the appellant assumes responsibility for their character and quality throughout Canada.

Held: That the wares for which the mark "Esco" is registered and the wares for which appellant desires to register the mark "Escone" are similar within the meaning of The Unfair Competition Act 1932, s. 2 (*l*).

2. That the word marks "Esco" and "Escone" are similar within the definition of "similar" in The Unfair Competition Act 1932, s. 2 (*k*) since the contemporaneous use of both marks in the same area in association with the wares manufactured by the parties would be likely to cause users of such wares to infer that the same person assumed responsibility for their character or quality, or for their place of origin, and that confusion would thereby be brought about; the registration of the word mark "Escone" is therefore barred by s. 26 (*f*) of The Unfair Competition Act due to the prior registration of the word mark "Esco".

3. That the motion for a declaration under s. 29 (1) of The Unfair Competition Act must be dismissed as the evidence does not establish the essentials of such application.

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APPEAL from the refusal of the Registrar of Trade Marks to register the word mark "ESCONE".

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

Jack Rudner for appellant.

H. Gerin Lajoie K.C. for objecting party.

No one appeared for the Registrar of Trade Marks.

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

CAMERON J. now (July 24, 1948) delivered the following judgment:

This is an appeal from the Registrar of Trade Marks who refused the application of the appellant to register the word mark "ESCONE." By order of this Court the Objecting Party was added as a party to these proceedings. At the hearing the Registrar of Trade Marks appeared, but was not represented by counsel and took no part in the proceedings.

Under date of December 31, 1945, the appellant applied for registration of his word mark "ESCONE" for use on wares described as:

boys', girls', men's and women's fur coats; ladies' cloaks, suits, dresses, sportswear and blouses; and men's coats, suits and sportswear; infants' and children's fur coats, coats, suits, dresses, blouses, shirts and sportswear; men's shirts, overalls and working suits.

In his application the appellant stated that he had used the mark since the 1st of December, 1937, on the wares above mentioned. At the hearing it was well established that the appellant had not at any time manufactured or sold many of the articles above referred to. Following notice from the Registrar that the statement of wares on the application was not satisfactory, the appellant filed an amended application for registration of the same mark for wares described as:

ladies' and girls' fur coats, cloaks, coats, suits, sport coats, jackets, slacks, dresses and dress suits.

On August 31, 1934, the Objecting Party had obtained registration of its word mark, consisting of the word

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"ESCO," as applied to "work shirts and other garments," under No. N.S. 4580, Reg. 15. The Registrar, being of the opinion that the said trade mark "ESCO" might be similar to the word mark "ESCONE," notified the Objecting Party of the application for registration of the word "ESCONE"; and the Registrar, being of the opinion that the objections then raised by the Objecting Party were not frivolous, notified the appellant under the provisions of sec. 38 (2) of the Unfair Competition Act, 1932, that his application was refused.

The issues are defined in the pleadings. On April 2, 1948, the Objecting Party filed its Notice of Objection in which it set out the facts which I have above mentioned, alleged that the word "ESCO" and the word "ESCONE" were "similar," that the wares as to which the said word mark "ESCO" *had been registered* and those as applied to which the appellant had sought registration of "ESCONE," were "similar," and that the contemporaneous use in the same area of the said marks, both as applied to garments or clothing, would be liable to cause confusion. In its answer to the Objecting Party's statement of objections the appellant, after traversing the objections raised, denied that the marks were "similar" and in par. 12 stated:

> 12. That the wares to which the said mark "ESCO" *has been registered,* and those as applied to which appellant has sought registration in his name of the word mark "ESCONE" are not similar within the meaning of the Unfair Competition Act, 1932.

In reaching a conclusion as to whether the registration of the word mark "ESCONE" was properly refused, it is necessary to consider the issues as raised by the pleadings, on two main points: (1) are the wares in connection with which the appellant desired to register his mark "ESCONE" similar (within the definition thereof in sec. 2 (*l*) of the Unfair Competition Act) to the wares for which registration of the trade mark "ESCO" had been granted to the Objecting Party in 1934, namely, "work shirts and other garments"; and (2) is the word mark "ESCONE" similar (as defined in sec. 2 (*k*) of the Unfair Competition Act) to the registered trade mark of the Objecting Party, "ESCO," registered in 1934.

I shall first consider the question of similarity of wares. As has been noted above, the pleadings have confined this

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issue to a comparison between the wares to which the mark "ESCO" has been registered, namely, "work shirts and other garments," and those wares in connection with which the appellant desired to register "ESCONE." Nowhere in his pleadings does the appellant seek to establish his case on the ground that his wares should be compared with those on which the Objecting Party has, in fact, used its mark. At the hearing counsel for the Objecting Party objected to evidence submitted on behalf of the appellant to indicate what garments the Objecting Party had manufactured and on which it had used the mark "ESCO." I reserved my decision thereon, permitting the appellant to give such evidence subject to my later ruling as to its admissibility. In view of the issues as raised in the pleadings and mentioned above, I am of the opinion that such evidence is irrelevant and should not be admitted. The appellant has not launched a motion under sec. 52 (1) of the Act to have the register amended so that the word "ESCO" should be limited to those garments which the Objecting Party had manufactured, but his counsel, in argument, suggested that I should make such an order. I must refuse to give consideration to that matter until it is properly before the Court.

The "wares" in connection with which the Objecting Party's mark is registered are "work shirts and other garments." In the Shorter Oxford English Dictionary (Third Edition, reprinted 1947), the word "garment" is defined as follows:

> any article of dress; in sing. esp. an outer vestment; in pl.—clothes.

Undoubtedly each of the enumerated "wares" referred to in the appellant's amended application is within the term "clothes." I have no hesitation in finding, therefore, that in the manner in which the issues are before me, the "wares" for which "ESCO" is registered and the "wares" for which the appellant desires to register "ESCONE," are similar within the meaning of sec. 2 (*l*) of the Unfair Competition Act. The appellant admits that all the articles he manufactures are garments. It may be added, however, that if I am in error in excluding the evidence above referred to, that such evidence establishes beyond question that the Objecting Party had at times manu-

factured and sold certain of the "wares" for which the appellant seeks registration of its mark and bearing the word mark "ESCO," and more particularly certain coats, sport coats and jackets used by men and women, and boys and girls.

Reference may be made to the case of *Vasenolwerke Dr. Arthur Köpp Aktiengesellschaft* v. *The Commissioner of Patents and Chesebrough Mfg. Co.* (1). In that case the appellant applied for the registration of "Vasenol" and the respondent, owner of the trade mark "Vaseline," appeared as Objecting Party. In that case the late President of this Court stated at p. 205:

> For the purposes of the Unfair Competition Act I think it can fairly be said that the wares for which Chesebrough is registered in Canada, and the wares for which the applicant seeks registration in Canada, are similar.

On his finding that the wares were similar and that the words "Vasenol" and "Vaseline" were similar, the application was refused.

The remaining question for consideration in the appeal is whether the word marks "ESCO" and "ESCONE" are similar within the definition contained in sec. 2 (*k*) of the Unfair Competition Act, which is as follows:

> (*k*) "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use by 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.

"ESCO," the registered mark of the Objecting Party, is made up of the initial letters of the words "empire" and "shirt" and the abbreviated form of "company." It has been widely used by the Objecting Party for a great many years, the evidence establishing that it was in use long before 1934 when it was registered. The business of the Empire Shirt Company was commenced in 1894. It is now of a very substantial nature, doing business throughout the whole of Canada, employing up to six hundred persons, at times using 3,200 yards of cloth a day, its total annual output now running over $2,000,000. Sales are made to wholesalers, jobbers and to chain stores. It has turned

(1) (1935) Ex. C.R. 198.

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out as many as 10,000 garments a day bearing its mark "ESCO." It is admitted that its word mark was registered before the appellant first used his mark "ESCONE."

The word mark "ESCONE" was adopted by Samuel Cohen, the appellant, as the phonetic equivalent of "S. Cohen." Mr. Cohen commenced his present business in 1930 and now manufactures ladies' coats and suits and dress suits. At one time he made dresses, slacks and fur coats, but these lines have been discontinued. In his application for registration he stated that the mark "ESCONE" had been first used by him in 1937, but in evidence he stated that he thought it had been in use two or three years before that date, but was not quite sure. His total sales in 1947 exceeded $400,000 and about 80 per cent of his output was sold under the "ESCONE" mark. For many years he has been using a label bearing that mark and the word "Reg'd." He states that he thought he gave instructions to a former solicitor, now deceased, to have the mark registered and assumed that it had been done, but would not swear that he had ever given such instructions. While an employee gave some verbal support to this statement, no documentary evidence of any sort was produced to establish that such was the case. He admits that he was never advised that registration had been granted but merely assumed that his instructions were carried out.

On the evidence it is clear that the goods manufactured by the appellant are in the main more expensive than those made by the Objecting Party. They are of more expensive materials and of a nature that usually requires a personal fitting, such as ladies' cloaks, coats, jackets and suits. They are sold in departmental stores, leading retail stores and some of the chain stores. The Objecting Party now manufactures principally negligee, dress, sport and work shirts; pyjamas, night shirts, sport and coat jackets; men's underwear, winter style shirts; boys' and girls' scout and utility shirts; and many of these articles, while designed primarily for men and boys, are purchased and worn by women and girls as well. Since the registration of its mark the Objecting Party has made ladies' pyjamas, lingerie, dresses and other articles for women and girls only; but ladies' pyjamas, dresses, playsuits, smocks and overalls have not

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been made for some years. The "ESCO" wares are sold in all types of stores handling dry goods and furnishings. The mark "ESCO" is widely used by the Objecting Party on its cheques, invoices, statements, stationery, and on its tags and labels and packaging, as well as in advertising.

It is established by the evidence that in some specialty stores—such as the better class ladies' coat and dress shops —the goods now manufactured by the Objecting Party would not likely be on sale; and that in large departmental stores the goods of the appellant and the Objecting Party would both be sold, although possibly in different departments. On the other hand, it is shown that in chain stores and general stores where there is less or no departmentalization of goods wares similar to those of both parties hereto would be on sale on adjacent—or in some cases on the same —counters.

The principles to be followed in reaching a conclusion as to whether two word marks are similar are set out in many cases. Reference may be made to *The British Drug Houses Limited* v. *Battle Pharmaceuticals Limited* (1), affirmed in the Supreme Court of Canada, 1946, S.C.R. 50. Kerwin, J., in delivering judgment, cited the test referred to in the speech of Viscount Maugham in the House of Lords in the case of *Aristoc Limited* v. *Rysta Limited* (2), as follows:

> 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.

The general approach to the solution of a problem of this kind was stated by Parker J. in the *Pianotist Company Ld's Application* (3), as follows:

> You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of

(1) (1944) Ex. C.R. 239.
(2) (1945) A.C. 68.
(3) (1906) 23 R.P.C. 774 at 777.

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customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

This statement was quoted with approval by Davis J. in the *Pepsi-Cola* v. *Coca-Cola case* (1).

In this case it is admitted that there is no proof that confusion has arisen, although the wares of the parties bearing their respective marks have both been sold throughout Canada since 1937 at least. That is a matter to be taken into consideration but it is not here the determining factor. The fact that there has been no proven confusion may be attributed, I think, to the fact that during those years the goods of the Objecting Party, in the main, have been of a relatively inexpensive character and mainly designed for men and boys (although widely used by women and girls as well), while the goods of the appellant have been more expensive and limited to ladies' coats, cloaks, jackets and suits. But it is to be kept in mind that the application of the appellant also includes ladies' dresses and slacks, both of which have been manufactured in the past by the Objecting Party, and that there is nothing to prevent the latter from again manufacturing these articles, or the other articles which it now manufactures from other and more expensive materials, and using its mark "ESCO" thereon. In fact, the evidence is that the Objecting Party now proposes to expand its lines and has taken steps to do so. If that is done, then undoubtedly the wares of the parties hereto will be in more direct competition than at present.

Keeping in mind the principles laid down in the cases to which I have referred, I have reached the conclusion that the word marks "ESCO" and "ESCONE" are similar within the definition of that word (Supra). "ESCONE" is made up of the entire word "Esco" and two additional letters. The sound of the two final letters of "ESCONE" does not distinguish that word from the word "ESCO"

(1) (1940) S.C.R. 17 at 32.

unless pronounced in a very clear manner, the emphasis being entirely on the first four letters which have exactly the same sound as the Objecting Party's mark. A dealer in the wares of both parties, due to his superior knowledge of the origin of such goods, might have but little difficulty in distinguishing them. But the user of such goods, and particularly one having but an imperfect recollection and desiring to purchase under the trade description, would be most likely to be confused. Applying the tests both of sight and sound, I have reached the conclusion that the contemporaneous use of both the marks in the same area in association with the wares manufactured by the parties hereto would be likely to cause users of such wares to infer that the same person assumed responsibility for their character or quality, or for their place of origin, and that confusion would thereby be brought about. The registration of the word mark "ESCONE" is therefore barred by the provisions of sec. 26 (*f*) of the Unfair Competition Act due to the prior registration of the word mark "ESCO."

I have not overlooked the argument of the appellant that the Objecting Party has acquiesced in the use of the word "ESCONE." I find, however, that in fact there has been no such acquiescence. I accept the evidence of the general manager of the Objecting Party that he had heard of the use of the word "ESCONE" but once. In 1941 his Toronto jobber told him that he had heard that the word "ESCONE" was being used but there is no satisfactory evidence to show that he knew by whom it was being used, or on what goods. He had no direct knowledge of its use until notified of the appellant's application in 1945, from which date its registration was opposed.

In my opinion the Registrar's decision was right. The appeal will be dismissed with costs to the Objecting Party, after taxation.

The other matter for consideration is the motion brought by the appellant in these proceedings. At the opening of the hearing, counsel for the appellant filed a Notice of Motion which on the same date had been served on the Registrar of Trade Marks and counsel for the Objecting Party. This motion was for a declaration under the provisions of sec. 29 of the Unfair Competition Act that the word mark "ESCONE" had been so used by the

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appellant as to become generally recognized by dealers in and/or users of the class of wares in association with which the said mark had been used, as indicating that the said appellant assumed responsibility for their character or quality throughout Canada. This motion was made in the alternative and was to be considered only if the Court, on the main appeal, was of the opinion that the said word mark "ESCONE" was not registrable and had dismissed the appeal.

I am of the opinion that this motion must be dismissed. At the opening of the hearing, when the motion was referred to by counsel for the appellant, I stated that I would not give consideration to the motion until the appeal was concluded. No objection was taken to that ruling, but upon the completion of the evidence led by the appellant his counsel asked that all evidence so introduced should be considered as evidence in support of this motion. Counsel for the Objecting Party had proceeded on the understanding that the entire motion would be dealt with at a later stage and had therefore neither cross-examined the witnesses called by the appellant in connection with the motion, nor did he later lead any evidence in opposition to the motion. However, at the conclusion of the trial, I heard argument by both parties on the motion itself, subject to the objection raised by counsel for the respondent. Inasmuch as the Objecting Party had no notice of this application until the opening of the hearing of the appeal, and had therefore no opportunity of calling any evidence in regard thereto, I am of the opinion that the application for short leave to serve the Notice of Motion should have been refused. On the merits, also, I am of the opinion that the motion should be dismissed.

It is an essential part of any application under sec. 29 (1) of the Unfair Competition Act that the applicant should satisfy the Court that the proposed mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced, or for their place of origin. The present application is made on the basis that the mark

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"ESCONE" has become generally recognized by dealers or users as indicating that Samuel Cohen assumes responsibility for their character or quality throughout Canada. None of the evidence submitted by the appellant establishes this to be the case. There is evidence that the word "ESCONE" has been used by the appellant on his wares since about 1935, although in his application for registration he stated that the first user was in 1937. There is also some evidence that purchasers of his goods have asked for them under the name of "ESCONE." There is no evidence, however, to indicate that "ESCONE" has been used so as to have become generally recognized by dealers in and/or users of the appellant's wares as indicating that Samuel Cohen assumes responsibility for their character or quality. The Notice of Motion referred to the affidavit of Samuel Cohen, dated May 31, 1948, but counsel for the appellant did not read the said affidavit when the motion was heard. In any event, that affidavit, which is that of the appellant himself, is not helpful to his case. He states in par. 5:

> that the said unregistered trade mark "ESCONE" has become generally recognized by dealers in and/or users of the class of wares in association with which the said mark has been used as indicating that I, the said Samuel Cohen, assume responsibility for their character or quality throughout Canada.

That evidence, of course, is quite inadmissible as being entirely hearsay.

Exercising the discretion vested in the Court by sec. 29(1) of the Act, this motion will be dismissed. The Objecting Party is entitled to its costs of the motion.

Judgment accordingly.

1948

Apr. 26, 27
July 24

BETWEEN:

ROMEO MALBOUF ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Negligence—Master and servant—No liability of master for negligent acts of servant when servant not on master's business.

Held: That where a servant does not start upon his master's business and is in no way in the course of following it the master is not liable for damages caused by the servant's negligence during such period.

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PETITION OF RIGHT by suppliant claiming damages for injuries suffered and allegedly caused by negligence of a servant of the Crown in the course of his duties or employment.

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

Hyman Soloway for suppliant.

Michael E. Anka for respondent.

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

O'CONNOR J. now (July 24, 1948) delivered the following judgment:

The suppliant claims damages from the respondent for loss which resulted when his 1937 Plymouth Sedan which was parked on the west side of Duke Street, in the City of Ottawa, south of the intersection of Lloyd Street, was struck by a motor ambulance owned by the respondent and driven by Frank Knox, a servant of the Crown, and which was proceeding south on Duke Street. The collision occurred about 9.40 p.m. on the 23rd of September, 1947. The suppliant's vehicle was damaged beyond repair.

There are two issues—the first, negligence and the second, whether at the time of the accident the driver, Frank Knox, was acting within the scope of his duties or employment.

The driver, Frank Knox, was at the time of the accident and had been for two years employed by the Department of Veterans Affairs and had been driving this particular ambulance for one year. His evidence may be summarized as follows: Each day at 8.45 a.m. he got the ambulance at the garage and drove to the Veterans' pavilion to pick up the patients who were to be taken to the Aylmer Building. That during the remainder of the day he had certain routine duties to perform at fixed times, such as taking new patients from the Aylmer Building to the various hospitals and calling at hospitals and bringing patients to the Aylmer Building. He also had to call for and deliver files and X-ray films during the day. His headquarters were at the Aylmer Building, and he received

his instructions from Mr. Fraser and Mr. McCorkell each day as to his duties that were not routine. As an example he would receive instructions from Mr. McCorkell to pick up patients at various points in the City and take them to a hospital or to meet patients on incoming trains, etc. He also stated that twice a month he delivered magazines to the various hospitals, but that he did not make a special trip for that purpose, but he only took them if he happened to be making a trip to that hospital. He stated that his day finished normally at 4.45 p.m. when he would then return the ambulance to the garage at Kent and Somerset Streets and leave it there.

He stated that on the 22nd of September, the day before the accident, he found a bundle of magazines marked, "Hull Sanitarium" on Mr. Fraser's desk and he took them downstairs, intending to deliver them, but that he was called out on some special duty so that he did not deliver the magazines. At 4.30 p.m. on the 23rd of September he had what he termed a "spare" and he decided that he would then take the magazines to the Hull Sanitarium, and he did so via the Inter-Provincial bridge and arrived there a little after 5 p.m. He stated the Sister in charge was busy so that he just put the magazines at the top of the stairs and then started back. When he reached the railroad tracks about one-quarter of a mile from Hull he stopped for the first track, then proceeded across it and then stopped for the second track. When he stopped, the engine stalled and in endeavouring to start it the starter locked. He tried to rock the vehicle in order to free the starter but because of the weight of the vehicle he was unable to do so: That although this was on one of the main highways only one or two cars passed and they refused to help him. Finally, about 7 p.m. two men came up and helped him and he then drove them to a beer parlour in Hull: That he overlooked the time but eventually he decided to leave: The man at the next table in the beer parlour asked for a lift and he gave him one.

That while he was proceeding south on Duke Street there were two cars proceeding north on Duke Street, one behind the other and that as he was approaching the first car, the car in the rear turned out to overtake and pass the preceding car. That to avoid a collision he turned the

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ambulance to the right and that he then saw the parked car of the suppliant for the first time, but that it was too late to avoid hitting it. After the collision he stopped the ambulance about one and a half blocks away and the man with him opened the door and that was the last he saw of him.

The suppliant stated that he had just finished some work at a house at 60 Duke Street and came out to his car which was parked in front of this house and had just got into it when he heard a siren sound. He decided to wait and he lit a cigarette and sat there. He heard a crash similar to that caused by a collision between two vehicles, turned around and saw the light of a vehicle which was about to strike the rear end of his car. He threw himself down and there was an impact and his car was driven 75 feet. He saw an ambulance continue south down Duke Street zigzagging across the road. He then got out and walked back to the intersection of Duke and Lloyd Streets where he saw another motor vehicle in the intersection which had been struck. He told of a conversation with the occupants which I hold is not admissible and which I reject. He stated that after he heard the siren he remained seated in the car and that there was not much traffic going (north on Duke Street) to Hull and that he did not see two cars travelling north at that time. His evidence was:

Q. Well did you see any cars coming towards you and cut out into the centre of the road?

A. No.

Three officials of the Department were called. Mr. Churchward said that certain magazines were received by him from time to time and he instructed Mr. Fraser, his assistant, to have Frank Knox deliver them. That never, at any time, were any of these magazines sent to the Hull Sanitarium, and that the magazines that were delivered to the other hospitals were never delivered on a special trip, but only when the ambulance happened to be going to that particular hospital.

Mr. Fraser, the District Transport Officer, said that Frank Knox was employed as a driver and worked directly under him and received all his instructions from him, with the exception of the instructions which were given by Mr. McCorkell as to picking up certain patients: That the only

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magazines that were ever delivered were those that were received through Mr. Churchward, and that none of these magazines were ever for the Hull Sanitarium. He stated that he had not instructed Frank Knox to deliver any magazines to the Hull Sanitarium.

Miss Doran, a receptionist at the Hull Sanitarium, said that she was on duty in September, 1947, from one to three and six to nine p.m., and that she had never received magazines from the Department of Veterans' Affairs while on duty, nor to her knowledge had any magazines been received at any time from the Department of Veterans' Affairs.

Mr. McCorkell said that he gave instructions each day to Frank Knox to pick up the various patients, but that he had never instructed Frank Knox at any time to deliver any magazines to any hospital.

The suppliant's evidence as to what happened at the time of the collision is in direct conflict with the evidence given by Frank Knox. I accept the evidence of the suppliant.

I find that Frank Knox was driving at an excessive rate of speed. The suppliant's vehicle was struck so violently that it was driven 75 feet from the place where it was parked. I find that Frank Knox did not have the vehicle under control and that he was not keeping a proper lookout. The injuries to the motor vehicle of the suppliant resulted from the negligence of Frank Knox.

The evidence given by Mr. Churchward and Mr. Fraser is at variance in certain respects with the evidence given by Frank Knox. I accept the evidence of Mr. Churchward and Mr. Fraser.

I find that the driver, Frank Knox, did not start out on the respondent's business when he left the Aylmer Building, but solely for his own purposes, and undertaken without the knowledge or consent of the respondent. He was not, therefore, at the time of the collision acting within the scope of his duties or employment. If he had started on the respondent's business and had deviated from the course on some business of his own, then the respondent might have been held liable because deviations are always a question of degree.

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But when the servant does not start upon his master's business and is in no way in the course of following it, the master is not liable.

In *Mitchell* v. *Crassweller* (1), Jervis, C.J., said:

I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance.

In *Joel* v. *Morison* (2), Parke, B., said:

The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

In *Storey* v. *Ashton* (3), Cockburn, C.J., said:

I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment.

Nor can it be said that when the driver left the beer parlour with the intentions of taking the ambulance to the garage that he re-entered upon the work he was employed to perform. Because not having started out on the respondent's business, his frolic would not end until he returned the ambulance to the Aylmer Building or to the garage.

The result is, much as the loss to the suppliant is to be regretted, that the suppliant, in my opinion, is not for the reasons I have given, entitled to the relief sought against this respondent. If it had been necessary to compute the damages of the suppliant I would have assessed them at $800.00. The suppliant's claim will, therefore, be dismissed, but under the circumstances, without costs.

Judgment accordingly.

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(1) (1853) 13 C.B.R., 235 at 245.
(2) (1834) 6 Car. & P. 501 at 503.
(3) (1869) L.R. 4 Q.B. 476 at 479-480.

1948

Jan. 22, 23
July 30

BETWEEN:

ANNA HINCHEY MARTIN.....APPELLANT;

AND

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

Revenue—Income—Excess profits—Excess Profits Tax Act 1940, c. 32, s. 2 (1) (g)—"Carrying on business"—Landowner renting own properties and providing various services therewith is engaged in a commercial enterprise—Appeal dismissed.

Appellant inherited a number of houses and apartment buildings and also furniture and fixtures. She rented the houses and apartments to tenants, except for a room in one of the apartments which she retained for her own use. Appellant acquired new houses and apartments as her own property and these she also rented to tenants. Some of these houses and apartments she rented furnished and in some instances supplied heat, refrigeration and electric stoves, linen and furniture. She employed janitors and office assistants. At no time did she manage or let property belonging to any one other than herself. Appellant was assessed for excess profits tax and from such assessment she appealed.

Held: That the appellant carried on business within the meaning of s. 2(1) (*g*) of the Excess Profits Tax Act as the services supplied were not something separate and apart from the letting of the apartments, that is, the land owning; that what was let paid for and used were the apartments plus the services as constituting one composite whole, and appellant was not a mere owner leasing her own property but was engaged in a commercial enterprise.

APPEAL under the Excess Profits Tax Act.

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

Rutledge C. Greig for appellant.

J. J. McKenna and *Miss Helen Currie* for respondent.

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

O'CONNOR J. now (July 30, 1948) delivered the following judgment:

These are appeals from assessments made under the Excess Profits Tax Act, Statutes of Canada, 1940, chap. 32, for the years 1940, 1941, 1942 and 1943.

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The appellant filed returns for the years 1940 and 1941 under the Excess Profits Tax Act, 1940, and the Minister of National Revenue sent a Notice of Assessment to the appellant pursuant to Section 54 of the Income War Tax Act, R.S.C., 1927, chap. 97, altering the amount of the tax as estimated by her in her return.

The appellant did not file returns for the years 1942 and 1943, and the Minister determined the amount of the tax to be paid by the appellant pursuant to the provisions of Section 47 of the Income War Tax Act. Under section 14 of the Excess Profits Tax Act, 1940, Sections 40 to 87, both inclusive, of the Income War Tax Act apply to matters arising under the provisions of the Excess Profits Tax Act.

The appellant served Notices of Appeal from the assessments upon the Minister, and the Minister affirmed the assessment. The appellant filed Notices of Dissatisfaction and the Minister confirmed the assessments.

The sole issue disclosed by the pleadings is whether or not the appellant carried on business in respect of real estate within the meaning of paragraph (*g*) of Section 2 of the Excess Profits Tax Act, 1940.

Under Section 2(1) (*g*) of the Excess Profits Tax Act, 1940, profits in the case of a taxpayer other than a corporation means the income of the taxpayer derived from carrying on one or more businesses, as defined by Section 3 of the Income War Tax Act. If the appellant carries on business within the meaning of Section 2(1) (*g*), then the provisions of the Excess Profits Tax Act, 1940, apply.

The relevant section of the Excess Profits Tax Act, 1940, is 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.

The appellant in her evidence said that she had inherited a small duplex on the death of her mother in 1933 and that on her father's death in 1936, she inherited a number of houses and apartment buildings valued at $161,000 and furniture and fixtures valued at $5,000. She used the

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front room in an apartment which she retained for herself as a combination living room and office. She let the houses and apartments and collected the rents. If a tenant wanted a furnished apartment, and if she had furniture available, she would furnish an apartment. If all the furniture was in use she would let the apartment unfurnished and advise the tenant to rent furniture from furniture stores which carried on that type of business. When her furniture was not being let it was stored. Out of the rentals from the houses and apartments she purchased additional houses and apartments and she converted single houses into duplexes and apartments and in some cases she let houses as shared accommodation. She did not sell any of the properties at any time. From 1936 to 1943 she handled only her own property and during that time she did not manage or let property belonging to anyone else.

In 1939 she filed a declaration in the partnership register in the Registry Office for the Registry Division in which she certified; (*a*) That I intend to carry on the business of a rental agency for real estate at premises known for municipal reasons as 269 Slater Street, in the City of Ottawa, under the firm name and style of the Sun Realty Company; (*b*) That the said business shall be deemed to have commenced on the first October, 1939; (*c*) That I am the only person associated in the said business.

She stated that she did this because she was tired of people calling on her and she used the name "Sun Realty Company" to hide from the tenants. Her telephone listing was changed to "Sun Realty Company". She had printed and used letterheads headed the "Sun Realty Company" with the address and telephone number, and her letter to the Department is on this letterhead. She had erected a Neon sign to advertise that there were apartments and houses to let. In 1940 she had over 150 tenants in the various apartments and houses, and she added to her holdings during the period in question 1940-1943.

Evidence was tendered by the respondent as to what the appellant did after 1943. Counsel for the appellant objected to this and I reserved the question. I am of the opinion that it is not admissible and I reject it.

During 1940-1943 the appellant let the apartments and houses in a number of ways. In the case of a duplex she, in some cases, supplied coal and the tenants or one of them

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did the firing. In all other cases the appellant supplied heat for the apartments. She also supplied refrigeration for many of the apartments. She supplied electric stoves and furniture to the extent that she had furniture available. And in some cases she supplied linen. She employed janitors for the various apartments and had office assistants on a part time basis.

The statement of revenue and expenditures attached to the 1941 return shows the following items:

Fuel	$6,151.91
Advertising	137.65
Telephone	140.23
Office and apartment cleaning	128.69
Automobile expenses for the business	800.00
Office supplies, stationery and postage	43.28

In 1943 the fuel charged was $8,969.49. The total revenue in 1940 was $49,380.57; in 1941 $59,231.89; in 1942 $68,-131.46 and in 1943 $74,149.14. The increase came, in part, from the additional properties acquired during the period but, chiefly, from increased occupancy and to a small extent from higher rentals.

The furniture was repaired and replaced from time to time. In the 1942 statement an item was charged for this of $1,404.30 and in 1943, $3,443.20.

No evidence was given as to the terms of the various lettings. I assume this was because the orders of the Wartime Prices and Trade Board had the effect of permitting the tenants to remain in possession without regard to the term of the original lease. And that this was so during the whole of the period in question.

No evidence was given as to the rents charged. I assume that following the usual practice the amounts charged would, in the majority of the letting other than single houses, include heat, refrigeration and electric stoves, but that if furniture and linen were supplied these amounts would be increased.

Neither the word "business" nor the expression "carrying on business" are defined in the Excess Profits Tax Act. There is no principle of law which lays down what carrying on business is. Neither the English nor the Canadian decisions lay down any principle or definition or legal test to be applied. All questions of this nature must of necessity

be decided upon the facts of the particular case under consideration; per Locke J., in *Argue* v. *Minister of National Revenue* (not yet reported).

In *Erichsen* v. *Last* (1), the Master of the Rolls said:

I do not think there is any principle of law which lays down what carrying on of trade is. There are a multitude of incidents which together make the carrying on a trade, but I know of no one distinguishing incident which makes a practice a carrying on of trade, and another practice not a carrying on of trade. If I may use the expression, it is a compound fact made up of a variety of incidents.

And Brett, L.J., said at page 425:

Now, I think it would be first of all nearly impossible and secondly wholly unwise to attempt to give an exhaustive definition of when a trade can be said to be exercised in this country. The only thing that we have to decide is whether upon the facts of this case it can be said that this Company is carrying on a profit earning trade in this country.

A landowner in dealing with his own land and granting leases thereof and so receiving rents and profits is not carrying on business. But the question here is has the appellant reached the point where land ownership has passed into commercial enterprise in land. In *The Rosyth Building & Estates Co., Ltd.*, v. *P. Rogers* (2), the Lord President said:

It may in the ordinary case be difficult to determine the point at which mere ownership of heritage passes into the commercial administration by an owning trader, but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts . . .

The cumulative effect of the facts already set out lead me to the conclusion that the appellant carried on business within the meaning of Section 2(1) (*g*) of the Act.

The services, heat, refrigeration, electric stoves, furniture and linen were not something separate and apart from the letting of the apartments, i.e., the land owning. What was let, paid for and used were the apartments plus the services, as constituting one composite whole.

On the facts here, in my opinion, the appellant was not a mere owner leasing her own property but was engaged in commercial enterprise. The accommodation of the property was used as the subject matter of the business.

For these reasons the appeals will be dismissed with costs.

Judgment accordingly.

(1) (1881) 4 T.C. 422 at 423.

(2) (1918-24) 8 T.C. 11 at 17.

1947
Jan. 13, 14
1948
Sept. 4

ENTRE:

SA MAJESTÉ LE ROI, sur l'information du Procureur Général du Canada, DEMANDEUR;

ET

ARTHUR SAUVAGEAU, JOSEPH SAUVAGEAU, CLÉOMEN SAUVAGEAU, THE PRICE NAVIGATION CO. LTD., et DAME MARIE POLIQUIN MALONE, faisant affaires seule sous le nom et raison sociale de J. C. MALONE AND COMPANY DÉFENDEURS.

Crown—Action to recover expenses incurred by the Crown in removing a wreck—The Navigable Waters' Protection Act, R.S.C. 1927, c. 140, ss. 13 (b), (14) (1) (2) (3), 15 (a), 16 (1) (2), 17 (1) (second sub. par. a)—Wreck—Obstruction to navigation—Removal—Joint and several liability of owner of the barge and person in charge thereof for costs of removing wreck—Charterer of barge not liable being neither the owner, nor the person in charge thereof—Powers of the Minister of Transport under s. 16 (1) of the Act with respect of the sale of a wreck and the proceeds thereof are discretionary.

