BETWEEN:

DOMINION DISTILLERY PRODUCTS COMPANY LIMITED ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

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Jan. 23, 24.
Feb. 3, 4, 5, 8, 15.

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June 12.

Crown—Petition of right—Action for recovery of money paid for sales tax and excise tax—Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, as amended by 23-24 Geo. V, c. 50, s. 24—Failure to make demand for return of money within period of limitation—Non-user of corporate powers by incorporated company—Forfeiture of charter—Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by 24-25 Geo V, c. 38—Transfer of entire assets by one company to another company—"Action on a statute"—"Action given by a statute"—Action for debt—Period of limitation—Ontario Limitation Act, R.S.O., c. 106—Exchequer Court Act, R.S.C., 1927, c. 34.

Suppliant, a licensed manufacturer and producer under Part IV of the Special War Revenue Act, 1915, and licensed as a distiller under Part III of the Inland Revenue Act, R.S.C., 1906, c. 51, by its petition of right filed in this Court on December 14, 1934, sought recovery of moneys paid the Crown as sales tax and excise duties prior to January 26, 1926, upon liquors purchased by it for export and which it claimed were exported to the United States. In May, 1926, suppliant by an agreement in writing sold and transferred to Dominion Distillers Limited its business and undertaking as a going concern as the same existed at the close of business June 30, 1925, including "all the book and other debts due the party of the first part (suppliant) in connection with the said business, and the full benefit of all securities for such debts, together with the full benefit of all pending contracts and engagements to which the party of the first part may be entitled in connection with the said business." The terms of this agreement were fulfilled and suppliant had not carried on business since 1925 or 1926.

The Court found that the goods in question were purchased by suppliant for the purpose and with the intention of exporting the same to the United States, and, with the exception of a limited quantity, sold and delivered to residents of Canada, were exported to that country.

By s. 24, c. 50, 23-24 Geo. V, amending the Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, it is provided that "(1) no refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder. (2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid."

Held, that s. 24, c. 50, 23-24 Geo. V, is retroactive and suppliant not having applied for a refund of the sales taxes paid by it, within the period of limitation set by the statute, the present action fails.

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2. That the Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by s. 12, c. 9, 20-21 Geo. V, automatically and without any preliminary procedure operates a forfeiture of a charter, if in fact there has been non-user of the corporate powers for three consecutive years; suppliant company had consequently ceased to exist by reason of the forfeiture of its charter for non-user, and the petition herein was therefore unauthorized and a nullity.

3. That suppliant's claim is in the nature of a debt, and rests upon an implied promise that the moneys in question would be refunded if the goods were shown to have been exported, and is barred by the Ontario Limitation Act, R.S.O., c. 106, s. 48.

PETITION OF RIGHT by suppliant to recover moneys paid the Crown for sales taxes and excise duties.

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

L. A. Forsyth, K.C., Oscar Gagnon, L. J. de la Durantaye and *J. W. Reid* for suppliant.

W. N. Tilley, K.C., F. P. Varcoe, K.C. and *C. F. H. Carson, K.C.* for respondent.

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

THE PRESIDENT, now (June 12, 1937) delivered the following judgment:

The suppliant in this petition of right, filed on December 14, 1934, was licensed as a manufacturer and producer under Part IV of the Special War Revenue Act, 1915, and was licensed also as a distiller under Part III of the Inland Revenue Act, Chap. 51, R.S.C., 1906; its principal place of business was at Montreal, Que. The suppliant seeks a refund of the sum of $121,401.61 paid by it as sales tax under the provisions of the Special War Revenue Act, in respect of a certain quantity of spirits purchased from Hiram Walker & Sons Ltd., hereafter to be referred to as "Walker," licensed distillers, of Walkerville, Ont.; the suppliant claims that such spirits were purchased for export and were in fact exported, to the United States. The suppliant also claims a refund of the sum of $1,296,557.01, which it paid on account of excise duties upon the identical spirits, under the provisions of the Inland Revenue Act, at the time of the removal of the same from Walker's bonding warehouse at Walkerville. The suppliant claims it is entitled to the benefit of certain statutory exemptions from both the sales

and excise taxes, in favour of goods exported, and one of the issues raised for determination relates to the construction of the statutory provisions as to the exemptions, and also there is the issue as to whether the dealings with the goods in question were such as to entitle the suppliant to the benefit of the exemptions. Several important questions are raised by the Crown contesting the right of the suppliant to recover any portion of the taxes so paid, even if export of the goods in question were in point of fact established.

The suppliant in its petition sets forth that officers of the Crown, contrary to the statute and any regulations made thereunder, illegally, and without colour of right, compelled it to pay the said excise taxes as a prerequisite to the granting of a permit to remove the spirits in question from the bonding warehouse at Walkerville, for export from Canada, and similarly compelled it to pay the sales tax upon the said spirits; and it claims that by virtue of the provisions of the statutes mentioned it is entitled to recover the sums respectively paid as sales tax and excise tax. As the suppliant's right to recover the moneys in question is dependent upon the provisions of the Special War Revenue Act, and the Excise Act, it may be convenient and desirable to state at once the relevant provisions of such statutes.

Section 19 BBB of the Special War Revenue Act provides:

> In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada, * * * * which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; * * * * Provided that the consumption or sales tax specified in this section shall not be payable on goods exported, * * * *

Subsec. 10 of the same section provides:

> * * * * and a refund of the said tax may be granted on domestic goods exported, under regulations prescribed by the Minister of Customs and Excise.

Section 58 of the Inland Revenue Act provides:

> No goods, subject to a duty of excise under this Act, shall be removed from * * * * any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required.

Sec. 68 provides that

> Goods warehoused under this Act may be transferred in bond, and may be exported or removed from one warehouse to another, without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary.

