BETWEEN: 1932 Dec. 9.

EMMA MACLAREN ..... APPELLANT;

AND 1933 Apr. 22.

MINISTER OF NATIONAL REVENUE... RESPONDENT.

Revenue—Company in liquidation—Shareholder—Interest on deferred payments—Income—Liquidator—Winding-Up Act—Income War Tax Act, s. 19—"On"—"That the company has on hand"—Interpretation —Constitutional law.

The appellant owned shares in the North Pacific Lumber Company Limited, which company in 1926 was ordered wound up under the provisions of the Winding-Up Act. The appellant, in 1929, received the sum of $5,439.91 from the liquidator of the company, this amount being paid out of the undistributed income of the company during the process of winding it up. This sum represented appellant's share of interest on the balance of deferred purchase prices of properties of the company. The Commissioner of Income Tax included this sum in the assessment notice sent to appellant. The assessment was confirmed by respondent, and, appellant being dissatisfied, the matter was referred to this Court.

Held: That interest on deferred payments of capital is income subject to taxation; and the distribution of assets of a company by a liquidator does not change the nature of such assets in such a way as to convert interest or earnings into capital. *The North Pacific Lumber Company Limited* v. *The Minister of National Revenue* (1928) Ex. C.R. 68, followed.

2. That the word *on* in s. 19 of c. 97, R.S.C., 1927, is equivalent to *from the date of* or *after* and implies a notion of continuity.

3. That the words *that the company has on hand* in said s. 19 do not mean *that the company has on hand at the time of the winding-up order.*

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

4. That taxing acts are not to be construed differently from any other act, when the language is clear and unambiguous.
5. That s. 19 is *intra vires* of the Parliament of Canada.
6. That there is no conflict between ss. 19 and 13 of c. 97, R.S.C., 1927.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

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

J. R. Maclaren and *G. F. Maclaren* for appellant.
C. F. Elliott, K.C., and *W. S. Fisher* for respondent.

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

ANGERS J., now (April 22, 1933) delivered the following judgment:

[The learned Judge stated the nature of the appeal and then continued.]

It being admitted or established by the evidence that the appellant was a shareholder of the company, that she received in 1929 the sum of $5,439.91 forming the subject of the present appeal and that this sum represented her share of interest on the balance of deferred purchase prices of properties of the Company, the whole case narrows down to a question of determining whether this interest constitutes an income and as such is taxable under the provisions of the Income War Tax Act, and, if so, whether its distribution by a liquidator under the Winding-up Act has had the effect of changing its nature from income to capital, as claimed by the appellant.

Section 3 of the Income War Tax Act defines taxable income; it contains, among others, the following stipulation:

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, ...; 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. . . . .

The balance of a purchase price, whether payable in a lump sum on a fixed date or whether payable by instalments, which bears interest, is money invested at interest just as much as the amount of a loan carrying interest. If

the purchase price of the several properties sold by the Company had been paid in cash and the appellant had received her share and invested it, the interest or dividends derived therefrom would unquestionably have been income subject to taxation under the statute. In virtue of the deferred payment agreements the residue of the purchase price remained invested in the hands of the purchaser and the interest yielded by such residue was an income of the Company, of which the appellant received her proportion when it was distributed by the liquidator.

In the case of *The North Pacific Lumber Company Limited, appellant,* and *The Minister of National Revenue, respondent* (1), the Honourable Mr. Justice Audette held, and held rightly in my opinion, that interest on deferred payments of capital is income subject to taxation. At page 72 of the report, the learned judge says:

> The interest due on the deferred purchase price and *earned by that capital* is a revenue of the company subject to the income tax, and which becomes a debt due to the Crown, for which the company is liable.

It goes without saying that the judgment in the above cited case does not constitute *res judicata* as regards the appellant herein, who was not a party thereto, but the reasons given in support of the judgment appear to me well founded and I unhesitatingly concur with the view adopted by the learned judge therein.

The next question raised by counsel for appellant, as I have already said, is whether the distribution of the assets of the Company by a liquidator changes the nature of such assets in such a way as to convert interest or earnings into capital.

The question having been brought up in the same case of *The North Pacific Lumber Company Limited* and *The Minister of National Revenue (ubi supra)* was decided in the negative by the Honourable Mr. Justice Audette.

The learned judge held in the first place that the Crown is not bound by the Winding-up Act, not being specially mentioned therein, and relied on the decision of the Supreme Court of Canada in the case of *The Queen* v. *The Bank of Nova Scotia* (2) and on Section 16 of the Interpretation Act (R.S.C., 1906, chap. 1, now R.S.C., 1927, chap. 1).