A barge owned by defendants Sauvageau and chartered by defendant J. C. Malone and Company sank in the north channel of the St. Lawrence River while being towed by a tug, the property of defendant The Price Navigation Co. Ltd. Because of its obstruction to navigation and failure on the part of defendants to remove it, the wreck was removed under the supervision of the Department of Transport. The action is to recover the expenses thus incurred by the Crown.

Held: That defendants Sauvageau, as owners of the barge, and defendant The Price Navigation Co. Ltd., as the person in charge thereof, are jointly and severally obliged, by virtue of section 17 (1) (second sub. par. *a*) of the Navigable Waters' Protection Act, to reimburse the Crown the expenses incurred by it in removing the wreck.

2. That defendant J. C. Malone and Company, as charterer of the barge, is not liable for the expenses of removal, being neither the owner, nor the manager owner nor the master nor the person in charge thereof as enacted by the same section of the said Act.

3. That under section 16 (1) of the said Act the Minister of Transport was not bound to cause the wreck to be sold and to apply the proceeds thereof in reimbursement of the expenses incurred.

INFORMATION exhibited by the Attorney-General of Canada to recover expenses incurred by the Crown in removing a wreck as an obstruction to navigation.

The action was tried before the Honourable Mr. Justice Angers at Three Rivers, Quebec.

William Morin, K.C. for plaintiff.

C. Russell Mackenzie, K.C.; Joseph Gravel, K.C.; Brock Clark for defendant Price Navigation Co. Ltd.

Léon Méthot, K.C. for defendants A. Sauvageau, J. Sauvageau, Cléomen Sauvageau.

Lucien Beauregard, K.C. for defendant Dame Marie Poliquin-Malone.

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

ANGERS J. now (September 4, 1948) delivered the following judgment:

Le demandeur réclame des défendeurs, conjointement et solidairement, la somme de $18,168.32 pour coût de l'enlèvement de l'épave de la barge "Belœil" sombrée dans le fleuve St-Laurent, près du Cap Charles, sur le côté nord du chenal, le 25 septembre 1941.

Dans son information le Procureur Général du Canada, pour et au nom de Sa Majesté, déclare ce qui suit:

le 25 septembre 1941, les défendeurs Arthur, Joseph et Cléomen Sauvageau étaient les propriétaires des 64 parts de la barge "Belœil", enregistrée à Montréal sous le numéro 103,342, d'une longueur de 156·8 pieds, d'une largeur de 25·3 pieds, d'un tonnage brut de 489·94 tonneaux et d'un tonnage enregistré de 261·59 tonneaux;

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

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

durant le remorquage de la barge "Belœil" par le "Chicoutimi", la navigation de la dite barge était sous le contrôle exclusif du "Chicoutimi";

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Angers J.

au moment de son naufrage, la barge "Belœil" était affrétée par la défenderesse J. C. Malone and Company et transportait des marchandises pour le compte de celle-ci;

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

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

après le naufrage de la barge "Belœil", les navigateurs ayant à naviguer dans ces parages se plaignirent à l'agent des Transports à Montréal des dangers auxquels les exposait l'épave de la dite barge;

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

nonobstant les mises en demeure susdites, les défendeurs négligèrent d'enlever l'épave de la barge "Belœil";

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

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

les opérations de l'enlèvement durèrent du 6 au 22 juin 1942 et coûtèrent $18,168.32;

la dite somme de $18,168.32 fut payée à qui de droit à même les deniers publics du Canada;

les défendeurs, par lettre du procureur du ministère des Transports, datée du 25 juillet 1942, furent mis en demeure de payer conjointement et solidairement la dite somme de $18,168.32.

Pour défense à l'action du demandeur, les défendeurs Sauvageau allèguent ce qui suit:

ils admettent que le 25 septembre 1941 ils étaient les propriétaires des 64 parts de la barge "Belœil" enregistrée à Montréal sous le numéro 103,342, telle que désignée dans le premier paragraphe de l'information;

ils admettent que durant son remorquage par le "Chicoutimi" la navigation de la barge "Belœil" était sous le contrôle exclusif de ce dernier;

ils nient ou ignorent les autres allégations de l'information;

Et plaident spécifiquement:

le 25 septembre 1941 ils n'étaient pas en charge de la barge "Belœil", n'avaient aucun contrôle sur elle et les personnes en charge d'icelle n'étaient ni leurs serviteurs ni leurs préposés;

dans le cours de juillet 1941, par contrat verbal intervenu entre eux et Sarsfield Malone, arrimeur, des Trois-Rivières, ils ont loué à celui-ci, qui en a pris le contrôle absolu, leur barge "Belœil" au prix de $18 par jour;

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

si la dite barge a sombré, tel qu'allégué dans l'information, ce sinistre est dû à la faute et à la négligence de ceux qui en avaient la charge, ces faute et négligence consistant:

a) dans le fait d'avoir procédé à faire le voyage alors que le temps était très mauvais et qu'il aurait été facile de se mettre à l'ancre, surtout avant de procéder dans cette partie du fleuve où le courant est fort et d'une grande vélocité;

b) dans le fait que la personne en charge du convoi ou ses préposés ont négligé de surveiller la barge et même de s'intéresser à des signaux que leur a faits une personne, qui se trouvait dans celle-ci, durant au moins une demi-heure avant son naufrage;

les défendeurs Sauvageau ne peuvent être tenus responsables du sinistre en vertu du droit commun, tant pour les raisons susmentionnées que parce qu'ils n'étaient pas en charge de la barge lorsqu'elle a sombré et causé une obstruction à la navigation;

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

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le demandeur ou ses préposés n'ont pas renfloué la dite barge et ne se sont en aucune façon conformés aux dispositions de la Loi de la protection des eaux navigables et ils n'ont aucun recours contre les dits défendeurs.

Pour réponse à la défense des défendeurs Sauvageau le demandeur:

demande acte des admissions y contenues, en nie les autres allégations et déclare spécifiquement ce qui suit:

le contrat intervenu entre les défendeurs et Sarsfield Malone et celui par lequel ce dernier aurait sous-loué ou transporté la barge "Belœil" à The Price Navigation Company Limited pour le transport du bois sont non pertinents et ne peuvent exonérer les défendeurs de leurs obligations;

les actes de faute et négligence reprochés, dans le paragraphe 9 de l'information, à ceux qui avaient la charge de la barge "Belœil" lors de son naufrage ne peuvent exonérer les défendeurs Sauvageau de leurs obligations à l'égard de l'épave de la dite barge, dont ils étaient les propriétaires.

Pour défense la défenderesse The Price Navigation Company Limited plaide ce qui suit:

elle admet la plupart des allégations essentielles de l'information;

elle nie que la date du naufrage de la barge "Belœil" soit le 25 septembre 1941;

elle nie que la navigation de la dite barge était sous le contrôle exclusif du remorqueur "Chicoutimi" et dit que son contrôle était à la charge du capitaine et de l'équipage ou des propriétaires;

la barge "Belœil" a sombré vers 1 h. 20 du matin le 26 septembre 1941 pendant un gros temps de violence telle qu'il constituait un cas de force majeure ou de fortune de mer;

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

le demandeur n'a pas allégué de faits pouvant constituer une réclamation en droit contre la défenderesse.

Pour réponse à la défense le demandeur demande acte des admissions y contenues, en nie les autres allégations et déclare:

ce n'est que par suite de la négligence des défendeurs en cette cause d'enlever l'épave et après avoir demandé des soumissions à des entreprises intéressées dans le renflouement ou le déplacement des épaves que le Ministre des Transports a dû, dans l'intérêt de la navigation, prendre l'initiative de l'enlèvement et du déplacement de l'épave de la barge "Belœil".

Pour défense la défenderesse, Dame Marie Poliquin Malone (J. C. Malone & Company), allègue:

elle admet que la barge "Belœil" a sombré dans le fleuve Saint-Laurent durant le mois de septembre 1941;

elle nie que la dite barge était affrétée par elle comme faisant affaires sous le nom de J. C. Malone & Company et ajoute qu'en fait, à cette époque, Sarsfield Malone faisait affaires sous la raison sociale J. C. Malone & Company et que ce n'est qu'en février 1942 que la défenderesse a été enregistrée comme faisant affaires sous ce nom;

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

le télégramme et la lettre mentionnés dans l'information font foi de leur contenu;

elle n'était pas obligée en fait ni en loi d'enlever l'épave de la barge "Belœil";

si la somme de $18,168.32 a été payée pour l'enlèvement de cette épave, la dite somme était exorbitante et au delà du coût raisonnable qui aurait pu être encouru pour cet enlèvement;

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

comme question de fait, la barge "Belœil" avait été affrétée à temps par la firme J. C. Malone & Company pour un prix quotidien et les personnes en charge de la dite barge n'étaient pas les serviteurs ou employés de la défenderesse mais ceux des propriétaires, par qui ils étaient payés;

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le demandeur n'a pas allégué de faits pouvant constituer une réclamation en fait ou en droit contre la défenderesse.

Pour réponse à la défense le demandeur:

demande acte des admissions y contenues, notamment à l'effet que:

a) la barge "Belœil" a coulé dans le fleuve Saint-Laurent en septembre 1941;

b) au moment du naufrage de la dite barge Sarsfield Malone faisait affaires sous la raison sociale J. C. Malone & Company, le demandeur ajoutant que la défenderesse Dame Marie Poliquin-Malone est aux droits et obligations de feu Sarsfield Malone;

c) la barge "Belœil" avait été affrétée par la firme J. C. Malone & Company à tant par jour;

nie les autres allégations de la défense.

La preuve révèle, entre autres, les faits suivants.

Un extrait du registre des navires au port de Montréal, produit comme pièce P-1, laisse voir que la barge "Belœil" a été enregistrée en 1931, sous le numéro 103,342.

Le 25 septembre 1941, jour de l'accident, la barge "Belœil", dont les 64 parts étaient enregistrées au nom des défendeurs Sauvageau, transportait du bois de pulpe du bassin de la rivière Chaudière aux usines de St. Lawrence Paper Mills Company aux Trois-Rivières, pour le compte de la défenderesse Dame Marie Poliquin-Malone (J. C. Malone & Company), qui l'avait affrétée. La barge "Belœil", avec deux autres qui n'offrent aucun intérêt en la présente cause, était touée par le remorqueur "Chicoutimi", propriété de la défenderesse The Price Navigation Company Limited.

Lorsque la barge "Belœil" est partie du bassin de la rivière Chaudière à destination des Trois-Rivières vers 6 h. ou 6 h. 30 du soir, il y avait un vent léger du sud-ouest.

Henri-Paul Sauvageau, matelot sur la barge "Belœil" ce soir-là, a fait à l'audience un croquis indiquant la position du remorqueur et des trois barges qu'il touait; ce croquis a été coté comme pièce P-2. Le témoin y a indiqué par la lettre T le remorqueur, par la lettre P les deux barges

autres que le "Belœil" et par la lettre B la barge "Belœil". La distance entre celle-ci et les deux autres a été mentionnée comme étant d'environ quinze pieds.

La coque de la barge "Belœil" était en acier, le pont et la cabine du pilote en bois. Le soir de l'accident la barge était en bonne condition et navigable.

Henri-Paul Sauvageau déclare que peu après le départ du bassin de la rivière Chaudière il est allé se coucher, qu'il s'est réveillé vers 11 h. ou 11 h. 30, qu'il est allé voir le capitaine, que celui-ci lui a dit que la barge était difficile à gouverner et lui a demandé d'aller voir si elle faisait eau. Il dit qu'il y avait environ quatre pieds d'eau dans le fond de cale, qu'il a fait des signaux de détresse au remorqueur avec un fanal pendant une vingtaine de minutes et qu'il n'a pas été tenu compte de ses signaux. Le témoin et le capitaine Daneau, constatant que la barge "Belœil" allait sombrer, sont montés sur un radeau pour éviter de se noyer. La barge "Belœil" a coulé peu après.

Le ministère des Transports a fait poser une bouée lumineuse au-dessus de l'épave de la barge "Belœil", laquelle a été remplacée, à l'approche de l'hiver, par une bouée peinte en vert, couleur qui est censée indiquer l'existence d'une épave.

L'identité de la barge "Belœil" a été établie par Burdette Bristow, scaphandrier, dont les services ont été requis par le ministère des Transports. Son témoignage est partiellement corroboré par Aussant et Larsen.

La preuve fait voir que la barge "Belœil" a sombré, dans un chenal navigable, à l'endroit indiqué sur le plan P-11 par une croix et une ligne au crayon de mine à l'extrémité de laquelle se trouvent les initiales du témoin Larsen (A.L.) et les mots "plase where Belœil dissapear" (*sic*) et sur le plan P-10 par une croix et une ligne au crayon rouge à l'extrémité de laquelle se trouvent les initiales du témoin Aussant (E.A.).

L'épave de la barge "Belœil", qui était un obstacle à la navigation, a été enlevée par le ministère des Transports, à la suite de mises en demeure par lettres recommandées au défendeur Arthur Sauvageau et à Price Brothers.

La preuve fait voir que l'épave a été soulevée, transportée hors du chenal et déposée dans le fleuve.

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La cause est régie par la Loi de la protection des eaux navigables, S.R.C. 1927, chap. 140.

L'article 14 de cette loi décrète ce qui suit:

14. Si la navigation de quelque eau navigable sur laquelle s'étend la juridiction du Parlement du Canada est obstruée, embarrassée ou rendue plus difficile ou plus dangereuse par suite du naufrage d'un navire qui a sombré, s'est échoué ou s'est jeté à la côte, ou de ses épaves, ou de toute autre chose, le propriétaire, le capitaine, le patron ou l'individu en charge du navire ou autre objet qui constitue cette obstruction ou cet obstacle, doit immédiatement donner avis de l'existence de l'obstruction au ministre, ou au percepteur des douanes et de l'accise du port le plus rapproché ou dont l'accès est le plus facile, et placer et, tant que subsiste l'obstruction ou l'obstacle, maintenir, de jour, un signal suffisant, et, de nuit, une lumière suffisante pour en indiquer la situation.

2. Le ministre peut faire placer et maintenir ce signal et cette lumière, si le propriétaire, le capitaine, le patron ou l'individu en charge du navire ou de l'objet qui cause l'obstruction ou l'obstacle manque ou néglige de le faire.

3. Le propriétaire de ce navire ou de cette chose doit aussitôt en commencer l'enlèvement, qu'il doit poursuivre avec diligence jusqu'à ce que l'enlèvement soit complet; mais rien dans le présent article ne peut être interprété comme restreignant les pouvoirs que la présente loi confère au ministre.

L'article 15, ayant trait au pouvoir du ministre des Transports (ci-devant Ministre de la marine et des pêcheries), ordonne, entre autre:

15. Si le ministre est d'avis

a) que la navigation de ces eaux navigables est ainsi obstruée, embarrassée ou rendue plus difficile ou dangereuse par le fait d'un navire ou de ses épaves, sombrés, en partie sombrés, ou jetés à la côte ou échoués, ou par le fait de quelque autre obstacle; ou...

il peut, lorsque l'obstruction ou l'obstacle ainsi causé subsiste pendant plus de vingt-quatre heures, le faire enlever ou détruire de la manière et par les moyens qu'il croit convenable d'employer.

L'article 16, concernant le transport de l'obstruction, sa vente et l'emploi du produit, est ainsi conçu:

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

2. Il est tenu de remettre tout surplus du produit de cette vente du navire, de la cargaison ou des objets, au propriétaire, ou à toutes autres personnes qui ont droit de réclamer la totalité ou partie du produit de la vente.

L'article 17, relatif au coût de l'enlèvement ou la destruction d'une épave et à son recouvrement, contient, entre autres, les dispositions suivantes:

17. Lorsque, sous l'autorité des dispositions de la présente Partie, le ministre

a) .....

b) a fait enlever ou détruire quelque débris, navire ou épave, ou quelque autre objet par lequel la navigation de ces eaux navigables est devenue ou deviendrait vraisemblablement obstruée, embarrassée ou est ou serait rendue plus difficile ou dangereuse; ou

c) .....

et que les frais d'entretien de ce signal ou de ce feu, ou de l'enlèvement ou de la destruction de ce navire, ou de ses épaves, de débris ou d'un autre objet, ont été payés sur les deniers publics du Canada; et que le produit net de la vente, effectuée en vertu de la présente Partie, du navire ou de sa cargaison, ou de l'objet qui causait l'obstruction ou en faisait partie, ne suffit pas à couvrir le coût ainsi acquitté à même les deniers publics du Canada, l'excédent de ces dépenses sur ce produit net, ou le montant total de ces dépenses s'il n'y a rien qui puisse être vendu, ainsi qu'il est dit ci-dessus, est recouvrable, avec dépens, par la Couronne,

a) Du propriétaire du navire ou de l'objet qui causait l'obstruction ou l'obstacle, ou du propriétaire-gérant, ou du capitaine, du patron ou de l'individu en charge du navire ou de l'objet lorsque l'obstruction ou l'obstacle s'est produit; ou

b) De toute personne qui, par son fait ou par sa faute, ou par le fait ou par la négligence de ses serviteurs, a été cause que cette obstruction ou cet obstacle s'est produit ou a subsisté.

L'économie de la Loi de la protection des eaux navigables est qu'aucune obstruction ne doit être tolérée dans les eaux navigables. Il en va de la sécurité des navires qui y circulent.

Le mot "navire", aux termes du paragraphe (*b*) de l'article 13 de la loi, comprend "toute espèce de bâtiments, navires, bateaux ou embarcations, mus soit par la vapeur soit autrement, et employés soit aux voyages de long cours soit seulement sur les eaux de l'intérieur; et comprend aussi tout ce qui fait partie des machines, des attirails, de l'équipement, de la cargaison, du matériel ou du lest de ce navire".

Aucun des défendeurs n'ayant procédé à enlever l'épave de la barge "Belœil", le ministère des Transports, par l'entremise de son agent, R.-A. Wiallard, a, par lettres recommandées en date du 30 septembre 1941, notifié le défendeur Arthur Sauvageau et Price Brothers d'avoir à l'enlever immédiatement.

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La lettre adressée à Arthur Sauvageau, dont une copie a été produite comme pièce P-4, se lit ainsi:

Au sujet de la barge "Belœil" qui a sombré: vous êtes tenu, d'après les Règlements de la Marine Marchande du Canada, de voir à l'enlèvement de cette épave de la position où elle se trouve, et cela immédiatement, parce qu'elle obstrue la navigation.

Si vous ne prenez pas les mesures nécessaires pour que la chose se fasse sans tarder, je dois vous faire savoir que le Ministre, d'après les dits Règlements, possède tous les pouvoirs d'enlever l'épave, mais à vos frais. Vous êtes prié d'agir en conséquence.

La lettre adressée à Price Brothers, dont une copie a été produite comme pièce P-3, est ainsi conçue:

With reference to the Barge "Belœil" which, I believe, broke away from the Tug "Chicoutimi" which is owned by your company, I would, therefore, kindly ask, under the circumstances, that you take the necessary action to see that this barge is removed with the least possible delay, as it forms, as it lies, an obstruction to navigation.

Aucune réponse ne paraît avoir été faite à cette notification par le défendeur Arthur Sauvageau. Par contre, Price Brothers & Company Limited a, le 1er octobre 1941, écrit à Wiallard la lettre suivante (pièce P-7):

We acknowledge receipt of your registered letter of September 30th with respect to the barge "Belœil", and we are surprised to hear from you in view of the fact that we have no responsibility, the disaster having been due to a very heavy storm and not to negligence on our part or on the part of any of our employees.

You should contact the registered owner of the barge.

Aucune preuve n'a été faite qu'un avis au même effet ait été signifié à Dame Marie Poliquin-Malone (J. C. Malone & Company). Je noterai incidemment que l'avis n'a été donné qu'au défendeur Arthur Sauvageau et non à lui, Joseph et Cléomen Sauvageau, propriétaires enregistrés de la barge "Belœil". En outre l'avis a été donné Price Brothers et non à The Price Navigation Company Limited, la défenderesse. Rien dans la loi cependant n'exige la signification de pareil avis. Ces omissions et irrégularités ne peuvent conséquemment être fatales à l'action.

Les défendeurs Sauvageau, comme propriétaires de la barge "Belœil", sont tenus, en vertu du *deuxième* sous-paragraphe (*a*) du paragraphe 1 de l'article 17, de rembourser à la Couronne le coût de l'enlèvement de la dite épave. Ils avaient à bord de la barge "Belœil", lors de son naufrage, deux de leurs employés, savoir Henri-Paul Sauvageau et Daneau, qui étaient payés par eux. Le pro-

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cureur du demandeur a suggéré qu'ils avaient abandonné la barge sans tenter de pomper l'eau qu'il y avait dans la cale. Peut-être était-il trop tard pour ce faire, quand le capitaine et le matelot se sont rendu compte que la cale était à peu près remplie. Le fait est que la barge a coulé quelques instants plus tard. Daneau et Henri-Paul Sauvageau auraient-ils dû constater plus tôt que la barge s'emplissait d'eau graduellement? Il est possible qu'une surveillance plus active aurait contribué à éviter la catastrophe. D'un autre côté, il ne faut pas oublier que Henri-Paul Sauvageau a donné des signaux de détresse au remorqueur à l'aide d'un fanal, que ses signaux ont été aperçus par des membres de l'équipage du "Chicoutimi" et que celui-ci a néanmoins continué sa route sans modérer sa vitesse. Il est vraisemblable que la même conduite insoucieuse et négligente aurait été adoptée si les signaux eussent été donnés plus tôt. La barge "Belœil" était étanche et en état de naviguer. L'eau qui est entrée dans sa cale provenait des fortes vagues soulevées par un vent assez violent durant la soirée. Quoi qu'il en soit, ceci ne modifie point la responsabilité des défendeurs Sauvageau relativement à l'enlèvement de l'épave. Le statut est catégorique.

La preuve démontre que la défenderesse The Price Navigation Company Limited avait le contrôle et la charge de la barge "Belœil" lorsqu'elle sombra; le témoignage de Larsen sur ce point est catégorique. Elle me paraît donc tenue, comme les défendeurs Sauvageau, en vertu du même deuxième sous-paragraphe (*a*), au remboursement à la Couronne du montant que celle-ci a payé pour l'enlèvement de la dite épave.

Rien dans la preuve, à mon avis, ne justifie la demande de condamnation de Dame Marie Poliquin-Malone (J. C. Malone & Company), qui n'était qu'affréteur, n'était pas en charge de la barge "Belœil" et n'avait rien à voir relativement à sa navigation.

L'argument, soumis de la part de la défenderesse J. C. Malone & Company, qu'une loi statutaire doit être interprétée strictement me paraît bien fondée: *Anderson* v. *The King* (1); *Attorney General of Canada* v. *Brister & al.* (2);

(1) (1919) 59 S.C.R. 379, 384. (2) (1943) 3 D.L.R. 50, 55.

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Arrow Shipping Company Limited v. *Tyne Improvement Commissioners* (1); *Wolverhampton New Waterworks Company* v. *Hawkesford* (2); *Herron & al.* v. *The Rathmines & Rathgar Improvement Commissioners* (3); Maxwell, The Interpretation of Statutes, 9e éd., pp. 289 et s.; Craies, Treatise on Statute Law, 4e éd., pp. 107 et 114; Beal, Cardinal Rules of Legal Interpretation, 3e éd., p. 483.

En assumant que le ministre des Transports se soit conformé à toutes les exigences de la loi, je ne crois pas que la défenderesse J. C. Malone & Company puisse être tenue responsable du coût de l'enlèvement de l'épave de la barge "Belœil", parce qu'elle n'en était ni propriétaire, ni propriétaire-gérant, ni patron, ni capitaine, ni personne en charge aux termes du deuxième sous-paragraphe (*a*).

Le procureur de la défenderesse J. C. Malone & Company et celui des défendeurs Sauvageau ont soutenu que le ministre des Transports devait faire vendre l'épave dans le but de couvrir les dépenses encourues pour faire enlever l'épave et qu'il était tenu de remettre le surplus du produit de cette vente aux propriétaires. Ceci me paraît juste et équitable; cependant l'article 16 n'est pas impératif, mais simplement permissif; il dit que le Ministre "peut" et non "doit" ordonner que le navire soit transporté à l'endroit qu'il juge convenable pour y être vendu. L'article ajoute que le Ministre *peut* employer le produit de la vente à couvrir les dépenses par lui contractées pour faire enlever, détruire ou vendre le navire. L'article devient impératif quand il déclare au paragraphe 2 que le Ministre est tenu de remettre tout surplus du produit de cette vente au propriétaire.

La preuve révèle que le coût du déplacment de l'épave de la barge "Belœil" s'est élevé à $18,168.32, comme le constatent les états de compte pièces P-8 et P-9, et que cette somme a été payée à même les deniers publics du Canada durant l'année fiscale 1942-1943 (dép. Kendrick).

Il est établi en outre que la ferraille de la barge aurait représenté une valeur d'environ $5,500 mais qu'il aurait fallu déduire de cette somme celle de $500 pour réduire la barge à la ferraille.

(1) (1894) A.C. 508, 527.
(2) (1859) 6 C.B. (N.S.) 336, 335.
(3) (1892) App. Cas. 498, 523.

Le capitaine Weir a déclaré que pour sortir la barge "Belœil" entièrement de l'eau, l'enlever du chenal et la renflouer complètement il aurait fallu utiliser deux autres navires au coût de $6,000 et que le ministère n'était pas intéressé dans autre chose que de libérer le chenal. Si j'accepte cette version, qui n'est pas contredite, il n'y avait aucun avantage à vouloir renflouer et vendre l'épave de la barge "Belœil". Ce qui est étonnant c'est que les propriétaires de la barge "Belœil" n'aient pas jugé à propos de la renflouer immédiatement; il me semble certain qu'au moment de son naufrage la barge "Belœil" valait plus que $6,000. Vraisemblablement les défendeurs Sauvageau n'avaient pas les moyens requis pour exécuter ce renflouage. Ils subissent une perte dont ils ne sont certainement pas les principaux responsables, assumant qu'ils le soient partiellement.

Après avoir examiné attentivement la preuve, orale et documentaire, lu mes notes assez copieuses des plaidoiries, étudié la loi et la jurisprudence, j'en suis venu à la conclusion que les défendeurs Arthur, Joseph et Cléomen Sauvageau et la défenderesse The Price Navigation Company Limited sont, en vertu de la Loi de la protection des eaux navigables, conjointement et solidairement responsables du remboursement au demandeur de la somme de $18,168.32, avec intérêt à compter du 21 avril 1943, date de la signification de l'information, et les dépens. Il y aura jugement dans ce sens.

L'action, quant à ce qui concerne Dame Marie Poliquin-Malone, faisant affaires sous la raison sociale de J. C. Malone & Company, est rejetée, avec dépens contre le demandeur.

Judgment accordingly.

1948

May 25
Sept. 9

BETWEEN:

J. E. McCOOL LIMITED.....APPELLANT

AND

THE MINISTER OF NATIONAL REVENUE.....RESPONDENT

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 5(1)(a)(b), 65(1)—Depletion allowance on timber limits to be determined by the Minister on the basis of the actual cost thereof to the taxpayer but limited by the actual value thereof and not on the basis of the cost to a predecessor in title—Interest, not being interest paid on borrowed capital used in the business to earn the income, cannot be claimed as an operating expense—Appeal allowed in part.

Appellant company which is controlled by one McC. purchased from the latter certain assets including timber limits for which limits McC. had previously paid $35,000 00. In the agreement for sale no specific value was assigned to the timber limits but appellant among other considerations, gave McC. a demand note for $123,097.34 bearing interest at 5 per cent per annum.

In its tax return for the taxation year 1942 appellant claimed a depletion allowance on the timber limits on a valuation of $150,000.00 which it represented was the price paid for the limits and also, as an operating expense, certain interest paid on its note to McC. The Minister of National Revenue allowed depletion on the basis of cost price of the limits to McC. of $35,000.00. He disallowed all interest paid on the note as it was not interest on borrowed capital. Appellant company appealed from the Minister's decisions.

Held: That in considering what depletion allowance should be made the duty of the Minister is to consider the cost of the timber to the taxpayer and the actual value thereof. Fixing depletion allowance to the appellant on the basis of the cost to a predecessor in title is to proceed on a wrong principle and the assessment should be set aside.

2. That the interest paid by appellant to McC. on his note was not interest paid on borrowed capital used in the business to earn the income and was properly disallowed.

APPEAL under the Income War Tax Act.

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

Lee A. Kelley, K.C. for appellant.

Alastair Macdonald and *T. Z. Boles* for respondent.

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

CAMERON J. now (September 9, 1948) delivered the following judgment:

This is an appeal from assessments to income tax and excess profits tax for the taxation year 1942. The appellant had claimed a normal depletion allowance in the sum of $51,874.36, and also, as an expense, certain interest paid on its note for $123,097.34 to one T. E. McCool. In assessing the appellant on February 9, 1945, the respondent had allowed normal depletion in the sum of $10,445.94 only and had disallowed entirely all interest paid on the said note. It is in respect of these two items that the appeal is now taken.

In order to appreciate the issues in the case it is necessary to set out the facts in some detail. The president and chief shareholder of the appellant Company is one T. E. McCool. For some years prior to 1940 he owned and operated a farm near Pembroke, Ontario, and during the winter months operated a small log and pulp-jobbing business. On March 27, 1940, he secured from one Gertrude A. Booth an option to purchase for $35,000.00 certain timber licenses held by her from the Province of Ontario on lots in the County of Renfrew. This option to purchase (Exhibit 7) was open for acceptance until June 1, 1940, and could be taken up by payment of $10,000.00 by the date named, a further payment of like amount being due on January 2, 1941, and the balance on May 1, 1941, all without interest. After cruising the Limits, McCool estimated that he would be able to cut 20,000,000 feet B.M. from the properties, took up the option and made the down payment of $10,000.00.

Mr. McCool considered it advisable to operate the said Limits (which will hereafter be referred to as "the Booth Limits") and his other assets through the medium of an incorporated company. On August 31, 1940, he entered into an agreement (contained in Exhibit 3) with one Lawrence S. Ryan, Chartered Accountant, as trustee on behalf of the Company to be formed, by the terms of which he agreed to sell and transfer to the Company to be formed all the lands and assets set out in Schedule "A" to that

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agreement, which schedule included the Booth Limits, other limits, real estate and buildings, machinery, equipment, horses, cattle, camp equipment, trucks and cars, accounts receivable, shares in a certain company and a specified amount of cash on hand and in bank. Except in regard to accounts receivable and cash on hand and in bank, no values were assigned to the assets to be transferred. In consideration of the transfer of the assets to the Company to be formed, the Company was to (1) assume liabilities of the vendor in the sum of $37,684.20, (2) pay the vendor $400.00 in cash to be used in payment for the four shares of the incorporators of the Company, (3) allot to the vendor 596 fully paid up and non-assessable shares in the Company of a par value of $100.00 each, and (4) to make and give to the vendor a demand note for $123,097.34 bearing interest after September 1, 1941, at 5 per cent per annum. In the said agreement it was provided that the transfer of the assets from the vendor should be deemed to have effect from August 31, 1940, and the benefit of any operations carried on prior to such transfer was to enure to the Company. Any subsequent asset required by the vendor in connection with his business and prior to the transfer was, at the option of the Company, to be transferred to it.

The appellant Company was incorporated on October 20, 1941 by Dominion charter. By an agreement dated November 28, 1941 (contained in Exhibit 3), between the said T. E. McCool, the said Lawrence S. Ryan as trustee, and the Company, the said McCool, with the consent of the said trustee, agreed to sell and convey to the Company, and the Company agreed to purchase from him, all the assets mentioned in Schedule "A" to the agreement of August 31, 1940, together with one additional property in the town of Pembroke on the terms and conditions and for the consideration mentioned in the agreement of August 31, 1940. The said agreement was duly carried out, the assets transferred to the Company and the vendor received the consideration above mentioned, including the note for $123,097.34. On November 28, 1941, the said vendor directed the secretary-treasurer of the appellant Company to issue and allot the 596 shares to which he was entitled, in

a certain manner between his eight children and himself; and following that date and taking into consideration the incorporator's shares, the said T. E. McCool held 360 shares and each of his eight children 30 shares, a total of only 600 shares being issued.

At the Directors' Meeting held on November 28, 1941, T. E. McCool, after stating that he had entered into the agreement with Ryan dated August 31, 1940, and that he had an interest in the matters which would come before the meeting regarding the purchase of his assets, withdrew from the meeting. Subsequently, the directors considered these matters, approved of the acquisition of his assets on the basis of that agreement and passed a by-law authorizing the execution of the agreement above referred to and dated November 28, 1941. They further authorized the issue of the shares to T. E. McCool, as provided in the said agreement and the execution of its note to him for $123,097.34.

As stated above, the agreement of August 31, 1940, placed no individual valuation on the Booth Limits nor did the said agreement state the total value placed on all the assets to be conveyed to the Company. Under date of November 10, 1941, the said Lawrence S. Ryan—who was the chartered accountant of the appellant Company—addressed a letter to the shareholders of the Company, attaching a balance sheet of the Company outlining its opening position as of August 31, 1940. The letter and statement comprise Exhibit 5. In that statement the assets in all are valued at a total of $220,781.54 the Booth Limits being valued at $150,000.00. The liabilities also total $220,781.54, being made up of current liabilities of $37,684.20; issued capital stock (600 shares of a par value of $100.00 each) at $60,000.00, and the demand note to T. E. McCool for $123,097.34.