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Sec. 73 states that

No goods shall be removed from warehouse for consumption unless upon the payment of the full amount of duty accruing thereon.

Sec. 140 provides:

The Governor in Council may make such regulations for the warehousing and for the ex-warehousing, either for consumption, for removal, for exportation, or otherwise, of goods subject to a duty of excise, and for giving effect to any of the provisions of this Act, and declaring the true intent thereof in any case of doubt as to him seems meet.

Sec. 174 provides:

The duty paid on spirits taken out of warehouse for consumption, or which have gone directly into consumption, shall not be refunded by way of drawback or otherwise upon the exportation of such spirits out of Canada, unless when specially permitted by some regulation made by the Governor in Council in that behalf.

Sec. 177 provides that

No spirits shall be removed from any distillery, or from any warehouse in which they have been bonded or stored, until a permit for such removal has been granted in such form and by such authority as the Governor in Council, from time to time, directs and determines.

There are sections in this Act, such as numbers 141 and 176, which provide that on exportation of goods manufactured wholly or partially from articles subject to a duty of excise, and on which such duty of excise has been paid, a drawback equal to the excise duty so paid may be allowed, and similarly upon export of spirits in the production whereof any malt is used and upon which any duty of excise has been paid; but such provisions for drawback are not applicable here.

Coming now directly to the facts pertaining to the transactions from which arise this controversy, and which perhaps should be stated rather fully. In the material period, from January 31, 1924, to January 25, 1926, the suppliant purchased from Walker certain quantities of spirits, the particulars of which are contained in a schedule to the petition. For the greater part, these transactions originated on the written orders of the suppliant to Walker, to ship to the former at Montreal, by rail, a specified quantity of spirits (rye whisky) "duty paid"; such shipments were always in substantial quantities, rarely, I think, being less than 1,000 cases. These orders contained no reference to the time, place, or manner of payment for such goods, but Walker's terms of sale were said to be "net cash." In the invoices rendered by Walker to the suppliant, the excise duties paid the Crown by Walker did not appear as a separate item and outwardly constituted a part of the sales

price to the suppliant; the sales tax, also paid by Walker as manufacturer or producer of the spirits, in accordance with the statute, always appeared on the invoices rendered the suppliant as a separate item. Walker was paid at its place of business the amount of any invoice rendered, ordinarily, I think, prior to shipment, though subsequent thereto on many occasions, usually by one Cooper, president of the suppliant company, who, in the material period, lived at Walkerville or in that vicinity. Walkerville, and such places as Sandwich, Ford, Belle River, La Salle and Amherstburg, are situated rather closely together on the Canadian side of the Detroit river, and are outports of the customs port of Windsor, and within the Customs Division of Windsor, Ont. One or other of these ports, it is claimed, was the port of export of the goods in question, to Detroit, U.S.A., on the opposite side of the Detroit river, a comparatively short distance away.

In the early stages of the transactions in question, covering a period of about three months, any spirits purchased from Walker by the suppliant would be moved by motor trucks from the bonding warehouse either directly to a boat for export to the United States, or to a warehouse—doubtless subject to customs supervision—on a certain dock for temporary storage, at the port of Walkerville. During this limited period, it may be assumed that customs was aware that the suppliant was exporting, or attempting to export, from Walkerville, such spirits to the United States; they were there entered at customs for export to that country. On April 26, 1924, instructions were issued by Mr. Taylor, Assistant Commissioner of Customs at Ottawa, to Walker, in respect of future shipments of spirits to the suppliant, in the following terms:

> I am directed to inform you that the officer in charge of your distillery is being instructed, by means of a copy of this letter, to refuse delivery or issue of permit for the removal of duty-paid spirits from your distillery to the Dominion Distillery Products Company Limited, unless the goods are shipped direct to their licensed premises in Montreal.

Henceforward all shipments of spirits were made by Walker directly by rail to Montreal, and from there the same would be promptly reshipped by rail to one of the mentioned Canadian ports on the Detroit river, in the Windsor Customs District, in the Province of Ontario; in practically all cases the spirits, as I understand it, would not actually be

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removed from the cars to the suppliant's warehouse but would be routed to the port of export in the same car or cars after examination by, and with the permission of, Montreal customs authorities. The procedure in such cases throughout would be about as follows:

On receipt of an order from the suppliant for a specified quantity of duty paid spirits, Walker would procure from the Collector of Customs and Inland Revenue at Walkerville, a permit to remove the same in bond from the Walkerville bonding warehouse to Montreal, and the same would then be forwarded by rail, consigned to the order of the Collector of Customs and Excise at Montreal, who would in due course notify the suppliant of their arrival. On application of the suppliant, another permit would then issue from Customs and Excise at Montreal permitting the shipment of the same goods by rail to one of the Detroit River points mentioned, and always, we may assume for the purposes of this case, by the same cars, after the same were opened, the contents checked, and the cars resealed, all by customs. The bill of lading accompanying the rail shipment would usually name one Scherer of Detroit, sometimes one Kemp of the same place, as consignee, and one of the Detroit River ports mentioned would be named as the Canadian destination of the rail shipment; the bill of lading would also contain the name of the boat by which the goods were to be exported from the designated Canadian port to Detroit. The prescribed customs form B 13, an export entry for articles of domestic production and foreign articles not subject to customs or excise duties, containing the name of the shipper, the name and address of the consignee, the number of packages, a description of the goods together with their quantity and value, and the name of the Canadian port and the boat at and to which the goods were to be delivered for exportation, would accompany the shipping documents; the Montreal customs permit would not issue until a B 13, covering the entire shipment, was supplied by the suppliant. After the shipment reached the designated Canadian port of export, and when the goods, or a portion of them, were placed on board a boat and examined by customs, a B 13 would then be tendered on behalf of the suppliant to the customs office nearest the port of exit, and if found satisfactory, customs would affix