(1) (1928) Ex. C.R., 68. (2) (1885) 11 S.C.R., 1.

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

Angers J.

Section 16 reads as follows:

> No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

The text of this section is perfectly clear and comments are needless.

In the case of *The Queen* v. *The Bank of Nova Scotia*, Ritchie, C.J., referred to the following cases: *In re Henley & Co.* (1) and *In re Oriental Bank Corporation, ex parte The Crown* (2), in which the above doctrine was fully considered and adopted.

See also on this point: Bacon's Abridgement of Law, vol. 8, Prerogative, p. 92; Maxwell on the Interpretation of Statutes, 7th Ed., pp. 117 et seq.; *Giles* v. *Grover* (3); *Cushing* v. *Dupuy* (4); *Théberge* v. *Landry* (5); *The Liquidators of the Maritime Bank and The Queen* (6); *The Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick* (7).

The Crown is not mentioned in the Winding-up Act and it is accordingly not bound thereby. I see no need of insisting further on this point.

It was argued on behalf of appellant that the payments made by the several purchasers of the Company's properties, consisting partly of principal and partly of interest, became one common fund of assets as soon as they were received by the liquidator and that the distribution by the latter of the amounts so received must be considered as a distribution of capital, irrespective of the fact that a portion of such amounts was interest when they came into the hands of the liquidator.

The Honourable Mr. Justice Audette has held in the *North Pacific Lumber Co. Ltd.* v. *The Minister of National Revenue (ubi supra)* that the fact that the affairs of a Company pass into the custody and under the control of a liquidator does not change the nature of a debt owing to the Company. In other words what is paid by a debtor to the liquidator as interest remains interest and what is paid as capital remains capital, for the purpose of taxation, just as if there had been no liquidation and the money had been

(1) (1878) 9 Ch. D., 469.
(2) (1885) 28 Ch. D., 643.
(3) (1832) 9 Bing., 128, at 156.
(4) (1879-80) 5 A.C., 409, at 419.
(5) (1876) 2 A.C. 102, at 106.
(6) (1888) 17 S.C.R., 657.
(7) (1892) A.C., 437, at 441.

paid to the Company itself. In fact the moneys due to the Company are received by the liquidator for the Company. Under Section 19 of the Winding-up Act (R.S.C., 1927, chap. 213) the Company from the time of the making of the winding-up order ceases to carry on business, but its corporate state and its corporate powers continue to exist until the affairs of the Company are entirely wound up: see *Kent et al* v. *La Communauté des Soeurs de Charité de la Providence* (1).

The learned judge in the case of *The North Pacific Lumber Co. Ltd.* and *The Minister of National Revenue,* having arrived at the conclusion that the nature and character of the debts had not been changed by the liquidation, held that the interest on deferred payments of capital received by the liquidator was income and as such was taxable under the Income War Tax Act. I share this opinion without the least hesitation and I do not see that I could add anything useful to the learned judge's remarks which I adopt unreservedly.

Has this interest become capital as a result of its distribution by the liquidator to the shareholders? I do not think that it has; more than that I cannot conceive how it could be considered capital under the law in force in 1929.

In support of his contention counsel for appellant has cited the decision in the case of *Inland Revenue Commissioners* v. *Burrell* (2), in which it was held "that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only."

In this case the Court of Appeal (Pollock, M.R., Atkin, L.J. and Sargant, L.J.) affirmed the decision of Rowlatt, J., who had upheld the decision of the Commissioners of Income Tax.

The grounds on which the decision of the Court of Appeal is based are clearly summed up in the following remarks of the Master of the Rolls (pp. 63 and 64):

> Upon the grounds, and in accordance with the authorities, which I have up to this point stated and referred to, the Crown are not, in my judgment, entitled to charge super tax in accordance with the assessments made. It is not right to split up the sums received by the shareholders into capital and income, by examining the accounts of the company when

(1) (1903) A.C., 220, at 225. (2) (1924) 2 K.B., 52.

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

Angers J.

it carried on business, and disintegrating the sum received by the shareholders subsequently into component parts, based on an estimate of what might possibly have been done, but was not done.

There is in addition a dictum of Scrutton L.J. directly in point: see *Inland Revenue Commissioners* v. *Blott* (1920, 2 K.B. 657). In that case the question was whether certain bonus shares allotted to a shareholder could be treated for purposes of super tax as part of his total income from all sources for the previous years within s. 66 above quoted. Rowlatt J. (1920, 1 K.B. 114), the Court of Appeal (1920, 2 K.B. 657) and the House of Lords (1921, 2 A.C. 171) all decided in the negative. Scrutton L.J. in the course of his judgment dealt with the very point to be decided here. He said (1920, 2 K.B. at 675): "A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1) their original capital, (2) accretions to capital due to increase in the value of the assets of the company, (3) the reserve fund of undivided profits in the company, (4) the undivided profits of the last year of assessment. Heads (3) and (4) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super tax as assessment; they are not income from property, but the property itself in course of division."