I shall first consider the appeal in regard to depletion allowances. During its fiscal year ending August 31, 1942, the appellant had cut 6,916,581 feet B.M. from the Booth Limits. In its tax return it had claimed an allowance for depletion at the rate of $7.50 per 1,000 feet B.M. so cut. Assuming that there were 20,000,000 feet in all in the Limits (as had been estimated by T. E. McCool), it had divided the sum of $150,000.00 (which it represented was

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the cost of the Limits to it) by 20,000,000 feet and thereby ascertained the figure of $7.50 per 1,000 feet B.M. as a proper depletion allowance. The respondent, in assessing the appellant, rejected the appellant's computation. In a letter accompanying its Notice of Assessment, and dated February 9, 1945, the following paragraph appeared:

> It has been ruled by the Deputy Minister of National Revenue (taxation) that the Timber Limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000 00, that the depletion allowable will be the result of dividing $35,000 00 by the total cruise and multiplying by the cut during the period, and that interest will not be allowed on the balance of the T. E. McCool account in arriving at the taxable profit. A depletion schedule "C" is attached. Depletion has been allowed in accordance with section 5(*a*) of the Income War Tax Act and the interest has been disallowed under section 6(*a*) of the Income War Tax Act.

The respondent, therefore, in fixing the depletion allowance, assumed that there were 20,000,000 feet B.M. in all in the Booth Limits and by dividing $35,000.00 by 20,000,000 feet, allowed depletion at the rate of $1.75 per M B.M., thereby reducing the normal allowance to $12,104.02 for the 6,916,581 feet cut in the fiscal year ending August 31, 1942. In the assessment, however, the respondent took into consideration the fact that the Company was incorporated only on October 20, 1941, and therefore allowed depletion to the appellant only for the period October 21, 1941, to August 31, 1942, a total of $10,445.94.

Notice of Appeal was given, the appellant stating inter alia that the Booth Limits were transferred to the Company at a valuation of $150,000.00 and giving as one of its reasons for appeal:

> (*a*) It should be allowed depletion on the basis of a valuation of $150,000 00 and not $35,000 00, the sum of $150,000 00 being the price paid by it for the said Limits when purchased from Mr. McCool and *being less than the actual market value of the said Limits at the date of acquisition by the appellant.*

Following the service of the Notice of Appeal, the Minister gave his Decision on November 23, 1945, and so far as this item of the Appeal is concerned, stated:

> The Honourable the Minister of National Revenue, having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating * * * hereby affirms the said Assessment in other respects on the ground that a just and fair allowance has been made under the

provisions of paragraph (*a*) of subsection (1) of section 5 of the Income War Tax Act of the amount of $10,445.94 in respect of depletion of a timber limit.

Notice of Dissatisfaction was given by the appellant on December 18, 1945, followed by the reply of the respondent affirming the assessment as levied. By order of the Court pleadings were delivered.

In 1942, sec. 5(1) (*a*) of the Income War Tax Act was as follows:

Sec. 5. *Exemptions and deductions*—1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) Depletion.—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.

This subsection and the nature of the discretion to be exercised by the respondent were recently under consideration in the case of *D. R. Fraser and Company* v. *Minister of National Revenue* (1). The judgment in that case establishes that the taxpayer has now no statutory right to a depletion allowance; and that the section confers on the Minister a discretion not merely as to the amount, but also as to whether any allowance for depletion should be made. But having determined that an allowance should be made, he must then fix an amount which "he may deem just and fair."

In the *Fraser Case* Estey J. said at p. 169:

The nature and character of the duties imposed upon the Minister under this section 5 (1) (*a*) would appear to be unchanged by the amendment. They remain, as stated by Lord Thankerton in Pioneer Laundry and Dry Cleaners Limited *v.* Minister of National Revenue:

* * * 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."

In reaching a conclusion as to whether the Decision of the respondent was against sound and fundamental

(1) (1947) S.C.R. 157.

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principles it is necessary to consider what material he had before him at the time he exercised his discretion and made the assessment, and at the time he gave his decision following the Notice of Appeal, and the reasons given by him.

Mr. W. F. Williams, Director-General of the Corporation Assessments Branch of the Taxation Division, Department of National Revenue, was examined for discovery and all of that examination was made part of the appellant's case. From that examination it appears that the Deputy Minister had before him the following documents:

(*a*) The option given to T. E. McCool by Miss Booth to purchase the Limits for $35,000.00.

(*b*) The trust agreement dated August 31, 1940, between T. E. McCool and Lawrence S. Ryan, referred to above.

(*c*) The balance sheet purporting to be the closing balance sheet as of August 31, 1940, for T. E. McCool personally, and in which the Booth Limits were valued at $35,000.00.

(*d*) The opening balance sheet of T. E. McCool Limited as of August 31, 1940, in which the Booth Limits were valued at $150,000.00.

(*e*) The appellant's income tax return for its fiscal year ending August 31, 1942, and the schedules attached thereto.

(*f*) A report of his assessor showing that the appellant Company had issued 600 of its 1,000 authorized shares, of which 360 were issued to T. E. McCool personally and the remaining 240 by the direction of T. E. McCool were issued in equal proportions of 30 shares to each of his eight children. This report also indicated that the 240 shares were given by T. E. McCool to his children and that on a valuation of $24,000.00 he had paid a gift tax of $1,000.00 in regard thereto. The minute book of the Company was not before the Minister but no doubt was examined by the assessor who made the report.

Mr. Williams was not in the Department at the time the assessment was made, but stated that in his opinion the division of the shares by Mr. McCool between himself and the members of his family would have influenced the decision of the Deputy Minister. He stated, "I would consider that the Company was Mr. McCool's company, that

he would have control as to the price to be fixed on any assets that were purchased from himself, and consequently that that was not a transaction as between strangers."

He added that he thought that the fact that Mr. McCool controlled the company might have had some bearing on the decision of the Deputy Minister.

In answer to a question as to whether any effort was made by the Deputy Minister to ascertain the market value of the Booth Limits in 1942, he said, "Yes, as far as market value is concerned they had a transaction. The Department usually looks at a transaction in regard to market value, if there is not a ready market * * * such as there is on the stock exchange, for example, or over the counter trading * * * at the last transaction that took place for cash, at arm's length or as between strangers. Now here was a transaction, the last transaction for cash between strangers, that only took place a month or two months before and was turned over immediately, approximately on the same day, from $35,000.00 to $150,000.00."

It is also in evidence that the Department of National Revenue (taxation) on February 19, 1942, adopted recommendations of the Timber Depletion Committee of the Income Tax Division and such recommendations were made public to the various timber associations. Included therein was the following:

> That the depletion allowance be such as to permit the owner of timber or the holder of a right to cut timber from Crown or private lands to recover successively and ratably out of income before tax such capital sums as he may have invested in acquiring such ownership or rights, and no more.

It is quite clear, therefore, that in making the assessment and affirming it in his Decision, the respondent, by his Deputy Minister, rejected the statements of the appellant that the Limits had cost the appellant $150,000.00 and that that sum was less than the actual value of the Limits at the time the appellant acquired them. Quite obviously the respondent did not consider that the sale to the appellant established a market value of $150,000.00. The respondent, in the letter to the appellant, stated very clearly that he

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would value the Limits at the cost price thereof to T. E. McCool—namely, $35,000.00. In so doing, did he violate sound and fundamental principles?

In general terms I think it may be said that the principle of taxation under the Income War Tax Act is the taxation of the net gains of the taxpayer. That principle as to depletion was put into practice by the Department of National Revenue (taxation) when it accepted the recommendation of the Timber Depletion Committee. That recommendation declared that the allowance should be such as to permit a taxpayer to recover out of income before tax such capital sums as he had invested in acquiring his timber. I do not suggest that such a general declaration of policy is in all cases binding on the respondent, for, as stated in the *Pioneer Laundry and Dry Cleaners Case* (1):

> These Departmental circulars are for the general guidance of the officers and cannot be regarded as the exercise of his statutory discretion by the respondent in any particular case.

In the *Fraser Case* (supra), Rand, J. stated at p. 164:

> It is, therefore, sufficient to say that whatever the effect of depletion allowance may, in particular cases, be, it nevertheless is designed only to enable the Minister broadly in time, factors and basis, *to afford assurance of the recovery of investment committed to the risk undertaken.* But what is to be the basis of returnable value? For instance, cost may be inapplicable to property demised: special considerations might affect it in mining ventures, and, as in the United States, place it either at the fair market value at the time of discovery, or a value ultimately ascertained by a percentage of gross return. But, apart from the latter, where there has in fact been a return of basic value or investment, the warrant for allowance has been removed. If here the measure, under the statute, is to be taken to be cost, then without more the case for the appellant disappears.
>
> Even conceding an absolute right to an allowance, *it is necessarily bound by the limitation of value* spread evenly over the asset as a whole; and since the statute does not prescribe the basis, the Minister must be free in any case to adopt one reasonably designed to carry out the purpose intended. On this assumption, I take the word "may" to include a discretion in that choice; and that the basis of actual capital investment may be used by him in any case is, I think, beyond doubt. Ordinarily the increments of return would attach to every unit of asset and value, but here the whole has been recovered by relation to part only of the asset.

In my view, the instant case is similar in many ways to *Pioneer Laundry and Dry Cleaners Limited* v. *Minister of National Revenue* (2). It is to be kept in mind that that

(1) (1940) A.C. 127 at 134. (2) (1939) S.C.R. 1.

appeal had to do with a depreciation allowance under the then section 5 (1) (*a*) which then read as follows:

"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 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 lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

That case is very well known and I do not consider it necessary to do more than quote a few passages from the dissenting judgments of the Chief Justice and Davis J., later approved in the Judicial Committee of the Privy Council.

At p. 5 Davis J. said:

The Commissioner of Income Tax put his denial of any amount for depreciation on the said machinery and equipment upon the ground that "there was no actual change of ownership of the assets" and they were "set up in the books of the taxpayer at appreciated values." In my view that was not a proper ground upon which to exercise the discretion that had been vested in the Minister. The Commissioner was not entitled, in the absence of any fraud or improper conduct, to disregard the separate legal existence of the Company and to inquire as to who its shareholders were and at what figures these assets had been carried on the books of some other individual, partnership or corporation.

And, at p. 6:

The appellant was a new owner for all legal purposes and its predecessor's depreciation allowance is immaterial when considering what is a reasonable amount to be allowed for its own depreciation. What is virtually said here against the appellant is—You are entitled to nothing because the beneficial ownership of your company is the same as the beneficial ownership of another company from which, indirectly, you purchased your machinery and equipment and we are entitled to look right through your legal existence and say that you are entitled to nothing at all for depreciation on your machinery and equipment.

In my view that is not a legitimate exercise of the discretion which Parliament vested in the Minister. I have not the slightest doubt that the Commissioner was as anxious to do justice as I am, but the public have been given the right to appeal to the Court from the decision of the Minister and if the Court is of the opinion that in a given case the Minister or his Commissioner has, however unintentionally, failed to apply what the Court regards as fundamental principles, the Court ought not to hesitate to interfere. I confess that I am influenced in this case by the insistence of many great judges upon the full recognition of the

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separate legal entity of a joint stock company and the impropriety in dealing with its affairs of ignoring its legal status as if it had never been incorporated and organized.

And, at p. 8:

The Income War Tax Act gives a right of appeal from the Minister's decisions and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law. But here the Commissioner acting for the Minister did exercise a discretion upon what I consider to be wrong principles of law and it is the duty of the Court in such circumstances to remit the case, as provided by section 65(2) of the Act for a reconsideration of the subject-matter stripped of the application of these wrong principles.

The judgment of the Judicial Committee of the Privy Council is reported in 1940 A.C. 127. At p. 137 Lord Thankerton, in delivering the judgment of the Board, stated:

Their Lordships agree with the Chief Justice and Davis J. that the reason given for the decision was not a proper ground for the exercise of the Minister's discretion and that he was not entitled, in the absence of fraud or improper conduct to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company and not its shareholders. Their Lordships agree with the reasons given by these learned judges, and their application of the authorities cited by them and it is unnecessary to repeat them.

In this case, as in the *Pioneer Laundry Case,* the Deputy Minister has based his decision on two grounds: (*a*) that there was no actual change of ownership of the assets, and (*b*) the assets (the Booth Limits) were "set up in the books of the appellant Company at appreciated values."

As held in the *Pioneer Laundry Case,* these were not proper grounds upon which to exercise the discretion vested in the Minister. As Davis J. said at p. 5:

The Commissioner was not entitled, in the absence of any fraud or improper conduct, to disregard the separate legal existence of the company and to inquire as to who its shareholders were and at what figures these assets had been carried on the books of some other individual, partnership or corporation.

What is virtually said against the appellant here is—You are entitled to some depletion allowance but only on the basis of the cost of the timber to your predecessor in title and not on the basis of the cost to you or its actual value. But the appellant was a new owner for all legal purposes and, in my view, is entitled to have the Minister

determine what is a just and fair allowance to it and not to a predecessor in title. In effect, the allowance for depletion given to the appellant is precisely the same as would have been allowed to T. E. McCool had he continued as owner of and had he operated the Limits.

In considering what depletion allowance should be made, I think that the first duty of the Minister is to ascertain the cost of the timber to the taxpayer. In the instant case there is now no doubt that the cost to the appellant was $150,000.00. It may be argued that on the material before the Minister there was no clear proof that such was the case; but I think that the evidence before him did fairly indicate that that was the cost and there was no evidence to establish that such was not the case. In any event, it has been esablished in evidence before me by both McCool and Ryan that the price put on the Limits at the time of the agreement of August 31, 1940, was $150,000.00. I think it may be fairly assumed that page 8 in Exhibit 5 (the opening balance sheet of the appellant Company as submitted by its auditor on November 10, 1941, and before the Directors' Meeting at which the purchase was authorized) contained the same values as T. E. McCool and Ryan had in mind when they signed the agreement on August 31, 1940. I do not see how otherwise the amount of the note at $123,097.34 could reasonably have been arrived at—the other unvalued assets being relatively of a minor nature.

But, as stated by Rand J. in the *Fraser Lumber Case* (supra), *the allowance is necessarily bound by the limitation of value* spread evenly over the asset as a whole. If cost to the taxpayer were the only matter to be considered, the statutory discretion of the Minister would be seriously interfered with and grave abuses could quite easily result. It is the duty, therefore, of the Minister to ensure that the cost on which depletion is to be based does not exceed the value of the wasting asset. It was asserted by the appellant in its Notice of Appeal that the cost of $150,000.00 was not in excess of the actual value of the timber. Again, it may be argued that this was not proven and that the only clear proof of value then before the Minister was the sale by Miss Booth to T. E. McCool of $35,000.00 some few months earlier.

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Be that as it may, it is now well established by the evidence given at the hearing that the value of the timber Limits when acquired by the Company was not less than $150,000.00. Objection was taken by counsel for the respondent to the admissibility of evidence as to the then market value. I reserved by finding in regard thereto but have reached the conclusion that it should be admitted. The question of value is clearly relevant to the issue and it is not barred by the provisions of section 65 (1) of the *Income War Tax Act,* as the appellant clearly raised that issue in its Notice of Appeal. The evidence of experienced, disinterested and competent valuators of timber with a full knowledge of the then values in that area indicates that the Limits were then worth from $150,000.00 to $250,000.00. That evidence is not contradicted in any way. The evidence also indicates that Miss Booth had no knowledge of the real value of her timber licenses, that she had inherited them from her father, had held them for about twenty-five years, and in 1940 was anxious to get rid of them.

I find, therefore, that in fixing depletion allowance to the appellant on the basis of the cost to a predecessor in title, the Minister proceeded on a wrong principle and the assessment should be set aside. In the case of *Minister of National Revenue* v. *Wright's Canadian Ropes Limited* (1) the Judicial Committee of the Privy Council (p. 125) stated that the power conferred on the Court under section 65 (2) of the *Income War Tax Act* to refer the matter back to the Minister for further consideration was limited to cases of the kind referred to in subsection (1) of section 65, namely, where matters not referred to in the Notice of Appeal or Notice of Dissatisfaction were admitted by the Court. Inasmuch as this was not the case here, I am unable to refer the matter back to the Minister for further consideration as I had at first thought it my duty to do. The issues have been fought out by action in this Court and inasmuch as I have found that the cost to the appellants of the Limits in question was $150,000.00, an amount which did not exceed the actual value of the timber, I think it is now my duty to allow the appeal on this point, and, as was done in the *Wright's Canadian Ropes Case,* direct that, under the in-

(1) (1947) A.C. 109.

herent jurisdiction of the Court, the assessment be referred back to the Minister for an adjustment of the figures consequential on the allowance of the appeal.

I find, therefore, that the appellant is entitled to depletion allowance at the rate of $7.50 per M.B.M. for all timber cut on the Booth Limits by it in its fiscal year ending August 31, 1942. It is now admitted that 6,916,581 feet B.M. were so cut by the appellant after its incorporation on October 20, 1941, and before March 1, 1942. I therefore refer the matter back to the respondent for a proper adjustment of the assessments, both under the Income War Tax Act and Excess Profits Tax Act consequential on the allowance of the appeal on this point. In making a new assessment under the Excess Profits Tax Act the appellant is entitled also to the additional allowance for depletion provided for in the memorandum of February 19, 1942, in the manner therein set out and on the basis of $7.50 per M.B.M. In view of the provisions of clause 2 of such recommendation in respect to additional allowance for depletion, the proper amount of such additional allowance would appear to be $20,582.41, as stated in a memorandum signed by counsel for both parties. If, however, there is any disagreement on this point, the matter may be spoken to.

The remaining point for consideration is the interest paid on the note to T. E. McCool under the circumstances above mentioned. The appellant claims that this should be allowed as an operating expense on the ground that the note represents borrowed capital used in the earning of its income and should be allowed under section 5 (1) (*b*) of the Act, which is as follows:

"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(*b*) *Interest on borrowed capital.*—Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security; by virtue of which the interest is payable.

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For the respondent it is argued that the payment of interest here is not interest on borrowed capital used in the business of the appellant to earn its income. In the letter of February 9, 1945, referred to above, it was stated that the interest was disallowed under section 6 (*a*) of the Act, but Mr. Williams in his Examination for Discovery stated that the disallowance was made under section 5(1) (*b*).

From that subsection it is apparent that interest may be allowed on borrowed capital secured to the lender by a note. But it is allowed only on borrowed capital. In my opinion, if there is to be borrowed capital, the taxpayer would have to be in the position of a borrower and some other party would have to be a lender. In this case the taxpayer was never a borrower from T. E. McCool and the latter did not at any time lend anything to the appellant. As between the appellant and the payee of the note, the relationship of borrower and lender did not exist at any time. The relationship between them at the time of the sale was that of vendor and purchaser and following the giving of the note the relationship was that of creditor and debtor. The note was given in respect of the unpaid part of the purchase money.

Reference may be made to the recent case of *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.* (1), in which it was held:

> The words "borrowed money" in paragraph 2 (1) in law required the relationship of a borrower and a lender, a relationship which did not exist in this case, but, even if the words were to be given some wider interpretation, the finding of the Commissioners that in ordinary commercial usage the relationship between the parties was not that of borrower and lender ought not to be disturbed.

In that case Tucker, L. J., in the Court of Appeal, said at p. 486:

> I find it difficult, if not impossible to appreciate how there can be borrowed money unless the legal relationship of lender and borrower exists between A and B. After all the words "borrow" and "lend" are not words of narrow legal meaning. They represent a transaction well known to business people which has taken its place in the law as a result of commercial transactions among the merchants of this country, and when the law, under the Bills of Exchange Act, or elsewhere, has to deal with matters of this kind, it is dealing with commercial transactions.

(1) (1948) 1 A.E.R. 482.

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In the case of *Dupuis Frères Ltd.* v. *Minister of National Revenue* (1) Audette, J., dealing with the same section as I am now considering, stated at p. 209:

> Therefore these shares used to pay for the purchase, and which go to make the capital authorized by the company cannot be classed as borrowed capital.

The interest paid by the appellant to T. E. McCool on his note was not in my view interest paid on borrowed capital used in the business to earn the income and was properly disallowed. The appeal on this point will be dismissed.

The appellant, having succeeded on the main point raised in the appeal, is entitled to its costs after taxation.

Judgment accordingly.

1948

May 4
Sept. 14

BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF;

AND

THE TORONTO TERMINALS RAILWAY COMPANY..... DEFENDANT

Crown—Action to recover money paid by the Crown beyond that authorized by contract—Payments made under a mistake of fact—Lack of evidence—Crown officer cannot bind the Crown to pay money beyond that authorized by contract—Lease sole authority for payment of money—Authority to pay cannot be widened by Crown officer—Order in Council required to widen authority to pay—Payments made after termination of contract or in excess of those authorized by it illegal, ultra vires—Principle underlying provision of the Assessment Act of Ontario, R.S.O. 1927, c. 272, s. 14 (1), (2) applicable in apportioning the assessed value of the properties.

Under a lease duly authorized and dated September 15, 1915, defendant leased to plaintiff, for the purposes of constructing thereon Postal Station A in Toronto, a parcel of land containing by admeasurement 43,811·958 square feet for a term of 21 years from September 1, 1915, renewable in perpetuity, "together with the free and uninterrupted right-of-way * * * through, along, over such of the courts * * * between the lands hereby demised and Bay and Front Streets, and of the carriage drives * * * for the purposes intended of the premises demised." In addition to the rent plaintiff convenanted to pay "all taxes * * * upon or in respect of the demised premises".

(1) (1927) Ex. C.R. 207.

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The parcel of land being part of a block of land which is bounded by Bay, Front and York Streets and had been leased by defendant from the City of Toronto and by the latter assessed as a whole and at a bulk sum, it was necessary to determine what proportion of taxes plaintiff should pay to defendant. This was done through some correspondence but in a rather obscure way, with the result that from 1916 to 1939 plaintiff paid taxes not only levied on the site, but also taxes levied on the lands between the site and Front Street which were subject to the right-of-way. On September 27, 1939, the property was expropriated by plaintiff and the latter paid, after the termination of the lease, the taxes levied in 1940 on both the site and the lands between the site and Front Street. The present action is to recover the money paid in excess of the amount the Crown covenanted to pay under the lease, on the ground that, prior to 1940, it was paid under a mistake of fact and under a mistake of fact and law for the year 1940, and also because the payments were not authorized payments and therefore recoverable.

Held: That the evidence does not establish the payments were made under a mistake of fact.

2. That a Crown officer had no authority to bind the Crown to pay taxes beyond those authorized by the lease.

3. That the lease was the only authority for the payment of taxes; that authority cannot be widened by a Crown officer. It would require an order-in-council.

4. That the payment made by the Crown in 1940, after the termination of the lease was not authorized, was illegal and ultra vires and so were the payments made from 1916 to 1939 that were in excess of those authorized by the lease.

5. That the principle underlying the provisions of the Assessment Act of Ontario, R.S.O., 1937, c. 272, s. 14(1), (2) is applicable in apportioning the assessed value of the property leased and the lands in front thereof which are subject to the right-of-way.

INFORMATION exhibited by the Attorney-General of Canada to recover money paid in excess of the amount the Crown covenanted to pay under a lease.

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

J. W. Pickup, K.C. for plaintiff.

A. D. McDonald, K.C. for defendant.

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

O'CONNOR J. now (September 14, 1948) delivered the following judgment:

Under an Information exhibited by the Attorney-General of Canada, as amended at the trial, the

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plaintiff claims payment by the defendant of (*a*) the sum of $31,074.53, being the difference between the amount actually paid by the plaintiff to the defendant in respect of municipal taxes for the years 1916 to 1939 inclusive, and the amount which the plaintiff alleges should have been paid to the defendant in respect of such taxes pursuant to a Lease of the site of Postal Station A which forms the east wing of the Union Station in the city of Toronto; and, (*b*) the sum of $12,914.62 paid by the plaintiff to the defendant in respect of municipal taxes for the year 1940.

The claim in respect to (*a*) is put first on the ground that the money was paid under a mistake of fact and in respect to (*b*) on the ground that the money was paid under a mistake of fact and of law; and secondly, in respect to both (*a*) and (*b*) that these payments were not authorized payments and therefore recoverable.

The defendant held a Lease from the city of Toronto of the block of land bounded on the north by Front Street, on the east by Bay Street, and on the west by York Street, together with certain other lands lying south of this block. The defendant offered to lease to the plaintiff a site required for Postal Station A and to construct, at the cost of the Crown, a building thereon which would form the eastern wing of the proposed Union Station. The building would be built at the same distance from the street line and be of the same style of architecture as the said station. The offer was accepted and the Lease and Contract were authorized by P.C. 2057, dated September 1, 1915 (Exhibit 2).

Under the Lease (Exhibit 1), dated September 15, 1915, the defendant leased to the plaintiff a parcel of land containing by admeasurement 43,811·958 square feet for a term of 21 years from September 1, 1915, renewable in perpetuity. The property is described in the Lease as commencing at a point 63′ 8¾″ from the southerly limit of Front street measured at right angles thereto and distant 48′ 8¾″ from the westerly limit of Bay street, measured on a line parellel to the southerly limit of Front street. The description from there on is a lengthy one because of certain jogs on the north and west side, but for the purposes here it

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is sufficient to say that it describes a rectangular area approximately 246′ 2″ on the north; 178′ 1″ on the west; 239′ 11″ on the south, and 182′ 11″ on the east.

The description in the Lease ends as follows:—

* * * (182′ 11″) to the place of beginning and containing by admeasurement an area of 43,811·958 sq. ft. be the same more or less, and as shown on the plan hereto attached; together with the free and uninterrupted right of way in common with the Lessor and all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways between the lands hereby demised and Bay and Front streets respectively, and of the carriage drives, roadways, courts, entrances and exits in and about the new Union Station premises as may be reasonably necessary for the full enjoyment for the purposes intended of the premises demised. To have and to hold all and singular the premises hereby demised or intended so to be and every part thereof, their and every of their appurtenances unto the said Lessee, His Successors and assigns, for, during and unto the full end and term of twenty-one years to be computed from the first day of September, 1915, and from thenceforth next ensuing and fully to be complete and ended.

Following the covenant to pay the rent the Lease provides:—

* * * and also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, including the municipal taxes for local improvements and works assessed upon the property benefited thereby, which now are or hereafter shall during the continuance of the said term be charged upon or payable in respect of the said demised premises, whether the same be rated or assessed on the said premises or on the landlord or tenant thereof. Provided that this covenant is not to be taken as an admission that the interest of the Crown in said property is subject directly or indirectly to taxation, the intention being that the covenant extends only to taxes, rates, etc., lawfully imposed and based upon the interest of the Lessor in said land.

And pursuant to the Contract authorized by P.C. 2057 (Exhibit 2), the defendant erected Postal Station A on the site described in the Lease (Exhibit 1).

The whole building, consisting of the Union Station and Postal Station A, was set back 63′ 8¾″ from Front street. Of this 63′ 8¾″ strip, 7′ in width adjoining the southern boundary of Front street formed part of the roadway (Front street), the next 25′ a concrete sidewalk, and on the next 32′ approximately, a depressed driveway (below the Front street level) was created. The building was also set back 48′ 8¾″ from Bay street on the east, and from York street on the west and these two areas were converted into drive-

ways (marked respectively carriage entrance and carriage exit on plan Exhibit 5), which joined the depressed driveway running in front of the building.

On the 13th December, 1915, W. G. Thurston, Esq., Barrister of Toronto, who was acting for the Crown, wrote the Deputy Minister of Public Works (Exhibit 4) in part as follows:—

The matter arose by way of an Appeal by the Toronto Terminals Company from the Assessment of the City of Toronto upon the property, a portion of which the Department of Public Works have leased from the Terminal Company. The block of land which is bounded by Bay, Front, the Esplanade and York street which has been leased by the City to the Terminals Company, was assessed as a whole, this block together with some other outlying portions being assessed at a bulk sum. Upon Appeal this was divided and the assessment on that portion of the land which is leased by your Department was confirmed as follows:—

the 48 feet 8¾ inches by 221 feet deep on the corner of Bay and Front streets being assessed at $1,350 a foot and the remaining 246 feet 2 inches running west on Front street by 178 feet deep at $850 00.

So far as the assessment itself is concerned, I think this is proper and it was in the interests of your Department to have the question of what this portion of land should be assessed at settled, otherwise the question was bound to have arisen between your Department and the Toronto Terminals under your covenant in the lease to your Department contained by which your Department covenants to pay the taxes assessed upon these lands. So far therefore as settling of the Assessment is concerned, I think that it has been to your advantage to have this done at this time and the Assessment is undoubtedly a fair one because the Judge inquired into the Assessments of all the surrounding properties and especially the assessments on the north side of Front street and the assessment of your leased property is quite in accordance with the Assessments and also with the value of the surrounding properties and in my opinion is not too high.

* * *

I do not see since the Crown has given the covenant that it can escape payment of taxes in respect of this property. As between the Toronto Terminals and the Crown however my opinion is following my conferences with Mr. H. H. Williams and hearing his views and analyzing the information which he has so kindly given me that the Crown should at least object to pay the taxes on the 48 feet 8¾ inches at the corner of Bay and Front streets which is assessed at $1,350 00 a foot. This is in reality a right of way and will be used by the Public and the liability of the Crown to pay taxes thereon may very well be open to question. This however is a matter between the Terminal Company and the Crown itself in respect of the covenant in the lease contained.

On March 16, 1916, W. C. Chisholm, Esq., General Solicitor for the defendant Company wrote to the Deputy Minister of Public Works (Exhibit 6) in part, as follows:—

You will remember the appeal which was taken from the City's assessment of this property to the County Judge and I presume Mr. Thurston

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wrote you advising of the result. While the matter is fresh in our minds I think it would be well to have defined what proportion of the taxes the Government should pay to the Terminals Company under the provisions of the lease. The revised assessment was arrived at by putting a rate of $850 00 a foot on the land on the south side of Front street and in talking to Mr. H. H. Williams I agreed that it would be fair that the Government should pay at that rate upon its actual frontage, although the Terminals Co. has to pay at a higher rate upon the vacant land between the east wing and Bay street. If you agree, please write me so that I may advise the Secretary of the Company.

In reply on the 31st March, 1916, the Deputy Minister of Public Works wrote to Mr. Chisholm (Exhibit 7) as follows:—

The Crown holds under a lease from the Toronto Railway Terminal Company a parcel of land situated, approximately, 68′ south of the southerly limit of Front street and 48′ 8¼″ west of the westerly limit of Bay street in the City of Toronto, having a frontage of 246′ 2″ paralleling Front street and a depth of, approximately, 182′ 11″ paralleling Bay street, and containing an area of 43,811·958 square feet. Upon an appeal by the said Company from the assessment of the City of Toronto upon the said demised lands and other premises, His Honour Judge Winchester confirmed the assessment upon the said demised lands at $850 00 per front foot of the Front street frontage of 246′ 2″ by a depth equal to the depth of the said demised lands.

I have to inform you that the Government accepts the decision of His Honour Judge Winchester, confirming the assessment at the amount above mentioned, and, pursuant to the terms of the lease, will pay, or refund to the Lessor, all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, including the municipal taxes for local improvements and works assessed upon the property benefited thereby, which now or hereafter shall, during the continuance of the term of the said lease, be charged upon or payable in respect of the said demised premises, upon an assessment of $850 00 per front foot of the Front street frontage of 246′ 2″ by a depth equal to the depth of the demised premises

On April 5, 1916 (Exhibit 8) Mr. Chisholm in a letter in reply said:—

I have your letter of the 31st ultimo agreeing to the suggestion contained in my letter of the 16th ultimo that the Crown should pay taxes on the frontage leased to it at the rate of $850.00 a foot.

He then goes on to point out that the assessment was made for the year 1917 and the four years following.

On the 7th April, Mr. Hunter replied to Mr. Chisholm's letter (Exhibit 9) stating that he was under the impression that $850.00 a foot was a fixed assessment but he now understood it was for the year 1917 and the four following years. He goes on to state:—

The Government accepts the assessment and will pay all taxes pursuant of the terms of the lease, but, of course, the Government reserves the right to appeal against the next assessment if it should be deemed advisable to do so.

Again on 22nd April, 1916 (Exhibit 11) Mr. Hunter in a letter to Mr. Chisholm states:—

The Government accepts the assessment and will pay all taxes pursuant to the terms of the lease.

The lands leased by the defendant from the City of Toronto were assessed as follows:—(Exhibit 20)—

Years 1916 to 1918 inclusive:		
Front and Bay Sts. 48′ 8¾″ x 246′ @ $1,350.00 per foot		65,785
Front Street West 752′ 8″ x 246′ @ 850.00 per foot		639,770
Front and York Sts. 48′ 8¾″ x 350′		Nil
Union Station rear lands Station Street closed Part Lots 41 and 42 Esplanade between Yonge and Bay Sts.	5·577 acres @ $90,000 per acre....	501,930
		$1,207,485

The site of Postal Station A is included in that portion of the assessment shown as Front Street west 752′ 8″ by 246′. This particular piece was assessed at $850.00 per front foot from 1916 to 1930, inclusive, and at $1,500.00 per front foot from 1931 to 1940.

In August, 1916, the defendant Company sent an account (Exhibit 3) to the Department of Public Works as follows:—

For your proportion of City of Toronto taxes for the year 1916 on the New Union Station property. Assessment based on frontage of 246′ 2″ @ $850 00.....			$ 209,241.67
General Rate.....	15M	$ 3,138.62	
War Tax.....	1M	209.24	
School Rate.....	6½M	1,360.07	
Propn. cost snow cleaning.....		2.50	
		$ 4,710.43	
Less discount.....		45.53	$ 4,664.90

Each year thereafter from 1917 to 1939 an account was sent to the Department of Public Works in the same terms, —"For your proportion of City of Toronto taxes for the year * * * on the New Union Station property. Assessment based on frontage of 246′ 2″ at $850.00," (and after 1931 at $1,500.00). Payment was made each year by the plaintiff to the defendant of the sum set out in the annual

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account. Each account was supplied to the resident architect in Toronto, examined by a representative of the Chief Architect's Branch in Ottawa, and then audited by the Chief Accountant or the Treasury Office.

In the years 1916 to 1939, both inclusive, the plaintiff paid to the defendant a total of $208,582.54.