thereon its stamp on the lower left hand corner, and this would also indicate the date of the export entry; in some cases the stamp would bear the words "for exportation." The master of any boat, before his departure outwards, would make at customs the required entry outwards, for Detroit in these cases, therein declaring his cargo content; thereupon a clearance certificate would be granted by customs to the master and in due course he would depart from port with his cargo. I should perhaps explain that the boats, in the large majority of cases at least, would receive the goods in fulfilment of sub-sales made to purchasers by Scherer or Kemp, and generally at an advanced price, I might add. Therefore the goods designated in any single export entry would vary according to the capacity of the boat, or the requirements of the sub-purchaser. The total quantity of goods shown in these B 13's would in the result be the equivalent of the quantities shown in the B 13's accompanying the rail shipments from Montreal. This practice seems to have been allowed by customs during the period in question but I believe the practice was later discontinued.

In case this matter be further considered, and for the moment disregarding all other grounds of defence which have been raised, it may be desirable that I express my opinion upon the question as to whether or not the goods in question, or a substantial portion of them, were in fact exported to the United States. Upon this point, the judgment of the Judicial Committee of the Privy Council in the case of *Carling Export Brewing and Malting Co. Ltd.* v. *The King* (1), was relied upon by each party as conclusive of that issue. In that case the Crown proceeded against the Carling company for the recovery of a considerable sum of money in respect of gallonage and sales tax levied under the provisions of the Special War Revenue Act, 1915, in respect of lager manufactured and sold by that company, between April 1, 1924, and May 1, 1927. The Carling Company claimed the benefit of exemption from such taxes on the ground that the beer had been manufactured for export to the United States, and had been actually exported to that country. The Special War Revenue Act, 1915, imposed a gallonage tax and a sales tax

(1) (1931) A.C. 435.

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upon specified goods, including beer, manufactured in Canada. It provided, however, that the gallonage tax in respect of beer should not be payable "when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise," and that the sales tax should not be payable on "goods exported," with a provision for a refund on "domestic goods exported under regulations" similarly provided.

It was held by their Lordships that the exemption from gallonage tax, like that from sales tax, applied only to goods actually exported, and that it operated although no regulations had been prescribed, and that an export of beer to the United States was within the exemption provisions although the import was contrary to the law of that country. It was also held that beer sold to a purchaser in the United States was within the exemptions where it had been consigned to him at a Canadian port, and was proved to have been shipped from there into the United States in smaller consignments, mostly to sub-purchasers. The provision in s. 19 B that the excise tax there imposed shall not be payable where the goods are "manufactured for export," does not enter into this case, because the words "manufactured for export" are not to be found in sec. 19 BBB of the same statute or in the Inland Revenue Act. As already stated, sec. 19 BBB of the Special War Revenue Act provides that the sales tax shall not be payable on goods exported, and subsec. 10 thereof provides that a refund of the sales tax "may be granted on domestic goods exported" under regulations prescribed by the Minister of Customs and Excise, and their Lordships, in the *Carling* case, were of the opinion that this proviso, in respect of the refund of the sales tax, would apply to goods which, "though not manufactured for export," were subsequently exported. Therefore, as I understand their Lordships' decision in the *Carling* case, it is not a requirement in the case under discussion that the goods be "manufactured for export" in order to become entitled to the exemption from the sales tax, or to a refund of the same if paid; the only requirement is that the goods be actually exported.

As to the proof of export in the *Carling* case their Lordships held that the most important evidence was to be found in the bills of lading, and the customs forms known

as B 13's which accompanied each consignment of beer, the latter of which were presented to and stamped by the customs officers at the port of exit; further proof of export they held was to be found in the fact that on shipment of the goods on board a boat a report outwards was signed by the master, which stated the Carling company to be the shipper of the goods and a port in the United States as the destination, and on this report a clearance certificate was granted by the customs officer at the port of exit; and further, it was held, that the supervision by one Low of the Carling company at the riverside up to the shipment of the goods on board the boats, along with the documentary evidence, and the fact that the beer had been manufactured for export, sufficiently proved that the Carling company saw that the arrangement for export to the United States was, in fact, carried out. There having been no B 13's produced for a certain percentage of the consignments their Lordships sustained the finding of the learned trial Judge who held that in respect of such percentage the Carling company was liable for both the gallonage and sales tax, and was also liable for the same taxes on account of any sales made from such consignments in Canada to one Bannon, a resident of Canada, and which goods Bannon resold in Canada.

On the assumption that there was here involved but the one question for determination, that is, whether or not the goods in question were in fact exported to the United States, I would feel bound by the *Carling* case to hold that in the main they were so exported, and that the suppliant was entitled to recover back the greater portion of the taxes paid. The facts here as to exportation are not to be seriously distinguished from those of the *Carling* case, and the proof of export in this case, I think, is equally as strong as in the *Carling* case. I entertain no doubt whatever but that the goods in question were purchased by the suppliant for the purpose and with the intention of exporting the same to the United States, and that they were exported to that country with the exception of a limited quantity sold and delivered to residents of Canada, at one or more of the Canadian export points, and by them relanded or resold in Canada, corresponding exactly to the sales made to Bannon in the *Carling* case, and which transactions were