No doubt this opinion was expressed obiter in the course of the judgment, but I agree with it. The quota returned to the shareholder is returned to him as that part of the property of the company to which he is entitled, by the officer whose duty it is to distribute the "property of the company" in accordance with s. 186 of the Companies (Consolidation) Act, 1908. That officer does not carry on the company as the directors did; and he has no longer the powers that they had, to divide the profits as dividend upon the shares—profits, to which, in that character, the shareholder had no right to lay a demand.

The decision of the Court of Appeal follows the dictum of Scrutton L.J. in re *Inland Revenue Commissioners* v. *Blott* (1) quoted by Pollock M.R. in his notes in the case of *Inland Revenue Commissioners* v. *Burrell* hereinabove cited.

In the *Blott* case an assessment to super tax had been made upon Blott for a certain year in respect of an allotment to him of bonus shares in a limited Company; in the previous year the Company had decided that out of its undivided profits a bonus should be paid to its shareholders by means of a distribution among them of unissued shares credited as fully paid up. The Court of Appeal found that these shares were not part of Blott's income but were an addition to his capital.

The facts in the *Blott* case differ materially from those in the present case, where no allotment of shares was made in payment of accumulated profits. It was apparently to meet such a contingency that Section 2 of the (Canadian)

(1) (1920) 2 K.B., 657, at 675.

Income War Tax Act, 1917, was amended in 1920 by 10-11 Geo. V, chap. 49, by adding thereto Subsection (1): "Dividends shall include stock dividends." Subsection (1) has become Subsection (*b*) in chapter 97, R.S.C., 1927.

The case of *Crichton's Oil Company* (1), to which Pollock, M.R., also refers, although perhaps more in point than *Inland Revenue Commissioners* v. *Blott,* differs nevertheless quite substantially from the present one. The facts in the *Crichton* case were these: the capital of the Company was divided in preferred and ordinary shares, the former being entitled to a cumulative preferential dividend; the articles of association empowered the directors to set aside, out of the profits, the sums they thought proper as a reserve fund; for some years the preferential dividend was paid, but for three years the expenditure exceeded the income, the result being a loss of capital amounting to £4,346; in the following year there was a profit of £1,675 on the year's business, but the directors declared no dividend; the Company went into voluntary liquidation—which is what happened in the present case; the debts were paid and the capital to the extent of £7 per share (the par value being £10) was returned to the shareholders; the sum of £1,675 remained in the hands of the liquidator. The question was whether this sum of £1,675 ought to be paid to the preference shareholders or whether it ought to be distributed as surplus assets among all the shareholders rateably. It was held by the Court of Appeal, affirming the decision of Wright, J., as follows:—

Upon the construction of the articles (of association), that the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital rateably among all the shareholders.

The decision in the *Crichton* case rested to a great extent on the interpretation of clause 6 of the articles of association of the Company which provided that the owners of the preference shares should "be entitled to a cumulative preferential dividend at the rate of £5 per cent per annum, payable half-yearly . . ." (*b*) "Provided always that, in the event of the winding up of the company, the surplus assets . . . shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid thereon . . ."

(1) (1902) 2 Ch., 86.

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

Angers J.

Dealing with this clause 6, Stirling, L.J., says (p. 96):

Clause 6 of the articles provides (*b*) what is to happen in the event of the winding-up of the company, namely, that the "surplus assets" are to be distributed between the holders of preference shares and ordinary shares according to the amount paid up thereon. Primâ facie I think "surplus assets" means that which remains after all claims of the creditors of the company and the costs of the winding-up have been paid. In the present case there has been a loss of capital, and this sum of £1,675, the excess of the income over expenditure in the last year of the company's trading, is, I think, "surplus assets," and ought to be dealt with as provided by clause 6.

Clause 139 of the articles was also considered.

This case, decided mostly on the interpretation of the memorandum of agreement and articles of association of the Company and on questions of fact is, it seems to me, of very little assistance, if any, in deciding the issues herein. The case of *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1) was also cited.

The case of *Inland Revenue Commissioners* v. *Burrell,* I must admit, offers more analogy with the present one than any of the others hereinabove alluded to. This decision however was based on the Finance (1909-10) Act, 10 Ed. VII, chap. 8, which contains no provision similar to Section 19 of the (Canadian) Income War Tax Act.