On the 27th September, 1939, the property was expropriated by the plaintiff. In the year 1940 the defendant paid to the City of Toronto the municipal taxes charged against all of the lands leased by it from the City of Toronto, including the area leased to the plaintiff and which had been expropriated in 1939, and in the year 1940, forwarded to the Department of Public Works a statement in the following form:—

For City of Toronto 1940 taxes payable on land occupied by Postal Station "A".		
Assessment based on frontage of 246′ 2″ @ $1,500 00 per foot—$369,250.00.		
General @ 23·70 mills	$ 8,751.23	
Public School @ 11·45m	4,227.91	
	$12,979.14	
Less ¼ of 1% discount off 2nd and 3rd instalments $8,602.91	64.52	$12,914.62

The plaintiff paid the defendant the said sum of $12,914.62.

As the lands occupied by Postal Station A had been expropriated in 1939, there were no municipal taxes payable thereon in the year 1940.

The Crown covenanted to pay "all taxes * * * which now are or hereafter shall during the continuance of the said term be charged upon or payable in respect of the said demised premises whether the same be rated or assessed on the said premises or on the landlord or tenant thereof."

It is clear from the Lease that the "demised premises" consist only of the site described in the Lease. In addition to the site the plaintiff was given:—"together with the free and uninterrupted right-of-way in common with the Lessor and all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways *between the lands hereby demised and Bay and Front streets*, respectively, and of the carriage drives, road-

ways * * * in and about the new Union Station premises as may be reasonably necessary for the full enjoyment for the purposes intended of the premises demised."

The Crown did not covenant to pay taxes on the right-of-way and no taxes were levied on the easement itself. Nor did the Crown covenant to pay taxes on the lands which were subject to the easement. But the Crown did in fact pay "during the continuance of the said term" the taxes levied not only on the demised premises, i.e., the site, but in addition the taxes levied on the lands between the site and Front street which were subject to the easement. And paid, after the termination of Lease, the taxes levied in 1940, on both the site which for convenience will be referred to as "A" and the lands between the site and Front street which will be referred to as "B".

The claim for payment is first put forward by the Crown on the basis that the payments in excess of the amount which it has covenanted to pay under the Lease were paid under a mistake of fact. There is a division in the submission between the period prior to 1940 and the year 1940, but it is not necessary to deal with this in view of the conclusion which I have reached. The mistake of fact which the Crown alleges is this: that having been advised by its agent, Mr. Thurston, (Exhibit 4):—

> * * * and the assessment on that portion of the land which is leased by your Department was confirmed as follows: the 48′ 8¾″ by 221′ deep on the corner of Bay and Front streets being assessed at $1,350.00 a foot and the remaining 246′ 2″ running west on Front street by 178′ deep at $850.00.

and having received an account from the defendant:—

> For your proportion of City of Toronto taxes for the year 1916 on the New Union Station property. Assessment based on frontage of 246′ 2″ @ $850.00..... $209,241.67

the Crown, believing that the assessment of $850.00 per foot was to a depth only of 178′, and therefore only on the site, made the payments on that basis; whereas, in fact, the assessment of $850.00 per foot was to a depth of 246′ (Exhibit 20). And that under that mistake of fact the Crown paid such excess from 1916 to 1939, inclusive.

This contention is supported by Mr. Hunter's letter to Mr. Chisholm (Exhibit 7) in which he set out that upon the appeal the assessment "upon the said demised lands"

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was confirmed at $850.00 per front foot on the Front street frontage of 246′ 2″ by "a depth equal to the depth of the said demised lands". Against that contention is the fact that in Mr. Thurston's letter (Exhibit 4) he stated, "an assessment on that portion of the land which is *leased by your Department* was confirmed as follows:—48′ 8¾″ by 221′ deep on the corner of Bay and Front streets * * * and the remaining 246′ 2″ running west on Front street by 178′ deep". Mr. Hunter, when he dictated Exhibit 7 had before him the Lease from the defendant to the Crown, to which was attached a plan of the property leased (Exhibit 1). He sets out in his letter the fact that the Crown holds under a Lease from the Toronto Terminals Railway Company a parcel of land situate approximately 68′ south of the southerly limit of Front street and 48′ 8¾″ west of the westerly limit of Bay street, having a frontage of 246′ 2″ parallelling Front street and a depth of, approximately, 182′ 11″ parallelling Bay street and containing an area of 43,-811·958 square feet. He knew then, that Mr. Thurston's letter was quite incorrect in stating that "an assessment on that portion of the land which is leased by your Department was confirmed as follows:—48′ 8¾″ by 221′ deep on the corner of Bay and Front streets", because that area was not included in the Lease.

Mr. Hunter was then answering Mr. Chisholm's letter (Exhibit 6) which stated "the revised assessment was arrived at by putting a rate of $850.00 a foot *on the land on the south side of Front street* * * *". And he knew because he set out in his letter (Exhibit 7) that the parcel of land was situate approximately 68′ south of the southerly limit of Front street. He was replying to Mr. Chisholm's letter (Exhibit 6) which stated—"While the matter is fresh in our minds I think it would be well to have defined what proportion of the taxes the Government should pay to the Terminals Company under the provisions of the Lease".

It was obvious that this proportion had to be determined in view of the fact that the site of Postal Station A was not assessed separately, but was included in an assessment which also covered the 68′ south of Front street.

What Mr. Chisholm stated was this:—That as the revised assessment put a rate of $850.00 a foot on the land on the

south side of Front street that it would be fair that the Government should pay at that rate upon its actual frontage, although the Terminals Company had to pay at a higher rate upon what Mr. Chisholm termed the vacant land between the east wing and Bay street, a width of 48′ 8¾″.

Postal Station A had been erected under the contract, authorized by P.C. 2057, between the defendant and the plaintiff represented by the Minister of Public Works of Canada. P.C. 2057 and the Lease provides that the building shall be built at the same distance from the street line as the Union Station and to be of the same construction. These were matters with which Mr. Hunter, as Deputy Minister of Public Works, must have been perfectly familiar. Mr. Chisholm's proposal was, in effect, that as the defendant Company was paying the taxes on the area between the demised premises and Bay street, that it would be fair that the Government should pay for the area between Front street and the demised premises, as well as the taxes on the site itself. If Mr. Hunter did not intend to accept that proposal he must have known from the subsequent letters that Mr. Chisholm believed that his proposal had been accepted. Because in his reply Mr. Chisholm (Exhibit 8) stated that he had Mr. Hunter's letter agreeing to the suggestion that the Crown should pay taxes on the frontage leased to it *at the rate of $850.00*. If that was not Mr. Hunter's intention he allowed Mr. Chisholm to rest under that impression.

Moreover, it must have been quite clear to Mr. Hunter that the proportion of the taxes, in view of one assessment, had to be determined, and if he did not intend to accept Mr. Chisholm's proposal, he failed to set out any method by which the proportions could be determined. It is true that he reiterates throughout his letters that the Crown will pay the taxes upon an assessment of $850.00 per front foot on a frontage of 246′ 2″ by "a depth equal to the depth of the demised premises", but in view of Mr. Chisholm's proposal to him, what he meant is not at all clear. In any event the evidence before me does not establish that the payments were made under a mistake of fact and I so find.

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I find, however, that Mr. Hunter's letters do not constitute an agreement to pay the taxes on the land between the site and Bay street, as the defendant contends, and in any event Mr. Hunter had no authority to bind the Crown to pay taxes beyond those authorized by the Lease.

The claim of the Crown is put forward on a second basis that whether there was a mistake or not, the payment of any taxes in excess of the liability under the Lease was not authorized by Parliament within the meaning of Section 22 of the Consolidated Revenue and Audit Act, 1931, and was, therefore, illegal and that the Crown is entitled to recover the same.

Section 22 of the Consolidated Revenue and Audit Act, 1931, provides:—

22(1) Subject to the provisions of subsection two of this section, no issue of public moneys out of the Consolidated Revenue Fund shall be made except under the authority of Parliament.

(2) Issues out of the Consolidated Revenue Fund of public moneys received for special purposes or in trust may be made for the express purposes for which such moneys were received without further parliamentary authority than the provisions of this subsection, subject however to the provisions of any particular statute dealing with such special or trust moneys.

(3) The Consolidated Revenue Fund shall be subject to the charges hereinafter mentioned, and in the following order, that is to say:—

First.—The costs, charges, and expenses incident to the collection, management and receipt thereof, subject to be reviewed and audited in such manner as is hereby or is hereafter by law provided.

Second.—The salary of the Governor General.

Third.—The yearly salaries of the judges of the Supreme Court of Canada and of the Exchequer Court of Canada.

(4) The grants payable to the several provinces constituting the Dominion of Canada shall be charged upon the Consolidated Revenue Fund of Canada, and payable out of any unappropriated moneys forming part thereof.

P.C. 2057 (Exhibit 2) authorized the Lease (Exhibit 1) which in turn authorized the payment of the taxes and was the only authority in the evidence for the payment of the taxes.

There were amounts put in the estimates annually to provide for the payment of the rent and taxes in respect of this property. But amounts are put in the estimates and passed on the basis that they are or may be required by the Department during the current year and whatever Parliament sees fit to appropriate, is appropriated for that

purpose. That is an appropriation for the Crown which is subsequently released to the Crown by an order-in-council. Beyond that in turn there must be authority to pay the money to the person who is entitled to it.

If in this case (B) had been owned by the defendant and situated on the north side of Front street and the Crown paid the taxes on (A) and (B) either by mistake or because an official thought it was fair and equitable for the Crown to do so, the fact that an amount to cover these taxes was put in the estimates and appropriated by Parliament would not authorize the payment of the taxes on (B). What authorized the payment here was the Lease and only the Lease, which in turn was authorized by the P.C. 2057 (Exhibit 2).

Parliament provided funds to make lawful payments, i.e., payments authorized by the Lease. That authority cannot be widened by the Department. It would require an order-in-council, or what was referred to in the evidence as a specific appropriation to a particular purpose. Mr. Pickup's contention in this respect is, in my opinion, sound and the principle laid down in *Auckland Harbour Board* v. *The King* (1), which he cites in support of his contention is applicable. The facts there taken from the headnote were:—

An agreement made in 1913 provided (inter alia) that the Minister of Railways of New Zealand (representing the Crown) should pay to the appellants £7,500 when the appellants granted a lease to B. and Co. The making of the agreement had been authorized by an Act of 1912, which empowered the Minister, without further appropriation, to pay to the appellants out of the Public Works Fund such sum as might be payable in accordance with the agreement. Owing to an alteration in the scheme to which the agreement related, the Minister did not require the appellants to grant the lease, and it was not granted. Nevertheless the £7,500 was paid by the Minister of Railways to the appellants in 1914 out of a vote included in the Public Works Schedule to the Appropriation Act for the year, and the Controller and Auditor-General passed the sum as being so payable:—

HELD, that as the lease had not been granted the payment of the £7,500 was not authorized by the Act of 1912, and that it was recoverable by the Government and could be deducted from a larger sum admittedly due to the appellants.

Viscount Haldane said at page 326:—

But it was argued that, as the voucher for this amount had been passed, and the money paid, the transaction could not now be reopened. It was said, and it appears to have been the fact, that the Controller and Auditor-General subsequently passed the sum handed over as having

(1) (1924) A.C. 318

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been payable out of public moneys appropriated in general terms for railway services by the New Zealand Parliament in 1914. But this is not a sufficient answer to the contention that the payment was not authorized. Sect. 7 of the Act of 1912 provides that the sum which was agreed on at £7,500 was to be payable to the appellants only on a condition—namely, on the granting of the lease, which was to be the consideration. The provision which Parliament thus made was to be in itself a sufficient appropriation, but only operative if the condition was actually satisfied. Their Lordships have not been referred to any appropriation or other Act which altered these terms. If, as must therefore be taken to be the case, it remained operative, the authority given by Parliament is merely the conditional appropriation provided in s. 7, for a condition which was not fulfilled. The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced.

The defendant contends that what took place was a mere computation of the taxes for which the Crown was liable, but no computation or division of the taxes as between (A) and (B) was ever made. It is clear, I think, that what has happened is that the Crown paid taxes on both (A) and (B), and to the extent that they paid taxes on (B), such payment was in excess of the payment authorized by the Lease.

First as to the payment made by the Crown in 1940: The parcel (A) was expropriated in 1939 and the expropriation terminated the Lease. The payment, therefore, of $12,914.62 made by the plaintiff to the defendant in 1940 was not authorized in any way and was illegal and ultra vires.

Second, so also were the payments made in 1916 and 1939 that were in excess of those authorized by the Lease. Even if the payments were made with the approval or concurrence of the officials of the Crown, that would not divest them of an illegal character.

The next question then that falls to be determined is what payments were made in excess of those authorized by

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the Lease, from 1916 to 1930, (A) the site, and (B) in front of the site, were included in one assessment, at first at $850.00 per front foot and then at $1,500.00 per front foot. In order to ascertain the taxes levied on (A), the assessed value of $850.00 per foot must be proportional between (A) and (B).

The only evidence before me is that of Mr. Bosley, called by the Crown. The defendant did not call any expert witnesses. Mr. Bosley arrived at his valuation on this basis: that if the property was assessed at $850.00 per foot on a depth of 246′ 7″, then on a depth of 182′ 11″ the value would be reduced to $723.00 a front foot, and when assessed at $1,500.00 per front foot on a depth of 246′ 7″, then on a depth of 182′ 11″ the value would be reduced to $1,277.00 per front foot. These figures were arrived at by applying the Davies Depth Rule which, in his opinion, measured fairly accurately the diminishing value of the front foot frontage for varying depth. He stated that the Davies Depth Rule was an application of the 4-3-2-1 rule which was, in effect, that, given a lot 100′ in depth, the first 25′ from the street was worth 40 per cent of the whole, the second 25′ from the street was worth 30 per cent of the whole, the third 25′ 20 per cent and the fourth or back 25′, 10 per cent.

Mr. Bosley computed the taxes that would have been levied on assessments of $723.00 and $1,277.00 per front foot. Column 5 (Exhibit 21). He deducted this amount from the taxes levied on the actual assessment of $850.00 and $1,500.00 (Column 7) leaving a balance which is the amount of the Crown's claim.

While the claim is put on the basis that it is the excess of the taxes which the Crown paid over the amount that was levied on (A), it is therefore the tax levied on (B), based on Mr. Bosley's valuation. When Mr. Bosley attributes a value of $723.00 per front foot to (A) of the assessed value of $850.00, he must, by inference, have valued (B) at the difference of $127.00 per front foot. And on an assessed value of $1,500.00 he has valued (B) at $223.00 per front foot.

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So that the claim is made therefore on the basis that the taxes should be apportioned in the same ratio that the respective values of (A) and (B) bear to the assessed value of the whole.

The claim is not made on the basis that the taxes should be apportioned in the same ratio that the respective areas of (A) and (B) bear to the whole area. And in my opinion the plaintiff has put the claim forward on the correct basis, because while both (A) and (B) are in one assessment and therefore valued as a whole, the assessed value being the actual value would not be uniform throughout. In arriving at the actual value, the assessors would be bound, for example, to value the area nearest Front street at a higher level than the area at the rear, as shown by the 4-3-2-1 rule. It would be inequitable to divide the taxes on any basis other than that of respective values.

In any event, that is the basis of the claim put forward by the Crown as will be seen from Mr. Bosley's evidence and from Exhibit 20. What remains, therefore, is an examination of the method and factors taken into account by Mr. Bosley in reaching his conclusions. He has arrived at the figures for (A), the site, by applying the depth rule to a diminished depth of 182′, i.e., the depth of (A). If he had applied the rule to the depth of (B), i.e., 63′ $8\frac{3}{4}$″, he would have arrived at a figure for (B) very much greater than either $127.00 or $223.00. And in using this depth rule he has given (B) the same value that would be given land at the rear of (A), because if (A) were increased in depth to 246′, the increase in value would be $127.00 and $223.00, depending on the assessed value.

But while he has given (A) the increased value resulting from the right-of-way over (B), because without the right-of-way he stated that (A) would be landlocked and of little value, he has not taken into account the depreciation in (B) by reason of the fact that it is subject to a right-of-way in perpetuity. Land at the rear of (A) could be built on or used for any purpose. But (B) cannot be built on or used for any purpose because of the right-of-way in perpetuity. The right-of-way prevents any beneficial use of it by the owner.

Section 14 of the Assessment Act of Ontario, R.S.O., 1937, ch. 272, provides:—

14(1). Where an easement is appurtenant to any land it shall be assessed in connection with and as part of such land at the added value it gives to such land as the dominant tenement, and the assessment of the land which as the servient tenement, is subject to the easement shall be reduced accordingly.

(2) Where land is laid out and used as a lane and is subject to such rights-of-way as prevent any beneficial use of it by the owner it shall not be assessed separately, but its value shall be apportioned among the various parcels to which the right-of-way is appurtenant and shall be included in the assessment of such parcels. In such cases the assessor shall return the land so used a "Lane not assessed".

The assessment here was not made on that basis but the principle underlying this provision is applicable here in apportioning the assessed value. An easement adds to the value of the dominant tenement and reduces the value of the servient tenement because it, in the language of sub-section 2, "prevents any beneficial use of it by the owner".

(B) has value, but its value, in my opinion, is very limited. I have before me Mr. Bosley's valuation of (B) at $127.00 and $223.00 per front foot. And the evidence also shows that (B) is subject to the right-of-way. Taking this into consideration, I am of the opinion that the value of (B) is only $12.70 and $22.30 per front foot. In other words, (B) value is in my opinion only 10 per cent of the values given by Mr. Bosley due to the fact that (B) is subject to the right-of-way.

For these reasons I am of the opinion that the Crown is entitled to recover 10 per cent of $31,074.53, viz. $3,107.45 from the defendant as the amount paid to the defendant from 1916 to 1939 in excess of the amount payable by the plaintiff as authorized by the Lease. The plaintiff is also entitled to recover the sum of $12,914.62 paid to the defendant in 1940, which payment was not authorized in any way.

In the circumstances here, the plaintiff is not entitled to interest.

There will, therefore, be judgment for the plaintiff in the sum of $16,022.07, and costs.

Judgment Accordingly.

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Apr. 23, 24
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Oct. 8

BETWEEN:

THE EXECUTORS OF THE ESTATE OF DAVID FASKEN ..... APPELLANT;

AND

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

Revenue—Income tax—The Income War Tax Act, 1917, St. of C. 1917, c. 28, s. 4 (4)—An Act to amend the Income War Tax Act, 1917, St. of C. 1926, c. 10, ss. 7, 12—Income War Tax Act, R.S.C. 1927, c. 97, s. 32 (2), 32 (4)—An Act respecting the Revised Statutes of Canada, St. of C. 1924, c. 65, ss. 2, 5 (2)—Interpretation Act, R.S.C. 1927, c. 1, s. 19—Transfer of property from husband to wife—Meaning of words "property", "transfer"—Meaning of rule that taxing Act must be construed strictly—Words in taxing Act to be read in their ordinary sense—Purpose of evading taxation need not be shown—Presumption of execution of documents from their date—Liability of taxpayer under assessment to be determined according to law in force in period for which assessment made—Appeal from income tax assessment not a private dispute.

Midland Farms Company owed a large sum of money to David Fasken. At his request the Company acknowledged its indebtedness of such sum to three trustees who declared the trusts under which they held it, including the right of David Fasken's wife to receive a portion of the interest thereon which should come into their hands. The acknowledgment and declaration of trust were dated December 31, 1924. During the years 1925 to 1929 Mrs. Fasken received amounts of income from the Company which were treated by the trustees as having been received by them and paid to her under the declaration of trust. After the death of David Fasken it was sought to hold his estate liable for income tax on the income so received by Mrs. Fasken as having been derived from property transferred by David Fasken to his wife. Appeals from assessments for 1925 to 1929 allowed.

Held: That in construing a taxing Act the Court ought not to assume any tax liability under it other than that which it has clearly imposed in express terms.

2. That unless the context otherwise requires the words in a taxing Act should be read in the sense in which they are ordinarily used.

3. That the word "transfer", as used in section 32(2) of the Income War Tax Act or its predecessor, section 7 of the 1926 Act, is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.

4. That liability under section 32(2) of the Act or its predecessor, section 7 of the 1926 Act, is not confined to cases where the transfer of property was made for the purpose of evading taxation nor does the fact that the transfer was made in good faith or for valuable consideration place it outside the scope of the sections. *Molson et al* v. *Minister of National Revenue* (1937) Ex. C.R. 55 disapproved.

5. That the word "transfer" in section 32 (2) of the Act or its predecessor, section 7 of the 1926 Act, can not be read to mean or include "has transferred".

6. That in the absence of evidence to the contrary documents should be considered as having been executed on the day they bear date.

7. That it is a fundamental principle that the validity of an income tax assessment and the liability of the taxpayer thereunder must be determined according to the law in force in the period for which the assessment was made and in which the liability, if any, of the taxpayer was incurred, and not according to the law in force at the time the assessment was made.

8 That in order that a taxpayer should be liable under section 7 of the 1926 Act in respect of income derived from property transferred by him to his wife it would be necessary to show not only that such income was derived while the section was in effect but also that the transfer had been made after it had come into force.

9. That an appeal from income tax assessment is not a private dispute between the appellant taxpayer and the Minister or a *lis* in the ordinary sense, in which the agreement of counsel may bind the parties thereto and so preclude the Court from dealing with the issue on the appeal on its merits; the public has an interest in the disposition of the appeal and in seeing that taxpayers are held liable for the tax which Parliament has imposed upon them and that no taxpayer is released therefrom pursuant to an agreement of counsel and the acquiescence of the Court in its application. It is the duty of the Court in such an appeal to determine the liability of the taxpayer under each assessment appealed from according to the law which Parliament has made applicable to it regardless of what agreement counsel may have made as to its disposition. It is not for counsel to fix such liability by agreement. That is for adjudication by the Court. *Minister of National Revenue* v. *Molson et al* (1938) S.C.R. 213 disapproved.

APPEALS from income tax assessments under the provisions of the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. W. Pickup K.C. for appellant.

D. J. Coffee K.C. and *E. S. MacLatchy* for respondent.

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

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THE PRESIDENT now (October 8, 1948) delivered the following judgment:

The appeals herein are from income tax assessments for the years 1925 to 1929 in respect of amounts of income received in such years by Alice Fasken, the wife of David Fasken, on which it is sought to hold the estate of the said David Fasken liable for income tax. The appeals from all the assessments were heard together.

The facts on which the assessments were based were as follows. In 1913 David Fasken, who was resident in Toronto, bought a large farm of 226,000 acres in Texas. Since the law of Texas did not permit an alien to own real property or any interest therein a corporation, known as Midland Farms Company, was created with an authorized capital of $300,000 consisting of 3,000 shares of $100 each. The farm was bought in the name of a trustee for David Fasken and conveyed to Midland Farms Company in consideration for the issue of 2,997 fully paid up shares. The remaining 3 shares were subscribed for in cash in the name of nominees of David Fasken. All of the shares in the Company belonged to David Fasken, 2,999 being transferred to him in his own name and one to his nominee, R. E. H. Morgan, since the law required at least two shareholders. The title to the farm was vested in Midland Farms Company "subject to a lien indebtedness for the purchase price of the same, amounting to the sum of $1,092,313.75". It may be assumed that David Fasken had advanced the purchase price and that the said indebtedness was in his favour. At the first stockholders' meeting on January 28, 1914, David Fasken, R. E. H. Morgan and Alexander Fasken, a nephew of David Fasken, were elected directors and at the directors' meeting on the same date David Fasken took on the office of vice-president, that of president being taken by R. E. H. Morgan. On March 27, 1917, the share issued to R. E. H. Morgan was transferred to Robert Fasken, the only son of David Fasken, and at the stockholders' meeting on that date Robert Fasken, David Fasken and Andrew Fasken were elected directors and at the directors' meeting on the same date Robert Fasken became president, Andrew Fasken secretary and David Fasken continued as

vice-president. At the directors' meeting on January 16, 1918, at which the same officers were elected, the following resolution was passed:

Upon motion duly made it was resolved that a note be given to Mr. David Fasken for the sum of $ being the amount of principal with interest down to December 31, 1917, as set forth on statement filed.

The probable explanation for this resolution is that under the law of Texas the period of limitation for actions for debt was two years and it was passed to prevent the indebtedness from being outlawed. Similar resolutions were passed at the stockholders' and directors' meetings on February 5, 1919, and January 27, 1920. In each case the amount of the principal was left blank. Moreover, there is no record of any note having ever been given by the Company to David Fasken. On September 1, 1920, David Fasken transferred his 2,999 shares in the Company to his son Robert Fasken, who had become an American citizen.

Thereafter, there were other changes in the shareholdings in the company, with which we are not concerned, but after that date David Fasken was never a shareholder, director or officer of the company, nor did he or the executors of his estate ever claim any interest in any of the shares. At the stockholders' meeting on February 7, 1921, and at the directors' meeting on the same date the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgement, lien or mortgage on the property of the Company as may be demanded be given J. H. Black and Alex Fasken, Trustees for the persons advancing or having advanced money to the Company or for its account or benefit or on its behalf to meet obligations for unpaid purchase money. The amount so to be secured being the sum of $1,860,757.92 with interest from the first day of January 1921 at 8 per cent per annum. Such security to be given when and in the form demanded by the said trustees or the survivor of them.

J. H. Black was a personal friend and close business associate of David Fasken and Alex Fasken was his brother. It may be assumed that David Fasken was one of the persons for whom these two persons were trustees. This is the first resolution in which a specific amount of indebtedness is mentioned. Similar resolutions were passed at the stockholders' meeting and directors' meeting on January 2, 1922, and on January 2, 1923, except that the amounts of the indebtedness were larger and that in the resolution passed on January 2, 1923, the Trustees were R. Fasken

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and Alex Fasken. There is no record of any note, acknowledgment, lien or mortgage ever having actually been given to the Trustees pursuant to any of these resolutions.

This brings us to 1924. At the stockholders' and directors' meetings held on March 8, 1924, the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgment, lien or mortgage on the property of the Company as may be demanded be given Alex Fasken, Chas. Q. Parker and Andrew Fasken, Trustees for the persons advancing or having advanced money to the Company or for its account or benefit or on its behalf to meet obligations for unpaid purchase money. The amount so to be secured being the sum of $2,239,602.67 with interest from the first day of January, 1924, at 8 per cent per annum. Such security to be given when and in what form demanded by the said trustees or the survivor of them.

There can be no doubt that David Fasken was one of the persons for whom these three persons were trustees. The next date of importance is December 31, 1924. On that date Midland Farms Company under its seal executed the following acknowledgment:

To:

Alexander Fasken, Charles Q Parker and Andrew Fasken, Trustees.

We, the Midland Farms Company, do hereby acknowledge that we are indebted to you in the sum of $2,374,461.99, and we agree to pay the same to you on demand with interest as well after as before maturity at the rate of eight per centum per annum computed from this date. Interest to be payable half yearly on the first days of January and July in each year beginning with the first day of July 1925.

Dated this 31st day of December, 1924.

Midland Farms Company
(Sgd.) A. Fasken,
President.
(Sgd.) H. W. Rowe,
Secretary.

Witness:

(Seal of Midland Farms Co.)

On the same date as this acknowledgment the Trustees, Alexander Fasken, Charles Q. Parker and Andrew Fasken, acknowledged and declared the trusts, terms and conditions under which they held the indebtedness. The declaration of trust contained the following paragraph:

(5) It is declared that the said Andrew Fasken is entitled to an interest equal to $100,000 in the capital of the said indebtedness, and out of the net interest on the said indebtedness which shall come to their hands from time to time the trustees shall pay to the said Andrew Fasken for his own use and benefit the interest at the rate of 5 per cent per annum on the said sum of $100,000 or on such lesser sum as shall from time to time equal the capital interest of the said Andrew Fasken, in the fund, after crediting the payments made him under Clause 6 hereof, such

interest to be computed from the 31st day of December 1924 and the Trustees shall pay the balance of the net interest which shall come to their hands from time to time (including the net income mentioned in Clause 7 hereof) in equal shares to Alice Fasken, wife of David Fasken and Robert A. W. Fasken his son and to the survivor of them during his or her lifetime.

We are not concerned with the trusts relating to the capital of the indebtedness. At the stockholders' and directors' meetings on January 6, 1925, the following resolution was passed:

Upon motion duly made it was resolved that a note, acknowledgment, lien or mortgage on the property of the Company as may be demanded, be given to Alex Fasken, Charles Q. Parker and Andrew Fasken, Trustees for persons having claims either personally or through assignments or claims against the Company for moneys advanced to the Company or for its account, or for its benefit or for services rendered to the Company or on its behalf. The amount so to be secured being the sum of $2,374,461.99 with interest from the first day of January, 1925, at 8 per cent per annum. Such security to be given when and in what form demanded by the said trustees (or the trustees for the time being of the said claim) or the survivor of them.

The changes in the description of the persons for whom the persons named are trustees are significant and must, I think, relate to the acknowledgment and declaration of trust of December 31, 1924. Similar resolutions, but with differing amounts, were passed at the stockholders' and directors' meetings of February 5, 1926, February 10, 1927, January 27, 1928, January 7, 1929, and January 27, 1930. Apart from the note or acknowledgment of December 31, 1924, there is no record of any note, acknowledgment, lien or mortgage having been actually given to the trustees pursuant to any of the resolutions referred to.

After Midland Farms Company had executed the acknowledgment of indebtedness to the Trustees of December 31, 1924, and the trustees had declared the trusts upon which they held it the Company made certain payments direct to Mrs. Fasken, namely, $10,000 in June, 1925, $5,000 in May, 1926, $11,000 in June, 1927, $10,000 in May, and $5,000 in July, 1928, and $20,000 in May, 1929. The trustees did not direct the Company to make these payments but treated them as though they had been made to them by the Company as payments of interest on the indebtedness and in turn made by them to Mrs. Fasken under the declaration of trust. Subsequently the trustees reported the making of these payments to the income tax

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authorities. David Fasken died on December 2, 1929. On March 3, 1944, as appears from notices of assessment, the amounts paid to Mrs. Fasken in the years 1925 to 1929 were added to the amounts shown by David Fasken in his income tax returns for these years and his estate was assessed accordingly for the years 1925 to 1929. The executors and trustees under David Fasken's last will and testament appealed from these assessments on the ground that there was no power to impose income tax against the estate on the income of Mrs. Fasken. The decision of the Minister affirming the assessments was as follows:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that the amounts received by the said Alice Fasken were taxable income of the taxpayer according to the provisions of Subsection 4 of Section 4 of the said Chapter 28 of the Statutes of 1917 and as amended by Section 7 of Chapter 10 of the Statutes of 1926 and according to the provisions of Subsection 2 of Section 32 of Chapter 97 of the Revised Statutes 1927. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

Being dissatisfied with the decision of the Minister the appellant brings its appeals from the assessments to this Court.

The appeals involve the construction of the statutory enactments referred to by the Minister in his decision. Section 4(4) of The Income War Tax Act, 1917, Statutes of Canada, 1917, chap. 28, which will hereafter be referred to as the 1917 Act, provided as follows:

> 4. (4) A person who, after the first day of August, 1917, has reduced his income by the transfer or assignment of any real or personal, movable or immovable property, to such person's wife or husband, as the case may be, or to any member of the family of such person, shall, nevertheless, be liable to be taxed as if such transfer or assignment had not been made, unless the Minister is satisfied that such transfer or assignment was not made for the purpose of evading the taxes imposed under this Act or any part thereof.

By Section 7 of An Act to amend the Income War Tax Act, 1917, Statutes of Canada, 1926, chap. 10, which will hereafter be referred to as the 1926 Act, it was provided:

> 7. Subsection four of section four of the said Act is hereby repealed and the following substituted therefor:—
>
> (4) For the purposes of this Act,—
>
> (a) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such

transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

(*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

By section 12 of the 1926 Act it was provided that certain sections, including section 7, "shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof." Finally section 32(2) of the Income War Tax Act, R.S.C. 1927, chap. 97, which will hereafter be referred to as the 1927 Revision, provides:

32. 2. Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The first contention of counsel for the appellant was that there had never been any transfer of property from David Fasken to his wife within the meaning of the Act. The argument was that prior to December 31, 1924, Midland Farms Company owed a debt to David Fasken, that on that date it assumed an obligation to three trustees, that these trustees acted as such at the request of David Fasken and that the Company gave the acknowledgment of indebtedness of December 31, 1924, to them at his request, that by this novation the former indebtedness was extinguished and a new indebtedness by it to the trustees created, that such novation was not a transfer of the indebtedness to anyone but a contract whereby David Fasken released the Company from its indebtedness to him in consideration of its assuming a new obligation to the trustees with the result that the debt passed out of existence altogether, and that since the indebtedness of the Company to David Fasken was the only property which he had owned and it had ceased to exist there could not have been any transfer of it by him to anyone. In the alternative, it was contended that if there was any transfer such transfer was to the trustees and not to Mrs. Fasken; the argument was that the only thing she was given was the right to receive a certain portion of the interest, that she never became entitled to any portion of the indebted-

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ness, either directly or as a beneficiary, that she could not have sued the Company for it, her only remedy being against the trustees, and that what went to the trustees and through them to her was not property that had ever belonged to David Fasken but something else substituted for it, that it was not the same property as that which he had owned and that consequently it could not be said that he had transferred any of his property to his wife within the meaning of the Act.

The second point urged by counsel was that if there was any transfer of property by David Fasken to his wife the property so transferred was not the kind of property referred to in the section. It was argued that the section was applicable only to the transfer of property from which an income was derived and that since all that Mrs. Fasken was given was a right to receive income it could not be said that such right was property from which income was derived within the meaning of the Act.

These two arguments may be considered together, but before they are dealt with specifically certain observations may be made. It has been said on numerous occasions that a taxing Act such as the Income War Tax Act must be construed strictly. This does not mean that the rules for the construction of such an Act are different in principle from those applicable to other statutory enactments. All that is meant is that in construing a taxing Act the Court ought not to assume any tax liability under it other than that which it has clearly imposed in express terms. Nowhere has this fundamental principle of construction of such an Act been better expressed than by Lord Cairns in *Partingdon* v. *Attorney-General* (1):

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

and by Lord Halsbury in *Tennant* v. *Smith* (2):

> In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as

(1) (1869) 4 E & I App. 100 at 122. (2) (1892) A.C. 150 at 154.

the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.