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not held to taint in any way the balance of the export transactions; in fact the same Bannon was one of such Canadian sub-purchasers in this case. The shipments here were supervised on behalf of the suppliant by its officers or servants, and most of the B 13's have been reasonably accounted for. That the spirits in question were not shown to have been expressly manufactured by Walker for the suppliant, for export to the United States, is, as I have already pointed out, of no importance here. There were obvious reasons why persons willing to risk engagement in this class of exports to the United States, during its prohibition period, should attempt to carry out their intentions, and, in fact, in this case it would not appear to have been very difficult to do so. It is not a mere fiction to assume that in the United States there were to be found, during the period in question, many persons whose requirements for alcoholic beverages would be as amply satisfied with rye whisky, as with rice beer. If I were pronouncing judgment in this case, upon the assumption mentioned, I would feel obliged to hold that the suppliant was entitled to recover the amount sued upon, less the taxes paid upon goods for which there was no reasonable accounting for the B 13's and also upon any of the goods shown to have been sold and relanded in Canada. In view of what I am later to say I need not now take time to discuss how the resulting calculation should be arrived at, or estimated. The result may be determined if and when it is held by any court reviewing this judgment that the suppliant is entitled to recover back the taxes paid on goods proven to have been exported, either by that court of review, or by this court, if counsel themselves were unable to agree upon the amount.

The suppliant's right to recover is however contested upon grounds other than those emerging from the decision in the *Carling* case. First it is contended that the claim for recovery of the sales tax is barred by sec. 117 of the Special War Revenue Act. Sec. 117 of the Special War Revenue Act, as enacted by chap. 54 of the Statutes of Canada 1931, provided that:

> No refund or deduction from any of the taxes imposed by this Act shall be paid unless application for the same is made by the person entitled thereto within two years of the time when any such refund or

deduction first became payable under this Act or any regulations made thereunder.

By chap. 50, sec. 24, of the Statutes of Canada 1932-33, this section of the Special War Revenue Act was repealed but re-enacted in precisely the same terms, but with the addition of the following subsection:

(2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The sales taxes here in question were paid on goods sold and exported at least sometime prior to January 26, 1926, and it was not till December 14, 1934, nearly eight years therafter, that this petition of right was filed; and it does not appear from the evidence that any application in writing was ever made for a refund of such taxes prior thereto, or, at least, within two years of the time when any such refund or deduction first became payable under the Act. Section 117 of the Act was obviously intended to be retroactive, and it is not unusual for similar taxing statutes to contain some such provision. I have read this section many times and I can only interpret it as meaning that if one has paid or overpaid to the Crown any taxes imposed by this Act, the same shall not be refunded unless application has been made in writing within two years of the time when any such refund or deduction became payable, which would be within two years after such moneys were paid or overpaid. On this ground alone I think the suppliant must fail in respect of its claim for a refund of the sales tax.

On a motion made on behalf of the respondent, which was adjourned to the trial, it was sought to dismiss the petition upon the ground that the suppliant company had, prior to the filing of this petition, sold and transferred its business and undertaking as a going concern to another corporation, Dominion Distillers Ltd., and that thereafter the suppliant company had ceased to exist and its charter had become forfeited under the provisions of the Companies Act, R.S.C., chap. 27, sec. 29, and amending Acts, and that consequently this petition could not have been authorized by the suppliant.

In May, 1926, just four months after the last of the transactions with which we are here concerned took place,

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the suppliant company by an agreement in writing, sold and transferred to Dominion Distillers Ltd. its business and undertaking as a going concern, and "as the same existed at the close of business on the 30th of June, 1925," including all property movable and immovable, stock in trade, plant, equipment, goods, cash in hand and at the bank, and all bills and notes in connection with the said business, and

> all the book or other debts due the party of the first part, (suppliant) in connection with the said business, and the full benefit of all securities for such debts, together with the full benefit of all pending contracts and engagements to which the party of the first part may be entitled in connection with the said business * * * *

The consideration for the sale was the issue by the purchasing corporation to the vendor, the suppliant company, of the sum of $1,200,000 payable in the fully paid preference stock and common shares of the purchasing corporation, and which stock and shares were distributed among the shareholders of the suppliant company, four or five in number, I believe, and who alone thereafter held all the stock and shares of the Dominion Distillers Ltd.

On the motion, to dismiss the petition, upon this and another ground, Mr. Gagnon, of counsel for the suppliant company, submitted an affidavit to the effect that in August, 1933, he had been consulted by Mr. Leo George, president of the Dominion Distillery Products Company Ltd., regarding the matter of the initiation of this petition of right proceeding against the Crown; that in May, 1934, this petition of right was drafted by him; that frequent meetings of directors of that company had been held since August, 1933, for the purpose of discussing the proposed petition of right proceeding; that he had been verbally instructed by the directors to launch a petition of right proceeding; and that a careful search failed to reveal any written assignment by Dominion Distillery Products Company Ltd., to Dominion Distillers Ltd., of the claims mentioned in the petition of right herein, other than the agreement of May, 1926, already mentioned. Mr. George, who had been president of the suppliant company since 1923 or 1924, also filed an affidavit but he merely confirmed the statements contained in the affidavit of Mr. Gagnon.

Both Mr. Gagnon and Mr. George were examined upon their affidavits but nothing that will assist us here was

disclosed on the examination of the former. Mr. George testified that the suppliant had not been manufacturing or exporting liquor, or carrying on any business, since 1925 or 1926; that the assets of the suppliant company had been transferred to Dominion Distillers Ltd. in conformity with the agreement of May, 1926; that the office of the suppliant was closed in 1926 and it was no longer listed in the Montreal City Directory or in the Montreal Telephone Directory; that no meeting of the suppliant company was held between March 9, 1926, and February 16, 1935, and that there was no election of directors or of any auditor during that period; that the suppliant had no assets except possibly the amounts claimed from the Crown in this petition; and that no return had been made by the suppliant to the Department of the Secretary of State since April 4, 1925, and no company fees had been paid to that Department since that date. I might add that on June 26, 1926, Dominion Distillers Ltd. forwarded to the Secretary of State a letter in the following terms:

> We take this opportunity of advising you that with the reorganization of the Dominion Distillery Products Company Limited, to the Dominion Distillers, Limited, that the office which was formerly used by the first above mentioned company has been discontinued. So therefore all correspondence which you will have in the future should be addressed Dominion Distillers Limited, P.O. 670, Montreal, Can. There is no longer any office at 1185 St. James St. So we would consider it a great favour if you would advise your office as to this change.