The provision contained in Section 19 was introduced into the Income War Tax Act, 1917, in 1924, by 14-15 Geo. V, chap. 46, s. 5 as subsection (9) of Section 3; it later became Section 19 of chapter 97 of the Revised Statutes of Canada, 1927.

Section 19 reads as follows:

On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

It appears to me evident that this section was enacted to meet circumstances similar to those which arose in the *Burrell* case; if it was not, I must say that, in my opinion, it does meet them.

It has been urged on behalf of appellant that Section 19 is not sufficiently broad and clear to change the law as expressed in the *Burrell* case and the decisions therein referred to. Counsel for appellant particularly submitted that the word "on" in Section 19 is not broad enough to cover the whole period of liquidation but that it refers to

(1) (1895) 2 Ch. D., 596.

a definite particular time, viz., the commencement of the liquidation, and that it cannot be extended to mean "during." I cannot agree with this proposition. In my opinion, the word "on" in Section 19 is equivalent to "from the date of" or "after" and it implies a notion of continuity. The word "on" undoubtedly has other meanings, varying according to the sentence in which it is used; it cannot be construed separately. In the case of *Robertson* v. *Robertson* (1), an application by a wife, against whom a decree nisi for dissolution of marriage had been made, for an order for permanent maintenance, Jessel, M.R., interpreting the word "on" in Section 32 of the Divorce Act, 1857, empowering the Court to make the order "on" the decree, stated:

> Whatever meaning may be given to the word "on" in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after.

In a case of a similar nature, i.e., *Bradley* v. *Bradley* (2), the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, discussing the meaning of the word "on" in the same Section 32 of the Divorce Act, said:

> The word "on" is an elastic expression, which, so far from excluding the idea of its meaning after, is more consistent with that signification than any other. In some cases the expression "on" may undoubtedly mean contemporaneously or immediately after, and the question now before the Court is, whether there is anything from which it can be seen that the legislature used the word in the 32nd section in this restricted sense?

It seems obvious to me that the word "on" has a much more restricted meaning in Section 32 of the Divorce Act than it has in Section 19 of the Income War Tax Act; the decree under the Divorce Act is final and the word "on" in that case implies no idea of continuity.

The appellant further contended that the words "to the extent that the company has on hand undistributed income" refer exclusively to such funds on hand at the commencement of the winding-up proceedings. Again I fail to agree with the appellant's contention; I do not think that the legislators in using the words "that the company has on hand" in Section 19 meant or intended to mean "that the

(1) (1883) P.D. 94, at 96. (2) (1877) P.D., 47, at 50.

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

Angers J.

company has on hand at the time of the winding-up order." There is nothing in the statute to indicate such an intention on the part of the legislators and it cannot be assumed.

See *Hope* v. *The Minister of National Revenue* (1), in which the purview of Section 19 was carefully analysed by the Honourable Mr. Justice Audette. At page 161 of the report the learned judge says:

> It is true that sec. 5, subsec. 9 (14-15 Geo. V, ch. 46) reads as follows:—
>
> *5. On the winding up, discontinuance or reorganization of the business of any incorporated company the distribution in any form of the property of the company shall be deemed to be a payment of a dividend to the extent that the company has on hand undistributed income*
>
> and that this section came into force for the taxing period of 1921; but it is found that it is the time of payment of such dividend that must govern. That is to say, without any further qualification any such dividend paid in the ordinary course after that date will fall within the ambit of the section. It is a dividend paid in 1926 and which must be paid according to the law in force at that date, which does not require an investigation as to how the company came to pay the dividend.

And at page 162, he adds:

> The plain intention of this section 5, subsec. 9 (14-15 Geo. V, ch. 46) is that dividends made up of undistributed profits and paid or payable after 1921 as under the circumstances of the case, are liable to tax. The Act primarily imposes a tax upon all incomes made up of profits and gain and that is intended to be taxed in this case. And failing to come within any of the statutory exemptions, the appellant must pay. The wording of subsec. 9 of sec. 5 is clear and unambiguous in its grammatical meaning and that should be adhered to.

I may perhaps quote from page 163 the following extract:

> Moreover, I must find that this amendment of the Act in 1924 (sec. 5, subsec. 9) was enacted for the purpose of removing any possible doubt or contention—*ex majore cautela*—because the reserve fund in question in this case, made up of gain and profits, would, prior to such amendment, under secs. 3 and 4 of the Act, be treated as a dividend made up of profits and gains and thereby become liable. The amendment is of the same nature as the one made with respect to the Judges' salaries. See *In re* Judges' Salaries (1924, Ex. C.R. 157), confirmed on appeal to the Supreme Court of Canada.