It is the letter of the law, and not its assumed or supposed spirit, that governs. The intention of the legislature to impose a tax must be gathered only from the words by which it has been expressed, and not otherwise. Obviously, the rule of strict construction, understood in the sense indicated, is applicable to the sections of the Act under review, under which it is sought to make the taxpayer liable for income tax on income which he himself has never received. Unless the income received by Mrs. Fasken under the declaration of trust during the years 1925 to 1929 has been reached by the words of one or more of the sections of the Act relied upon by the Minister in such a way as to make David Fasken liable for income tax thereon the appeals from the assessments herein must be allowed.

It is also a cardinal principle of interpretation of the words in a taxing Act that, unless the context otherwise requires, they should be read in the sense in which they are ordinarily used. This is consistent with the statement of Lord Wensleydale in *Grey* v. *Pearson* (1):

> In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

And in *Rhodes* v. *Rhodes* (2) Lord Blackburn accepted this as the rule and also quoted with approval the statement of Lord Cranworth in *Thelluson* v. *Rendlesham* (3):

> Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is perhaps involved in the former, for supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense.

(1) (1857) 6 H.L. Cas. 61 at 106.
(2) (1881-2) A.C. 192 at 204.
(3) (1860) 7 H.L. Cas. 428 at 493.

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Later in *Smelting Company of Australia* v. *Commissioners of Inland Revenue* (1) Pollock B. said:

> It has often been said by judges of very great experience that, in construing Acts relating to the revenue, the popular sense of words rather than their strict legal meaning should be looked at, and the reason for that is obvious. The object of taxing Acts has nothing to do with the strict legal meaning of words, unless the words used are words of art, such as words which describe an estate in real property, or technical terms peculiar to English law.

And in *Inland Revenue Commissioners* v. *Herbert* (2) Lord Haldane laid down the governing principle in these terms:

> The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated.

But it has been held that where words have a legal technical meaning they should be construed according to such meaning: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3).

While the use of definitions in dictionaries in construing the meaning of words in an Act of Parliament has been deprecated, for example, by Lord Macnaghten in *Midland Railway Co. et al* v. *Robinson* (4), dictionaries may properly be consulted for guidance as to the meaning of words in their ordinary sense. In *The Queen* v. *Peters* (5) Lord Coleridge C. J. said:

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

Vide also *Spillers Ld.* v. *Cardiff (Borough) Assessment Committee,* per Lord Hewart C.J. (6).

(1) (1896) 2 Q.B. 179 at 184
(2) (1913) A.C. 326 at 332.
(3) (1891) A.C. 531.
(4) (1890) 15 A.C. 19 at 34.
(5) (1885-6) 16 Q.B.D. 636 at 641.
(6) (1931) 2 K.B. 21 at 42.

The first thing to consider is whether what Mrs. Fasken became entitled to under the declaration of trust was "property" within the meaning of the Act. The word "property" is a term of wide import. The new English Dictionary gives the following as one of its definitions:

2. That which one owns; a thing or things belonging to or owned by some person or persons; a possession (usually material), or possessions collectively; (one's) wealth or goods.

And Webster's New International Dictionary, Second Edition, puts it similarly as follows:

5. That to which a person has a legal title; thing owned; an estate, whether in lands, goods, money or intangible rights, such as copyright, patent rights, etc.: anything, or those things collectively, in or to which a man has a right protected by law;

The Courts have also recognized the wide extent of the word. For example, in *Jones* v. *Skinner* (1) Lord Langdale M.R. said:

It is well-known, that the word "property" is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have.

Vide also *Re Lunness* (2), per Riddell J. What Mrs. Fasken became entitled to is manifest from clause (5) of the declaration of trust, namely, the right to receive from the trustees one half of the interest on the indebtedness that should come to their hands from time to time after the interest on Andrew Fasken's claim had been paid. In my view, the word "property" as used in the Act is clearly wide enough in meaning to include such a right.

The next question is whether there was a transfer of such property from David Fasken to his wife. The word "transfer" is another term of wide meaning. The New English Dictionary gives this meaning of it:

2. Law. To convey or make over (title, right or property) by deed or legal process.

And Webster's New International Dictionary, Second Edition, says:

2. To make over the possession or control of, to make transfer of; to pass; to convey, as a right, from one person to another; as, title to land is *transferred* by deed.

(1) (1836) 5 L J. (N.S.) Ch. 87 at 90

(2) (1919) 46 O L.R. 320 at 332.

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In *Gathercole* v. *Smith* (1) James L.J. spoke of the word "transfer" as "one of the widest terms that can be used" and Lush L.J. said, at page 9:

> The word "transferable," I agree with Lord Justice James, is a word of the widest import and includes every means by which the property may be passed from one person to another.

The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer. The plain fact in the present case is that the property to which Mrs. Fasken became entitled under the declaration of trust, namely, the right to receive a portion of the interest on the indebtedness, passed to her from her husband who had previously owned the whole of the indebtedness out of which the right to receive a specified portion of the interest on it was carved. If David Fasken had conveyed this piece of property directly to his wife by a deed such a conveyance would clearly have been a transfer. The fact that he brought about the same result by indirect or circuitous means, such as the novation referred to by counsel involving the intervention of trustees, cannot change the essential character of the fact that he caused property which had previously belonged to him to pass to his wife. In my opinion, there was a transfer of property from David Fasken to his wife within the meaning of the Act.

Moreover, I think that the transferred property was property from which income was "derived", meaning thereby the source or origin of such income: *Vide Gilhooly* v. *Minister of National Revenue* (2); *Kemp* v. *Minister of National Revenue* (3). If the property that was transferred was the interest that Mrs. Fasken received then, of course, her husband could not be taxed on it for that would be tantamount to making him liable on the whole amount of the transferred property, instead of only on the income derived therefrom, as the Act contemplates, and there

(1) (1880-81) 17 Ch. D. 1 at 7.
(2) (1945) Ex. C.R. 141.
(3) (1947) Ex. C.R. 578.

would be some substance in the argument that the transferred property was not the kind of property contemplated by the Act. But it was not the interest itself that was transferred. There was not a fresh transfer of property from David Fasken to his wife in each of the years 1925 to 1926 when she received payments of interest. What was transferred was the right to receive the interest, not the interest itself, and that right could be and was transferred only once. The amounts of interest received by Mrs. Fasken were the fruits of such right and could properly be regarded as income derived from it. The right was, therefore, property from which income was derived. I come to this conclusion notwithstanding the fact that in 1934 Parliament deemed it desirable to add subsection 4 to section 32 of the Act whereby it was provided that a transfer of the right to income came within the operation of the section even although the ownership of the property producing such income was not transferred. The finding that David Fasken transferred property to his wife and that the amount received by her under the declaration of trust in each of the years 1925 to 1929 was income derived therefrom disposes of the appellant's first two arguments.

It was also argued by Counsel for the appellant that section 32(2) of the 1927 Revision and its predecessor, the corresponding part of section 7 of the 1926 Act, were applicable only in cases where the transfer of property from the husband to the wife, or *vice versa,* was made for the purpose of evading taxation, that the transfer from David Fasken to his wife, if there was any, had no such purpose but was made to prevent an asset from being lost to his beneficiaries including his wife and that, consequently, it was outside the scope of the sections. In support of this argument he relied upon the judgment of Angers J. in this Court in *Molson et al* v. *Minister of National Revenue* (1). There the facts were that Kenneth Molson by his marriage contract on March 28, 1913, had made to his future wife a donation *inter vivos* of the sum of $20,000, which he promised to pay after the marriage. Then on March 23, 1925, in order to fulfil this obligation he transferred certain securities to his wife which she accepted in full payment of the sum of $20,000. After his death in April, 1932, his

(1) (1937) Ex. C.R. 55.

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estate was assessed for income tax on the income derived from the transferred property in each of the years 1925 to 1931. The executors appealed from such assessments and Angers J. held that they must be set aside. After setting out the facts and finding that the donation was made in good faith he referred to the statutory provisions and the fact that section 32 of the 1927 Revision appears under the heading "Transfers to Evade Taxation", that opposite section 7 of the 1926 Act are the words "Transfer of property", and that the marginal note opposite section 4(4) of the 1917 Act is "Transfer of property to evade taxation", and then held, at page 61:

> It seems to me obvious that the object of section 32 is, as, prior to the revision of the statutes in 1927, the object of subsection 4 of section 4 was, to tax in the hands of the transferor property transferred for the purpose of evading taxation.
>
> The conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it is not, in my opinion, subject to the provisions of section 32 of the Income War Tax Act. This conveyance was effected by said Molson in fulfilment of the donation of $20,000 which he had made and which he had the right to make to his wife by his marriage contract.

When the case went to the Supreme Court of Canada, the majority of the Court did not think it necessary to consider these grounds and expressed no opinion on them. In *Connell* v. *Minister of National Revenue* (1) I expressed the view that, under the circumstances, the *Molson* case (*supra*) could not be regarded as authority for holding that section 32(2) of the 1927 Revision applied only to transfers made for the purpose of evading taxation and that the question was left open. Then I stated that I could see no reason for restricting the application of the section to transfers made for the purpose of evading taxation, and that I was not prepared to hold that a transfer made for valuable consideration was necessarily excluded from its scope, but that in view of the conclusion I had reached on other grounds it was not necessary to decide the question. My remarks were thus, strictly speaking, *obiter*. But in this case the question does come up for decision in view of counsel's contention.

There are, I think, several reasons for not following the reasons for judgment of Angers J. in the *Molson* case (*supra*). In the first place, I see no justification for resort-

(1) (1946) Ex. C.R. 562 at 565.

ing to the heading "Transfers to Evade Taxation" in aid of the construction of section 32(2) of the 1927 Revision. In the construction of an Act only a limited use may be made of the headings in it. While a heading may perhaps be referred to in order to determine the sense of any doubtful expression in a section ranged under it, *Hammersmith and City Railway Co.* v. *Brand* (1), it is clear that there must be some ambiguous expression in a section before the aid of the heading under which it appears can be invoked to define its meaning: *Fletcher* v. *Birkenhead Corporation* (2). I am unable to see any ambiguous expression in section 32(2) of the 1927 Revision that could warrant the use of the heading in the construction of it. It should also be noted that the heading "Transfers to Evade Taxation" appears in the Act for the first time in the 1927 Revision. Prior thereto the words "Transfer of property to evade taxation" appeared only as a marginal note opposite section 4(4) of the 1917 Act but this was repealed by section 7 of the 1926 Act and the only marginal note opposite that section was "Transfer of property". It would, therefore, be quite impossible to import into section 7 of the 1926 Act any purpose of evading taxation as a condition of liability under it. That being so, no such condition can be imported into section 32(2) of the 1927 Revision, for section 8 of An Act respecting the Revised Statutes of Canada, Statutes of Canada, 1924, chap. 65 provided:

> 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.

If then it was not a condition of liability under section 7 of the 1926 Act that the transfer therein referred to was made for the purpose of evading taxation there can be no such condition in section 32(2) of the 1927 Revision. Moreover, quite apart from any statutory provisions relating to the Revised Statutes, it is not permissible, where the words in a taxing Act are clear, to read into it either conditions of liability thereunder or exemptions therefrom other than those that are within its express terms. Full effect must be given to its words without additions or subtractions. In my opinion, the words section 32(2) of the 1927 Revision and the corresponding part of

(1) (1869) 4 H.L. 171.
(2) (1907) 1 K.B. 205 at 214.

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its predecessor, section 7 of the 1926 Act, are free from any ambiguity and liability thereunder is not confined to cases where the transfer of property was made for the purpose of evading taxation, nor does the fact that the transfer was made in good faith or for valuable consideration place it outside the scope of the sections.

The remaining argument advanced for the appellant is the most important one. It was urged that the taxpayer's liability for income tax for the years 1925 to 1929 must be determined by the law that was in force in such years, namely, section 4(4) (*b*) of the Act, as enacted by section 7 of the 1926 Act, from January 1, 1925, to which date it was made retroactive by section 12 of the said Act, up to February 1, 1928, when the 1927 Revision came into effect, and thereafter section 32(2) of the 1927 Revision, that the word "transfers" in each section cannot be read to mean or include "has transferred", that if there was any transfer of property from David Fasken to his wife it must have been prior to December 31, 1924, when Midland Farms Company acknowledged its indebtedness to the trustees and they made their declaration of trust and, therefore, prior to the effective dates of either section 7 of the 1926 Act retroactive to January 1, 1925, or section 32(2) of the 1927 Revision and was, consequently, not caught by the words of either of them.

While the word "transfers", as used in section 7 of the 1926 Act and section 32(2) of the 1927 Revision, is a term of wide meaning and must be given its full and complete effect, it seems plain that it speaks prospectively and contemplates only a transfer made after the Act had come into effect and cannot be expanded to mean or include "has transferred" and thus apply to a transfer that had already been made before the Act was in effect. There are a number of reasons for this conclusion. In the first place, to construe "transfers" as meaning or including "has transferred" would violate the rule of strict construction to which I have referred. The word "transfers" does not, in ordinary language, mean or include "has transferred". A further objection to such a construction is that it would give the enactment retrospective effect and "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a

construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication": Maxwell on Interpretation of Statutes, 9th edition, page 221. There is nothing in the Act under review to rebut the presumption against the retrospective operation of section 7 of the 1926 Act any farther back than January 1, 1925. If Parliament had intended to catch past transfers of property as well as future ones it could easily have indicated such intention by using the words "transfers or has transferred" or words to the like effect. The fact that it did not do so negatives any such intention. If, therefore, it appears that David Fasken had already transferred the property to his wife prior to January 1, 1925, to which date section 7 of the 1926 Act was made retroactive, then such transfer was not caught by the word "transfers" in section 7 of the 1926 Act or section 32(2) of the 1927 Revision.

It thus becomes important to determine the date of the transfer from David Fasken to his wife. The acknowledgment of Midland Farms Company to the trustees and their declaration of trust were both date December 31, 1924. The acknowledgment was executed in Texas. The declaration of trust was executed by two of the trustees in Ontario and by one of them in Texas. Counsel for the respondent, being anxious to show execution subsequent to December 31, 1924, contended that while the declaration of trust was dated December 31, 1924, it could not have been executed by all of the trustees on that date and must have been executed either by the Ontario trustees or the Texas trustee subsequently to such date. There is no evidentiary support for this contention. It could just as easily have been executed by the trustees in Ontario and sent on to the trustee in Texas for execution by him prior to December 31, 1924. There is no evidence as to the actual date of execution. I think that under the circumstances, the date which the documents bear should be accepted as the date of their execution. Phipson on Evidence, 8th Edition, page 506, says that "documents are presumed to have been executed on the day they bear date". At page 666, the same author says that "it is a general *prima facie* presumption that all documents, whether ancient or modern, whether formal, as deeds and wills, or informal, as receipts and letters, and whether emanating from parties or strangers, were written

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on the day they bear date", and also that "it rests, therefore, not on the party producing the document to confirm its date, but on his opponent to impeach it." He cites a number of cases as authorities: namely, *Anderson* v. *Weston* (1); *Potez* v. *Glossop* (2). While it is true that in *Butler* v. *Mountgarett,* (3) Lord Wensleydale expressed his opinion that the point was not finally settled, there is no doubt that the weight of judicial opinion supports Phipson's statement and I adopt it in the present case. Consequently, in the absence of evidence to the contrary, I find that the acknowledgment of indebtedness and the declaration of trust were both executed on the date they bear, namely, December 31, 1924.

It is obvious that before the acknowledgment and declaration of trust were executed David Fasken must have made the necessary arrangements for their execution. The contract of novation under which he divested himself of his interest in the Company's indebtedness to him on its assuming an indebtedness to the trustees and the arrangements with the trustees as to the trust under which they were to hold the indebtedness must, I think, have been made prior to the execution of the documents. At the latest, they were made at the same time. Consequently, if the transfer of property from David Fasken to his wife consisted of the total of the circuitous means which he adopted to divest himself of it and vest it in her, and so pass it from himself to her, as I have found it did, all such means were accomplished prior to or at the date of the execution of the documents, namely, December 31, 1924. The result is a finding that the transfer of property from David Fasken to his wife took place either prior to December 31, 1924, or, at the latest, on such date.

Counsel for the respondent sought to escape from this conclusion by arguing that the transfer was not complete until sometime after December 31, 1924. He urged that the acknowledgment of that date could not be effective until it had been ratified by the shareholders and directors and that such ratification did not take place until the resolution of January 6, 1925. I am quite unable to accept this. That resolution was that "a note, acknowledgment,

(1) (1840) 6 Bing. (N.C.) 396.
(2) (1848) 2 Ex. 190.
(3) (1858-1860) 7 H.L. Cas. 632.

lien or mortgage . . . be given." This is not language that would have been used if it had been intended to ratify an acknowledgment already made and I cannot see how a ratification of the acknowledgment of December 31, 1924, can be read into it. Indeed, no ratification of it was necessary for, as counsel for the appellant pointed out, the making of the acknowledgment was already fully and completely authorized by the resolution of March 8, 1924, to which I have already referred. Much was made of the fact that the amount mentioned in the resolution of January 6, 1925, was the same as that of the acknowledgment and that the latter was less than the amount mentioned in the resolution of March 8, 1924, with interest thereon from January 1, 1924, at 8 per cent. The explanation may well be that the difference represents the amount of interest paid during 1924, as to which there is no evidence. Moreover, it seems to me that the resolution of January 6, 1925, authorizes the giving in the future of a note, acknowledgment, lien or mortgage in the light of the new state of affairs resulting from the dispositions already made by David Fasken and the documents of December 31, 1924, and, like the similar annual resolutions that followed it, was made for the purpose of starting off a new period of time for the running of the statutory limitation in Texas with regard to debts. Under these circumstances, I am of the view that the appellant's contention that the acknowledgment of December 31, 1924, was made pursuant to the resolution of March 8, 1924, is a much more reasonable submission than that put forward by counsel for the respondent. I find equally untenable his contention that because Mrs. Fasken was not to receive any interest until after January 1, 1925, there was no transfer of property to her until after that date. The fallacy of this contention lies either in a misconception of the nature of the property that was transferred or in the erroneous assumption that the date of the transfer of a property depends upon the date of the receipt of the income derived from it. As already indicated, the subject matter of the transfer of property to Mrs. Fasken was not the interest but the right to receive it. Moreover, it is plain that the date of transfer of property is not determined by the date when the income derived from it is received. Here we are concerned with the date

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of the transfer to Mrs. Fasken of the right to receive the interest, not with the date of the receipt of the income derived from it. In my opinion, there is no merit in the contention of counsel for the respondent that the transfer of property to Mrs. Fasken was not complete until after December 31, 1924. Under the circumstances, and in view of my finding that the transfer was made on December 31, 1924, or prior thereto, it follows that I must hold, as I do, that neither it nor the income derived from the transferred property was caught either by section 7 of the 1926 Act or section 32(2) of the 1927 Revision.

Counsel for the respondent then argued that if the transfer of property was made prior to January 1, 1925, it was caught by section 4(4) of the 1917 Act and that there was a continuity of liability on the part of the taxpayer and of right in the Crown under it, notwithstanding its repeal by section 7 of the 1926 Act. In support of this contention he relied upon certain statements in the reasons for judgment given by the majority of the Supreme Court of Canada in *Minister of National Revenue* v. *Molson et al* (1). That decision is of such importance as to warrant the most careful scrutiny of it. I have already referred to the judgment in that case in this Court and the fact that while the Supreme Court of Canada dismissed the appeal therefrom, the majority of the Court did so on grounds quite different from those relied upon by Angers J. in this Court. It will be recalled that Kenneth Molson had transferred certain property to his wife on March 23, 1925, and that after his death in April, 1932, his estate was assessed for income tax in respect of the income derived from the transferred property during the years 1925 to 1931. The validity of these assessments and the liability of the taxpayer thereunder were in issue. It appears from the judgment of Duff C.J., who spoke for Davis and Hudson JJ. as well as for himself, and also from that of Kerwin J. that it was agreed between counsel for the Minister and counsel for the Molson estate that the question of liability was to be determined solely by reference to the assessment for income received in the year 1930 and the judgment proceeded on that basis. With the utmost respect, I must say that I

(1) (1938) S.C.R. 213.

consider the judgment an astonishing one. At page 218, Duff C.J., after referring to the reasons for judgment given by Angers J. in this Court and saying:

> We do not think it necessary to consider either of these questions. We express no opinion upon them.

went on to express his opinion as to the effect of section 32 of the 1927 Revision, as follows:

> In our opinion, section 32 of chapter 97 of the Revised Statutes of Canada, 1927, had not the effect of making the late Kenneth Molson liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because that section, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it on the 15th of June, 1926.

The Chief Justice then quoted with approval the statement of Boyd C. in *License Commissioners of Frontenac* v. *County of Frontenac* (1) as to the effect of a revision of the statutes on the statutes repealed by it but re-enacted in it. I need quote only the last sentence of this statement:

> The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity.

Then the Chief Justice said, at page 219:

> As regards the enactments reproduced in the Revised Statutes, there is unbroken continuity. As regards enactments repealed by virtue of section 5 of the Act respecting the Revised Statutes (Cap. 65 of 1924) and not re-enacted in the Revised Statutes, the effect of the revision is to be ascertained from sections 7 and 8 of this statute of 1924 and from section 19 of the Interpretation Act.

From this statement of the effect of the 1927 Revision the Chief Justice then stated his conclusion as to the application of section 4(4) of the Act, as introduced by section 7 of the Act of 1926, and re-enacted by section 32 of the 1927 Revision, in the following terms:

> In the case before us, subsection 4, as introduced by the statute of 1926, though repealed, was *uno flatu* re-enacted as section 32 of chapter 97 of the Revised Statutes of 1927 and is, therefore, preserved in unbroken continuity; while section 12 of the statute of 1926 is repealed and disappears. Subsection 4 (which has become section 32 of chapter 97 in the Revised Statutes) applies only to the income of property transferred after the day on which it was originally enacted, June 15, 1926.

With regard to the last sentence of this statement I have no hesitation in saying that, even if it is correct as to the effect of subsection 4 of section 4 after it had become section 32 of the 1927 Revision, as to which I entertain serious

(1) (1887) 14 Ont. R. 741 at 745.

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doubt, it cannot possibly, for the reasons hereafter set forth, be correct as to its effect prior to the coming into force of the 1927 Revision.

In arriving at his conclusion Duff C.J. applied to the question of the validity of the assessment for 1930 the law as he conceived it to be after the 1927 Revision had come into effect, namely, after February 1, 1928. In effect, he held that section 4(4) of the Act, as introduced by section 7 of the 1926 Act, was preserved in unbroken continuity by section 32 of the 1927 Revision, except as to the retroactive effect which had been given to section 7 of the 1926 Act by section 12 thereof, his reason for making this exception being that section 12 of the 1926 Act had been repealed and not re-enacted in the 1927 Revision. The result, according to the Chief Justice, was that section 32 of the 1927 Revision did not have the retroactive effect which its predecessor, section 7 of the 1926 Act, had had. Without such retroactivity section 32 of the 1927 Revision dated back through such predecessor only to June 15, 1926, the date when section 7 of the 1926 Act was assented to, whereas section 7 of the 1926 Act dated back to January 1, 1925, by reason of the retroactivity imparted to it by section 12 thereof. By thus applying section 32 of the 1927 Revision without the retroactive effect which its predecessor had had the Chief Justice found that the Molson estate could not be held liable for income tax on income derived in 1930 from property which Kenneth Molson had transferred to his wife prior to June 15, 1926, namely, on March 23, 1925. In view of the agreement of counsel to which I have referred the appeals from all the other assessments, even for the period prior to February 1, 1928, were also allowed without consideration of whether the law properly applicable to the validity of the assessments for such prior period was the same or not.

Quite apart from whether the view of the law thus taken by the Chief Justice is correct or not, it is obvious that the reasoning which he applied in holding the 1930 assessment invalid was equally applicable to the other assessments for the period subsequent to February 1, 1928, that is to say, the assessments for 1929 and 1931 and also that for 1928 in respect of the income derived from the transferred property in that year after February 1. If,

therefore, the Molson estate was properly held not liable to tax on the income derived from the transferred property in 1930 it was equally not liable in respect of the income derived therefrom at any time after February 1, 1928.

But the same reasoning could not possibly apply to the assessments for the period prior to February 1, 1928, when section 7 of the 1926 Act with the retroactivity imparted to it by section 12 thereof was in effect. It is a fundamental principle that the validity of an income tax assessment and the liability of the taxpayer thereunder must be determined according to the law in force in the period for which the assessment was made and in which the liability, if any, of the taxpayer was incurred, and not according to the law in force at the time the assessment was made. In the light of such principle let us test the validity of one of the assessments for the year prior to February 1, 1928, say the assessment for 1927, and the liability of the Molson estate thereunder in respect of the income derived in that year from the transferred property. Clearly the law applicable to such assessment would be section 4(4) of the Act, as introduced by section 7 of the 1926 Act, with the retroactive effect imparted to it by section 12 thereof making it date back to January 1, 1925. In order that a taxpayer should be liable thereunder in respect of income derived from property transferred by him to his wife it would be necessary to show not only that such income was derived while the section was in effect but also that the transfer had been made after it had come into force. Both of these conditions of liability would have to be complied with. It could not have been soundly argued that because the transfer of March 23, 1925, was made prior to June 15, 1926, the date when section 7 of the 1926 Act was assented to, it was not affected thereby, for such argument would have been tantamount to a denial of its retroactivity. When section 12 of the 1926 Act made section 7 thereof retroactively applicable to the year 1925 the effect was the same as if section 7 had been enacted on January 1, 1925, and it should have been construed and applied accordingly. I am unable to see how it could be given its retroactive effect otherwise. That being so, the transfer from Kenneth Molson to his wife of March 23, 1925, was made after the retroactive coming into force of section 7 of the 1926 Act

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and both the transfer and the income derived in 1927 from the transferred property became subject to it. Both of the necessary conditions of liability thereunder were fully complied with. Consequently, if the law properly applicable to the assessment for 1927 had been applied to it such assessment would have been held valid and the appeal therefrom dismissed. The same disposition would have necessarily followed in respect of the other assessments for the period prior to February 1, 1928, namely, the assessment for 1925 in respect of the income derived from the transferred property in the balance of that year after the date of the transfer, the assessment for 1926, and also that for 1928, in respect of the income derived from the transferred property in that year up to February 1. The result would then have been what it ought to have been, namely, that the Molson estate would have been held liable to tax on the income derived from the transferred property during the period from March 23, 1925, the date of the transfer, up to February 1, 1928, when the 1927 Revision came into effect.

There is, I think, an implied recognition of this in the remarks of Duff C.J., at page 221:

> It is perfectly true that the transfer of 1925 was a condition *sine qua non* of the liability of Kenneth Molson in respect of any taxing period anterior to the 1st of February, 1928; and it is also true that, as regards income derived from that property prior to that date, he had incurred a liability to taxation, and the Crown had acquired a correlative right.

But the majority of the Court confined themselves to determining whether the assessment for 1930 was valid and did not consider whether the law they applied thereto was applicable to the other assessments, although the appeal from each assessment is a separate appeal, but disposed of all the assessments and the appeals therefrom on the basis agreed upon by counsel. There was, therefore, no adjudication as to the validity of the assessments other than that for 1930, certainly not of those for the period prior to February 1, 1928, but merely an acquiescence in disposing of them as counsel had agreed. By such course they allowed the law as they conceived it to be after February 1, 1928, to govern the assessments for the period prior thereto without consideration or recognition of the fact that the law properly applicable to such assessments

was radically different therefrom. In effect, they made section 7 of the 1926 Act, as carried into section 32 of the 1927 Revision, but without any retroactive effect and, therefore, dating back only to June 15, 1926, applicable to all the assessments, even to those for the period prior to February 1, 1928, although the law properly applicable to the assessments for such prior period was section 7 of the 1926 Act with the retroactive effect imparted to it by section 12 and, therefore, dating back to January 1, 1925. The result of the agreement of counsel and the unquestioning acquiescence by the majority of the Court therein was that with regard to the period prior to February 1, 1928, the retroactive effect which Parliament had given to section 7 of the 1926 Act was wholly denied and the Molson estate released from an income tax liability to which it was lawfully subject.

It is unfortunate that the Court did not deal with the several assessments under appeal according to the law properly applicable to each instead of proceeding on the basis agreed upon by counsel, for if they had done so there can be no doubt that the result to which I have referred would have been avoided. The responsibility for such result must, I think, lie with the Court for acting upon the agreement rather than with counsel for making it. An appeal from an income tax assessment is not a private dispute between the appellant taxpayer and the Minister or a *lis* in the ordinary sense, in which the agreement of counsel may bind the parties thereto and so preclude the Court from dealing with the issue on the appeal on its merits; the public has an interest in the disposition of the appeal and in seeing that taxpayers are held liable for the tax which Parliament has imposed upon them and that no taxpayer is released therefrom pursuant to an agreement of counsel and the acquiescence of the Court in its application. It is the duty of the Court in such an appeal to determine the liability of the taxpayer under each assessment appealed from according to the law which Parliament has made applicable to it regardless of what agreement counsel may have made as to its disposition. It is not for counsel to fix such liability by agreement. That is for adjudication by the Court. It may, I think, in fairness to counsel, be assumed that when they made their agree-

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ment they considered that the law applicable to all the assessments was the same and did not intend that the liability of the taxpayer under any of them should be determined according to a law that was not properly applicable thereto. Yet that turned out to be the result of the Court's finding that the taxpayer was not liable under the assessment for 1930 and the application of such finding to the other assessments without adjudication as to the law applicable thereto. Under the circumstances, I am of the opinion that the *Molson* case (*supra*) was wrongly decided by the Supreme Court of Canada at least so far as the judgment relates to the assessments in respect of the income derived from the transferred property during the period from March 23, 1925, the date of the transfer, up to February 1, 1928, and that the Molson estate ought to have been held liable to tax on such income.

I am also of the view that the judgment in the *Molson* case (*supra*) is open to doubt as to the assessments covering the period subsequent to February 1, 1928. If the reasoning of the majority of the Court is correct that, because section 12 of the 1926 Act was repealed, section 32 of the 1927 Revision applied "only to the income of property transferred after the day on which it was originally enacted, June 15, 1926", which is the effect of what Duff C.J. said, then we have the extraordinary result that if a transfer of property from a husband to his wife was made at any time during the interval between December 31, 1924, and June 15, 1926, the transferor would be liable to be taxed on the income derived from such property up to February 1, 1928, because of the retroactive effect imparted to section 7 of the 1926 Act by section 12 thereof, but would not be liable in respect of any income derived therefrom after such date. I do not think that Parliament could have intended such an anomalous result. Since Parliament decided by section 7 of the 1926 Act that if a husband transferred property to his wife he should be liable to be taxed on the income derived from such property as if such transfer had not been made and by section 12 of the said Act made section 7 thereof retroactive to January 1, 1925, so that it was applicable to the income derived from property transferred after that date, I see no reason for assuming, in the absence of clear words indicating such an intention, that it intended

that the husband should be free from liability to tax on income derived from the transferred property after February 1, 1928. I am unwilling to accept a construction of the Act that leads to such an anomalous result, unless I am plainly driven to it. I do not think I am so driven. The unreasonableness of the result prompts an enquiry as to the correctness of the construction.

The reason for the result is to be found in the view which the majority of the Court took of the effect of the non-appearance of section 12 of the 1926 Act in the 1927 Revision. With the greatest deference, I doubt the correctness of such view. It is established that the effect of the 1927 Revision was to preserve the Acts consolidated by it in unbroken continuity. That being so, I am unable to see how the reasoning of Duff C.J. that, because section 12 of the 1926 Act did not appear in the 1927 Revision, section 32 thereof could date back through its predecessor, section 7 of the 1926 Act, only to June 15, 1926, can be consistent with the preservation in unbroken continuity of section 7 of the 1926 Act with its retroactivity back to January 1, 1925. How could it be said in the case of the hypothetical transfer to which I have referred that there was a preservation in unbroken continuity of section 7 of the 1926 Act by section 32 of the 1927 Revision if there was such a cessation of the liability which had previously existed? All that was preserved by the view taken by Duff C.J. was section 7 of the 1926 Act without its retroactivity.

Yet that was not the state of the law to which section 32 of the 1927 Revision succeeded. I have already expressed the view that when section 12 of the 1926 Act made section 7 thereof retroactive to January 1, 1925, the effect was the same as if it had been enacted on that date and that it ought to be construed and applied accordingly. It remained with its retroactivity up to February 1, 1928. That being so, it was carried into section 32 of the 1927 Revision with exactly the same force and applicability that it had had up to that date. Any other construction would, I think, amount to a denial of the doctrine that the Revision preserved the Acts consolidated by it in unbroken continuity.

There is a further reason for questioning the correctness of the construction adopted in the *Molson* case (*supra*). It was assumed that section 7 of the 1926 Act was repealed

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pursuant to section 5(2) of An Act respecting the Revised Statutes of Canada, to which I have already referred, which provided:

> 5. 2. On, from and after such day, (which was later by proclamation fixed as February 1, 1928) all the enactments in the several Acts or parts of Acts in Schedule A. above mentioned shall stand and be repealed to the extent mentioned in the third column of the said Schedule A.

In the said Schedule A, which appears at the end of Vol. IV of the Revised Statutes of Canada, under the heading "Extent of Repeal" the following appears with regard to the 1926 Act:

> The whole, except s. 2, the first sentence of par. (*f*) of s. 3, the last eighteen words of ss. 11 of s. 3, and s. 6.