The Companies Act, Revised Statutes of Canada, 1927, chap. 27, sec. 29, provided that:

> In case of non-user by the company of its charter for three consecutive years or in case the company does not go into actual operation within three years after the charter is granted, such charter shall be and become forfeited.

Section 29 of the Act was amended by chap. 9, s. 12, of the Statutes of Canada, 1930, by adding thereto the following subsection:

> In any case of doubt whether a charter has become forfeited under this section, if the Secretary of State is satisfied by such evidence as he may require that the charter is subsisting and valid, he may by supplementary letters patent so declare.

I might add that the Companies Act was re-enacted by chap. 33, of the Statutes of Canada, 1934, assented to June 28, 1934, and section 28 formerly section 29, is now as follows:

> (1) If a company does not go into actual *bona fide* operation within three years after incorporation or for three consecutive years does not use its corporate powers its charter shall be and become forfeited. (2) In any

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action or proceeding where such non-user is alleged proof of user shall lie upon the company. (3) The Secretary of State may upon application of any person interested revive any charter so forfeited upon compliance with such conditions as he may prescribe.

It was contended by Mr. Tilley that the suppliant's charter had become forfeited because of non-user for three consecutive years; that the sale of the suppliant's business and assets carried with it every right the suppliant possessed, even the claim against the Crown; and that, in any event, the authorization of Mr. George to initiate this petition of right proceeding was given as an individual and not as president or as a director of the suppliant company, all of which grounds were contested by Mr. Forsyth. In my view of the first ground of attack, that is, whether the suppliant's charter had become forfeited, it is not necessary to pronounce any opinion upon the last two mentioned points. The intention and purpose of sec. 29 of the Companies Act, as found in the Revised Statutes of 1927, and as amended in 1930, seems to me to be quite clear, and there is much to be said for the existence of such a legislative provision. It seems to me that the statute automatically, and without any preliminary procedure, operates a forfeiture of a charter, if in fact there has been non-user of the corporate powers for three consecutive years. Any doubt as to this seems to be put at rest by the amending enactment, chap. 9, s. 12, of the Statutes of 1930. From the section as thus amended, I think, it is clear that the legislature intended that forfeiture for non-user would take place automatically, without any procedure previously taken by any public authority responsible for the administration of the Companies Act, or by the company concerned, but if any doubt existed as to whether upon the facts forfeiture occurred, machinery was provided for removing that doubt, and if the Secretary of State were satisfied, on the application of the company no doubt, that the charter was in point of fact subsisting and valid he might by supplementary letters patent so declare. This means, I think, that a charter *prima facie* forfeited, might, upon cause shown, be declared valid, and unless automatic forfeiture for non-user were intended by the statute no purpose would be served by providing a procedure whereby such a charter might be declared valid by supplementary letters patent. There can be no doubt upon the facts here that for three

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and more consecutive years, after some month in 1926, there was non-user of the suppliant's corporate powers, for any purpose whatever, and the facts clearly indicate, I think, that the directors and shareholders of the suppliant company regarded the charter as having lapsed. And the suppliant never applied to the Secretary of State for a declaration validating the charter. There may be doubt as to whether sec. 28 of the Companies Act, 1934, may be referred to here and I am not therefore relying upon it. It is my view that the suppliant company had ceased to exist by reason of the forfeiture of its charter for non-user; the petition herein was therefore unauthorized and is a nullity, and upon this ground the suppliant fails.

The Exchequer Court Act provides that the laws relating to prescription and the limitations of actions in force in any province between subject and subject, shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province. This cause of action, I think, arose in the Province of Ontario. The Ontario Limitation Act, R.S.O., Chap. 106, s. 48, subsec. 1 (*b*) provides that an action upon a "bond, or other specialty" shall be commenced within twenty years after the cause of action arose, and by subsec. 1 (*g*), within six years in the case of an action for "trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander." It is pleaded by the suppliant that under the provisions of the Inland Revenue Act, and the Special War Revenue Act, as in force at the material time, it is entitled to the return of the moneys in question, and that under the said statutes the said moneys are due and payable, and to be refunded by the Crown to the suppliant. The contention is therefore advanced that the suppliant's claim, being founded upon those two statutes, is a specialty debt, and not barred until the lapse of twenty years after the accrual of the cause of action. The Crown contests this proposition and urges that the claim is one for money had and received, or, an action upon the case, and therefore barred by the lapse of more than six years from the time the cause of action arose.

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It seems to be established by the authorities that an action for a statutory debt, or an action brought upon a statute, is an action upon a specialty, but that there is a distinction between an action given by a statute, and an action on the statute. Illustrative of this point there are certain well known authorities and they are discussed by Romer J. in the case of *Aylott* v. *West Ham Corporation* (1), and in referring to such authorities I shall employ almost the precise language of Romer J. In *Cork and Bandon Railway Co.* v. *Goode* (2) an action to recover calls on shares was brought by the railway company which was subject to the provisions of the Companies Clauses Act, 1845. The declaration stated that the defendant was the holder of thirty shares in the plaintiff company and was indebted to the company in a certain sum in respect of certain calls, whereby an action had accrued to the said company by virtue of the Companies Clauses Act, 1845, and the company's private Act. The defendant pleaded that the action was founded upon contracts without specialty and that the cause of action did not accrue within six years before the suit. It was held that the plea was bad, as the action was founded upon the statute and therefore upon a specialty; that but for the Act of Parliament, no action could be brought by the company against one of its members; and that the action was brought in respect of a liability entirely created by statute and therefore was an action founded upon the statute. Maule J. after stating that it was manifest upon reading the declaration that it was a declaration in debt founded upon the two statutes said (p. 835):

> Now, a declaration in debt upon a statute, is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts dehors the statute; that must constantly arise in actions for liabilities arising out of statutes * * * There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the act of parliament. But the question is, whether that state of facts exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty.