Any doubt which may have existed regarding the Crown's right to tax as income, interest or earnings received by the liquidator of a limited company during the winding up of the company, has been removed by the enactment of subsection 9 of section 5, of chapter 46 of 14-15 Geo. V, now section 19 of the Income War Tax Act.

Some stress was laid by counsel for appellant on the doctrine that taxing statutes must be interpreted strictly. A few short remarks on the question may be apposite in the

(1) (1929) Ex. C.R., 158.

circumstances. Taxing acts are not to be construed differently from any other act.

Lord Russell, in the case of *Attorney-General* v. *Carlton Bank* (1) said:

> I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardships or of business convenience or the like. Courts have to give effect to what the Legislature has said.

There is, of course, the well established principle that in a taxing act the tax must must be expressed in unambiguous terms and that, in case of reasonable doubt, the act must be interpreted in favour of the tax payer: *Partington* v. *Attorney-General* (2) *Cox* v. *Rabbits* (3); *Versailles Sweets Ltd.* v. *Attorney-General of Canada* (4); Maxwell on the Interpretation of Statutes, 7th Ed., p. 246.

Section 19 of the Income War Tax Act, however, is clear and unambiguous: it shows clearly the intention of the legislators to impose upon the appellant the tax which has been assessed against her.

Counsel for appellant further argued that Section 19 of the Income War Tax Act is *ultra vires* of the Parliament of Canada inasmuch as it purports to change into income what, at common law, is capital and purports to effect a change in the nature of the property itself and is, consequently, an infringement upon the exclusive powers of the provincial legislatures to legislate with regard to property and civil rights, contrary to subsection 13 of section 92 of the British North America Act; counsel for appellant moreover urged that section 19 is *ultra vires* of and beyond the scope of the Act, in that it is an attempt to tax capital.

I must say that the argument on this particular aspect of the case has not impressed me very much. I do not think that the Parliament is endeavouring, under Section

(1) (1899) 2 Q.B., 158 at 164.
(2) (1869) L.R., 4 E. & I. App. 100, at 122.
(3) (1877-78) L.R. 3 A.C. 473, at 478.
(4) (1924) 3 D.L.R., 884, at 885.

1933

MACLAREN v. MINISTER OF NATIONAL REVENUE.

Angers J.

19, to tax capital. It has the power of taxing capital; this cannot be seriously contested. In fact counsel for appellant does not question the power of the Parliament of Canada to do so. He merely says that it cannot tax capital by means of an "Act to authorize a levy and war tax upon certain incomes." In my opinion, the tax is not imposed on capital, but exclusively on income. The import of Section 19 is that earnings, by way of interest or otherwise, which undoubtedly constituted taxable income when the Company was in operation still continue to be taxable income after a winding up order is made. The nature of the property remains the same. If a change in the nature of the property is effected, it is so effected by the decisions which declare that what was income before the winding up order is capital after it. Under this system a Company could liquidate its business, voluntarily, with the assistance of a liquidator, sell all its assets under long deferred payment agreements and make the liquidation last for years in such a way that its shareholders would withdraw, in dividends, an income derived from the interest paid by the purchasers of the assets and avoid payment of income tax on the same.

However there is, as far as I can see, no interference of any kind on the part of the Parliament of Canada with property and civil rights. Section 19 does not change property from one description to another; it merely carries out the intention of taxing income as it comes to the Company and later goes to the shareholder.

See: *Joshua Brothers Proprietary Ltd.* v. *The Federal Commissioner of Taxation* (1); *Caron* v. *The King* (2); *Veilleux* v. *Atlantic & Lake Superior Railway Co.* (3); *Cushing* v. *Dupuy* (4).

Contrary to appellant's solicitor's contention, I do not see any conflict between Section 19 and Section 13 of the Income War Tax Act. Section 13 deals with accumulated gains and profits and leaves to the discretion of the Minister to decide in each case whether they should be taxed as income or not; the section obviously does not apply to the present case.

(1) (1922-3) 31 Commonwealth L.R., 490.
(2) (1924) A.C. 999.
(3) (1911) R.J.Q., 39 S.C., 127.
(4) (1879-80) 5 A.C. 409.

There will be judgment dismissing the appeal and confirming the assessment, with costs against appellant.

In his statement of defence the respondent claims payment of the balance of the tax outstanding, to wit of the sum of $471.36 and interest. No proof was made in this respect and there is nothing in the record to indicate the date from which the interest should be calculated. The parties will determine between themselves the amount owing by appellant, tax and interest included, and if they cannot agree, they may refer the matter to me in chambers for a decision.

Judgment accordingly.