Section 12 of the 1926 Act is thus included among the Acts and parts of Acts repealed. But the said section 5 and Schedule A must be read in the light of section 2 of the same Act, which provides:

> 2. There shall be appended to the said Roll a Schedule A similar in form to Schedule A appended to the Revised Statutes of Canada of 1906; and the Commissioners may include in the said Schedule all Acts and parts of Acts which though not expressly repealed, are superseded by the Acts so consolidated, or are inconsistent therewith, and all Acts and parts of Acts which were for a temporary purpose, the force of which is spent.

I venture the opinion that it is thus clearly indicated that not all the Acts or parts of Acts included in the third column of Schedule A as having been repealed are of the same nature or have the same effect because of such inclusion. Section 12 of the 1926 Act comes within the category of "Acts and parts of Acts which were for a temporary purpose, the force of which is spent" and its inclusion in Schedule A ought not to be construed as affecting any change in the law or cessation of liability under it. When it gave section 7 of the 1926 Act retroactive effect back to January 1, 1925, its purpose was wholly served and its force spent. Section 7 continued to have such retroactive effect up to February 1, 1928, when it was succeeded in unbroken continuity by section 32 of the 1927 Revision. Thereafter, since its purpose was completely accomplished and its force was spent there was no further need for it. Under the circumstances, I am unable to see how its non-appearance in the 1927 Revision or its inclusion in Schedule A can have the effect which the majority of the Court ascribed to it, namely, a change in the law by removing

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the retroactivity which section 32 of the 1927 Revision had inherited from its predecessor and thus giving it a different applicability from that which its predecessor had had. It follows from what I have said that, in my opinion, the Molson estate ought to have been held liable for income tax under all the assessments levied against it.

If the decision of the Supreme Court of Canada in the *Molson* case (*supra*) is correct, it would follow in the present case that the appellant ought not to be held liable in respect of the income derived from the transferred property in the period from 1925 to 1929 even if the transfer was made in 1925, as counsel for the respondent suggests, or, indeed, at any time prior to June 15, 1926, when section 7 of the 1926 Act was assented to. *A fortiori* that would be so if the transfer was made prior to January 1, 1925. But in view of what I have said, if I had held that the transfer was made subsequent to January 1, 1925, I would have held the appellant liable under all the assessments under appeal notwithstanding the decision in the *Molson* case (*supra*).

But since the transfer was made prior to January 1, 1925, the appellant should not be held liable in respect of any income derived from the transferred property either under section 7 of the 1926 Act or section 32(2) of the 1927 Revision on the ground that it was made before either of these sections came into force, even if section 7 of the 1926 Act is construed and applied with its full retroactive effect back to January 1, 1925, since one of the essential conditions of liability to which I referred cannot be complied with. If, therefore, there is any liability on the part of the appellant it can only be under section 4(4) of the 1917 Act. Here is where the argument of counsel for the respondent based upon certain remarks by the majority of the Court in the *Molson* case (*supra*) came in. The contention was that just as section 4(4) of the Act, as introduced by section 7 of the 1926 Act, was preserved in unbroken continuity by section 32 of the 1927 Revision, as Duff C.J. had said, so also a continuity of liability and right under section 4(4) of the 1917 Act was preserved, notwithstanding its repeal by section 7 of the 1926 Act, just as if such section had not been passed; that there was a liability under the 1917 Act which continued until June 15, 1926,

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when section 7 of the 1926 Act was enacted, to which section 12 thereof did not apply, and that later assessments might come under the new Act because of such continuity; and that rights acquired by the Crown under the 1917 Act were likewise preserved. From these premises he argued that since the income derived by Mrs. Fasken from the transferred property in the years 1925 and 1926 was received by her in June, 1925, and May, 1926, respectively, there was a liability incurred by the taxpayer and a correlative right acquired by the Crown in respect of such income before section 7 of the 1926 Act was enacted and that the making of such section retroactive could not cause such liability or right to disappear. I am unable to accept this argument. In the first place, the statement of Duff C. J. that section 7 of the 1926 Act was preserved in unbroken continuity by section 32 of the 1927 Revision was applicable only because it was re-enacted in the revision in identical form and cannot be extended to apply to the repeal of section 4(4) of the 1917 Act by section 7 of the 1926 Act. There was a change in the law by such repeal and, consequently, no preservation of any continuity of it. Thereafter section 4(4) of the 1917 Act ceased to have any effect except such as was saved by section 19 of the Interpretation Act, R.S.C. 1927, chap. 1, which provides in part:

> 19. Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided.
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

In order that a taxpayer shouud be held liable under section 4(4) of the 1917 Act it would be necessary to show not only that he had made a transfer of property to one of the persons named therein after the date named therein and while it was in effect but also that the reduction in his income thereby had occurred while it was still in force. Both conditions of liability must be complied with. It is obvious that if the transfer by David Fasken to his wife was made on December 31, 1924, there could not have been any reduction in his income thereby in 1924. The only reductions that occurred in such income by reason of the transfer prior to June 15, 1926, were those of $10,000 in May 1925 and $5,000 in June 1926. The utmost liability that David Fasken

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could have incurred under section 4(4) of the 1917 Act would, therefore, be in respect of these amounts as contained in the assessments for 1925 and 1926. But his liability under such assessments must be determined by the law properly applicable to the assessments for such years. The law must be section 7 of the 1926 Act made applicable by section 12 thereof to 1925 and subsequent years. This retroactivity of section 7 of the 1926 Act back to January 1, 1925, prevented any incurring of liability or acquiring of right under section 4(4) of the 1917 Act after such date. To hold a taxpayer liable under such section 4(4) for a reduction of income in 1925 and in 1926 would be a denial of the retroactivity of section 7 of the 1926 Act.

Consequently one of the conditions of liability under section 4(4) of the 1917 Act, namely, that there should be a reduction of income while it was in force cannot be complied with and there can be no liability under it.

Since there is also no liability under section 7 of the 1926 Act or section 32(2) of the 1927 Revision it follows that the appellant is not liable to tax on any of the income derived from the transferred property. The appeals from all the assessments must, therefore, be allowed with costs.

Judgment accordingly.

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Apr. 8

Sept. 17

BETWEEN:

THE GOTTFRIED COMPANY..... PLAINTIFF

AND

THE COMFORT KIMONA AND DRESS MANUFACTURING COMPANY..... DEFENDANT

Trade Mark—The Unfair Competition Act of 1932, 22-23 Geo. V, c. 38, sec. 28(1)(d)—Mark "Marie Dressler" written in script and surrounded by a frame as registered in U.S.A.—Mark "Marie Dressler" as registered in Canada—Same owner—Registration in Canada of a group of words which had not already been registered as a trade mark in country of origin—Mark "Marie Dressler" as registered in U.S.A. a design-mark under the Unfair Competition Act—Section 28(1)(d) of the Act not applicable to design-marks but only to word-marks—Invalidation of word-mark "Marie Dressler"—Letters not marked "without prejudice" and resulting in settlement of an intended

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litigation admissible as evidence—Estoppel not created by letters in so far as counterclaim for expungement is concerned—Action dismissed —Counterclaim allowed.

Plaintiff on December 28, 1938, under No. N.S. 10591 registered pursuant to the provisions of the Unfair Competition Act of 1938 the trade mark "Marie Dressler" for use on wares described as dresses, hooverettes and coats. Plaintiff had already registered in U.S.A. under No. 320,829 the mark "Marie Dressler" written in script and surrounded by a frame for ladies dresses, in class 39, clothing. Defendant while the registered owner of the word-mark "Magicoat" was using the mark "Marie Dressler" on its wares. Certain correspondence was passed between solicitors of plaintiff and defendant in 1940 and defendant then undertook not to use the mark "Marie Dressler" until a judgment had been given in the Exchequer Court upsetting plaintiff's contention. Defendant discontinued to use the mark for a few months and then continued to use it again.

The action is one for infringement. Defendant denies infringement and claims by way of counterclaim that the mark "Marie Dressler" should be expunged from the register.

Held: That the letters are admissible because they were not marked "without prejudice" and they did result in a settlement. *Scott Paper Company v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151 at 157 distinguished.

2. That the letters are relevant to the issue whether they create an estoppel and, therefore, are admissible.

3. That an estoppel was not created by the letters in so far as the counterclaim for expungement is concerned.

4. That plaintiff has registered in Canada under section 28(1) (*d*) of the Unfair Competition Act a group of words which it had not already caused to be duly and validly registered as a trade-mark in the country of origin.

5. That the mark plaintiff registered in the country of origin would be a design-mark under the Unfair Competition Act and provisions of section 28(1) (*d*) are not applicable to design-marks but only to word marks.

6. That the registration of plaintiff's mark is invalid and must be expunged.

ACTION by which plaintiff seeks an injunction and damages for alleged infringement by defendant of the trade-mark "Marie Dressler".

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

S. F. M. Wotherspoon for plaintiff.

Gordon F. Henderson for defendant.

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

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O'CONNOR J. now (September 17, 1948) delivered the following judgment:

The plaintiff was incorporated under the laws of the State of Ohio, and has its principal office in the city of Cleveland, Ohio. The defendant is a Company incorporated under the laws of the Province of Quebec, and has its principal office in the city of Montreal. The plaintiff seeks an injunction and damages for alleged infringement by the defendant of the trade-mark "Marie Dressler". The defendant denies infringement and claims by way of counterclaim that the registration should be expunged from the register.

The plaintiff on the 8th of January, 1935, under No. 320,-829 registered the mark "Marie Dressler" writen in script and surrounded by a frame in the Patent Office of the United States of America for ladies' dresses, in class 39, clothing. The application stated that the trade-mark had been continuously used and applied to the said goods in the applicant's business since April, 1931.

The registration was made under the Act of 1905—33 U.S. Statutes, pt. 1 (1903-1905) chap. 592, of which Section 5 provides:—

Sec. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

(*a*) * * *

(*b*) * * * *Provided,* That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or * * * shall be registered under the terms of this Act: * * *

By an application dated 27th November, 1935, the defendant applied to register pursuant to the Unfair Competition Act of 1932, the following:—

Magicoat
Seam to seam overlap
Tailored with a hem.
Marie Dressler
Slender stouts
Tailored with a hem.

The application stated that the applicants had used the said mark since the month of March, 1935, on wares described as "women's cotton frocks and garments".

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The Registrar refused registration on the grounds that the application contained two separate and distinct word-marks and consisted of more than 30 letters divided into more than four groups and that the words were of a descriptive nature and not registrable under Section 26(1) (*c*). And that as Section 26(1) (*b*) of the Act provided that the name of a person may not be registered as a trade-mark and as "Marie Dressler" was a personal name, such words were not registrable.

Section 26(1)(*b*) provides:—

26(1) Subject as otherwise provided in this Act, a word mark shall be registrable if it,

(*a*) * * *

(*b*) is not the name of a person, firm or corporation.

The defendant then made a separate application for the registration of the word-mark "Magicoat" which was granted. The defendant continued to use the mark "Marie Dressler".

The plaintiff on the 20th July, 1937, applied to register the word-mark "A Marie Dressler Dress". The application stated that the trade-mark had been used in Canada on dresses, hooverettes and housecoats and that the mark was first used in the United States on the 1st April, 1931, and that the first use of the mark in Canada occurred on the 15th August, 1931. The Registrar refused the application for the reason that under the provisions of Section 26(1)(*b*) of the Act, the name of a person was not registrable as a trade-mark.

On the 6th December, 1938, the Registrar wrote to the solicitor in Ottawa for the plaintiff Company stating that as the registration in the United States was for "the word mark Marie Dressler", he was prepared to grant registration of this word on the basis of Section 28(1)(*d*), provided the plaintiff Company submitted a new application for registration of the word-mark "Marie Dressler" only.

Section 28(1)(*d*):—

28.(1) Notwithstanding anything hereinbefore contained:—

(*a*) * * *

(*b*) * * *

(*c*) * * *

(*d*) A word or group of words, which the applicant or his predecessor in title, without being guilty of any act of unfair competition, has already caused to be duly and validly registered as a trade mark in the country of origin of such registration, shall, although otherwise unregistrable by

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reason of its or their form, sound or meaning, be registrable under this Act provided (i) that its use as a trade mark is not prohibited by this Act; (ii) that it is not calculated to deceive nor otherwise contrary to some law or regulation directly concerned with the maintenance of public order; (iii) that it is not in conflict with any mark already registered for similar wares; (iv) that having regard to all the circumstances, including the length of time its use has continued, it cannot be said to be wholly without distinctive character; (v) that it does not include the personal or trade name of any person domiciled or carrying on business in Canada.

By an application dated 12th December, 1938, the plaintiff Company then applied for registration of the word-mark "Marie Dressler" in association with wares described as "dresses, hooverettes and housecoats" and stated that the mark was first used in the United States on the 1st April, 1931, and that the first use of the mark in Canada occurred on the 15th August, 1931. The application was accepted and the Certificate of Trade Mark registration N.S. 10591 was sent to the plaintiff's solicitor on the 28th December, 1938. The Certificate shows the registration date as the 27th July, 1937, which was the date of the application to register "A Marie Dressler Dress". The Certificate also sets out the 1st April, 1931, as the date of first use. A discontinuance, dated December 29th 1938, of the application for the registration of the mark "A Marie Dressler Dress" was filed with the Registrar.

On the file of the Registrar in connection with the plaintiff's application, are certain letters written after the registration of the plaintiff's word-mark between the Registrar and the defendant's solicitors.

Counsel for the plaintiff objected to their admission. The objection was not as to the form of the evidence, but on the ground that they were written after the registration of the plaintiff's mark, and were not relevant to the issues here.

These letters tend to show that the defendant has throughout maintained its right to use the mark and the letters are, in my opinion, admissible.

On the 2nd February, 1939, the solicitors for the defendant wrote to the Registrar protesting the plaintiff's registration of the word "Marie Dressler" in Canada, when the defendant's application had been refused. The Registrar in his reply stated that the defendant's application was for

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"the registration of what is commonly called a composite mark", and he stated that the plaintiff's registration was based upon the terms of the International Convention, and that under the terms of Section 28(1)(*d*) there was no alternative other than to register the mark. The Registrar on the 30th May, 1940, advised the solicitors for the defendant that:—

> Some months ago, the question was raised as to whether or not a personal name was registrable even in view of the terms of the International Convention. The office is now awaiting judgment from the Exchequer Court on litigation which is pending before it.

Counsel for the plaintiff tendered certain correspondence passing between the solicitors for the plaintiff and the defendant Company in 1940. Subject to the determination as to the admissibility of the letters the parties agreed under paragraph 1 of the Agreement of Fact, that such letters were written and agreed as to the contents without further proof, Counsel for the defendant contended first, that the letters were not admissible on the grounds that they were written in settlement of intended litigation and were, therefore without prejudice whether marked "without prejudice" or not. *Scott Paper Company* v. *Drayton Paper Works Ltd.* (1). That contention cannot prevail in my opinion, because these letters were not marked "without prejudice" and they did result in a settlement. And that fact distinguishes this correspondence from the admissions dealt with in the *Scott Paper case* (*supra*).

The next contention of counsel for the defendant is that the correspondence does not establish an adoption of the mark and does not create an estoppel, and therefore is not admissible. But in my view the letters are relevant to those issues and are admissible. Whether they do create an estoppel or establish that the defendant knowingly adopted the mark is another question.

In view of the conclusion that I reach that the plaintiff's mark must be expunged, it is not necessary for me to deal with the question of "knowingly adopted" and for the same reason I deal with the question of estoppel only in so far as it affects the issue of expungement.

The Pleadings disclose that the plaintiff's action is one for infringement. The action is not framed as a breach of

(1) (1927) 44 R.P.C., 151 at 157

contract. Per Cameron, J., in *The Gottfried Company* v. *The Comfort Kimona and Dress Manufacturing Company* (1). The correspondence is not tendered, therefore to establish a contract. The defendant denies infringement and counterclaims for expungement. In its defence to the counterclaim the plaintiff alleges that the defendant is estopped from alleging the invalidity of the plaintiff's registration because of the undertaking of the defendant contained in the letter of July 18, 1940, from the solicitor of the defendant to the solicitor for the plaintiff. The letter forms part of the correspondence and is, in part, as follows:—

> I have gone into the matter quite thoroughly and I find that there is at the present moment in the Exchequer Court a contested action which bears directly on the issue in this case.
>
> I am fully prepared to give you the assurances that you asked for in your letter of the 15th inst. I merely wish to add that if in the future a judgment is rendered in the Exchequer Court, the effect of which will upset your present contentions, that my client in that case be permitted the use of the trademark, "Marie Dressler". I believe that this suggestion is reasonable and cannot prejudice your client in any way.
>
> Until such time, then, I am authorized to advise you that my client has ceased and will not again use this trademark in virtue of the pretentions that you have made in an earlier letter that you had sent to me.

But whatever may be said in support of the argument that an estoppel was created by this correspondence on the question of infringement, it is clear that those contentions are not applicable in respect to the counterclaim for expungement.

In any event the effect of the whole of the correspondence was to deny the validity of the plaintiff's mark. But in view of some decision then pending in this Court, the defendant undertook not to use the mark until the judgment had been given upsetting the plaintiff's contention.

There was no express representation that the plaintiff's mark was valid. There was at best an implied representation but this was qualified and conditional.

The defendant could have taken expungement proceedings the day after the letter was written. And the plaintiff could not then and, in my opinion, cannot now in defence to the counterclaim, contend that the defendant is estopped from so doing by the undertaking. The defendant has a

(1) (1948) 7 C.P.R., 23 at 24.

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statutory right under the Unfair Competition Act to move to expunge the plaintiff's mark and is not, in my opinion, estopped from so doing by this undertaking.

Counsel for the defendant tendered certain letters purporting to be written by a solicitor for the plaintiff Company in Cleveland, to the defendant's solicitors, Bernstein and Rohrlick. Counsel for the plaintiff Company objected to the admission of these letters without further proof. Counsel for the defendant was not able to establish that the firm in Cleveland were solicitors for the plaintiff or that the letters written by the solicitors for the defendant had been received by this firm of solicitors in Cleveland. The letters must be rejected because they have not been proven.

The defendant Company discontinued the use of the mark "Marie Dressler" in July, 1940, for a few months only, and then continued to use it again and did so continuously until 1947.

An agreed Statement of Facts was submitted by counsel setting out certain facts relating to subparagraph (*v*) of Section 28 (1) (*d*). In my opinion these facts do not establish that "Marie Dressler" was the personal name of any person domiciled in Canada, or that "Marie Dressler" was the trade name (defined by Section 2(*n*)) of any person carrying on business in Canada.

Evidence was given by Mr. T. J. Bailey of Washington, D.C., a lawyer specializing in patents and trade-marks. His training and experience are set out in the evidence and there is no question as to his qualifications to give expert opinion in these matters. His evidence may be summarized as follows:—

The mere name of an individual as such, i.e. in ordinary block type is not a good technical trademark, i.e., a mark used to distinguish wares. *Woodbury* v. *Woodbury*, 23 Fed. Sup. 162: *Charles Broadway Rouss Inc.*, v. *Winchester Co.*, 300 Fed. 706.

A name as such is not registrable under the Act of 1905. It is merely the presence of some additional display matter, either by way of a design surrounding the name or by way of peculiar lettering in the name itself that renders it registrable.

In order to register under the Act of 1920, the requirement was that the name be connected with a display or printed in a peculiar or unusual manner, the display being such at least as to weight as much in the eye of the observer as the name. *Ex Parte* Sperti 68 U.S.P.Q. p. 93, where it was held that the name "Sperti" in block letters printed vertically was not distinctively displayed and therefore not registrable under the Act

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of 1905. In *Ex parte Ayerst McKenna and Harrison Ltd.*, 71 U.S.P.Q. 297, the name "Ayerst" which was written in script but which was not the signature of the applicant was held to be unregistrable under the Act of 1905.

That in his opinion the name "Marie Dressler" independently of any particular form would not be registrable under the 1905 Act, and it was the combination of the script letters and the surrounding design that constituted the registrable features of the trade-mark registration No. 320,829.

And in his opinion the use by a vendor of ladies' dresses of letters constituting the name "Marie Dressler" in block letters would not infringe the U.S. registration 320,829.

That the Courts of the United States in considering the infringement of a combination mark consisting of words plus some form of design, took into account the dominant feature of the mark whether it was the design or the words. But in either case, if the dominant feature was not a good technical trade-mark, there could be no trade-mark infringement by the use of that portion of the composite mark.

The question is this: Has the plaintiff registered in Canada under Section 28(1)(*d*) a group of words which the plaintiff had already caused to be duly and validly registered as a trade-mark in the United States?

Section 28(1)(*d*) is an exception to the whole scheme of the Act. Under the provisions of the Act, prior use is essential to registration of a mark. But under Section 28 (1) (*d*) registration can be effected without prior use of marks and "otherwise unregistrable by reason of its or their form, sound or meaning". The plaintiff must, therefore, be shown to be clearly within the express words of the Section.

In my opinion the plaintiff was not entitled to register the words "Marie Dressler" under Section 28(1)(*d*) for the following reasons:—

In their natural and ordinary sense the words used, "a word or words which the applicant * * *, has already caused to be duly and validly registered as a trade mark in the country of origin of such registration", means that registrations under Section 28(1)(*d*) may be made of trade-marks which consist only of a word or group of words and which the applicant has caused to be registered in the country of origin. That is of trade-marks which under the Unfair Competition Act are "word marks".

The trade-mark which the plaintiff caused to be registered in the United States did not consist of words alone. And a trade-mark is not one part of the matter. It is the whole thing.

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In *re Christiansen's Trade Mark* (1), the Master of the Rolls at page 61 said:—

> We are to consider whether the one trade mark is so like the other trade mark that it is calculated to deceive. What is the trade mark? The trade mark is not the distinguishing feature of the trade mark. The trade mark is not one part of the matter. The trade mark is not in the one case "Medals" and in the other case "Nitedals". That is not the trade mark. If you say that, you strike out all the rest. The trade mark is the whole thing, the whole picture on each. You have, therefore, to consider the whole.

The section does not provide that a word or group of words out of a registered trade-mark may be registered. But it provides that a word or group of words registered as a trade-mark in the country of origin, may be registered under the Unfair Competition Act.

The plaintiff in my opinion did not register the words "Marie Dressler" in the United States. This is clear from Mr. Bailey's evidence, which I accept, supported as it was by the authorities and statutes. The words "Marie Dressler" were not the registrable feature of the mark and, in themselves, did not constitute a good technical trade-mark. And the use by another of the words "Marie Dressler" in block type would not infringe the plaintiff's mark.

The plaintiff has, therefore, registered in Canada under Section 28(1)(*d*) a group of words which it had not already caused to be duly and validly registered as a trade-mark in the country of origin.

The protection which the plaintiff obtained in the United States was in respect to form. The mark the plaintiff registered in the United States would be then a design-mark under the Unfair Competition Act. And in my opinion the provisions of Section 28 (1) (*d*) are not applicable to design-marks but only to word-marks. In *Albany Packing Company Inc.*, v. *The Registrar of Trade Marks* (2), Maclean P., said.—

> Sec. 28(1)(*d*) would appear to enact that if an applicant has registered a word mark—not a design mark—in the "country of origin", and though it be unregistrable under any previous section of the Act, it shall nevertheless be registrable if not barred by any one of the five provisos therein mentioned.

(1) (1886) 3 R.P.C. 54.

(2) (1940) Ex. C.R., 256 at 272.

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Counsel for the plaintiff made reference to Article 6 of the Convention defined by Section 2(*a*). Reference may properly be made to the Convention, but only on the basis set out in *Kerly on Trade Marks* 6th Ed., p. 673:—

> The Convention * * * may be referred to by the Court as a matter of history, in order to enable it to understand under what circumstances the sections of the Act were passed; *Carter Medicine Co.'s Tm.*, (1892) 3 Ch. 472; 9 R.P.C., 401: but the terms of the Convention cannot be employed as a guide to interpret the sections, *Californian Fig Syrup Co.'s Tm.* (1888), 40 Ch.D. 620; 6 R.P.C., 126, for a treaty with a foreign State binds the subjects of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way: *Californian Fig Syrup case, (supra)*, and *Walker* v. *Baird* (1892) A.C. 491.

Article 6 of the Convention is, in part, as follows:—

> A. Every trade-mark duly registered in the country of origin shall be admitted for registration and protected in the form originally registered in the other countries of the Union under the reservations indicated below. These countries can demand, before proceeding to a final registration, the production of a certificate of registration in the country of origin issued by the competent authority. No legalization shall be required for this certificate.

The plaintiff did not, however, register its trade-mark in Canada *in the form originally registered* in the country of origin as provided by Article 6A.

> B. (1) * * *
>
> (2) Trade-marks cannot be refused in the other countries of the Union on the sole ground that they differ from the marks protected in the country of origin only by elements not altering the distinctive character and not affecting the identity of the marks in the form under which they have been registered in the aforesaid country of origin.

The name of a person is not adapted to distinguish his goods from those manufactured by other persons of the same name. In *Magazine Repeating Razor Company of Canada Limited et al* v. *Schick Shaver, Limited,* (1), in discussing Rule 11(*e*) made under Section 42 of the *Trade Mark and Design Act* R.S.C. 1927, c. 201 which is in these words:—

> 11. The Minister may refuse to register any trade mark or union label.
>
> (*e*) if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking.

Duff, C.J., said at page 472:—

> The registration of a surname which had not acquired a secondary meaning, in such a manner as to become adapted to distinguish the goods of the applicant, would be wanting in the essential elements of a trade mark within the contemplation of section 11. That, I think, was the law governing the registration of trade marks under the Trade Marks Act.

(1) (1940) S.C.R. 465.

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The name of a person is not registrable under the *Unfair Competition Act* by reason of Section 26(1)(*b*). It is only registrable under the *United States Act of 1905* and under the *English Patent, Design and Trade Mark Act of 1883*, when written "in some particular or distinctive manner".

The mark registered in Canada differed from the mark registered in the United States by the very elements that allowed it to be registered in the United States, and without which it could not have been registered in the United States.

And those differences altered the distinctive character and affected the identity of the mark in the form under which it had been registered in the United States.

I hold that the registration of the plaintiff's mark is invalid and must be expunged. It follows that the plaintiff's action for infringement must be dismissed by reason of the provisions of Section 4(4).

The defendant will have its costs of the action.

Judgment Accordingly.

BETWEEN:

ATLANTIC SUGAR REFINERIES LIMITED ..... APPELLANT;

AND

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

1945

Apr. 2

1948

Oct. 26

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Profit on isolated transaction outside ordinary course of business—Speculative investment—Operation of business in a scheme for profit making.

Appellant was faced with a prospective loss in its ordinary business operations through having bought raw sugar at high prices and undertaken to sell refined sugar at existing prices. To recoup such operating loss and in the belief that the prices of raw sugar were too high it sold raw sugar for future delivery on the New York Coffee and Sugar Exchange and later bought raw sugar for future delivery. On these transactions appellant made a profit on which it was sought to hold it liable to income tax.

Held: That the appellant's transactions in the raw sugar futures market were not an investment in raw sugar or otherwise of a capital nature. *McKinlay* v. *H. T. Jenkins and Son, Limited* (1926) 10 T.C. 372 distinguished

2. That whether the gain or profit from a particular transaction is an item of taxable income cannot be determined solely by whether the transaction was an isolated one or not. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and its surrounding facts.

3. That the appellant's venture into the raw sugar futures market was not unconnected with its business but closely connected therewith.

4. That the profit of the appellant from its sales and purchases in the raw sugar futures market may fairly be regarded as "a gain made in an operation of business in carrying out a scheme for profit making", or "a profit made in the operation of the appellant company's business". *Californian Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 and *T. Beynon and Co., Limited* v. *Ogg* (1918) 7 T.C. 125 followed.

APPEAL under the Income War Tax Act.

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

Hon. S. A. Haydon K.C. for appellant.

R. Forsyth K.C. and *A. A. McGrory* for respondent.

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

The PRESIDENT now (October 26, 1948) delivered the following judgment:

This appeal is from the income tax assessment levied against the appellant for the year 1939, to the extent that it was thereby sought to hold it liable to tax on the profit made by it in such year from sales and purchases of raw sugar on the New York Coffee and Sugar Exchange.

The facts are not in dispute. Mr. E. S. Johnston, the treasurer of the appellant, filed a statement giving particulars of the said sales and purchases during September and October, 1939. They were contracts for the sale and purchase of raw sugar for future delivery made in the terms of a contract known on the Exchange as Raw Sugar Contract No. 4. The contracts so made were commonly described with reference to the months of delivery specified therein as, for example, December No. 4 Contracts, March No. 4 Contracts, etc. The sales and purchases were in lots of 50 tons each. The appellant dealt through two brokers. Through one of them its sales of raw sugar were as follows: on December No. 4 contracts 20 lots

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on September 11, on March No. 4 contracts 8 lots on September 11 and on May No. 4 contracts 30 lots on various dates from September 11 to October 9.

Subsequently, through the same agent it purchased raw sugar for delivery in the months of delivery of its sales, in amounts equal to those of its sales, as follows: on December No. 4 contracts 20 lots on various dates from September 19 to October 27, on March No. 4 contracts 8 lots on October 27 and on May No. 4 contracts 30 lots on October 27. On the sales and purchases made through this agent the appellant made a profit of $33,201.31. Through the other broker it sold on May No. 4 contracts 40 lots on September 11, and purchased on May No. 4 contracts 40 lots on October 23 and October 27. On these transactions it made a profit of $30,927.60. These two amounts were in New York funds which meant an additional 11 per cent in Canadian funds, making a total profit on its raw sugar contracts in Canadian funds of $71,183.09.

These sales and purchases in the raw sugar futures market were made at the instance of the appellant's president and general manager, Mr. L. Seidensticker, and subsequently approved by its directors. Mr. Seidensticker outlined the events that led up to the transactions and explained his reasons for making them. Immediately after the outbreak of the war at the beginning of September, 1939, there was a heavy demand for sugar by the consuming public and industrial users whereupon the Canadian sugar refining and beet sugar industries were called to Ottawa to meet a committee of control set up by the Canadian government, which requested them to meet the heavy demand without any increase in price. This was prior to the establishment of price controls and rationing. The industries, including the appellant, undertook to sell all the sugar they had at existing prices and went into the cash market to buy raw sugar the prices of which were rapidly advancing. For example, the appellant, because of the drain on its raw sugar supplies to meet the heavy demands for sugar, purchased in September 15,515 tons of raw sugar in the cash market for future delivery, at prices substantially above those previously paid. Subsequently, the authorities found that more stringent measures were necessary and instituted sugar control and appointed

a Sugar Controller. Thereafter, the Sugar Controller was the sole source of supply of raw sugar for the Canadian sugar refining industry and the price of refined sugar was fixed. But this, of course, did not affect the commitments for the purchase of raw sugar at high prices which the appellant had already made.

Mr. Seidensticker explained that in the interval before the establishment of sugar control the necessity of the appellant responding to the demand to supply sugar and the need of buying raw sugar to overcome the deficiencies which normally and naturally occurred resulted in his attempt to recoup what he feared might be a consequent loss resulting from the purchases of raw sugar at high prices, which would, of course, be an operating loss. His attempt took the form of the sales and purchases referred to. He put his reasons for venturing into the futures market in various ways, all of the same tenor; he thought perhaps that something in the market might be found to provide a speculative offset to the appellant's operating loss and he conferred with a friend of his in New York and on his advice and working in conjunction with him entered into the transactions on the New York Coffee and Sugar Exchange; they were entered into for the purpose of offsetting the loss referred to; it seemed to him that to a limited degree the market offered the possibility of a profit on the short side if raw sugar was sold to recoup the appellant for the anticipated loss on the high priced sugar it had bought; it was a speculative transaction to recoup its losses; he thought that there was a good probability of a speculative gain in the futures market; he thought that the price in the futures market on September 11 was so high that it offered possibilities of a gain or profit to the company and would recoup it for the loss it had sustained through the purchase of sugars at high prices; the venture into the raw sugar futures market was made in order to recoup the prospective loss which the appellant was facing.

There are some other facts to which reference should be made. The appellant had power under its letters patent of incorporation

(a) To buy, sell or otherwise deal in, import, export, manufacture, refine, clarify and otherwise prepare for market, sugar, syrup, molasses and all products thereof, and all articles of commerce of a similar nature.

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But while its sales and purchases of raw sugar on the New York Coffee and Sugar Exchange were thus within its powers it is clear that its ordinary business consisted of purchasing raw sugar, refining it and selling the refined product. It was from these activities that it ordinarily earned its income. It obtained its supplies of raw sugar from many places, but mostly from Cuba and the British West Indies. While it made its purchases of raw sugar for future delivery it did not ordinarily do so on the futures market but through agents or brokers who were direct representatives of holders of actual sugar. It sold its refined sugar direct to customers without the intervention of any exchange. In the ordinary course of its business it did not sell raw sugar at all. Only twice in its history did it venture into the raw sugar futures market, once in March and April, 1937, and again in September and October, 1939. In 1937 it made a small profit of $212.10 which it treated as an item of profit and gain in its ordinary earnings for that year. But in 1939 it recorded its transactions in the futures market in a private journal and did not include its profits in its profit and loss accounts. Mr. Seidensticker denied that the transactions could be regarded as hedging. He claimed that they were quite outside the ordinary business of the appellant and described the venture as "just a gamble or speculation". But on his cross-examination he said that speculating with the appellant's money in a transaction on the futures market was within his authority; while he had no authority to gamble in such things as oil wells he did have authority to gamble in sugar futures.

When the assessment for 1939 was made the profits of the appellant from its "operations on raw sugar futures" amounting to $71,183.09 were added to the amounts of income shown on the appellant's income tax return. From such assessment an appeal was taken to the Minister who confirmed it on the ground that the appellant's profit from its raw sugar futures operations was income within the meaning of the Act. Being dissatisfied with the Minister's decision the appellant now brings its appeal from the assessment to this Court.