(1) (1927) 1 Ch. D. 30.

(2) (1853) 13 C.B. 826.

In the case of *In re Cornwall Minerals Ry. Co.* (1) the question was as to whether the liability of a railway company to pay interest on debenture stock issued under the Companies Clauses Act, 1863, was a statutory liability, and there it was held, by Vaughan Williams J. on the principle laid down in the *Cork and Bandon Railway* case, that the liability to pay the interest was to be found in the statute alone. But, again it is to be observed, the fact that a liability to make a payment is imposed by statute does not necessarily lead to the conclusion that an action brought to enforce such liability is an action upon a specialty.

In the case of *Thomson* v. *Lord Clanmorris* (2) an action was brought against certain directors to recover compensation under the Directors Liability Act, 1890, for alleged untrue statements in a prospectus, and which Act was passed to obviate the conclusion arrived at as to the liability of directors in *Derry* v. *Peek* (3). It was contended by the directors that the action was one for "penalties, damages or sums of money given to the party grieved by any statute" within the meaning of sec. 3 of the Civil Procedure Act, 1833, and that, inasmuch as the action had not been commenced within two years after the plaintiff's cause of action arose, his claim was barred by that section. This contention was held unsound, and, as the action was commenced within six years of the accrual of the cause of action, it did not become necessary to determine whether the action was governed by the Civil Procedure Act, or 21 Jac. 1, c. 16. But in giving judgment Vaughan Williams J. expressly dealt with that point. He said (p. 727):

> One must consider what is really the nature of the enactment contained in s. 3 of the Directors Liability Act, 1890. And it seems to me that, though that section does not in form give a new action though it only says that directors and others "shall be liable to pay compensation to all persons who shall subscribe for any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus," yet what the section really does is to give a new action on the case. It creates a new negative duty. The directors or promoters, or whatever other class is included in this section, have cast upon them a new duty in respect of prospectuses and similar documents. Speaking generally, one may say that the Act creates a new statutory duty of accuracy—a new statutory duty to abstain from inaccurate and untrue statements, and then in effect gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty. It seems to me, therefore, that this case is provided

(1) (1897) 2 Ch. 74. (2) (1900) 1 Ch. 718.
(3) (1889) 14 A.C. 337.

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for by the statute 21 Jac. 1, c. 16. The action is an action on the case, and if so of course the six years' limitation would apply. But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Ry. Co.* v. *Goode* (*supra*) is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, "grounded on a contract without specialty." It does not seem to me that that decision is really material to the case now before us. Maule J. pointed out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon Ry. Co.* v. *Goode* (*supra*) was an action of debt on the statute. And, as I have already said, the only question there really was whether the action came within the words of s. 3 of the statute of James. In the present case it seems to me that a new duty of accuracy in respect of the preparation and issue of prospectuses is created, and an action on the case is given to those persons who are injured by the breach of that duty. It is said that this is a new form of statute. But I do not think that in substance this statute differs from the Statute of Marlbridge (52 Hen. 3, c. 1 and c. 4), by which, in respect of not only illegal but irregular and excessive distresses, it is provided that, notwithstanding the liability to punishment, "nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses." So here it seems to me that the effect of s. 3 of the Act of 1890 is that amends shall be made to those who have sustained loss by being induced to subscribe for shares by reason of misstatements in the prospectus.

By the statute a liability was imposed upon the directors to pay compensation. Apart from the statute they were not liable. But the Lord Justice treated the action not as one brought on the statute, but as an action given by the statute, although in terms the statute did not purport to give any right of action.

I have earlier quoted all the provisions of the Inland Revenue Act, and the Special War Revenue Act, which are at all relevant to this point. Those provisions, it seems to me, are far from creating a statutory liability, or giving an action for a statutory debt, or an action on the statute; and they do not even, in express terms, purport to give any right of action. As a matter of fact the only relief available to the defendant is by way of petition of right. Therefore, in my opinion this is not an action upon a specialty, and the limitation period of twenty years does not apply here.

It was contended on behalf of the Crown that the claim here was one falling within sec. 48, subsec. 1 (*g*) of the Ontario Limitation Act, and that it was one for money had and received, or, an action on the case. The forms of action have now been abolished, and therefore the suppliant's claim is not specifically laid in simple contract,

debt, money had and received or on the case; all that is now required is that every pleading shall contain a statement in summary form of the material facts on which the party pleading relies. But it is still often of importance, in considering the question whether a plaintiff has a cause of action under particular circumstances, and in determining the period of limitation prescribed for the particular ground of complaint in question, to inquire what should have been the form of action under the old practice. "Relief" in the Petition of Right Act includes every species of relief claimed or prayed for, whether a restitution of any incorporeal right, or a return of lands or chattels, or payment of money, or damages, or otherwise.

Simple contracts include all contracts which are not contracts of record or contracts under seal, or specialties, and they may be either wholly or partly implied. A contract is in some cases said to be implied by law, which really is an obligation imposed by law independently of any actual agreement between the parties, and may even be imposed notwithstanding an expressed intention by one of the parties to the contrary; it is an obligation of the class known in the civil law as quasi-contracts. As already mentioned, in the case of simple contract or debt grounded on any contract without specialty, the period of limitation is six years under the Ontario Limitation Act.

It was particularly contended by Mr. Tilley that the form of the suppliant's form of claim or action was one for money had and received under an implied contract. The historic basis of such a claim or action is a promise implied by law. While the basis of such a claim or action is a contract implied in law, yet that principle is not to be confused with the separate question of when a court will imply a contract. The count for money had and received belongs to the field of quasi-contracts, or contract implied by law, other common counts belong to the field of promises implied by fact. It was laid down by Lord Mansfield in the much debated case of *Moses* v. *Macferlan* (1), where any notion of an actual contract was excluded, that

> where a defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt a receipt by the defendant for the use of the plaintiff,

(1) (1760) 2 Burr. 1005 at p. 1009.

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an action for money had and received may be maintained. Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt:

> If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon a contract.

This principle was held in many later cases to have been too widely expressed. It was said that to ask what course would be *ex aequo et bono* to both sides never was a very precise guide and the weight of authority seems to be that there is no ground for suggesting as a recognized equity the right to recover money merely because it would be the right and fair thing that it should be refunded to the payer. However, I understand the authorities now to hold that the law will not refuse to imply a promise to repay money received where the law can consistently impute to the defendant at least the fiction of a promise.

The doctrine enunciated by Lord Mansfield was discussed at considerable length in the speeches of Lord Haldane and Lord Sumner in the important case of *Sinclair* v. *Brougham* (1), and one of the effects of the decision in that case is that in many cases a contract may be implied as a basis for an action for money had and received, regardless of any moral obligation. For a very considerable time many entertained the view that Lord Mansfield in *Moses* v. *Macferlan* (*supra*) altered the basis of the action by introducing a theory of *aequum et bonum* to replace the theory of a contract implied by law, and that view more or less held the field until, in 1914, *Sinclair* v. *Brougham* (*supra*) marked a return to the theory of implied contract, and that a promise to repay money on the part of the recipient will be implied unless for some reason the very fiction of contract is excluded by law. In that case the court had to decide whether a promise to pay could be imputed where moneys had been deposited with the "Burbeck Bank," under a contract that was *ultra vires*, and it was held that a promise could not be imputed, and that the courts will not imply a contract in circumstances where an express promise could not be valid. The effect of this decision, as I construe it, is to establish the rule that the court will not imply a contract in circumstances where an express promise

(1) (1914) A.C. 398.

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could not be valid, but where there is debt a promise to repay on the part of the recipient will be implied, unless for some reason the very fiction of a contract is excluded by law.

Assuming then that upon the facts disclosed and the statutes involved, and without having regard to the Limitation Act, the suppliant is entitled to the relief claimed, it seems to me that the ground of the suppliant's claim is in the nature of a debt, and rests upon an implied promise that the moneys in question would be refunded if the goods were shown to have been exported; that, I think, is the form of the action, and it may be said therefore to be one for money had and received, and if not that then it is one on the case. If I be correct in this view, then the suppliant's claim is barred by sec. 48, subsec. 1 (*g*) of the Ontario Limitation Act because the petition was laid more than six years after the cause of action arose.

I might well conclude here but in fairness to counsel I perhaps should briefly refer to some other points that were raised and pressed upon me, even though they be of no ultimate consequence in view of the conclusions which I have already expressed. It was contended by Mr. Tilley that Walker, and not the suppliant, would be the proper party, if any, to enforce a claim for a refund of the excise duties paid. I do not think this contention is sound. The moneys paid over as excise duties by Walker were those of the suppliant, and in doing so, Walker, I think, must be held to have acted merely as the agent of the suppliant. Because of want of interest I do not think Walker could be heard to claim a refund of such duties. If a cause of action lies for the recovery of the excise duties, then, it appears to me it must be with the suppliant. I do not understand the same contention to be advanced in respect of the sales tax. Mr. Tilley also urged that the Inland Revenue Act does not contemplate a refund of excise duties paid upon spirits where the same were subsequently sold and exported at an advanced price, and so calculated as to absorb the amount of such duties so paid. I know of no principle which would limit the price the suppliant, the exporter here, might charge the United States importer, and I cannot think there is any substance in this point, even if it were conceded that the advanced price was expressly calculated to include the excise duties paid.

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It was also contended that there was no proof that Walker sold the goods to the suppliant under the arrangement that they were to be exported, and that it saw to it that they were exported in any event; this contention could only be applicable to the sales tax. In the *Carling* case it is true that the Privy Council held that the sales tax was not payable if it were established (*a*) that the goods were sold under the arrangement that they were to be exported, and (*b*) that the Carling Company saw to it that they were so exported. But there the Carling Company was the exporter. In the *Carling* case, the goods were manufactured and sold by the Carling Company for export, to the United States, and proof of export was necessary to secure the exemption; it was hardly necessary to say that it had to be established that the arrangement was that the goods were to be exported, and that the Carling Company was to see that the goods were in fact exported; all that would be implied in any sale of goods for export. I assume that if some unquestioned proof of export had been made, and there was entirely lacking any evidence of any specific engagement on the part of the Carling Company to see that the goods were in fact exported, that the Crown would have failed in its action, as it did. The *Carling* case held that an export of beer to the United States was within the exempting provisions, although the import was contrary to the law of that country, and that the prohibitory laws of the United States only affected the quantum of proof of export; and the Judicial Committee's notion of proof of export was satisfied by that series of facts mentioned in their judgment. Once it is conceded that at the material time a Canadian might export beer or spirits to the United States, and be entitled to exemption from the sales taxes, then, in my opinion, only the fact of export is to be established, and that may be done in the same way as any other question of fact is established, that is to say, it must be done to the satisfaction of the tribunal trying the issue of fact; and in the case of the sales tax it is not, I think, a requirement that the manufacturer be the exporter, nor do I understand that such was decided in the *Carling* case. Subsec. 10 of sec. 19 BBB could never have contemplated that only the manufacturer of domestic goods was entitled to the exemption on exported goods. Therefore I do not think it can be successfully contended that when Walker

sold the goods in question to the suppliant here, it was a necessary condition of the sale that the goods were to be exported, before the suppliant would be entitled to the exemption.