The issue on the appeal is whether the profit of the appellant on its dealings in raw sugar was taxable income

within the meaning of the Income War Tax Act, R.S.C. 1927, chap. 97, section 3 of which defined taxable income 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 . . .

The argument of counsel for the appellant may be summarized briefly. His first submission was that the amount of the appellant's gain from its transactions in the raw sugar futures market was a capital gain; that it was made such by the employment of its capital for purposes other than its usual business operations; that the transactions were a speculative investment in the raw sugar futures market; and that they were the same as if the appellant had purchased shares of a mining or industrial company or foreign exchange and made a profit thereon. The other submission, really the converse of the first one, was that the gain was not taxable income within the meaning of section 3 of the Act, because it was not income from any trade which the appellant carried on and because the transactions were not part of the normal business operations of the appellant or necessarily incidental thereto but isolated transactions. It was urged that the question of what constituted the appellant's business was a question of fact to be determined not by what it had power under its charter to do but by what it actually did; that its ordinary business was not that of buying and selling raw sugar, but of buying raw sugar for the purpose of refining it, refining such sugar and selling the refined sugar and that it was taxable only on the annual net profit or gain from such business; that it was no part of its business operations to speculate in the raw sugar futures market; that the fact that its transactions there were dealings in raw sugar and it was part of its business to purchase raw

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sugar to refine it should not make any difference, for while it could purchase its raw sugar requirements in the futures market that was not its usual and ordinary manner of acquiring its raw sugar supplies, and it did not sell raw sugar as a matter of ordinary and usual practice; that its venture into the raw sugar futures market was unusual and outside the ordinary course of its operations; and that its transactions there constituted an isolated transaction quite apart from its business so that its gain therefrom was not taxable income. Counsel also argued that if the appellant had made a loss on its raw sugar futures transactions it could not have deducted such loss as an expense for it would not have been wholly, exclusively and necessarily laid out for the purpose of earning the appellant's income.

In support of his submissions that the appellant's gain from its transactions in the raw sugar futures market was a capital gain and not taxable income counsel relied upon *McKinlay* v. *H. T. Jenkins and Son, Limited* (1), sometimes referred to as the *Marble* case, and contended that it was applicable to the present case. There the Company carrying on the business of marble, granite and stone merchants at Torquay, England, had made a contract to supply a quantity of marble for use in a building in Shanghai. Anticipating that it would be necessary to buy the marble in Italy the Company bought Italian lira in March, 1921, although the marble did not have to be obtained until six months later. The lira were bought at 103 to the pound. By May they had risen in value to 72 to the pound and the Company decided to sell them. It did so and realized a profit of £6,707 thereby. Later, when the time came to buy the Italian marble to be supplied under the contract it had to buy lira again. The Special Commissioners held that the £6,707 profit made on the sale of the lira was not a profit assessable to income tax and on appeal to the High Court their view was sustained. It was held by Rowlatt J. that the sum was not a profit arising out of the contract for the supply of the marble, but merely an appreciation of a temporary investment and not assessable to income tax as part of the profits of the Company in the way of its business as a profit of its

(1) (1926) 10 T.C. 372.

trade. The case has been the subject of judicial comment. It was distinguished in *Commissioners of Inland Revenue* v. *George Thompson & Co., Ltd.* (1). There the Company, which carried on business as ship owners, merchants, ship brokers, freight contractors and carriers, had entered into a contract for the supply to it of coal. Subsequently, some of its ships were requisitioned by the Australian government with the result that it had a surplus of coal to be delivered to it for which it had no immediate use. It transferred the benefits under its coal contract to a third party at a profit. Although the Company had power to deal in coal it did not make a practice of selling coal. Rowlatt J. held that the coal transactions were on revenue account and that the profits therefrom were part of the Company's profits. At page 1102, he referred to his decision in the *Marble* case (*supra*) as follows:

> there the way I looked at it . . . was simply this, that they had some capital lying idle, and they embarked upon an exchange speculation. They bought the lire as a speculation, not as consumable stores, or anything of that sort, but they simply bought them as a speculation rather than keep the money in the bank.

It is thus clear that he regarded the purchase of the lira in advance of its being required as a speculation in exchange unconnected with the Company's business as marble merchants. This explanation of the decision in the *Marble* case (*supra*) was adopted in *Imperial Tobacco Co.* v. *Kelly* (2). There the appellants were tobacco manufacturers who were in the habit of buying large quantities of tobacco leaf for cash in the United States. In order to make these purchases it was necessary for them to acquire dollars and they had accumulated dollars for such purpose. On September 9, 1939, the British Treasury requested them to stop all further purchases of tobacco leaf and they did so. This left them with a large surplus of dollars. On September 30, 1939, they were required under the Defence (Finance) Regulations to sell the surplus dollars to the Treasury. They had risen in value, with the result that the appellants had a large profit. They contended that although the dollars were bought for the purpose of their trade they ought to be regarded as having been purchased for the purpose of making a "temporary

(1) (1927) 12 T.C. 1091.

(2) (1943) 1 All E.R. 431; (1943) 2 All E.R. 119.

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investment in foreign currency" and as having, therefore, no connection with their trade and the decision of Rowlatt J. in the *Marble* case (*supra*) was relied upon. The Special Commissioners, however, held that the profits made by them on the compulsory sale of the surplus dollars to the British Treasury must be included in the computation of the profits of their trade. Their view was sustained in the Court of King's Bench by Macnaghten J., whose judgment was affirmed by the Court of Appeal, which refused leave to appeal to the House of Lords. My reading of the decisions in the *Imperial Tobacco Co.* case (*supra*) leads me to think that neither Macnaghten J. nor Lord Greene M.R. considered the *Marble* case (*supra*) wholly free from doubt. But, whether that is so or not, I am unable to see how the appellant's transactions in raw sugar futures can be brought within the ambit of the principle of the *Marble* case (*supra*), even on the basis of the view taken by Rowlatt J. that the Company bought the lira as a speculation unconnected with its business. The only thing in common between the transactions in that case and the appellant's transactions in this one is the element of speculation. That is not sufficient to determine whether a transaction is of a capital or a revenue nature. There are many transactions of a speculative nature that are nevertheless trading or business operations the profits from which are assessable to income tax. The appellant's speculation in the raw sugar futures market was of quite a different nature from that described by Rowlatt J. in the *Marble* case (*supra*). It was not a case of idle capital being temporarily invested in sugar. I think it is fanciful to say that the appellant was making a temporary investment in raw sugar and that such investment stood in the same position as if it had purchased shares of a mining or industrial concern or foreign exchange for a purpose unconnected with its business. There was, in my view, nothing of a capital or investment nature in the appellant's transactions.

There remains the contention that the appellant's gain was not taxable income because it was not income from any trade and because its venture was an isolated transaction outside its normal business operations and unconnected therewith. The appellant cannot escape liability

merely by showing that its entry into the raw sugar futures market was an isolated transaction. While it is recognized that as a general rule an isolated transaction of purchase and sale outside the course of the taxpayer's ordinary business does not constitute the carrying on of a trade or business so as to render the profit therefrom liable to income tax—*vide Commissioners of Inland Revenue* v. *Livingston et al* (1); *Leeming* v. *Jones* (2); it is also established that the 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. There are numerous expressions of opinion to that effect—*vide Californian Copper Syndicate* v. *Harris* (3); *T. Beynon and Co., Limited* v. *Ogg* (4); *McKinlay* v. *H. T. Jenkins and Son, Limited* (5); *Martin* v. *Lowry* (6); *The Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* (7); *Commissioners of Inland Revenue* v. *Livingston* (8); *Balgownie Land Trust, Ltd.* v. *Commissioners of Inland Revenue* (9); and *Anderson Logging Co.* v. *The King* (10).

Whether the gain or profit from a particular transaction is an item of taxable income cannot, therefore, be determined solely by whether the transaction was an isolated one or not. A further test must be applied. One such test was laid down in *Californian Copper Syndicate* v. *Harris* (11). There a company was formed to acquire and re-sell mining properties. After acquiring and working a certain property it sold it at a profit. It was held that such profit was assessable to income tax. At page 165, the Lord Justice Clerk (Macdonald) 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

(1) (1926) 11 T.C. 538 at 543, per Lord Sands
(2) (1930) 1 K.B. 279; (1930) A.C. 415.
(3) (1904) 5 T.C. 159.
(4) (1918) 7 T.C. 125 at 133.
(5) (1926) 10 T.C. 372 at 404.
(6) (1925) 11 T.C. 297 at 308, (1926) 1 K.B. 550 at 554, (1927) A.C. 312.
(7) (1920) 12 T.C. 358.
(8) (1926) 11 T.C. 538.
(9) (1929) 14 T.C. 684 at 691.
(10) (1925) S.C.R. 45 at 56.
(11) (1904) 5 T.C. 159.

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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 . . .

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

The Court came to the conclusion that the sale of the property in question was a proper trading transaction. The statement of principle by the Lord Justice Clerk in the *Californian Copper Syndicate* case (*supra*) has been approved by Lord Dunedin, speaking for the Judicial Committee of the Privy Council, in *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1); by Lord Buckmaster in the House of Lords in *Ducker* v. *Rees Roturbo Development Syndicate, Limited* and *Commissioners of Inland Revenue* v. *Rees Roturbo Development Syndicate, Limited* (2); and by Duff J., as he then was, speaking for the Supreme Court of Canada, in *Anderson Logging Co.* v. *The King* (3), which judgment was affirmed by the Judicial Committee of the Privy Council (4).

The test to be applied was put in a somewhat narrower form in *T. Beynon and Co., Limited* v. *Ogg* (5). 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 waggons for its clients, made a purchase of waggons 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 profits therefrom. Sankey J. put the matter thus, at page 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?

(1) (1914) A.C. 1001 at 1010.
(2) (1928) A.C. 132 at 140.
(3) (1925) S.C.R. 45 at 48.
(4) (1926) A.C. 140.
(5) (1918) 7 T.C. 125.

The test thus put is really to the same effect as that laid down by the Lord Justice Clerk in the *Californian Copper Syndicate* case (*supra*). Certainly it was so regarded by Duff J. in *Anderson Logging Co.* v. *The King* (1).

A more specific test was suggested in *Commissioners of Inland Revenue* v. *Livingston* (2). There 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 steam-drifter and selling it. They were not connected in business and had never previously bought a ship. Extensive repairs and alterations to the ship were carried out and then respondents sold the vessel at a profit. It was held that they were assessable to income tax in respect of it. At page 542, the Lord President (Clyde) 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* (3). He regarded it as covering all the cases.

While it may not be possible to define the line between the class of cases of isolated transactions the profits from which are not assessable to income tax and that of those from which the profits are so assessable more precisely than in the tests referred to, it is clear that the decision cannot be made apart from the facts. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and the decision as to the side of the line on which it falls made after careful consideration of its surrounding facts.

While there are cases in which it is difficult to decide on which side of the line a transaction falls, I find no such difficulty in the present case. In my opinion, Mr. Seidensticker's evidence is a complete answer to the appellant's contentions. He said of its transactions in the raw sugar futures market: "I think it is difficult to disassociate them

(1) (1925) S C.R. 45 at 49
(2) (1926) 11 T.C. 538.
(3) (1930) 1 K.B. 279 at 283.

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from what took place in the first instance." In my view, it is impossible to do so. It is clear from his evidence that the appellant entered into the transactions because it had been caught in an abnormal situation in its business operations in its ordinary field and thought it could offset the consequences thereof, to some extent at least, by operating in a related field. It was faced with a prospective loss because of its purchases of raw sugar at high prices and its undertaking to sell refined sugar without any increase in price and with the likelihood of sugar control and a fixed price. There seemed no possibility of avoiding such loss if it confined its business operations to their usual and ordinary course. This was the abnormal emergency situation in the appellant's business that led Mr. Seidensticker to the venture in the raw sugar futures market. With his knowledge of the sugar business and sugar prices and the advice of his friend in New York he thought that the prices of raw sugar were too high and would fall. It was only in such a free market as the raw sugar futures market in New York that he could put his knowledge and judgment to profitable use. The venture into such market was thus not an isolated transaction that was unconnected with the appellant's business. On the contrary it was closely connected therewith. It was impossible to listen to Mr. Seidensticker without being constantly reminded of this close connection. That theme ran through the whole course of his evidence. Emergency situations in business frequently beget departures from the usual and ordinary course without any change in the character of such departures as business transactions. That is what happened in the present case. It was the abnormal situation in the appellant's business in its ordinary course that took it into the raw sugar futures market. It was only because of its prospective loss through its purchases of raw sugar at high prices in the cash market that it decided to sell and subsequently purchase raw sugar in the futures market. The sales and purchases in the futures market would not have happened otherwise; they were, in a sense, the result of what had happened in its ordinary course of business. Moreover, quite apart from their cause, they were transactions in the same commodity as that which it had to purchase for its ordinary purposes. In my view,

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they were of the same character and nature as trading and business operations as those of its business in its ordinary course, even although they involved a departure from such course. The appellant made such departure an operation of its business.

Under all the circumstances, I am unable to see how the transactions can be regarded as an investment in raw sugar or as otherwise of a capital nature. In my judgment, the profit of the appellant from its sales and purchases in the raw sugar futures market may fairly be regarded as "a gain made in an operation of business in carrying out a scheme for profit making", or "a profit made in the operation of the appellant company's business." The operations involved in the transactions were also "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."

That being so, the appellant has failed to show error in the assessment appealed from. Its profit from its transactions in the raw sugar futures market was properly included as an item of taxable income in its hands. The appeal must, therefore, be dismissed with costs.

Judgment accordingly.

BETWEEN:

CANADA STEAMSHIP LINES LIMITED, ... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1946

Nov. 7, 8, 12

1948

Nov. 3

Crown—Petition of Right—Negligence—Lease—No exemption from liability when damage caused by gross negligence of servants of respondent.

Held: That a clause in a lease providing "That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time

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brought, placed, made or being upon the said land, the said platform or in the said shed", leased by Respondent to Suppliant, does not exempt Respondent from responsibility for the damages suffered by Suppliant as a consequence of a fire which destroyed the shed or warehouse in question and its contents, such fire having been caused by the gross negligence of officers and servants of Respondent while acting within the scope of their duty or employment.

PETITION OF RIGHT by Suppliant claiming damages from Respondent for loss of goods due to the alleged negligence of officers or servants of Respondent acting within the scope of their duty or employment.

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

Hazen Hansard, K.C. and *Geo. Montgomery, Jr.* for suppliant.

F. P. Brais, K.C. and *O. J. Campbell* for respondent.

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

ANGERS J. now (November 3, 1948) delivered the following judgment:

By its petition of right the suppliant seeks to recover from His Majesty the King the sum of $42,367.47 representing the price and value of goods, wares and merchandise destroyed by fire on May 5, 1944, in a shed belonging to the respondent and leased by the latter to the suppliant, situate on the westerly side of St. Gabriel Basin No. 1 of the Lachine Canal, in the City of Montreal, the said fire and the loss of the suppliant's said goods, wares and merchandise having allegedly been caused by the fault, negligence, imprudence and want of skill of the respondent's employees and servants acting within the scope of their duties and employment and in the performance of the work for which they were employed.

[The learned Judge here refers to the pleadings and continues:]

An admission as to damages, signed by counsel for suppliant and counsel for respondent, dated March 10, 1947, was put in evidence; it reads thus:

Without admission of liability and under reserve of all other defences to the principal action, the Parties hereto, by the undersigned, their respective Attorneys of Record, admit that the damages sustained by

and caused to the Suppliant as a result of the fire which occurred on or about May 5, 1944, in the shed described in paragraph 1 of the Petition of Right herein amount to the sum of $40,713.72 being the value of or extent to which goods, wares and merchandise, the property of Suppliant, as described in the said Petition of Right, were destroyed or damaged in the said fire.

The case is governed by paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act (R.S.C. 1927, chap. 34). The relevant part of section 19 is worded as follows:

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

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

It is idle to note that the evidence discloses gross negligence by officers or servants of the Crown while acting within the scope of their duties and employment. Particularly the depositions of Mitchell and Newill, independent and disinterested witnesses, are categorical and cogent and they have not been contradicted.

The respondent seeks to free himself of responsibility in virtue of clause 7 of the lease. Before dealing with this aspect of the case I wish to say a word about the plea of *vis major*.

This means is raised in paragraph 7 of the statement of defence:

> If the damage was caused by a thing under the care of an employee of the Crown . . . the circumstances were such that it was impossible by reasonable means to prevent the act which caused the damage.

This claim does not seem to me tenable. Counsel for respondent rightly abstained from putting it forward. I shall now endeavour to determine the bearing of clause 7 of the lease.

Authors distinguish between contractual responsibility and that arising from an offence or quasi-offence. This distinction seems to me immaterial in the present case seeing that both contractual responsibility and responsibility resulting of a quasi-offence exist simultaneously, the

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first consisting in the failure of the lessor to give to the lessee peaceable enjoyment of the thing during the continuance of the lease (article 1612 C.C.) and the second in the negligence of officers and servants of the Crown while acting within the scope of their duties and employment.

Regarding the contractual responsibility the position of the lessor and the lessee is clear and it does not require a lengthy statement.

In the preamble of the lease we find, among others, the following provisions:

THIS INDENTURE .....

WITNESSETH that the Lessor, in consideration of the rents, covenants, provisoes and conditions hereinafter reserved and contained, hath demised and leased, and, by these presents, doth demise and lease unto the Lessee—(here follows a description of the thing leased, which it is useless to reproduce)—

TOGETHER with the right and privilege to occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the Lessee, the whole of St. Gabriel Shed No. 1, so called.

TO HAVE and TO HOLD the said land and rights and privileges unto the Lessee, from and after the first day of May, one thousand nine hundred and forty, for a term or period of twelve years and then fully to be complete and ended.

The following paragraph, dealing with the rent, is irrelevant and the one defining certain terms included in the lease has no materiality herein.

The lease then contains the following conditions:

AND FURTHER AGREED by and between the said parties hereto that these Presents are made . . . subject to the covenants, provisoes, conditions and reservations hereinafter set forth . . . namely:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the Lessor will, at all times during the currency of this Lease, at His own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Article 1641 C.C. enacts:

The lessee has a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure:

1.....

2.....

3. To recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee.

The action brought by the suppliant, as far as the procedure is concerned, seems to me justified by the third clause of article 1641 C.C.

The cause of action having arisen in the Province of Quebec, the lease must be interpreted and the rights and obligations issuing therefrom determined according to the law of that province: *The Queen* v. *Filion* (1); *The Queen* v. *Grenier* (2); *The King* v. *Armstrong* (3); *The King* v. *Desrosiers* (4); *National Dock and Dredging Corporation Ltd.* (5).

If it were not for clause 7 of the lease, the contractual responsibility of the lessor would, in my opinion, be indisputable.

Clause 7 of the lease stipulating that the lessee shall not have any claim or demand against the lessor for damage or injury of any nature to the shed, motor or other vehicles, materials, supplies, goods, articles, effects or things being at any time in the said shed is, in Canada and particularly in the Province of Quebec, acknowledged as valid.

Before the decision of the Supreme Court in the case of *The Glengoil Steamship Co. et al.* v. *Pilkington et al.* (6), the clause of irresponsibility contained in a contract was not favourably considered by the judges of the Province of Quebec: *Samuel* v. *Edmondstone et al.* (7); *Huston* v. *Grand Trunk Railway Co.* (8) and (sub-nom. *Grand Trunk Railway Co. and Mountain & Huston*) (9); *Drainville* v. *Canadian Pacific Railway Co.* (10); *Rendell* v. *Black Diamond Steamship Co.* (11); *Gracie* v. *Canada Shipping Co.* (12).

Since the decision of the Supreme Court in the case of *The Glengoil Steamship Co. et al.* v. *Pilkington et al.*, the

(1) (1894) 24 S.C.R 482.
(2) (1899) 30 S.C R. 42.
(3) (1908) 40 S.C.R. 229.
(4) (1908) 41 S.C.R. 71, 78.
(5) (1929) Ex. C.R. 40, 42.
(6) (1897) 28 S.C.R. 146.
(7) (1857) 1 L.C J. 89.
(8) (1859) 3 L.C.J. 269.
(9) (1860) 6 L.C.J. 173.
(10) (1902) R.J.Q. 22 S.C. 480.
(11) (1895) R.J.Q. 8 S.C. 442 & (1896) 10 S.C. 257.
(12) (1895) R.J.Q. 8 S.C. 472.

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doctrine that a stipulation of irresponsibility is not contrary to public order is generally admitted by the authors and the Courts: *Canadian National Railway Co.* v. *Cité de Montréal* (1); *Canadian Northern Quebec Railway Co.* v. *Argenteuil Lumber Co.* (2); *Furness, Withy and Co. Ltd.* v. *Vipond* (3); Perrault, Des stipulations de non-responsabilité, no 79 et s.

Does the stipulation of irresponsibility apply in cases of gross negligence of officers or servants of the Crown? This is the question which must be solved. A brief review of the doctrine and of the precedents seem to me expedient.

With respect to negligence generally, see Sourdat, Traité de la responsabilité, 5th edition, vol. 1, Nos. 668, 670 and 680.

Lalou, in his Traité de la responsabilité civile, defining "faute lourde" or gross negligence, writes (p. 280):

> 415—8° — *Faute lourde.* A première vue la notion de faute lourde paraît assez simple. On pourrait dire avec les jurisconsultes romains qu'elle consiste dans "le fait de n'avoir pas compris et de n'avoir pas prévu ce que tout le monde aurait compris et prévu" ou avec Pothier, comme nous le rappelions supra, n° 415-2° "dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires". Mais cette notion est plus difficile à dégager quand on recherche s'il y a identité entre la faute lourde d'une part et des fautes autrement qualifiées (faute volontaire, faute inexcusable, faute intentionnelle).
>
> La faute volontaire n'est pas nécessairement une faute lourde, pas plus qu'une faute inexcusable ne s'identifie nécessairement avec une faute lourde. Nous venons de nous expliquer sur ces nuances. Reste à distinguer la faute lourde de la faute intentionnelle. Celle-ci apparaît plus grave que celle-là; car il peut y avoir faute lourde sans mauvaise foi de son auteur, c'est-à-dire sans que celui-ci ait voulu les conséquences dommageables de l'acte ou de l'omission.
>
> Cette discrimination entre la faute lourde et la faute intentionnelle commande logiquement une conséquence: la discrimination de la faute lourde et du dol. Contre cette discrimination il ne peut être fait qu'une objection tirée de l'adage: *culpa lata dolo aequiparatur,* règle traditionnelle qui s'expliquerait par cette idée que l'intention de causer le dommage peut rarement être prouvée directement; qu'elle ne peut s'induire que de l'existence d'une faute lourde; que, de plus, le fait de causer un dommage consciemment et non intentionnellement peut difficilement être distingué du dol proprement dit; qu'enfin il est le plus souvent impossible de savoir si la faute lourde est consciente ou non (V. Planiol, Ripert et Esmein, Traité pratique de droit civil français, t. VI, n° 409).
>
> Sans doute la faute lourde peut valoir à titre de présomption de fait du dol; mais il n'est pas possible, sauf disposition formelle, de l'ériger en présomption légale, alors surtout que l'article 2268 c. civ. édicte la pré-

(1) (1927) R.J.Q. 43 K.B. 409.
(2) (1919) R.J.Q. 28 K.B. 408, 413
(3) (1916) R.J.Q. 25 K.B. 325 & (1916) 54 S.C.R. 521.

somption contraire de bonne foi. Il y a, en effet, une différence essentielle entre la faute lourde et le dol, différence qui tient à ce que ce dernier suppose nécessairement un élément intentionnel que la faute lourde ne suppose pas (V. Lecompte, La Responsabilité du plaideur envers son adversaire en matière civile et commerciale, *Revue critique de législation et de jurisprudence* 1938, p. 513 et suiv.).

Boutaud, in his work Des clauses de non-responsabilité et de l'assurance de la responsabilité des fautes, discussing the validity of the clause of irresponsibility and its applications, makes the following comments (p. 225):

129. ...Le débiteur, qui stipule qu'il ne devra pas de dommages-intérêts pour les fautes même lourdes qu'il pourra commettre dans l'exécution de son contrat, reste obligé. Sa responsabilité est restreinte; mais l'exécution de son obligation peut être poursuivie en justice.

Further on, under the heading Exposé de la doctrine et de la jurisprudence, the author adds (p. 232):

133. ...La théorie des auteurs, qui se sont occupés de la question à un point de vue général, se résume dans ces quelques idées: la clause de non-responsabilité est valable, en tant qu'elle s'applique à la faute contractuelle. Elle a pour effet d'exonérer le débiteur de sa faute légère. Mais la faute lourde est en général assimilée au dol et oblige toujours son auteur à payer des dommages intérêts, malgré la convention de non-responsabilité. L'exonération de la faute délictuelle est assez généralement considérée comme contraire à l'ordre public. Il y a d'ailleurs sur tous ces points des divergences importantes.

Savatier, in his Traité de la responsabilité civile, dealing with the same question, expresses a similar opinion (p. 251, No. 662); I deem it apposite to quote the second clause of this paragraph:

662. *Clauses excluant la responsabilité contractuelle du fait des préposés.*—Cependant, la jurisprudence est hésitante. Elle n'est pas, non plus, fixée sur le point de savoir si l'on doit assimiler, en matière contractuelle, la faute lourde ou le dol du préposé, à la faute lourde ou au dol du commettant, de manière à exclure, quand ils se présentent, le jeu des clauses d'irresponsabilité. Nous pensions que les raisons qui interdisent au débiteur lui-même de pouvoir s'exonérer contractuellement de son propre dol ou de sa propre faute lourde (V. supra, nº 660) ne sauraient être étendues au dol ou à la faute lourde du préposé. En stipulant la non-garantie de la faute lourde ou du dol de ses préposés, le débiteur, en effet, n'aboutit pas à la négation de sa propre obligation, pourvu qu'il ne puisse se permettre ainsi une véritable incurie dans la surveillance de ses préposés.

In their Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle Henri and Léon Mazeau set forth the following remarks (p. 778):

2585. *Faute intentionnelle et faute lourde.*—Et d'abord les clauses de responsabiilté contractuelle atténuée sont-elles, comme les clauses de non-responsabilité, prohibées pour fautes dolosives ou lourdes?

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Sans aucun doute pour le dol. S'il n'est pas possible qu'un débiteur ait la faculté de ne pas exécuter l'obligation qu'il a souscrite, il n'est pas plus admissible qu'il puisse à son gré limiter cette obligation. Malgré la clause de responsabilité atténuée, le dol engage donc l'entière responsabilité du débiteur.

Quant à la faute lourde, les mêmes raisons que pour les clauses de non-responsabilité commandent de la présumer dolosive jusqu'à preuve contraire. La jurisprudence, après avoir hésité, applique, aux clauses de responsabilité atténuée, comme aux clauses de non-responsabilité, son système d'assimilation totale de la faute lourde au dol; elle écarte donc les clauses de responsabilité atténuée au cas de faute lourde du débiteur.

Josserand, in his work entitled Cours de droit civil positif français, at page 252, makes these observations:

472. *Clauses élisives ou limitatives de responsabilité.*—De prime abord, apparaît la possibilité d'une distinction entre le délit et le quasi-délit. Il serait intolérable qu'on pût stipuler l'irresponsabilité à raison de ses fautes intentionnelles; une telle clause serait exclusive de toute responsabilité et de toute moralité; elle irait à l'encontre des bonnes mœurs et de l'ordre public; il est d'ailleurs douteux qu'il se trouve jamais une personne qui, saine d'esprit, consente à se mettre ainsi à la discrétion d'autrui. Mais il faut se rappeler que la *faute lourde* est traditionnellement assimilée au *dol*; elle comporte donc le même traitement; contre la faute intentionnelle et contre la faute lourde, *toute réserve conventionnelle est impuissante;* et il faut en dire autant du dol et de la faute lourde des préposés: un commettant, un mandant ne pourraient pas, à l'aide d'une clause de non-responsabilité, se mettre à l'abri de la responsabilité de droit que l'article 1384 fait peser sur eux; en toute occurrence, le dol et la faute lourde sont générateurs de responsabilité dans les termes mêmes de la loi.

Planiol et Ripert, in their Traité élémentaire de droit civil, dealing with agreements relating to negligence, after pointing out that the principle that the debtor may exonerate himself from the consequences of his negligence is admitted (Dalloz Répert., v° Obligation, n° 686), state that "il a été jugé que cette clause d'exonération n'est pas valable pour la faute lourde (Cass., 15 mars 1876 D. 76.1.449, S. 76.1.337)". The authors add that "la faute lourde" or gross negligence is "traditionnellement assimilée au dol"... and that "par suite on doit en être responsable d'une manière tout aussi absolue".

Planiol et Ripert add that this is the principle supported by Labbé in his note under the decision reported in Sirey, but observe that "cette assimilation de la faute lourde et du dol a été quelquefois contestée (Sainctelette, Responsabilité et garantie, n° 11)".

Colin et Capitant, in their treatise Cours élémentaire de droit civil français, 7th edition, vol. 2, share the same

opinion. On page 76, under the heading "Clauses exonérant le contractant de sa responsabilité au cas d'inexécution de son obligation", we find the following remarks:

85. Est-il permis au contractant de stipuler qu'il ne sera pas responsable de l'inexécution de son obligation dans le cas où cette inexécution proviendrait d'une cause qui lui est imputable?

After having noted that one must not confuse this question with that of the insurance against negligences which one may make and having said a few words on the subject, the authors continue:

Cette observation faite, revenons donc à notre question. Tout d'abord, il est bien évident qu'un débiteur ne peut pas à l'avance s'exonérer des conséquences d'une inexécution qui proviendrait de sa mauvaise volonté, ou de son dol. Cela reviendrait en effet à lui reconnaître la faculté de ne pas exécuter son obligation. Or, aux termes de l'article 1174, toute obligation est nulle lorsqu'elle a été contractée sous une condition protestative de la part de celui qui s'oblige.

On admet d'autre part qu'un débiteur ne peut pas davantage stipuler qu'il ne sera pas responsable de sa faute lourde, car il est un minimum de soin qu'il faut nécessairement apporter à l'exécution de ses obligations. C'est le cas d'appliquer le vieil adage *Culpa lata aequiparatur dolo.* (Civ. 5 mars 1876, D.P. 1876.1.449; S. 1876.1.337, note de M. Labbé; Req, 15 mai 1923, D.P. 1925.1.15, S. 1924.1.81, note de M. Henri Rousseau).

Demogue, in his Traité des obligations adopts the opinion that public order demands the exclusion of gross negligence from an exculpatory clause.

In volume 5 of his treatise, we find these commentaries (p. 461):

L'ordre public fera également exclure la faute lourde. La solution contraire serait admise si l'exclusion du dol s'expliquait par une idée de condition protestative, bien que cette opinion n'ait été soutenue qu'avec hésitation, en disant que la faute lourde fait présumer le dol.

La majorité des auteurs admettent d'ailleurs la clause d'irresponsabilité, sauf dol ou faute lourde, du moins pour la responsabilité contractuelle, car ils excluent souvent l'exonération en matière délictuelle.

See Dalloz, R.P. Vol. 10, p. 366, No. 244; D.P. 1876. 1.449.

Perrault, in his work Des stipulations de non-responsabilité, paragraphs 175 and 176, annotates the decisions of the Courts of the Province of Quebec and of the Supreme Court of Canada on the subject. It seems to me expedient to quote paragraph 176, which summarizes clearly and precisely the jurisprudence since the decision of the Supreme Court in the case of Glengoil Steamship Company v. Pilkington:

176. Avant la décision de *Glengoil SS. Co.* v. *Pilkington,* notre Cour d'appel avait toujours déclaré nulles les Clauses de non-responsabilité.

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Faut-il suivre encore de nos jours cette jurisprudence? L'hon. juge MacDougall, en 1936, dans la cause citée plus haut (74 C.S., p. 451, à la page 455) semble être d'avis que l'on ne peut pas s'exonérer de sa responsabilité délictuelle due à son fait personnel. Cette théorie doit-elle être admise?

Je crois que l'on peut s'autoriser des principes posés par la Cour suprême dans *Glengoil SS. Co., Regina* v. *Grenier,* par la Cour d'appel dans *Canadian Northern Ry. Co.* v. *Argenteuil Lumber Co.* pour ne plus suivre l'ancienne jurisprudence de la Cour d'appel, celle d'avant 1898. Lorsque la responsabilité délictuelle d'une personne est encourue par un quasi-délit, qui ne constitue ni une faute lourde, ni une négligence grossière, nous croyons qu'elle peut être repoussée par une clause de non-responsabilité, sans qu'il faille distinguer s'il s'agit d'une faute du débiteur ou de son employé.

Il n'y a rien de contraire à l'ordre public dans le fait de se prémunir contre une distraction possible, ou un manque d'habileté.

.....

Nous ne voyons rien de contraire à l'ordre public dans cette solution, théorique il est vrai, du problème. Il nous semble que les conventions d'irresponsabilité délictuelle, quand il s'agit du fait personnel, devraient être tenues pour valides en autant qu'il s'agit de fautes involontaires et légères.

L'appréciation du degré de la faute variera suivant les circonstances. Ce sera au tribunal à décider si la faute *involontaire, personnelle,* est assez légère pour qu'on puisse s'en exonérer par une convention.

In the case of *Brasell* v. *La Compagnie du Grand Tronc* (1), the head-note contains the following statements:

Jugé: 1. Une compagnie de chemin de fer sur la ligne de laquelle circulent les voitures d'une compagnie de chars dortoirs, peut invoquer, à l'encontre de l'action dirigée contre elle à raison d'un accident, par un employé de la compagnie de chars dortoirs, un contrat par lequel celle-ci a stipulé immunité, pour elle et pour la compagnie de chemin de fer, de tout accident que l'employé pourrait éprouver dans l'exercice de ses fonctions, lorsque ce contrat a été fait en vertu d'une convention intervenue entre les deux compagnies. Art. 1028, 1029 C.C.