The next point is one of general importance, and its application here is subject to many difficulties. It is contended that the spirits were released for domestic consumption from Walker's bonding warehouse and that the excise duties having been so paid they cannot now be refunded. All the circumstances attending the transactions in question clearly indicate, I think, that the suppliant purchased the spirits with the intention and for the purpose of exporting the same; in the circumstances of the time any other suggestion would seem altogether improbable. It is difficult to understand why, in the circumstances, the excise taxes were exacted or paid and there is practically no evidence to enlighten one upon the point. The spirits might, under the statute, have been removed from Walker's bonding warehouse to that of the suppliant without payment of duty; in fact, I am unable to see how the suppliant, as an exporter, could lawfully be denied the right of shipping the same directly from the former warehouse, without payment of duty, to a designated port of export, if it were to be permitted at all to export to the United States; that, I think, is now made more clear by the decision in the *Carling* case. The goods apparently were not removed from the Walkerville warehouse for domestic consumption, otherwise such an entry would have been made on the form prescribed by the regulation, and it would have been in evidence. Again, they were not entered for consumption at Montreal, but on the contrary were there entered for export, and up to that time the goods had never been released from customs. If the goods were in fact intended to be entered for consumption, either at Walkerville or Montreal, then it would appear that the statute and regulations were not observed, and it is difficult to attribute this to error or oversight. If excisable goods are removed from a warehouse for consumption, that would be a matter of record, and sec. 73 of the Inland Revenue Act requires payment of the excise duty thereon before the removal; in this case it is only by reason of the payment of the excise duty before removal from the Walkerville warehouse that removal for

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consumption might be inferred, but otherwise there is no evidence upon the point. Sec. 174 of the Act provides that the duty paid on spirits taken out of warehouse "for consumption, or which have gone directly into consumption," shall not be refunded upon the exportation of such spirits out of Canada, unless specially permitted by some regulation made by the Governor in Council in that behalf. It is difficult to say just what was the intended purpose of this section, or why it is found just where it is in the Act. It is arguable that the section was intended to apply only to spirits removed to a bonded manufactory, for a bonded manufacturer. Having provided by sec. 73 for the payment of duty in the ordinary case of removal of goods from a warehouse for consumption, it is difficult to conclude that the words "or which have gone directly into consumption" in sec. 174 could have been intended to refer to spirits other than that which had gone into consumption in the manufacture of other goods, in a bonded manufactory. However, reading the section literally, there is no evidence that the spirits were removed for consumption, or that they went directly into consumption in any way. Sec. 174 provides for a refund being made upon exportation, but only when specially permitted by regulation; there then arises the question whether, in the absence of such regulations, the statutory right to a refund is thereby rendered nugatory; this would seem to impose a hardship, not intended by the legislature, upon a *bona fide* exporter, and the authorities would seem to be to the effect that the exporter in such a case was not to be prejudiced by reason of the failure to make the necessary regulations applicable thereto, and as authorized by statute. If it appeared from the evidence that the suppliant was a willing party to the payment of the duties on the basis of their removal from warehouse for domestic consumption, for its own convenience, protection or advantage, though actually export was intended, the question for determination might then be a different one.

The facts and the statute relating to this point are so difficult and confusing, and the whole procedure attending the transactions involved is so unusual, that I refrain from pronouncing any definite opinion upon this point until it arises under a more definite state of facts; and it is un-

likely that the point will arise again in quite the same state of facts and circumstances. I therefore rest my judgment upon the defences already discussed.

Before concluding I might make a brief but inconclusive reference to the contention advanced by Mr. Tilley that the transfer of the suppliant's undertaking as a going concern, to Dominion Distillers Ltd., included any right which the suppliant had in the claim here sued upon, and that the suppliant had no further interest in the said claim. At the moment I am rather impressed with this view. The claim which is sought to be recovered here is in the nature of a debt, and claims for a refund of duties paid the Crown must be quite common in the experience of business concerns who are importers of goods, or dealers in excisable goods; in the event of the sale or transfer of the undertaking of such a business, as a going concern, it seems to me that the transfer should be interpreted to include debts or claims of the nature mentioned unless there was a specific reservation of the same. The assignment here was not one of a right of action which offends against the law relating to champerty, nor does it seem to fall within any other exception applicable to assignments of debts, and choses in action. There may be some doubt, as contended, as to whether a petition of right would lie against the Crown by an assignee in a matter of this kind. It was urged on behalf of the suppliant that because the claim in question was not one enforceable by an assignee, against the Crown, that it therefore remained an asset belonging to the suppliant company and that this fact was evidence of the continued corporate existence of the suppliant. Robertson, Civil Proceedings By and Against the Crown, chapter 3, states that there seems to be no reason why, subject to limitations of general application, any person or persons should not present a petition of right who would be entitled to bring an action against a subject, whether jointly or severally, by assignment, representation, or succession. While I am presently inclined to the view that a claim of the nature in question, against the Crown, is one that is assignable, yet I do not propose expressing any definite opinion upon the point.

I omitted earlier to explain that the title of the Inland Revenue Act, R.S.C., 1906, chap. 51, was, by chap. 26 of the Statutes of Canada, 1921, changed to the "Excise Act,"

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but I thought it more convenient and less susceptible to confusion to refer to the Act under its former title.

The petition is therefore dismissed and costs will follow the event.

Judgment accordingly.