2. Cependant ce contrat n'aura pas l'effet de libérer la compagnie de chemin de fer, lorsque l'accident est arrivé par sa faute ou négligence grossières, mais il incombe à l'employé lié par ce contrat de prouver cette faute ou négligence. Art. 1676 C.C. et 51-52 Vic. (Can.), ch. 29, art. 246.

Pagnuelo, J., in his judgment, after making some comments on certain decision of French tribunals, on the opinions of some authors (Nouveau Denisart, Pardessus et Troplong) and the judgments in Rendell v. The Black Diamond Steamship Co. (ubi supra); Gracie v. Canada Shipping Co. (ubi supra), *The Great North Western Telegraph Co.* v. *Laurance* (2), *Grand Trunk Railway Co.* v. *Vogel* (3) and *Western & Atlantic Railway Co.* v. *Bishop* (4), sets forth these observations (p. 159):

(1) (1897) R.J.Q. 11 S.C. 150.
(2) (1892) R.J.Q. 1 Q.B. 1.
(3) (1885) 11 S.C.R. 612.
(4) (1873) 50 Georgia Rep. 465.

Ce raisonnement a le défaut de restreindre la liberté des contrats à une négligence constituant un crime. Il faut aller plus loin et dire que personne ne peut stipuler l'immunité pour sa faute lourde ou grossière, ni les corporations publiques, ni les individus; peu importe la nature du contrat et les personnes qui contractent; cette convention serait nulle dans son essence comme contraire à l'ordre public.

In the case of *Lavoie* v. *Lesage* (1), one of the reasons put forward by Pratte, J., in his judgment reads thus (p. 151):

Considérant que si, par l'acquiescement du demandeur, cette déclaration du défendeur équivaut à une clause de non-responsabilité faisant partie du contrat intervenu entre le demandeur et le défendeur, cette clause doit être considérée comme ne visant que la responsabilité contractuelle du débiteur; qu'en effet, en l'absence de preuve au contraire, on ne peut présumer que les parties au contrat, lorsqu'elles ont convenu sur ce point, aient envisagé d'autres relations juridiques que celles découlant du contrat qu'elles formaient, et que par conséquent, la clause d'exonération précitée n'a d'autre effet que d'affranchir le débiteur de l'obligation de prouver que s'il n'a pu rendre la chose dont il avait la garde la cause en est à un cas fortuit ou à une force majeure, et n'enlève pas au créancier le droit de réclamer des dommages-intérêts s'il peut prouver la faute du débiteur; que même si la clause d'exonération précitée pouvait libérer le débiteur de certaine responsabilité quasi-délictuelle elle serait sans effet sur la responsabilité découlant de sa faute lourde.

In the case of *Les Commissaires du Havre de Québec* v. *Swift Canadian Co.* (2), the summary of the judgment of the Court of King's Bench, reversing the judgment of the Superior Court, contains this paragraph:

...3. Dans un contrat d'entreposage, la clause d'exonération de responsabilité est valide en tant qu'elle s'applique à la faute contractuelle. Elle libère le débiteur de la faute légère, mais non de la faute lourde ni de la faute délictuelle.

In the case of *Conway* v. *Canadian Transfer Company Limited* (3), the judgment of Tait, C.J., contains the following statement (p. 67):

Considering that the special condition of said receipt, limiting the liability of the said defendant to a sum of $50, even in case of gross negligence, is a special condition within the meaning of the article 1676 C.C., which cannot avail defendant, if the loss was occasioned by its gross negligence as the court finds was the case here.

In the case of *Aga Heat (Canada) Limited and Brockville Hotel Company Limited* (4), the head-note, fairly comprehensive, reads in part as follows:

Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range

(1) (1939) R.J.Q. 77 S.C. 150.
(2) (1929) R J Q. 47 K.B. 118.
(3) (1911) 17 R.L., n.s., 60.
(4) (1945) S.C.R. 184.

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and canopy. To remove the canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his wish that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel.

Held: affirming judgment of the Court of Appeal for Ontario, (1944) O.R. 273, that appellant was liable to respondent in damages.

In the judgment of Justices Taschereau and Estey, delivered by the latter, are the following remarks, clear and precise, which I believe convenient to quote (p. 189):

Under the terms of the contract the Aga Heat (Canada) Limited had expressly agreed to complete the removal of "range and canopy" and to install the equipment they had sold. In all this they were pursuing their usual course of business. Mr. Craig on behalf of the appellants inspected the premises, examining particularly the canopy as to the presence of grease because he appreciated the possibility of fire. Mr. Craig employed Henry & Company who in their business use oxy-acetylene torches. Mr. Henry discussed the fire hazard, and as a result fire extinguishers were obtained. Moreover the company, in its letter of January 6, 1939, described the canopy as "a harbour for dirt and grease", and referred to the ventilator fan. The evidence refers to the cleaning of the ducts from time to time. Here and there throughout the ducts dirt and grease would be expected particularly by those familiar with the equipment. Notwithstanding all this, when it was decided to cut the lead ducts close to the main duct, no questions were asked and no precautions were taken and they proceeded forthwith to use the oxy-acetylene torch.

The appellant, as was its right under the contract, had selected this oxy-acetylene torch, which in operation generates a heat of over 6,000 degrees and sends out quantities of sparks. The operation of this torch in such circumstances as we have in this case creates a possibility of fire and requires on the part of those operating it that reasonable precautions should be taken to avoid fire. In this case there were no precautions taken at or near the point of severance and, in my opinion, the duty to do so rested upon the appellants who had undertaken the work, provided the equipment, and employed the men. The respondents on their part had a right to regard the appellants as competent both to do their work and to take reasonable precautions that the premises would not be injured as a consequence of their failure to do so. The Nautilus Steamship Co. Ltd. *v.* David and William Henderson & Co. Ltd., 1919 Sess. Cas. 605; H. & C. Grayson Ltd. *v.* Ellerman Line Ltd., (1920) A.C. 466; The Pass of Ballater, (1942) P. 112; Honeywill & Stein Ltd. *v.* Larkin Bros. Ltd., (1934) 1 K.B. 191.

See also *Canadian National Railway Co.* v. *Canada Steamship Lines Limited* (1).

(1) (1948) O.R. 311, 325.

The case of *Insurance Company of North America* v. *Louis Picard & Company Inc.* (1) relied upon by counsel for suppliants Copping, Cunningham & Wells Limited and W. H. Taylor Limited, is not legally pertinent, if it is otherwise interesting on account of the similarity of the facts, the damages claimed therein having arisen from a fire caused by the use of oxy-acetylene torch, with which the defendant was piercing holes in a steel beam.

The stipulation of irresponsibility must be interpreted strictly: *Watson* v. *Dame Philips* (2) and the authorities cited in note 1 at the bottom of the page; *Allen* v. *The Canadian Pacific Railway Co.* (3).

I examined carefully the works of the outstanding English authors, who deal with the questions of negligence and tort; unfortunately, they offer no assistance for the solution of the problem with which we are faced. They refer to gross negligence, sometimes setting it aside as not distinguishable from common negligence and sometimes attempting to define it, but they make no commentaries on the validity of the stipulation of irresponsibility in that respect. This silence on a so important matter is, to say the least, strange.

Clerk & Lindsell on torts, 10th edition, which is, as far as I know, the most recent work, express the following opinion (p. 344):

> Though there are no degrees of negligence, obviously the degree of care which would be exercised by a reasonable and prudent man will vary with the circumstances. Therefore, the expression "gross negligence", though inaccurate and possibly misleading, is a convenient phrase to express the idea that the degree of care required of the defendant was small. These degrees of care, however, it is impossible to define or classify, for they are infinite in number, each special set of circumstances requiring its own particular degree; so that an exhaustive catalogue of the various degrees of care would be a simple enumeration of all the decided cases. It is in each case practically a question of fact for the jury whether the proper degree of care has been taken.

The authors then cite a few cases of negligence, which I do not think necessary to analyse. Further on they make the following observations (p. 349):

> The existence of a duty to take care provides the really difficult problem of the tort of negligence. As the subject has grown up over a long period and without initial definition, it is practically impossible to be scientifically accurate, more particularly because the existence of a duty has been frequently confused with the degree of care. The matter

(1) (1942) 9 Insurance Law Reporter, 67.
(2) (1924) R J.Q. 62 S C. 448.
(3) (1910) 10 Can. Ry. Cas. 424.

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has been further complicated by the subject of remoteness of damage which has a definite bearing upon this topic. In fact the problem has two clearly distinct aspects: first, whether the circumstances give rise to the duty, and secondly, whether the duty is owed by the defendant to the plaintiff. It is necessary that both these questions should be answered in the affirmative before any cause of action exists, but usually in answering the first the second affirmative automatically follows. Therefore, the first will be considered as exhaustively as space and authorities permit.

It may be convenient here to call attention to the fact that the expression "negligent act" should be used with the greatest caution. An act may constitute negligence in law only provided that the other element of damage to a person to whom a duty of care is owed exist. Even if this duty is established, it remains a question of fact for the jury and not a question of law for the Judge.

In Beven's Negligence in Law, 4th edition, vol. 1, we find these commentaries (p. 25):

Now it is beyond question that the term "gross negligence" has been used by many Judges—as, for instance, by Lord Chelmsford in Moffatt *v.* Bateman ((1869), L.R. 3 P.C. 115, 122). But there he uses it merely as a convenient colloquialism; for he speaks of "gross negligence—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another responsible." Such use of the term is analogous to the use by other Judges of the term "degrees of negligence"—as, for instance, by Lindley, L.J., in Cornish *v.* Accident Insurance Co. ((1889), 23 Q.B.D. 453, 457), where when he says "but there are degrees of negligence" he clearly does not intend to assert that negligence is divisible into "ordinary", "slight", and "gross", but intends merely to point out that there are—as there obviously are—degrees in the "absence of care according to the circumstances" which constitutes negligence (See per Montague Smith, J., in Grill *v.* General Iron Screw Collier Co. (1866) L.J.C.P. 321, at p. 331), and in many cases the Judges have refused to recognize any distinction in law between "negligence" and "gross negligence", and have, as will be seen, used the two terms as practically interchangeable.

At page 30 the author adds:

The subject of gross negligence was discussed in Cashill *v.* Wright ((1857), 6 E. & B. 891, 899, as to which see Newman *v.* Bourne & Hollingsworth (1915), 36 T.L.R. 209), where misdirection was alleged in telling the jury to find for the plaintiff unless they were of opinion that he had been guilty of gross negligence; and the Queen's Bench made a rule absolute for a new trial. There Erle, J., said: "It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*" (See Taylor *v.* Russell, (1891) 1 Ch. 8, judgment

of Kay, J., and post, Estoppel). But after saying this he went on, "We think that the rule of law resulting from all the authorities is that in a case like the present (in which an innkeeper was sued for the loss of the watch, etc., of a guest which the guest had left on the dressing-table of a bedroom when he went to bed leaving the bedroom door ajar) the goods remain in the charge of the innkeeper and the protection of the inn so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way that the loss would not have happened if the guest had used the ordinary care that a prudent man may reasonably be expected to have taken under the circumstances.*"

Underhill, in his book A Summary of the law of torts, 15th edition, lays down the following principles (p. 156):

It will be observed that negligence may consist in either misfeasance, i.e. doing that which a prudent and reasonable man would not do; or in nonfeasance, i.e. omitting to do something which a prudent and reasonable man would do. *Negligence is judged by the standard of prudence of an ordinary reasonable man,* and if a person does something which one of ordinary intelligence and prudence would not do or omits some precaution which one of the ordinary intelligence and prudence would take, he is negligent, although he may himself think it legitimate to do that thing or unnecessary to take that precaution. And although an act which is in accord with general and approved practice cannot usually be condemned as negligent, even if subsequent experience may prove that some additional precaution is necessary, yet sometimes the general practice itself falls short of the standard of care which would be exercised by a man of ordinary prudence, in which case it is no defence for the defendant to say that he has followed that practice.

Later he adds (p. 177):

(1) In the case of articles and substances dangerous in themselves, such as loaded firearms, poisons, explosives, inflammable gases, and other things, *ejusdem generis,* there is a duty imposed on those who control, deliver or otherwise send them forth to take precautions to secure the person and property of others from injury and damage thereby.

In Salmond's Law of Torts, under the general heading Negligence, we find the following comments (p. 29):

1. *Negligence and wrongful intent distinguished.*—In the law of torts negligence has two meanings: (1) an independent tort, with which we shall deal in its place; (2) a mode of committing some other torts. It is with the latter that we are now concerned. In this latter sense negligence is carelessness. In some cases either negligence or wrongful intent is required by law as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and therefore does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care—who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others. The

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wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot also have caused it negligently, and vice versa.

The author's remarks under the titles The Duty of Care (p. 430) and The Standard of Care (p. 436) may also be consulted with benefit.

In the case of *Giblin* v. *McMullen* (1), Lord Chelmsford, who delivered the judgment of the Judicial Committee of the Privy Council, speaking of gross negligence, makes the following observations, which are in the same sense as those of the authors herein above quoted (p. 336):

> Did the Plaintiff, then, give any evidence of the Bank having been guilty of that degree of negligence which renders a gratuitous Bailee liable for the loss of property deposited with him?
>
> From the time of *Lord Holt's* celebrated judgment in Coggs *v.* Bernard (Ld. Raym. 909), in which he classified and distinguished the different degrees of negligence for which the different kinds of Bailees are answerable, the negligence which must be established against a gratuitous Bailee has been called "gross negligence". This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a Bailee of this class. At last, Lord *Cranworth* (then Baron *Rolfe*), in the case of Wilson *v.* Brett (11 M. & W. 113), objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet". And this critical observation has been since approved of by other eminent Judges.

As previously stated, it is established beyond doubt that the fire, which destroyed the shed or warehouse in question and its contents, was caused by the gross negligence of officers and servants of the Crown while acting within the scope of their duties or employment.

After carefully perusing the doctrine set forth by the authors, French and Canadian, and adopted by the Courts of the Province of Quebec and the Supreme Court of Canada, with respect to the bearing of the excupaltory clause in the lease Exhibit A in the case of gross negligence, I have reached the conclusion that this clause does not exempt the respondent from his responsibility in connection with the damages suffered by the suppliant as a consequence of the fire.

There will be judgment in favour of suppliant against respondent for the sum of $40,713.72 and costs.

Judgment accordingly.

(1) (1867-1869) L.R. 2 P.C. 317.

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June 16

Sept. 21

BETWEEN:

DOMINION SHIPPING COMPANY, (DEFENDANT)..... APPELLANT

AND

CELESTE ADMANTA D'ENTREMONT et al., (PLAINTIFFS)..... RESPONDENT

Shipping—Appeal from District Judge in Admiralty—Collision at sea and and in a dense fog—Area frequented by a fleet of scallop ships—International Regulations of the Road for preventing collisions at sea—Signals required by Articles 9(h) and 15(e) of said Regulations for vessel engaged in scallop dragging and for vessel under way and unable to manoeuvre—Failure by respondent to sound proper signal—Burden on appellant to establish the failure contributed to collision—Burden not discharged—Inference from evidence properly drawn by trial judge —Appeal dismissed.

The *Rockwood Park,* owned by appellant, at 5.17 a.m., on May 29, 1947, encountered dense fog in an area (George's Bank) which its master knew was frequented at that season by a fleet of scallop ships, one of which being then the motor vessel *Lora Grace Peter,* owned by the first-named respondent, and commenced and continued to sound one pronounced blast every two minutes. The *Rockwood Park's* speed was 8¼ knots up to the time the *Lora Grace Peter* was sighted and for a considerable period prior thereto. The latter vessel was engaged in scallop dragging and its master had been sounding the whistle from 6 o'clock every two minutes, one prolonged and two short blasts which are the signals required by Article 15(*e*) of the International Regulations of the Road for preventing collisions at sea for a vessel under way and unable to manoeuvre, whereas the signals that should have been blown on an operation of scallop fishing or dragging and under the conditions existing were those provided by Article 9(*h*) of the said regulations, i.e., a blast at intervals of not more than one minute.

There was no evidence as to the interval between the last signal of the *Lora Grace Peter* and the "alarm" signal given by the latter vessel when the *Rockwood Park* was sighted. Collision occurred almost immediately after.

Held: That the onus was on the appellant to establish that the failure of the *Lora Grace Peter* to sound the proper signal did contribute to the collision and that that burden was not discharged. *S.S. Heranger* v. *S.S. Diamond* (1939) A.C. 94 followed.

2. That the learned trial judge has drawn the proper inference from the evidence. *S.S. Haugland* v. *S.S. Karamea* (1922) 1 A.C. 68 discussed.

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APPEAL from the judgment of the District Judge in Admiralty for the Nova Scotia Admiralty District allowing plaintiff's action for damages resulting from a collision at sea.

The appeal was heard before the Honourable Mr. Justice O'Connor at Halifax, N.S.

F. D. Smith, K.C. for appellant.

C. B. Smith, K.C. and *R. L. Stanfield* for respondents.

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

O'CONNOR J. now (September 21, 1948) delivered the following judgment:

This is an appeal by the defendant from the judgment of the learned trial Judge of the Nova Scotia Admiralty District, whereby in an action for damages by a collision between the steamship *Rockwood Park* owned by the appellant and the motor vessel *Lora Grace Peter* owned by the first-named respondent, he pronounced in favour of the claim of the respondents.

The facts are not in dispute. The *Rockwood Park* at 5.17 a.m., on the 29th May, 1947, encountered what was described by all witnesses as "a dense fog" and commenced and continued to sound the regulation signal—one pronounced blast every two minutes. The learned trial Judge found that the *Rockwood Park's* speed was $8\frac{1}{4}$ knots up to the time the *Lora Grace Peter* was sighted and for a considerable period prior thereto. And that the *Rockwood Park* maintained this speed in a dense fog in an area (George's Bank) which the Master of the *Rockwood Park* well knew was frequented at that season by a fleet of scallop ships.

The *Lora Grace Peter* was engaged in scallop dragging which is described by the learned trial Judge as, "a machine is put overboard which scrapes the bottom and picks up the scallop. The drag is of course attached to a cable; in the instant case its length was about 125 fathoms and

made of steel". The Master of the *Lora Grace Peter* had been sounding the whistle from 6 o'clock every two minutes, one prolonged and two short "while towing the drag".

The Master of the *Lora Grace Peter* said that, "the Chief sang out that he heard a whistle that he didn't think was near", and "first, when he sang out that he heard a whistle I grabbed my whistle and blew but she was coming so fast I had to leave and run and the ship ran us in the port bow * * *" The crew cut the life boat lashings but had no time to launch them before the collision, and the crew had just time to jump to the *Rockwood Park* and scramble aboard. There was no evidence as to the interval between the last signal of the *Lora Grace Peter* and the "alarm" signal given by the *Lora Grace Peter* when the *Rockwood Park* was sighted.

The First Officer in charge of the watch of the *Rockwood Park* was on the bridge and there was a lookout with him. His evidence was that—"the lookout said he thought he heard a whistle and at the time, the same time he was saying it, this vessel appeared on my starboard bow, going across our bow". And that then when he saw the *Lora Grace Peter* first he judged it was "perhaps 100 feet" away in a direct line from the bow of the *Rockwood Park*.

The learned trial Judge found—First:—

> I find that under the existing circumstances and conditions the *Rockwood Park* was not proceeding at a moderate speed, but was proceeding in direct violation of the first part of Article 16 of the International Regulations for preventing collisions at sea, which by virtue of the Canada Shipping Act have the force of statute law in this jurisdiction.

Second:—That the signals given by the *Lora Grace Peter* were three blasts every two minutes, one prolonged blast followed by two short blasts which is the signal required by Article 15, subsection (*e*) for a vessel "under way" and unable to manoeuvre, whereas the signals that should have been blown on an operation of this kind (scallop fishing or dragging) and under the conditions existing were those mentioned in Article 9, subsection (*i*). The learned trial Judge referred to and quoted the English rule Article 9, subsection (*i*). Counsel agreed that the relevant rule was

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Article 9(*h*) and the appeal proceeded on that basis. The differences between Article 9(*i*) and 9(*h*) are minor. Articles 9(*h*) and 15(*e*) respectively, are as follows:—

Article 9(*h*) In fog, mist, falling snow, or heavy rain storms, drift vessels attached to their nets, and vessels when dredging, or when line-fishing with their lines out, shall, if of 20 tons gross tonnage or upwards, respectively, at intervals of not more than one minute, make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the fog-horn; each blast to be followed by ringing the bell. Fishing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

Article 15(*e*). A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manoeuvre as required by these Rules, shall, instead of the signals prescribed in paragraphs (*a*) and (*c*) of this Article, at intervals of not more than 2 minutes, sound three blasts in succession, viz., one prolonged blast, followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

The third finding of the learned trial Judge was:—

However, while non-compliance with this Article may be designated as a fault, I am of opinion that it did not contribute in the remotest way to the collision.

And further, my opinion is and I find that the efficient and real and sole cause of the collision and consequent damage was the immoderate speed of the *Rockwood Park*, which was not careful, having regard to the existing circumstances and conditions prevailing.

The learned trial Judge held that the damage and loss was caused solely by fault of the *Rockwood Park* and directed that if counsel were unable to agree on the amount of the damages that he would later assess the damages covering the value of the ship and the scallops and the personal belongings of the Master and crew.

The appellant does not appeal from the finding of the learned trial Judge that the speed of the *Rockwood Park* was immoderate.

But the appellant does appeal the finding that the failure of the *Lora Grace Peter* to give the signals required by Article 9(*h*) did not contribute to the collision.

The Admiralty Law in England from 1870 to 1911 imposed upon a vessel that had infringed a regulation which was prima facie applicable to the case, the burden of proving not only that such infringement did not contribute but that it could not by possibility, have contributed to the collision.

The Maritime Conventions Act, 1911, 1 and 2, Geo. 5, chap. 57, repealed Section 419(4) of the Merchant Shipping Act, 1894. The effect of this repeal is stated by *Marsden's Collisions at Sea*, 9th Ed., p. 65, to be:—

> The effect of the Act is to abolish an arbitrary rule by which any infringement, which by possibility might have contributed to the collision, rendered a vessel to blame and to "leave the Court to follow what is a reasoning judgment and to say, 'Did this want of obeying the regulations in any way contribute to the collision?' not 'Might it possibly have done so?'" *Per* Bargrave Dean, J., *The Enterprise*, (1912) P. 207, 211.

The question, however, of whether the burden was upon the infringing vessel to establish that the breach of her statutory duty did not contribute to the collision, or whether the burden was upon the party setting up a case of negligence to establish that such breach contributed to the collision, remained in doubt. *Marsden's* (*supra*) was published in 1934, and at page 67 he states his opinion:—

> It is submitted that the rule laid down in *The Fenham* (1870), L.R. 3 P.C. 212, is good law to-day, and that the burden is upon the infringing vessel to establish that the breach of her statutory duty did not contribute to the collision.

This statement was approved in *Hochelaga* v. *Dreyfus and SS. Leopold* (1).

The question was, however, determined by the decision in *S.S. Heranger* v. *S.S. Diamond* (2), Lord Wright said:—

> Mr. Hayward has, however, contended that even if the *Heranger* was negligent, still that negligence is immaterial unless it is established by the respondents that it actually contributed to the collision. He contended that the statement of law contained in the judgment of the President in *The Aeneas* (1935) P. 128, 131, was erroneous. The President said: "I think the principle to be applied, when there is a breach of a rule which is definitely asserted to have contributed to a collision, is that it is for those who have been guilty of the breach of the rule to exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision, actively, or to the resulting damage." This in my opinion is contrary to the principle stated by Lord Finlay that "only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage": *The Karamea* (1922) 1 A.C. 68, 71. It is also contrary to the general principle of the law of negligence, according to which it is necessary for the plaintiff to show both breach of duty and consequent damage. Damage is, it is said, the gist of the action. This is too well established at common law to call for any citation of authority. But it is, as Lord Finlay points out, also the rule in Admiralty. Whatever the Admiralty law on this matter was before the Maritime Conventions Act, 1911, it is now, I think, clear that the onus is on the party setting up a case of

(1) (1930) 1 D.L.R. 529, 540. (2) (1939) A.C. 94 at 104.

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negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases, is equally the rule in Admiralty. The party alleging negligence or contributory negligence must establish both the relevant elements. I thus find myself with all respect unable to agree with the view as to the onus of proof stated by the learned President in *The Aeneas* (1935) P. 128, 131. But though the burden is on the respondents to prove that the fault of the *Heranger* contributed to the accident and resulting damage, I think it is clear that they have discharged this burden.

It is clear from this that when there is a breach of a rule, it is not for those who have been guilty of the breach of the rule to exonerate themselves or to show affirmatively that their fault did not contribute in any degree to the collision. And only faults which contribute to the accident are to be taken into account and the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage.

Counsel for the appellant did not contend that the decision in the *Heranger case* (*supra*) was wrong or that it is not applicable.

What the appellant contends, however, is that as the *Rockwood Park* was at a speed of 8¼ knots, she would proceed about 820 feet in a minute. And if the *Lora Grace Peter* had given the proper signal one minute before the alarm, the *Rockwood Park* would have had an additional 820 feet in which to manoeuvre and would have avoided the collision. And that there is no evidence as to the time which elapsed between the last so-called "signal" of one prolonged blast and two short blasts and the warning blast, and that the collision would not have occurred if the *Lora Grace Peter* had given the required signal at the proper time.

Counsel also contended that there is a presumption (of fact) that if the signal required had been given, it would have been heard and bases this contention on the statements made in *S.S. Haughland* v. *S.S. Karamea* (1) Viscount Finlay said at page 75:—

> The *Haugland* broke the rule by not giving the signal. It is certainly possible that the signal, if it had been given, would have been heard. All that we have to the contrary is the statement of the officer who wrongfully failed to give the signal that he thought the *Karamea* was too far

(1) (1922) 1 A.C. 68.

away to hear. It would be extremely dangerous if any encouragement were given to neglect the duty of giving the signal by accepting without some definite evidence the plea of the officer in default that the signal would not have been heard. I think we ought to presume in the present case as against the *Haughland* that if she had done her duty by giving the signal in the present case it would have been heard. She was in the position of a wrongdoer, and no satisfactory grounds are shown for coming to the conclusion that giving the signal would have made no difference in the result.

Viscount Cave at page 77 said:—

> The assessors advising the Court of Appeal saw no reason why at that distance the whistle (if an efficient one) should not have been heard; and the experts advising your Lordships on this appeal did not differ from that view. In the circumstances, it cannot be said to be proved that the whistle would not have been heard; and in the absence of such proof I think the presumption is against the ship which broke the rule. Upon this point I agree with the Court of Appeal and consider that the *Haughland* was responsible on this ground also.

And, therefore, the burden was on the respondents to establish that the failure to give the signal did not contribute to the collision, and that the respondents failed to discharge that burden.

Counsel for the respondents does not question the finding of the trial Judge that the *Lora Grace Peter* was not complying with Article 9(*h*) of the Regulations or that this was the appropriate Regulation. His contention, based on the decision in the *S.S. Heranger case, (supra)*, is that the onus of establishing that the failure to give the proper sound signals contributed to the collision, is on the appellant and that the appellant failed to discharge that onus.

If the *Karamea case* (*supra*) is authority for the contention of the appellant that there is a presumption in all cases in which a required signal was not given, that if given, the signal would have been heard, then it is in conflict with the decision in the *Heranger case* (*supra*). Because the effect would be that those who had been guilty of a breach of the rule would have to, in the language of the President in *The Aeneas* (1),—"exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision, actively, or to the resulting damage". And that statement was expressly overruled in the *Heranger case* (*supra*).

(1) (1935) P. 128, 131.

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But in my view the *Karamea case* (*supra*) is not and does not purport to be authority for this contention. Viscount Finlay makes it quite clear that he is presuming the signal would have been heard in that case and in that case only. In one sentence (page 75) he twice used the words, "in the present case"—

> I think we ought to presume in the present case as against the *Haughland* that if she had done her duty by giving the signal in the present case it would have been heard.

In that case the vessels were 2 or 3 miles apart and the lights of the vessels were visible to one another so the visibility must have been good and the weather clear. Under those circumstances the assessors and experts advised both Courts that they saw no reason why the whistle at that distance should not have been heard. There was no reason to assume that the whistle would not be heard. The only evidence to the contrary was the statement of the Chief Officer when asked why he did not give the signal—"Because it appeared to me that the *Karamea* was too far away; she would not hear it". And his opinion, in the existing circumstances, the Court refused to accept. The Court logically inferred from the facts existing in that case that the signal, if given, would have been heard.

The Court made no express finding that the signal, if given would have been heard, but Viscount Finlay said at page 75:—

> In the absence of a finding that the signal, if given, would have been heard I should have difficulty in agreeing with the Court of Appeal that the mere failure to give the signal would have made the *Haughland* contributory to the damage.

And he added—

> I think also that a finding that the signal, if given, would have been heard would be justifiable upon the evidence.

He said at page 73:—

> The *Haughland* was guilty of disobedience to the rule, but it does not follow that she is liable to contribute to the damages. If it appears that the signal, if given, could not have been heard by the other vessel, the failure to give the signal cannot have contributed to the damage, as the signal would have been useless.

The inference or presumption drawn from the evidence was in the result, therefore, a finding that the signal, if given, would have been heard.

The question is then, can the same presumption be made here? That is, can it be logically inferred from the evidence in this case that the signal, if given, would have been heard?

In this case there were 50 fishing vessels in the vicinity, and although their signals were heard at times by the *Lora Grace Peter,* there is no evidence that the *Rockwood Park* heard their signals.

The *Rockwood Park's* last signal was heard by only one man out of the whole crew on the *Lora Grace Peter,* and he said he "didn't think it was near". Yet the ships were then only a little more than 100 feet apart.

Almost instantly the Master of the *Lora Grace Peter* grabbed his whistle and blew, but that signal was only heard by one man out of the men on duty on or near the bridge, and he said he "*thought* he heard a whistle". And the evidence from the *Rockwood Park* was that the distance between the ships was then 100 feet.

It is difficult to understand why this was so, but as *Marsden* states at page 46,—" 'The vagaries of sound in a fog', it has been said by nautical men of experience, 'are of a most astonishing character.' "

On those facts here there can be no presumption that if the *Lora Grace Peter* had given a signal one minute before the alarm that it would have been heard by the *Rockwood Park.* On the contrary, the logical inference is that it would not have been heard.

The evidence does not, therefore, establish that the fault of the *Lora Grace Peter* contributed to the collision. As Viscount Finlay said at page 71, in referring to the *Peter Benoit case,* (1):—

> It was there laid down that only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage.

Moreover the contention of the appellant is based on the assumption that the *Lora Grace Peter* did not signal one minute before the alarm. And if that warning had been given the *Rockwood Park* would have heard it and would have had 820 feet additional in which to manoeuvre. But

(1) 13 Asp. M.L.C. 203.

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there is no evidence as to the interval between the last signal of the *Lora Grace Peter* and the alarm sounded by her. It may have been sounded within five seconds or three seconds, or one minute before the alarm.

The difference in the signals under Articles 15(*e*) and 9(*h*) respectively, except as to the interval between signals, is not material. Both signals indicate a vessel unable to manoeuvre and were appropriate to the occasion, because they indicate what fog signals are intended to indicate, viz., that another ship is in the vicinity. They are not signals relating to vessels in sight of one another. In this case either signal, if heard, would have warned the *Rockwood Park* that the *Lora Grace Peter* was in the vicinity and unable to manoeuvre.

The onus was on the appellant (defendant) to establish that the failure of the *Lora Grace Peter* to sound the proper signal did contribute to the collision, and in my opinion that burden was not discharged.

In my opinion the learned trial Judge has drawn the proper inference from the evidence.

The appeal will be dismissed with costs.

Judgment Accordingly.

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entertainment, recreation and social welfare of the members of His Majesty's Forces during World War II. He worked under and was responsible to the Senior Administrative Officer at the R.C.A.F. station at Patricia Bay, B.C. The suppliant assisted that officer in producing a play by members of the R.C.A.F. Lieutenant Hardwick, the officer in charge of the Special Service Branch of the Navy at Naden, B.C., arranged with suppliant and his senior officer to stage a performance of the play at Naden, a naval establishment a little distance from Patricia Bay. The approval and consent of the Commanding Officer at Naden were obtained and the play was produced at the drill hall, the centre of all social activities at the camp. After the performance the producing company and the suppliant were conducted from the ward room where they had had refreshments to the drill hall by an officer detailed by Lieutenant Hardwick for that purpose. Suppliant remained in the ward room, a brief moment, then, with his wife, proceeded to join the others but found the door of the drill hall locked against him. They walked along a roadway or platform, used at night by the members of the forces and their friends at the dances and entertainments put on in the drill hall. He wished to reach his car which was parked near the drill hall. He fell off the end of the roadway and was seriously injured. In this action for damages the Court found that the end of the roadway constituted an unusual danger which was known to Lieutenant Hardwick and to the Commanding Officer at Naden or should have been known to him, as well as to the officer conducting the party. The Court also found that the officer conducting the party to the drill hall and to their transport was a servant of the Crown, acting within the scope of his duty or employment while so engaged. *Held:* That the test to be applied to determine who is the employer of the servant is to decide in whose employment a man was at the time, when the acts complained of, were done; by the term employer is meant the person who has the right at the moment to control the doing of the act. 2. That suppliant was an invitee for he entered the premises by the permission of the respondent, permission granted in a matter in which the respondent had some material interest, namely, the entertainment of His Majesty's Forces. ALBERT EDWARD FARTHING v. HIS MAJESTY THE KING..... **134**

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recover the same in the present action, since the matter is governed by the *lex fori* which recognizes a maritime lien for such disbursements. 3. That the members of the crew being entitled to the enforcement of a maritime lien for their wages under the law of the United States such lien will be recognized in Canada. 4. That the priority of payment of the several claims is determined according to the *lex fori*. HARNEY ET AL v. M. V. *Terry*..... **27**

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